NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1980 to December 31, 1980

vol. 1

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

DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION
SUPERIOR COURT AND SUPREME COURT
1980

CUMBERLAND REGIONAL EDUCATION ASSOCIATION,	)	
PETITIONER,	)	
V.	)	INITIAL DECISION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT, CUMBERLAND COUNTY,	)	DKT. NO. EDU 143-3/78
RESPONDENT.	)	

APPEARANCES:

Joel S. Selikoff, Esq., for Petitioner

Casarow, Casarow & Kienzle (A. Paul Kienzle, Esq., of Counsel)
for Respondent

BEFORE THE HONORABLE LILLARD E. LAW, ALJ

Petitioner, the Cumberland Regional Education Association, hereinafter "Association," challenges the administrative interpretation of a dress code policy adopted by the Board of Education of the Cumberland Regional High School District, hereinafter "Board," wherein said policy regulates teacher attire. The Board avers that at all times it acted within its powers and responsibilities pursuant to N.J.S.A. 18A:1-1 et seq. and N.J.A.C. 6:1-1 et seq. and demands that the Petition of Appeal be dismissed.

On April 17, 1979 the Association filed a Motion for Summary Judgment. An oral argument on the Motion was held on June 28, 1979 at the State Department of Education, Trenton. Prior thereto, counsel had filed Briefs and documents in support of their respective positions. The matter was subsequently transferred to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

The Association contends that on or about May 12, 1976, the Board adopted a Policy Statement Concerning Staff Conduct and Dress which provided in pertinent part as follows:

"Responsibility for acceptable conduct and dress will rest primarily with the employee as a professional individual.

> "The Board expects teachers to enforce a standard of personal conduct in the school building and on and off schoolgrounds which shall be above reproach and which shall contribute to a high morale in the school and a wholesome school reputation.
>
> "Employees of the Cumberland Regional School District shall be neatly attired and groomed while discharging their responsibilities to the district. Grooming and attire shall not affront community tastes nor standards."

The Association contends that, subsequent to its adoption and without formal Board action, the Superintendent of Schools issued a written interpretation of the Board's dress code to all teaching staff members as follows:

> "STAFF DRESS CODE:
>
> "The Board expects teachers to enforce a standard of personal conduct in the school building and on and off schoolgrounds which shall be above reproach and which should contribute to a high morale in the school and a wholesome school reputation.
>
> "All staff will be required to be neatly attired and groomed while discharging their responsibilities to the school. Grooming and attire shall not affront community tastes nor standards.
>
> "Although the responsibility for acceptable dress will rest primarily with the employee as a professional individual, men will wear a tie and women will wear the attire generally accepted in a place of business."

The Association further asserts that, thereafter, the Superintendent issued an oral interpretation of the Board's dress code which permitted men teaching staff members to wear turtle neck sweaters or shirts in lieu of neck ties.

The Association argues that there are no genuine issues as to any material facts challenged in the instant matter. Susan Zink v. Board of Education of the City of Salem, Salem County, 1977 S.L.D. 1102, aff'd State Board of Education, 1978 S.L.D. _____ (decided May 5, 1978), aff'd App. Div. (Docket No. A-3960-77, decided February 22, 1979) It asserts, therefore, that the matter is ripe for adjudication pursuant to its Motion for Summary Judgment. Seltzer v. Isaacson, 147 N.J. Super. 308 (App. Div. 1977)

The Board contends, however, that there exists certain genuine issues of material fact not brought forth by the petitioner Association and that its Motion for Summary Judgment should be denied. It asserts that, at the time of their interview for employment within the school district and during the years 1975, 1976 and 1977, all teacher candidates were apprised of the Board's dress standards (Board's Brief at p. 1; Response #4 to Petition of Appeal; answer Interrogatory #3). It further asserts that on

September 1, 1977, the Superintendent specifically informed the teachers that men were required to wear neck ties as provided in the Teacher's Handbook under Staff Dress, ante. It avers that the said Teacher's Handbook containing the dress standards was given to all teaching staff members on or before September 1, 1977. (Board's Brief at p. 2). The Board relies, inter alia, upon its Answer to Interrogatory #9 to support its purpose to adopt the dress code as follows:

> "9. Set forth in full and complete detail all facts which Respondent will rely upon to prove that maintenance and enforcement of the dress code provision as to require male teachers to wear neck ties bears a rational relationship to the legitimate goals of the Cumberland Regional High School District.
>
> "Answer: In its quest to establish academic excellence, the Cumberland Regional Board of Education recognized that staff influence was a patent force in determining the quality of education in any school. The Board recognized that what takes place between the teacher and student in the classroom and in the school in general would, in large measure, determine the quality of education in Cumberland Regional High School.
>
> "There is a plethora of educational research which supports the fact that teachers do exert great influence on young people. How they talk, what they believe, how they act and how they dress are areas which students perceive in emulating their teachers.***"
>
> "How one dresses is an act of expression, often indicating how one feels about himself and how he wishes others to see him. The Cumberland Regional Board of Education, embracing the strong community concept that teachers should present themselves as role models compatible with community standards in terms of what a teacher's image should be, mandated that all male teachers wear shirts, ties and jackets. (Jackets could be removed in very warm weather.) Female teachers are required to wear attire which would be considered to be acceptable for going to church or in a respected place of business. Any attire which was too tight, or too loose, in poor taste concerning style or fit, or revealing to the point of causing disruptive attention, would not be accepted as proper dress.***"
>
> "Every candidate interviewed for a position in Cumberland Regional High School was apprised of the Board's philosophy concerning teacher dress and agreed that the requirements were not unreasonable; in fact, the overwhelming majority of candidates reflected full support for the Board's position."

The Board contends that in view of the existence of genuine issues of material fact, as hereto set forth, petitioner Association's Motion for Summary Judgment should be denied or, in the alternative, summary judgment be granted to the Board.

Having carefully considered the arguments of counsel and the record before me, I FIND no material facts in dispute which would warrant a plenary hearing. The relevant issues of fact have been set forth in the documents submitted by the parties by way of Interrogatories, Affidavit, adopted Board Policies and the official transcript of the Disciplinary Hearing of David W. Thompson held on January 17, 1979. The material facts, with respect to the Board's adoption of its dress code, the administrative interpretation of the dress code, both written and oral, are not in dispute. Neither is the fact that the teaching staff members were made aware of the code at their initial interview for employment. The Board's assertion that its philosophy and the community standards, with regard to the adoption of the dress code, in my judgment, are not relevant to the matter at issue. I CONCLUDE, therefore, that there are no material factual issues and that the instant matter is, indeed, ripe for Summary Judgment.

The Board argues that petitioner is estopped from asserting any claim under the herein Petition of Appeal grounded upon the equitable doctrine of laches and petitioners' acquiescence to its dress requirements for a period of two years. It asserts that the procedural delay for the filing of the petition is in direct conflict with N.J.A.C. 6:24-1.2, which provides in pertinent part that "***such a petition must be filed within 90 days after receipt of notice by the petitioner of the order, ruling, or other action concerning which the hearing is requested.***" It contends that the doctrine applies to the instant matter where there is a delay, unexplained and inexcusable, in enforcing a known right and prejudice has resulted to the other party because of such delay. Mitchell v. Alfred Hofman, Inc. 48 N.J. Super. 396, 403 (App. Div. 1958), cert. denied 26 N.J. 303 (1958). It argues, further, that under the doctrine of estoppel, acquiescence relates to active assent during the time the act is being performed. McSweeney v. Equitable Trust Co., 127 N.J.L. 299, 22 A. 2d. 282 (1941)

Petitioner contends that, although the Board's dress code was initially adopted on May 12, 1976 and that all teachers were made aware of such on or before September 1, 1977, the Board's administrative interpretation of the code was supplemented well after its adoption and that the school administration's enforcement is grounded upon such supplemental interpretation to the present time. Petitioner cites the Commissioner's determination in Gail Smith v. Board of Education of the Township of Cinnaminson, 1978 S.L.D. _____ (decided April 24, 1978), wherein it was held that the petition was timely and that the "continuing violation" concept was applicable as long as the petitioner therein continued in her attempt to resolve the dispute at issue. Also, Shokey v. Board of Education of the Township of Cinnaminson, 1978 S.L.D. _____ (decided November 29, 1978).

The Commissioner and the courts have addressed at length the application of the equitable doctrine of laches. In Auciello v. Stauffer, 58 N.J. Super. 522, 529 (App. Div. 1959), the following was quoted with favor from Bookman v. R.J. Reynolds Tobacco Co., 138 N.J. Eq. 312, 406 (Ch. 1946):

> "***It is the rule that the defense of laches depends upon the circumstances of each particular case. Where it would be unfair to permit a stale claim to be asserted, the doctrine applies.***"

In Elowitch v. Bayonne Board of Education, 1967 S.L.D. 78, affirmed State Board of Education 1967 S.L.D. 86, the State Board made the following statement in regard to laches:

> "***Implicit in the doctrine of laches is the inaction of a party with respect to a known right for an unreasonable period of time coupled with detriment to the opposing party. Pomeroy, Equity Jurisprudence, v. II, Sec. 419, p. 171-2; 27 Am. Jur. 2nd, Sec. 162, p. 701; Atlantic City v. Civil Service Commission, 3 N.J. Super. 57 (App. Div. 1949); Park Ridge v. Salimone, 36 N.J. Super. 485 (App. Div. 1955), aff'd 21 N.J. 28 (Sup. Ct. 1956)***."

Having carefully considered all such facts and arguments, I FIND the "circumstances" in the instant matter do not constitute a "stale claim," nor has any prejudice resulted as asserted by the Board. Accordingly, I FIND that the Board's defense of laches has no merit and IS HEREBY DISMISSED.

The issues ripe for adjudication are now precisely stated as follows:

1. Can the Board establish a dress code?

2. May the Board's Superintendent of Schools interpret and enforce such dress code?

3. Is the current dress code reasonable?

The Board defends its policy and relies upon its statutory authority pursuant to N.J.S.A. 18A:11-1 which reads in pertinent part 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."

The Board further cites its authority to make rules pursuant to N.J.S.A. 18A:27 as follows:

> "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."

The Board argues that dress codes have traditionally been established to promote a professional image for teachers, good grooming among pupils and the maintenance of respect in the classroom setting. East Hartford Education Association et al. v. Board of Education of the Town of East Hartford, et al., 562 F.2d 838(2d Cir. 1977) It asserts that such consideration was the legitimate purpose for its promulgating the present policy. It avers that its teaching staff members are not restricted to a particular uniform but, rather, are permitted alternative modes of dress within the interpretation of its dress code policy.

Petitioner relies foremost upon the Commissioner's decision in the matter of Janet Quiroli, et al. v. Board of Education of the City of Linwood and Francis Johnson, Atlantic County, 1974 S.L.D. 1035, as dispositive of the instant matter. Therein, the board of education adopted a policy regulating teacher dress attire which provided, inter alia, that male teachers were required to wear neck ties at all times. The Commissioner determined that a board may establish a reasonable dress code for its teachers pursuant to N.J.S.A. 18A:27-4. As to whether or not the policy was proper, however, the Commissioner relied upon the tests of propriety as set forth in Angell v. Board of Education of Newark, 1960 S.L.D. 141, as follows:

> "***A rule, in order to be valid, must be reasonable. Boards of education cannot exercise the authority given to them in ways that are arbitrary, capricious or unreasonable, overworked and difficult of precise definition as these words may be. N.J. Good Humor, Inc. vs. Bradley Beach, 124 N.J.L. 162 at 164. Reasonable is defined as 'comformable to reason; such as is rational, fitting or proper, sensible.' It imports that which is appropriate or necessary under the circumstances. A reasonable rule implies that there is a rational and substantial relationship to some legitimate purpose."

The Commissioner determined in Quiroli, that there was no rational or substantive relationship to any legitimate purpose, or any valid principle to be served by the Board's rule requiring male teachers to wear neckties. Accordingly, the Commissioner set aside the specific reference in the Board's policy mandating the wearing of neckties by male teachers as an unreasonable requirement. Quiroli, supra, at p. 1040.

The instant matter is distinguishable from Quiroli with respect to the adopted policies and the enforcement thereof. In Quiroli, the Board's dress code made specific reference to the requirement of male teachers to wear neckties. In the instant matter, however, the Board's policy is general in nature while placing the responsibility for "acceptable dress" upon the individual teacher. At issue in the instant matter is the Board's administrative interpretation of its stated policy.

There is no factual dispute that each male candidate for employment in the school district was informed, prior to employment, that it was the Superintendent's interpretation of the Board's dress code that all male teachers were required to wear neckties. Nor is it disputed by the parties that the Superintendent subsequently orally modified the policy to permit male teachers to wear turtle neck shirts or turtle neck sweaters in lieu of neckties. The Board asserts, however, that the turtle neck shirt was to be worn with a jacket. (Exhibit "F" - Disciplinary Hearing of David W. Thompson, January 17, 1979 at pp. 6 - 8)

Having carefully considered arguments of counsel, the documents in evidence and the undisputed facts in the instant matter, I FIND that:

1. The Board has the statutory and discretionary authority to make reasonable rules for its own government pursuant to N.J.S.A. 18A:11-1 and N.J.S.A. 18A:27-4. Further, that the Board's dress code policy, as set forth herein, is reasonable wherein it places the responsibility for acceptable conduct and dress primarily with the employee as a professional individual.

2. The Superintendent exceeded the clearly stated policy of the Board when he imposed his interpretation to require male teaching staff members to wear neckties and/or jackets with turtle neck shirts. The Commissioner stated In the Matter of the Tenure Hearing of William Lavin, School District of the Lower Camden County Regional High School District Number One, Camden County, 1976 S.L.D. that:

> "***The courts of this state have consistently held that statutes should not be given a meaning that may lead to absurd, unjust or contradictory results; nor should a statute be construed to permit its purpose to be defeated by evasion. In re Jersey City, 23 N.J. Misc. 311 (1945); Grogan v. DeSapio, 11 N.J. 308 (1953) This clear maxim applies equally to local board of education policies, as well as to those ordinances adopted by municipalities." (at p. 803) (Emphasis added.)

In Betty Eagle, Robert Covyeau, Oliver Vogel, and the Englewood Cliffs Education Association v. Board of Education of the Borough of Englewood Cliffs, Bergen County, Docket No. L-15025-71 New Jersey Superior Court, Law Division, February 19, 1971, the Court stated in its oral decision:

> "***The court must strictly construe any agreement against the draftsman. Bouton v. Litton Industries, Inc., 423 F. 2d 643 (3rd Cir. 1970). Couched in other words, 'the language must be interpreted in the sense that the promisor knew, or had reason to know, the promisee understood it***.' American Lithographic Co. v. Commercial Ins. Co., 81 N.J.L. 271 (Sup. Ct. 1911).***"

In Russell v. Princeton Laboratories, Inc., 50 N.J. 30, 38 (1967) the Court said:

> "***A contract should not be read to vest a party or his nominee with the power virtually to make his promise illusory.***"

I FIND, therefore, that the Superintendent's interpretation of the Board's dress code policy mandating the wearing of neckties by male teaching staff members is unreasonable and is to be set aside forthwith. Quiroli, supra. This is not to suggest, however, that the Superintendent, or other members of the Board's administrative staff, may not enforce the Board's dress code policy in force and effect.

Having made this determination, I FIND it unnecessary to further raise the specific issue of personal dress attire to the level of a deprivation of a right under the United States Constitution as alleged by petitioner. IT IS SO ORDERED.

Accordingly, Summary Judgment is hereby entered for petitioner.

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 records in these proceedings.

20 November 1979 — DATE

Lillard E. Law — LILLARD E. LAW, ALJ

CUMBERLAND REGIONAL EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT, CUMBERLAND 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. 6:24-1.17(b).

Petitioner takes exception to the failure of Judge Lillard L. Law to determine that the Superintendent's supplemental interpretation of the dress code relating to the wearing of jackets with turtle neck shirts or sweaters was unreasonable. The Commissioner finds no merit in such argument and determines it to be one of form over substance. Rall v. Bayonne, 104 N.J. Super. 236, 243

The Board's exceptions, in main part, argue against the granting of Summary Judgment, the denial of the defense of laches offered by the Board and protests any reliance on Quiroli, supra, as being an outdated decision. The Commissioner has carefully examined the record and finds that the material facts pertaining to the dress code adopted by the Board and the administrative interpretation thereof are not in dispute. Accordingly, the Commissioner agrees with the finding that the matter be decided by Summary Judgment. The Commissioner agrees with the dismissal by Judge Law of the defense of laches raised by the Board finding that no prejudice resulted to the Board as contended. Finally, the Commissioner finds no merit in the Board's disavowal of the use of Quiroli as being outdated. The Commissioner finds that this decision is directly on point in this matter and notes that it was rendered on November 15, 1974 and respondent's dress code was under consideration prior to the opening of school September, 1977. The Commissioner does not find the resulting three year span of time one that renders Quiroli obsolete.

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

January 11, 1980

CUMBERLAND REGIONAL EDUCATION ASSOCIATION, PETITIONER-APPELLEE, V. BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT, CUMBERLAND COUNTY, RESPONDENT-APPELLANT.	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, January 11, 1980 and March 18, 1980

For the Petitioner-Appellee, Selikoff & Cohen (Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Appellant, Casarow, Casarow &'Kienzle (A. Paul Kienzle, Esq., of Counsel)

The Commissioner has held invalid an interpreted dress code of the Cumberland Regional School Board which required male teachers to wear either a necktie with a shirt, or a jacket if a turtleneck or sweater is worn. We believe that this policy as so interpreted was not so unreasonable as to be beyond the discretionary authority of the local Board.

The Board clearly has the right to adopt a reasonable dress code for its staff, and the Commissioner himself has so held. Quiroli v. Linwood Board of Education, 1974 S.L.D. 1035. The key question is one of reasonableness, and this quality must be determined in the light of the valid objective of the code -- to create an atmosphere of respect for teachers and a dignified environment conducive to discipline and learning.

In Quiroli, supra, the Commissioner concluded that the Board could not reasonably require male teachers to wear neckties. However, in East Hartford Education Association v. Board of Education of East Hartford, 562 F. 2d 838

(2d Cir. 1977), the Court held that a male teacher's constitutional rights were not violated by the school's requirement that he wear a necktie. We find this case persuasive, even though it dealt with Federal Constitutional law rather than State law. We further note that the option was given the Cumberland Regional teachers to wear turtlenecks in lieu of neckties, so long as a jacket was also worn; and in this respect the Quiroli decision is distinguishable on its facts. Insofar as Quiroli declared it unreasonable for any board to require the wearing of neckties, we think the decision should not be followed. In view of the broad authority granted by N.J.S.A. 18A:11-1, each local district should be allowed to decide for itself what sort of staff dress code will best achieve its legitimate aims, and its determination should not be disturbed unless patently arbitrary or capricious.

For the foregoing reasons, the State Board reverses the Commissioner's decision. Request for oral argument is denied. The petition is dismissed.

November 5, 1980

Pending N.J. Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 WASHINGTON ST
NEWARK, NEW JERSEY 07102
(201) 648-6186

DAVID BRODY	)	INITIAL DECISION
	)	
Petitioner,	)	O.A.L. DKT. NO. E.D.U. 2581-79
	)	AGENCY DKT. NO. 250-6/79A
vs	)	
	)	
BOARD OF EDUCATION OF ELMWOOD PARK, BERGEN COUNTY	)	
	)	
Respondent,	)	

APPEARANCES:

For the Petitioner:
Theodore M. Simon, Esq.
David Brody

For the Respondent:
Stanley Turitz, Esq.
Alexander R. Maccia, Principal
Joseph Heffernan, Acting Superintendent

EVIDENTIARY DOCUMENTS:

P-1: Heffernan to Brody letter of May 17, 1979
P-2: Observation of January 11, 1979; conference of January 23, 1979; evaluation of February 14, 1979
P-3: Heffernan to Brody letter of April 11, 1979

R-1: Heffernan to Brody letter of April 23, 1979
R-2: Brody to Maccia letter of March 28, 1979
R-3: Maccia to Brody memo of April 2, 1979
R-4: Maccia to Heffernan memo of April 4, 1979
R-5: Maccia to Assistant Superintendent Ferese memo of March 8, 1979
R-6: Maccia to Heffernan memo of March 30, 1979

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

Petitioner appeals an action of the Board of Education, hereinafter "Board", at its regular meeting on May 15, 1979 which

withheld petitioner's salary increment for the 1979-80 school year. His contention is that the Board's action was arbitrary, capricious and otherwise improper.

The Board avers that its action was proper and within its discretionary authority in accordance with the law.

The petitioner is a tenured teacher of physical education who is also assigned to cafeteria supervision one day a week. The supervisory assignment is conducted without the assistance of any other teaching staff member or aide, and consists of supervising children in grades one (1) through six (6) in addition to special education children in two (2) thirty (30) minute shifts of approximately two hundred (200) pupils per shift.

On February 23, 1979 the petitioner observed two (2) male special education (emotionally disturbed) pupils standing on benches on each side of a table throwing orange peels and possibly other particles of food at each other. Petitioner yelled at them to stop. His directive was ignored. Petitioner stepped between the boys, grabbed each by the arm and escorted them away from the table to talk to them and quell the disturbance.

It is noted that petitioner's testimony relative to the above incident represents the only eye-witness report of the incident. In the absence of any effort on the part of the Board to produce conflicting testimony, I FIND that the report of the incident is undisputed and is therefore acknowledged as a reasonably accurate report of the incident.

The petitioner did not consider the incident of sufficient importance to report the matter to the principal, there being no policy or regulation requiring that he do so.

The incident came to the attention of the principal as the result of a telephone call from the parent of one of the pupils involved. A conference followed between teacher, parent and principal concerning the matter which concluded with reasonable assurance of a "hands off" policy concerning her son. The principal testified that he had an informal discussion in the basement with the petitioner admonishing him with concern that hands should not be placed on students. The principal also testified that he was not of the mind to take any disciplinary action against the petitioner.

On March 26, 1979 another incident occurred involving the petitioner, this time at the conclusion of a physical education class. Apparatus and mats were in the process of being stored. Petitioner was storing a "folding ladder" type of apparatus, which he could not release without endangering himself, when he observed a pupil running across the floor and swinging a mat-type piece of equipment at another pupil. The mat had hardware attached and the petitioner testified as to his concern that another pupil would be injured. The petitioner hollered at the pupil to cease swinging the mat but was ignored. After securing the apparatus under his control, the petitioner proceeded to separate the mat from the pupil who had possession. To achieve this objective the petitioner undisputably placed one hand on the mat and the other on the pupil. The objective was achieved and in the process the pupil may or may not have fallen to the floor. No significant injury resulted, and the petitioner did not consider the matter sufficiently important to report same to the principal.

As in the first incident, the petitioner was the only eye-witness that testified, and in the absence of any effort on the part of the Board to produce conflicting testimony, I FIND that the report of the incident is acknowledged as a reasonably accurate report of the indicent.

The principal testified that he became aware of the second incident as the result of a phone call from the mother of the pupil who had possession of the mat. A conference was held between mother, petitioner and the principal, who concluded after conferring with the pupil that he had been touched by the petitioner and fell to the floor.

There were no allegations made that the petitioner had used excessive or unreasonable physical force on any pupil in either incident, and it was undisputed that the petitioner touched the pupils with his hands in both incidents.

The principal reported the first incident by memo to the assistant Superintendent, with copies to Board members, to comply with a request of a Mrs. L. who was a Board member. (R-5)

The second incident was reported by memo to the acting Superintendent with copies to Board members (R-6) attached to the memo was a hand-written report of the incident by the petitioner. (R-2)

The principal sent a memo to petitioner under date of April 2 in which the petitioner was admonished "where you have placed your hands on students in a manner that was construed as out-of-order." (R-3) Under date of April 4, the principal sent a memo to the acting Superintendent calling "for a review of his [petitioner's] evaluation submitted February 26 "and stated the suggestion that "A possible solution might be delaying a decison on an increment for a probationary period of time." (R-4) The evaluation referred to was unquestionably positive. (P-2)

The acting Superintendent sent a letter to the petitioner under date of April 11 which stated that "I have indicated to ...[the principal] that he is to re-evaluate your job performance as of June 15, 1979....as a result of the two recent incidents..." (P-3) Both the principal and acting Superintendent testified that no re-evaluation took place.

The acting Superintendent sent another letter to petitioner under date of April 23 which "notified that the Board of Education will hold a Special Meeting on Tuesday, May 15, 1979, at 7:00 p.m. ... for the purpose of reviewing your personnel evaluation and the recommendations of the Superintendent of Schools concerning said evaluation. Said meeting is currently scheduled as a closed session meeting." (R-1)

The petitioner received another letter from the acting Superintendent under date of May 17 which advised him that "it was recommended to the Board of Education, and approved, that your increment for the 1979-80 school year be withheld" and "was made ...based upon your evaluation submitted to my office by the principal." (P-1) The acting Superintendent testified, and it was stipulated, that the reason given for the Board action was erroneous.

The petitioner was not invited to be heard by the Board nor did the acting Superintendent ever meet to discuss the matter with him. Both the petitioner and acting Superintendent testified to this.

The acting Superintendent testified that he recommended the increment withholding after discussion with the principal and on the reported memos sent to him by the principal, and basically because of how the petitioner handled the incidents. He further testified that he would not have recommended the increment withholding on the acceptance of the petitioner's reports of the incidents as per his testimony at the hearing.

N.J.S.A. 18A:29-14 provides in pertinent part as follows:

> "Any board of education my withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year .... . The member may appeal from such action to the commissioner .... [who] shall consider such appeal and shall either affirm the action of the board of education or direct that the increment be paid ....."

In J. Michael Fitzpatrick v. Board of Education of the Borough of Montvale, Bergen County, 1960 S.L.D. 4, the Commissioner, relying on the guidance provided by the Court in Kopera v. West Orange Board of Education 1958-59 S.L.D. 96, affirmed 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, affirmed New Jersey Superior Court, Appellate Division, January 10, 1963 (1961-62 S.L.D. 233) held:

> ".... Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play. ...."

It is recognized that counsel for the parties have put forth considerable effort to support the contentions of both the Board and the petitioner. It is also recognized that it is the Commissioner's function to determine whether the underlying facts were as the Board claims, and whether it was unreasonable for the Board to conclude as it did upon those facts. In so determining the Commissioner is not to substitute his judgment for that of the Board, but is to determine whether the Board had a reasonable basis for its conclusion. See Kopera, supra.

A analytical summary of the foregoing reveals that the principal acted with uncertainty and precipitously in communicating his suggestions to the acting Superintendent, and which may not have been made at all in the absence of the intial request of Mrs. L.

I am constrained to state that I cannot consider the actions of the petitioner in the two incidents significantly different from what should be expected of a reasonably prudent teaching staff member in the emergent situations described. I do not feel compelled to address the procedures utilized by the principal, acting Superintendent and the Board from the initial awareness of the first incident to the final action of the Board to withhold petitioner's salary increment on May 15, 1979.

I FIND that the principal acted precipitously, and the acting Superintendent and as particularly the Board acted arbitrarily, capriciously and unreasonably.

I CONCLUDE, therefore, that the Board is ORDERED to place petitioner on his proper step on the salary guide as though no action had been taken, and to compensate petitioner, forthwith, for all salary withheld to date by the Board's action.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

26 November 1979
DATE

WARD R. YOUNG, A.L.J.

DAVID BRODY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed 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 adopts them as his own.

Accordingly, the Petition of Appeal is hereby affirmed. The Board is directed to place petitioner on his proper step on the salary guide with all accompanying emoluments as though no prior order had been taken by the Board.

COMMISSIONER OF EDUCATION

January 12, 1980

G.F., a minor, by his parents and natural guardians,	)	
PETITIONERS,	)	INITIAL DECISION
V.	)	EDU DKT. NO. 111-4/78
BOARD OF EDUCATION OF WASHINGTON TOWNSHIP, GLOUCESTER COUNTY.	)	
RESPONDENT.	)	

APPEARANCES:

For the Petitioners, D. Ellen Stimler, Attorney at Law

For the Respondent, Hyland, Davis & Reberkenny, Esqs. (William D. Hogan, Esq., appearing)

DOCUMENTARY EVIDENCE:

C-1 (Court Exhibit) Field Test Report
C-2 (Court Exhibit) Suspension-Expulsion Policy
J-1 (Joint Exhibit) G.F. Transcript
J-2 (Joint Exhibit) E.G. Transcript
J-3 (Joint Exhibit) J.M. Transcript
J-4 (Joint Exhibit) Board Policy - Drugs
J-5 (Joint Exhibit) Notice of Suspension
J-6 (Joint Exhibit) Board's determination
R-1 (Respondent's Exhibit) Board minutes
R-2 (Respondent's Exhibit) Affidavit

BEFORE THE HONORABLE DANIEL B. MC KEOWN, ALJ

Petitioners, the parents of G.F., a pupil enrolled in the tenth grade of the Washington Township Public Schools, Gloucester County, under the control and direction of the Washington Township Board of Education, hereinafter "Board," allege that G.F.'s long-term suspension from regular school attendance by the Board was excessive and was in violation of his rights to due process of law. The Board denies the allegations and asserts that its controverted action is in all respects proper and legal.

A hearing was conducted in the matter on June 2 and June 30, 1978 at the office of the Gloucester County Superintendent of Schools and at the Department of Education building, Trenton, respectively. Thereafter, the parties filed Briefs in support of their respective positions.

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

Several preliminary observations must be made:

First, it is observed that subsequent to the joining of the pleadings herein, petitioners moved for interim relief, pending disposition on the merits of the matter, before the Commissioner of Education. The Commissioner denied that requested relief in a written opinion dated April 21, 1978. (See G.F., et al. v. Board of Education of the Township of Washington, Gloucester County, 1978 S.L.D. _____ (decided on Motion, April 21, 1978).)

Second, it is observed that on the last day of hearing, the Board moved for dismissal of the matter on the grounds that the issues raised herein were rendered moot because it had determined to reinstate G.F. to regular school attendance effective September 1978. The Board, in further support of this Motion, asserted that it also took action to expunge G.F.'s record in regard to the long-term suspension. (Tr. II-4, 6)

The then hearing examiner for the Commissioner, now administrative law judge and author of this opinion, denied the Board's Motion to Dismiss on the grounds that neither G.F.'s reinstatement to regular school attendance nor the expungement of his record do not, standing alone or together, address the issue of whether G.F.'s rights to due process of law were, in the first instance, violated by the Board as alleged. (Tr. II-10-12)

Relevant testimony, documentary evidence, and stipulations entered by the parties as to the facts creating the circumstances within which G.F.'s rights to due process were to have been violated are as follows:

During the 1978-79 academic year, G.F. was in tenth grade at the Washington Township High School. The Board provided G.F. school bus transportation to and from school.

Upon arrival at school on March 8, 1978, G.F. and a fellow pupil, E.G., rather than proceeding directly to the schoolhouse for their first class period, went to a pavilion in a park adjacent to the high school. G.F. and E.G. were then joined by another pupil, J.M., at the pavilion.

The parties agree that while the three pupils were at the pavilion, they were being observed by a police officer who was sitting in an automobile which was parked on the high school parking lot. It is further agreed that the police officer observed "***petitioner /G.F./ and the two other students passing around a white, cigarette-like object***." The police officer was to have called another patrol car for assistance and, upon its obvious arrival, the three pupils began to run. G.F. and E.G. were quickly apprehended by police officers, as was J.M. a short time later.

J.M. was found to be in possession of an unlighted cigarette which, it appears, the police suspected to be marijuana. No contraband, suspected or otherwise, was found on G.F. or E.G. The police officers then escorted the three pupils to the high school principal's office.

The police officers informed the principal of the pupils in the pavilion and of their attempting to run away upon the arrival of a patrol car, and of discovering a suspected unlighted marijuana cigarette on the person of J.M. The cigarette-like object the boys were seen passing around was not recovered.

The principal, in conjunction with the police officers, had the three pupils drop their trousers to determine whether contraband was hidden in their underwear. None was found. (Tr. II-52)

The principal further testified that as a result of the police verbal report, he examined each of the three pupils by talking with them in close, physical proximity to determine whether he could detect a marijuana odor on their breath. The principal testified that as the result of this examination with respect to G.F., he concluded "***that he /G.F./ had been in contact with marijuana***." The principal also testified that he detected an odor of marijuana on G.F.'s clothes which, in his view, also supported his conclusion that G.F. had been in contact with it. (Tr. II-20)

It is noticed that the principal testified G.F. denied smoking marijuana; that E.G. initially denied smoking marijuana; and that J.M. refused to admit or deny he had smoked marijuana in the pavilion.

The principal testified that he requested the school nurse to examine the three pupils by determining whether she could detect the odor of marijuana. The principal attests that the school nurse confirmed to him that each of the three pupils "***unmistakenly smelled /of/ marijuana***." (T-2) (Tr. I-96) (Tr. II-22)

The principal then contacted the parents of each of the three pupils and requested their presence in his office. G.F.'s father testified in this regard that the principal requested his presence because his son, G.F., "***smells of marijuana***." (Tr. I-49)

The principal first met with E.G. and his father. The principal testified that notwithstanding E.G.'s earlier denial, he did admit smoking marijuana at the pavilion during the private conference with him and his father. The principal also testified that E.G. stated G.F. and J.M. also smoked a cigarette he, E.G., said was marijuana. (Tr. II-23)

The principal testified that when he met with G.F. and his father, he told G.F.'s father that E.G. admitted smoking marijuana and that E.G. had said G.F. smoked it as well. (Tr. II-23) G.F.'s father, to the contrary, testified that the principal explained to him that the police had escorted his son to his office from the park pavilion; that his son was taken to the

school nurse's office; that it was determined G.F. smelled of marijuana; that G.F. denied smoking marijuana but admitted smoking a regular cigarette; that because of school policy G.F. was to be excluded from school pending a hearing by the Board; that before a hearing could be afforded by the Board, the cigarette discovered on J.M. would have to be analyzed; and that such analysis might take six weeks. (Tr. I-51, 52) G.F.'s father denies the principal told him that E.G. said G.F. was smoking marijuana in the park pavilion. (Tr. I-53)

G.F.'s father testified that after the meeting when he was told by the principal his son, G.F. would be suspended from school for possibly six weeks, he called an attorney, other than the attorney of record herein, in an effort to determine legal remedies, if any, available to him and to his son pending the Board hearing. That attorney testified that G.F.'s father visited his office in the afternoon of March 8, 1978 and explained what had occurred. Though no fee had been established, nor was a retainer tendered by G.F.'s father, the attorney testified he considered a lawyer-client relationship existed. (Tr. I-16) When G.F.'s father left the office, the attorney testified he made some telephone calls to school authorities and to Board counsel in connection with the matter. The attorney represented to these persons that he was counsel-of-record for G.F. and his father in connection with the incident. (Tr. I-17, 18) The Board asserts it kept petitioner informed of the matter through this attorney.

The attorney testified that subsequent to his telephone conversations with school authorities and with Board counsel, and after several conversations with G.F.'s father, he concluded that to secure G.F.'s immediate reinstatement to school pending the Board hearing, a court order would have to be secured. (Tr. II-22, 23) It was at this point that the attorney then discussed fees for his services with G.F.'s father. G.F.'s father testified he told the attorney that because of the amount of money requested, he would think about it and if he decided to proceed he would call back. G.F.'s father did not call the attorney back. (Tr. I-62)

G.F.'s father explained that at no time did he consider an attorney-client relationship existed (Tr. I-66) nor did he ever inform school authorities that he had retained this particular attorney to represent his son or him in the matter. (Tr. I-79) It is noticed that even if it were to be held by a court of competent jurisdiction that an attorney-client relationship did exist, G.F.'s father waived any privilege to confidentiality of the exchange of information which may have been passed. (Tr. I-14)

In the meantime, the principal testified that consistent with policy he had three Notices of Suspension prepared for each of the three pupils involved. He also testified that he placed a Notice of Suspension in the regular mails on March 8, 1978 addressed to the parents of each pupil. Though G.F.'s father testified he never received such a Notice of Suspension in regard to his son, the principal asserts he in fact had it prepared and mailed. That Notice purportedly advises G.F.'s parents and others, inter alia, of the following: (J-5)

"***/G.F./ *** is suspended effective March 8, 1978 ***
Pending the analysis of a material that might be a
'controlled dangerous substance'.

"***

"Your son's guidance counselor will be in contact with you
in regard to his school work which we hope he will continue
pending the final decision.

"While your son is on suspension he may not participate in,
nor attend, any school functions.***"

Though there is a line on the face of the Notice for the affected pupil's signature, neither G.F.'s signature nor either of his parents' signature appears thereon. On the reverse side of the Notice, (J-5) the following appears:

"DRUG INCIDENT

"March 8, 1978

"On the morning of Wednesday, March 8, 1978, three
students were brought to the Principal's office by
local police ***

"Both indicated they had observed the three students
close together in the pavillion passing a small white
object around. When confronted, the students ran and
were apprehended and searched. A rolled cigarette
and a pack of papers were found on J.M. No
substance was found on either of the other two students.
All three smelled very strongly of marijuana.

"/The principal/ met with the three students individually
and had the nurse give them a cursory observation which
verified that they did strongly smell of marijuana.

"While in conference with the parents of E.G., E.G. admitted to
'at least' one puff. J.M. admitted he 'didn't want to say
whether he was smoking or not.' G.F. denied smoking the
marijuana."

G.F.'s father testified he personally telephoned various school officials approximately fifteen times after the March 8 suspension of his son in an attempt to have a Board hearing so that his son could get back to regular school attendance. The principal testified he recalls that G.F.'s father had telephoned him several times after March 8 ostensibly to determine when the Board would afford his son a hearing. The principal testified he was unsuccessful in returning the calls except for one occasion when he advised G.F.'s father he was waiting for the police analysis of the cigarette found on J.M.

The principal testified that on or about Friday, March 17, 1978 he was advised in a telephone conversation with the police that a field test had been conducted upon the cigarette and the results were positive. The principal could not recall with whom he had spoken in this regard but does recall the person informed him that the results of the field test were positive for marijuana. The principal testified he then requested that person to forward the written results to him as soon as possible. The person was to have said "***we'll get it right out***." (Tr. II-36)

It is noticed here that the written result of the field test was ordered into evidence by this Court. (C-1) That report states that the cigarette found on J.M. on March 8, 1978 at 8 a.m. tested positive for marijuana but that the field test was not administered on the cigarette until April 27, 1978 at 2:15 p.m., more than a month after the purported telephone conversation between the principal and an unidentified person at the police station.

The principal explained that he reported to the Superintendent's office that he was told of the positive results and that he wanted to proceed with G.F.'s hearing as soon as possible.

Shortly thereafter, and on the same day, the Superintendent's office advised the principal's assistant that it arranged for G.F.'s hearing to be conducted by the Board the following Monday evening, March 20, 1978. (Tr. I-100)

G.F.'s father was notified by telephone by the assistant principal that G.F.'s hearing was scheduled for Monday evening, March 20, 1978. There is nothing in the record to establish that the principal advised G.F. or his father of the telephone call which confirmed in the principal's mind that the cigarette found on J.M. was positive for marijuana prior to the hearing. In fact, the principal testified that because of the rapidity by which the hearing was scheduled, he could not follow his usual custom of sending a letter to the parents advising them and the affected pupil of their rights at the hearing. (Tr. I-101)

Thus, G.F.'s father was advised by way of a telephone call on Friday afternoon that the Board would conduct a hearing the following Monday evening in regard to his son's suspension.

The Board's written policy with respect to controlled dangerous substances in its schools provides, inter alia, that a pupil suspected of being under the influence of a controlled dangerous substance, such as marijuana, to be examined by the pupil's private physician, or the school medical inspector, or at a nearby hospital. (J-4, at p. 6)

The Board's written policy with respect to pupil suspension and expulsion provides that a pupil accused of improper behavior may be suspended by the principal for a maximum five days. The principal may take such action after the pupil has been notified, orally or in writing, of the charges against him. The policy also provides that if the pupil denies the charge, he shall have explained to him the evidence in support thereof. (C-2, at p. 1)

That policy also provides that the suspension of a pupil by the principal may be extended by the Superintendent. If the cause of suspension is such that a hearing by the Board is necessary for it to determine whether to continue the suspension (long-term suspension or expulsion) or to reinstate the pupil, the Superintendent is required to, inter alia, (C-2, at p. 4)

1. Notify the student and his parents of the date when the hearing will be held;

2. Arrange the hearing so that
   a. The evidence in support of the charge may be presented

   b. The pupil may cross-examine witnesses against him and present his own defense.

It is observed that at this point G.F.'s father was originally advised to report to the principal's office on March 8, 1978 because, as he explained, G.F. smelled of marijuana. During the subsequent conference with G.F., his father, and the principal, G.F. denied smoking marijuana. The principal explained that E.G., in a private conference with him, stated G.F. did smoke marijuana. The principal insists he told G.F.'s father of E.G.'s admission. G.F.'s father denies the principal informed him of E.G.'s purported statement. The principal advised G.F. and his father that G.F. was suspended from further school attendance pending a Board hearing. The Board hearing could not occur, the principal explained, until the cigarette found on J.M. was analyzed.

The principal asserts he mailed a Notice of Suspension (J-5) to G.F.'s parents on March 8, 1978. G.F.'s father denies receiving the Notice of Suspension. Even if there were no dispute with respect to whether the Notice was sent or received, it advises only that G.F. is suspended pending an analysis of a material that could be a "'controlled dangerous substance,'" which continues on the reverse side that the three pupils "***smelled of marijuana***" and that G.F. denied smoking the marijuana.

The Board conducted spearate hearings for the three pupils during the evening of March 20, 1979. The minutes of the hearing afforded G.F. establish that the principal was the sole witness against G.F. G.F. and his father were present, without legal counsel, because, as he explained, it never occurred to him to be represented by counsel at a board hearing. (Tr. I-71)

The principal's testimony against G.F. consisted of what the police officers told him they observed of the three pupils in the pavilion, of his own conclusion that the three pupils smelled of marijuana, that the school nurse told him she detected an odor of marijuana on the three pupils, that the police had reported to him in a telephone conversation on March 17, 1978 that a field test on the cigarette confiscated from J.M. was positive; and that E.G. admitted to him that he and others had indeed been smoking marijuana.

Neither the police officers, nor the school nurse, nor E.G. were present at G.F.'s hearing because, as the principal explained, his testimony as to what was said to him by those persons was sufficient. (Tr. I-103)

The following day, March 21, 1978, G.F.'s parents were notified by the Superintendent that the Board determined as a result of the hearing to continue his suspension from the regular school program and to assign him to its night school. The Board's night school, it is observed, offers significantly less then its regular day school program.

In response to the specific question of

"What was the specific violation that /the Board/ found /G.F./ *** committed?"

the principal responded

"Being involved with marijuana." (Tr. I-109)

It is further noticed that the Board adopted a resolution on March 20, 1978, at a meeting conducted subsequent to G.F.'s hearing that the three pupils, including G.F., were to be excluded from the day school and assigned to the night school program "***due to marijuana charges***." (R-1)

It is upon this testimony and documentary evidence that I arrive at the following finding of fact:

1. G.F., together with two other pupils, was at a park pavilion on the morning of March 8, 1978 instead of being inside the schoolhouse where he was assigned.

2. It is stipulated that a police officer observed the three pupils in the pavilion "***passing around a white, cigarette-like object***." This object was not recovered.

3. Thereafter, the three pupils were brought to the principal by police officers.

4. The principal, because of an oral report given him by the police officers, determined to examine the three pupils by standing and talking to them in close physical proximity.

5. The principal concluded that as a result of his examination, all three pupils smelled of marijuana.

6. The principal, by way of a telephone call, advised G.F.'s father that G.F. "smelled of marijuana" and requested a meeting in his office.

7. G.F. denied smoking marijuana; he admitted smoking a regular cigarette.

8. The principal advised G.F. and his father that G.F. was suspended from school until a Board hearing.

9. The principal advised G.F. and his father that the hearing could not occur until a cigarette found on J.M. was analyzed.

10. G.F.'s father sought preliminary legal assistance. He abandoned that activity upon learning the proposed fee.

11. G.F.'s father made repeated telephone calls to school authorities in an effort to have the Board hearing for his son, G.F.

12. The principal, upon being informed by way of a telephone call on March 17, 1978 that a field test of the confiscated cigarette was positive, contacted the Superintendent's office to arrange for an immediate hearing for G.F.

13. The written field test report (C-1) establishes that the field test on the cigarette was not conducted until April 27, 1978.

14. The Superintendent's office arranged for a hearing for all three pupils the following Monday evening.

15. The assistant principal advised G.F.'s father on Friday afternoon by way of a telephone call that G.F.'s hearing was scheduled for Monday evening, March 20, 1979.

16. Neither G.F. nor his parents were advised in writing of the specific charges to be heard by the Board, the witnesses to be called against G.F., his right to cross-examine, his right to bring his own witnesses, and to be represented by counsel. (See C-2, ante)

17. The sole witness against G.F. at the Board hearing was the high school principal who, by way of hearsay, repeated what was told him by the police officers when G.F. was escorted to his office, by the school nurse when she allegedly detected a marijuana odor on G.F., and again by someone at the police station by way of telephone communication on or about March 17, 1978, when he was allegedly informed that a field test conducted on the cigarette found on J.M. was positive for marijuana.

18. The Board, based on such testimony, determined that G.F. was "involved with marijuana" and imposed the controverted discipline of exclusion from the regular day school program.

This concludes a recitation of findings of fact which, in my view, are necessary to place petitioner's allegations of due process violations in proper context. The issue which now emerges is if G.F. was entitled to due process, what process was due him by school authorities and/or the Board.

DISCUSSION OF LAW

The New Jersey Constitution (1947), Art. VIII, Sec. XV, Par. 1, provides:

> "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."

The legislature has recognized this constitutional mandate at N.J.S.A. 18A:38-25 which requires the attendance at school of pupils between six and sixteen, and at N.J.S.A. 18A:38-1 which provides that such attendance shall be free of charge.

A pupil's constitutional right to attend public schools, free of charge, is not unbridled. Pupils are subject to the authority of those over them and are required to obey the rules of the school. N.J.S.A. 18A:37-1. Those pupils who refuse to recognize the authority of those over them, or who refuse to obey the established rules, are subject to disciplinary measures as set forth at N.J.S.A. 18A:37-2. This statute provides for a pupil's suspension or expulsion from further school attendance if found to be, inter alia, defiant, disobedient, or violent.

Prior to the imposition of such a penalty which would effectively negate the pupil's constitutional right to attend public schools, free of charge, the Commissioner of Education recognized in 1968 that certain safeguards had to be built into the process of a suspension or expulsion action before taken against a pupil by a board of education.

In John Scher v. Board of Education of the Borough of West Orange, Essex County, 1968 S.L.D. 92, remanded by State Board of Education for completion of record, 1968 S.L.D. 97, the Commissioner, adopting the guidelines laid down in State ex rel. Sherman v. Hyman 180 Tenn. 99, 171 S.W. 2d 822 (1942) cert. den. 319 U.S. 748 (1945) held that a pupil, prior to an expulsion action (long-term suspension) being taken against him had to be informed of the nature of the charges against him, as well as the names of the principal witnesses against him when requested and a fair opportunity to make his defense. The Commissioner also adopted the view of that Tennessee court that the pupil could not, as a matter of right, claim the privilege of cross-examination.

The Commissioner, in the same opinion, also relied upon the guidelines for pupil expulsion laid down in Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir. 1961) which held that a notice of charges should contain a statement of the specific charges and grounds, which if proved, would justify expulsion under the regulations of the Board. Cross-examination of witnesses was affirmed as not being a matter of right.

Judge Lane, in R.R. v. Board of Education of the Shore Regional High School District, Monmouth County, 109 N.J. Super. 337 (Chan. Div. 1970) affirmed the principles of Dixon, supra, as expressed by the Commissioner in Scher, supra, in regard to the safeguards necessary to be employed prior to an expulsion action taken by a board against a pupil. Judge Lane also held that procedural due process as guaranteed by the Fourteenth Amendment must be afforded by public

school officials to pupils who face suspension or expulsion from school. Procedural due process included a notice of charge, a list of witnesses to appear against him, not necessarily subject to cross-examination, and the pupils right to enter his defense. Finally, Judge Lane opined that a pupil in such circumstance also has the right to legal counsel.

Finally, in Tibbs v. Board of Education of the Township of Franklin, 114 N.J. Super. 207 (App. Div. 1971), aff'd. 59 N.J. 506 (1971) the Court addressed the question of whether a pupil facing an expulsion action has the right to confront their accusers and cross-examine. The Court held that such right exists.

Thus, due process procedural requirements with respect to a pupil facing an expulsion (long-term suspension) by a board requires school authorities to advise the pupil of

1. a notice of the charge

2. a list of witnesses to be called in support of the charge

3. their right to cross-examine the witnesses

4. their right to enter their own defense, and

5. their right to counsel.

Here, petitioners argue that such advice must be provided in writing. The Board asserts that such notice may be provided orally as it asserts it did.

Neither Scher, R.R., Tibbs, nor more recently Goss v. Lopez, 419 U.S. 565 (1975) which substantially affirms the requirements of due process articulated above with respect to pupil expulsions, specify that such notice be or not be in writing.

In consideration of the established facts of the matter herein, a full and deliberate review of Scher, supra, R.R., supra, T.T., supra, and Goss, supra, and finally a full and fair review of the Briefs of the parties in support of their respective positions, I CONCLUDE that a pupil must be given written notice of charges against him, a written list of witnesses, a written statement of his right to cross-examination of those witnesses, a written statement of his right to enter his own defense, and a written statement of his right to legal counsel by school authorities, when faced with a Board hearing which may result in long-term suspension, more than ten days, or permanent expulsion. (See R.R., supra; Goss, supra.) In my view, to expect or demand less would render our constitutional guarantees meaningless.

Surely, there may be presented circumstances when school authorities must take swift action to sever a pupil from regular school attendance because of an attack upon other persons or other serious alleged offense. Both statutory

and case law provide adequate remedies in such instances by way of initial short-term suspension by the principal which may be an oral charge. (See N.J.S.A. 18A:38-4; Goss, supra; R.R., supra; Scher, supra.)

In the instant matter, G.F. was not afforded elemental due process of law, even orally, at his preliminary hearing with the principal. This is so for when G.F. was brought to the principal, even if the hearsay testimony of the principal should be believed, the principal was told by the police officers that G.F. was observed with two other pupils "***passing around a white, cigarette-like object***." That object was not recovered. Because an unlighted cigarette was found upon J.M. which the police officers and consequently the principal assumed to be marijuana, does not establish a causal nexus that, therefore, G.F. was, in fact, smoking marijuana. Nor is there any evidence whatever that G.F. was ever accused of marijuana smoking by the police officers or by the principal.

But beyond this, and even assuming his initial suspension was proper, if G.F. was initially suspended by the principal because he "***smelled of marijuana***," the Board concluded as the result of the long-term suspension hearing it afforded G.F. that he was "***involved in marijuana***." The Board arrived at this conclusion predicated upon the principal's direct observation that G.F. smelled of marijuana, and is hearsay explanation of what the police officers told him when G.F. was brought to him, upon the hearsay of what the school nurse said to him, upon his hearsay of what an unidentified person at the police station said on March 17, 1978 in regard to a field test on the cigarette found on J.M. - even though the actual field test report establishes such a test was not conducted until April 27, 1978.

Based on the foregoing, I FIND that:

1. G.F., though admittedly in a place other than where he was to be on March 8, 1978, was not informed of a precise charge against him.

2. G.F. was improperly suspended by the principal on March 8, 1978 because he was not told why he was being suspended other than he "smelled of marijuana."

3. G.F. was not informed, orally or in writing, of the charges against him to be heard by the Board.

4. The Board's determination was that G.F. was "involved in marijuana."

Based on the foregoing, I CONCLUDE that G.F. was, in fact, denied due process of law by the failure of school authorities to notify him in writing of the charges to be heard against him by the Board, and by the failure of school authorities to notify G.F., in writing, of his other due process rights articulated above prior to the Board hearing.

In my view there is no need, nor authority in this Court, to determine whether an attorney-client relationship existed between G.F.'s father and the attorney who testified herein. Even if such a relationship existed, the Board and/or school authorities have the responsibility to notify the affected pupil or his parents. Here, that was not done.

Though the Board did violate due process rights of G.F. with respect to the purported hearing it afforded him, the fact that G.F. is reinstated to regular school enrollment and his record is expunged of all notations in regard to this incident precludes relief being afforded here.

Finally, it is recognized that counsel for the Board asserts that should it be determined here that G.F.'s due process rights were violated, the matter ought to be remanded to the Board for a new hearing. (Tr. II-9) I disagree. G.F. is now enrolled in this twelfth year of school and justice would not be served, particularly for him, to allow the Board to reopen, with attendant publicity, the entire matter which is now close to two years old.

Upon the representation that G.F. is in regular school attendance and that his record is expunged of the entire matter, 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.

November 27, 1979
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

ams

G.F., a minor by his parents and natural guardians,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Board's argument that the Commissioner must take action in this matter is specious; the Commissioner is responding in a timely manner.

The Board in extensive confutation takes exception to the decision of Judge Daniel B. McKeown not to dismiss the Petition on the grounds of mootness inasmuch as the Board had reinstated G.F. into the normal daily educational program and had expunged any record of his suspension. The Commissioner does not agree and finds the action of Judge McKeown to determine if G.F. had received due process in his suspension hearing to be a determinable issue. The Commissioner does not agree with the Board's determination that the initial decision elevates suspension hearings to the level of mini-criminal trials and finds the Board's purported distinction between fundamental fairness and due process one that places form over substance. Rall v. Bayonne, 104 N.J. Super. 236, 243

The Commissioner is constrained to observe that he finds no hardship wrought on a board of education to give a pupil often of tender age, when faced with a hearing before that board which could result in long-term suspension or permanent expulsion, written notice of the charges against him, as well as a written list of witnesses including a statement of his right to cross-examine those witnesses, enter his own defense and his right to legal counsel.

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

January 13, 1980

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 WASHINGTON ST
NEWARK NEW JERSEY 07102
(201) 648-6186

EDNA KESSLER,	)	INITIAL DECISION
	)	O.A.L. DKT. NO. E.D.U. 1891-79
Petitioner,	)	AGENCY DKT. NO. 30-2/79A
	)	
vs	)	
	)	
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY	)	
	)	
Respondent,	)	

APPEARANCES:

Arnold M. Mellk, Esq.
Greenberg & Mellk, Esqs.
attorneys for petitioner

Peter P. Kalac, Esq.
attorney for respondent

EVIDENTIARY DOCUMENTS

P-1 Booklet, "Resident Learning Consultant, Bayview School"

P-2 Booklet, "LDT-C Handbook"

P-3 (Supplementary) Winkler/Richardson Report November 9, 1979

R-1 Letter, E. Alan Bartholomew to Edna Kessler, dated November 25, 1975

R-2 List of petitioner's certifications and assignments

BEFORE THE HONORABLE JAMES A. OSPENSON, A.L.J.:

This matter is a petition for declaratory judgment and individual relief by Edna Kessler against Middletown Township Board of Education said to be justiciable by the Commissioner of Education under powers granted in N.J.S.A. 18A:6-19, N.J.A.C. 6:24-2.1 and N.J.S.A. 52:14B-8. Petitioner alleges the Board's 1975 action in combining petitioner's child study team function under N.J.S.A. 18A:46-1, et seq, and N.J.A.C. 6:28-1, et seq. as learning disabilities teacher -- consultant (hereafter, LDT-C) (certification under N.J.A.C. 6:11-12.5) with duties of reading resource teacher (certification under N.J.A.C. 6:11-12.20),

with concomitant substantial classroom teaching duties, is such a dilution of LDT-C function and distortion of the special education plan required under N.J.A.C. 6:28-3.5(c)(1) as to be wrong as a matter of law. If that be so adjudicated, petitioner demands she be restored to her former full-time duties as LDT-C. The Board asserts, in denial, there is no provision of N.J.S.A. 18A:46-1, et seq, or of N.J.A.C. 6:28-1, et seq, that precludes it from combining petitioner's duties as it has. The Board says N.J.S.A. 18A:11-1 clearly empowers it to develop job descriptions and assign personnel within those job descriptions for the purpose of carrying on the management of the public schools of the district.

Petition was filed February 9, 1979 in the Division of Controversies and Disputes of the Department of Education. An Answer was filed March 22, 1979. The matter was transmitted to the Office of Administrative Law on June 27, 1979, pursuant to N.J.S.A. 52:14B-1, et seq, for hearing and determination as a contested case. On September 5, 1979 a pre-hearing conference was conducted and an Order entered. Hearing was held in the Office of Administrative Law on October 29, 1979, and the matter was finally concluded ten (10) days thereafter by submission of briefs as required.

It was admitted by the parties that petitioner has been employed by the Board for the past 18 years. She holds certification in elementary education and English (1-8), history and biology (secondary), elementary and secondary school principal as teacher of reading and as LDT-C. She has been assigned to Bayview School (K-6) exclusively since 1975. Since 1964-65 she functioned as a full-time learning disabilities specialist until she was certificated as LDT-C in 1971. Her job description (exhibit A of the petition) was adopted by the board on November 10, 1975. In it, her title is "Learning Disability Teacher-Consultant/Resource Teacher"; qualifications for the position include LDT-C certification under N.J.A.C. 6:11-12.15. The described job functions are (1) as a member of a multi-disciplinary child study team and (2) as an LDT-C "working within the framework of the entire school setting."

In performing the function of (1), the teacher is required, among other things, to "make provision for, and/or provide short-term instruction for classified students likely to profit from individual or small group teaching." In performing the functions of (2), the teacher is required, among other things to "make provision for and/or provide short-term instruction for students likely to profit from individual or small group instruction."

The parties agree that in August, 1976, petitioner was informed officially that her position as LDT-C was to be combined with that of reading resource teacher. That job description (Exhibit B of the petition) was adopted by the Board on July 3, 1974. Qualifications for the position include reading certification under N.J.A.C. 6:11-12.20. In performing the duties of the position, the teacher is required to "work with students at least fifty-one (51%) per cent of the time," including diagnosis, prescription and giving "short term instruction to students."

The petition alleges the combination resulted in petitioner's having to devote substantial time to classroom preparation and teaching in addition to the "staggering duties" required of LDT-C's by N.J.A.C. 6:28-1, et seq. At the hearing, however, petitioner acknowledged she has not actually been required to become a classroom teacher or do general education work since August, 1976 and thus there has been no actual dilution of the LDT-C and the reading resource teacher functions. (In her testimony, petitioner said she has been asked to attend reading resource teacher meetings, however, and this, she felt, diluted her effectiveness as LDT-C).

At issue in the proceeding, therefore, are the following:

I Does N.J.A.C. 6:28-1, et seq, mandate full-time functioning by this petitioner as LDT-C to the extent that her assignment as reading resource teacher with at least potential classroom preparation and teaching duties is impermissible?

II Are the functions of LDT-C and reading resource teacher by rule construction mutually exclusive of performance by the same staff member?

(There are no issues raised herein concerning tenure, seniority, involuntary transfer, or transfer to an unrecognized position title contrary to N.J.A.C. 6:11-3.6. See pre-hearing Order of September 5, 1979).

EVIDENCE AT HEARING

Petitioner testified she first learned of the proposed job combination from Board minutes in August, 1976. In September, 1976, she wrote the assistant superintendent that she felt such combination would be detrimental to the LDT-C function because the work load would be too heavy to carry. She felt then, as now, the reading resource teacher function is incompatible with that of LDT-C. The resource teacher collects data on books, monitors tests and papers, monitors teachers for supervision of reading, reviews reading materials for the general education

program, and does general education work. She felt that would take too much of her time and as a result she could do neither job well. In addition, she said, monitoring teachers as a resource teacher damages her rapport with the children. Also damaged is the LDT-C's rapport with the general education teacher, because she is required to monitor the teach something the LDT-C does not do. She felt her diagnostic work as LDT-C would suffer if she had to do resource work. Admitted into evidence as P-1 was a job description booklet, "Resident Learning Consultant, Bayview School," January, 1976, written by petitioner. In outline form, it is the basis for the job description adopted by the Board in 1975 (Exhibit A), under which petitioner presently functions except for the job title, which the Board called "LDT-C (Resource Teacher)." She said that "short term instruction" for classified and unclassified students in the Board job description and in P-1 is not traditional general education teaching by teaching staff members. She said because of scheduled child study team appointments she was unable to attend several meetings of reading resource teachers. She found such meetings irrelevant to her work as LDT-C, in any case.

Carol Scelza, a coordinator of LDT-C's for the Department of Education and a doctoral candidate in elementary education at Rutgers, was offered as an expert opinion witness on petitioner's behalf. She reviewed historical development of the concept of the LDT-C, who, since 1975, has been a consultant only and not a classroom teacher in general education. Vis 'a vis the student, the LDT-C's five (5) functions generally are diagnosis or evaluation of the referred child, planning educational programs, membership on the child study team, consultancy for the classroom teacher, and providing in-service training for the classroom or resource teacher. She felt it was inappropriate to combine the functions of LDT-C and reading resource teacher; the result is a diminished impact of the work of the LDT-C. She believed that since employment in education is in administration, services, or instruction, a board of education is precluded from using petitioner's certification as a reading teacher because she, petitioner, is employed as LDT-C under a services certification. She admitted she knows that LDT-C's can be employed on a part-time basis and also as teacher on a part-time basis but felt such state of affairs is not advisable unless there are two employment contracts. She admitted teachers certified in reading are natural good candidates, ultimately, for LDT-C certification.

For the respondent, the superintendent of schools, Dr. Bernhard Schneider, testified. He is in his ninth year as superintendent. Familiar with the LDT-C function, he said, he

developed the pilot child study plan in the district of which Dr. E. Alan Bartholomew, an assistant superintendent, has charge. Before 1972, the child study team structure for the district population of 14,000 was a psychologist and two social workers. In June, 1972, the State Department of Education initiated a study in the district looking to improvement of the quality and delivery of special education. A basic conclusion of the study, done under the aegis of Dr. James Jan-Tausch, Director of the Bureau of Pupil Personnel Services in the Division of Curriculum and Instruction of the State Department of Education, was that the then existing LDT-C staff was inadequate. (The August, 1972 study is marked R-3 in evidence.) Competency of the then staff was not questioned, but the report concluded the range of services delivered was inadequate. "The LDT-C should be giving more than 50% of his time to teacher consultation," the report concluded (p.7 of R-1), "and the remainder of time to individual diagnosis, team consultation, and direct instruction of children and to coordinating the work of the supplementary instructors. In Middletown the LDT-C's are giving more than 50% to diagnosis and the remainder of time to team consultation, coordination of supplementary instruction and almost no time for direct instruction or teacher consultation."

At the present time, said Dr. Schneider, and as a result of the changes since the 1972 study, there are 22 persons employed on child study teams for the district's 12 elementary schools: This is approximately 2 team members (one LDT-C and one reading resource teacher) for every 2 schools. A seventh LDT-C, there are now 6, has been requested.

Dr. Schneider said petitioner helped in the system change that evolved into the LDT-C - reading resource teacher combination. He felt she saw no basic conflict in the roles and that she could work well with the classroom teacher: in short, that she could handle both roles. Prevention of learning disabilities is an integral part of the LDT-C role. The roles are actually in combined form in only one of the elementary buildings, i.e. at Fairview. In any event, the Board authorized the combination by approving the LDT-C - Reading Resource Teacher job description in November, 1975 (Exhibit A). One tangible result since the study and the Board action, said Dr. Schneider, has been a dramatic reduction in the time spent in the student classification process.

The assistant superintendent for pupil-personnel services in the district, Dr. E. Alan Bartholomew, testified he was employed in 1973 after the Jan-Tausch report to implement

its recommendations. It was his interpretation of the LDT-C-Reading Resource Teacher job description (Exhibit A) that the term "making provision for short term instruction" denotes the doing of instruction by the LDT-C herself. The interpretation is entirely consistent, he thought, with the Jan-Tausch report. He said the term "full time equivalency" in N.J.A.C. 6:28-3.5(c) (1) refers not to any notion that the LDT-C should do work only in diagnosis, classification and teacher consultation. It refers to the annual plan for personnel assigment on a 180 day or 90 day employment basis.

DISCUSSION

In broad perspective, there is raised in this proceeding a question about the general management of pupil personnel services in the Middletown school district. Is the Board's combination of LDT-C/Reading Resource Teacher functions a reasonable, proper and efficient deployment of the district's service personnel? In broad perspective, one wonders whether the management question is as well likely to be answered by invocation of the Commissioner's controversies and disputes jurisdiction in the hearings process as it might have been under the Commissioner's supervisory jurisdiction under N.J.S.A. 18A:4-23, 24, 25 and 18A:46-15. In short, one might well expect to be better advised by an up-dated district evaluation extending, amplifying, and comparing the findings and conclusions of the Jan-Tausch report of 1972 with the state of affairs in pupil personnel services in the district in 1979-80. The advantage of such evaluative up-date on the scene today would seem, one may well conclude, an approach far better calculated to reach the truth than the adversary approach central to the hearings process. That petitioner has sensed a source of concern does not militate against the proposition that a remedy for general management problems is better sought administratively within the district than controversially without it.

But having chosen to invoke the Commissioner's jurisdiction over controversies and disputes under N.J.S.A. 18A:6-19, petitioner is faced with that which an administrative solution might well not have required of her. She must acknowledge, in the hearings process, that the Board action she controverts is entitled to a presumption of correctness. Her burden here is to demonstrate its unreasonableness. For absent such a showing, the Commissioner will not substitute his judgment for reasonably considered management determinations of the Board. See Thomas v. Morris Township Board of Education, 89 N.J. Super 327, 332 (App. Div. 1965); aff'd, 46 N.J. 581 (1966); Long Branch Ed. Assn. v. Bd. Ed. Long Branch, 150 N.J. Super 262, 264 (App. Div.

1977), aff'd 73 N.J. 461 (1977) (assignment of teachers to lunchroom duty was change of form only); and Dunellen Bd of Ed. v. Dunellen Ed. Assn, 64 N.J. 17, 29, 30 (1973) ("The Board has statutory responsibility for educational determinations; the Commissioner has overall responsibility for supervising such determinations and for hearing controversies and disputes" arising therefrom, such as over consolidation of departmental chairmanships).

The action of the Middletown Board petitioner controverts is an action taken in presumptive discharge of its general statutory duty as a district board of education under N.J.S.A. 18A:46-1, et seq, to identify (N.J.S.A. 18A:46-6), classify (N.J.S.A. 18A:46-8), and provide suitable facilities and programs of education for educationally handicapped children (N.J.S.A. 18A:46:1) of the district. The Commissioner according to rules and regulations approved by the State board shall approve district programs and assist local boards in formulating programs required under the law (N.J.S.A. 18A:46-15). Such rules and regulations have been adopted: N.J.A.C. 6:28-1, et seq.

Thus the broadly stated question about general management of pupil personnel services in the Middletown school district becomes refined here to whether petitioner has shown that the Board action was an arbitrary and unreasonable deployment of the district's service personnel.

I think she has not.

The evidence seems clear that the Board acted deliberately and carefully in the wake of the 1972 Jan-Tausch evaluation. That there was in fact such a prior evaluation by the Commissioner at all suggests even more readily the combination of functions was remedial, studied and in no sense arbitrary. The Board acted to employ an assistant superintendent for the specific purpose to effect the remediation. The record is barren of any evidence that delivery of pupil personnel services has suffered, that the educationally handicapped student has been denied the essentials of identification, classification or prescriptive educational services, or that the intent of the law and regulations are being thwarted. In particular, there is no evidence that district staff have not been informed of their responsibilities or provided with inservice education programs as required under N.J.A.C. 6:28-1(g). There is no evidence that basic child study teams in Middletown fail to meet the organizational standards of N.J.A.C. 6:28-1.3. There is no evidence that the comprehensive evaluation criteria of N.J.A.C. 6:28-1.6 have not been met, nor that the individualized education programs required by N.J.A.C.

6:28-1.8 have not been delivered. There is no evidence that standards for state funds entitlement under N.J.A.C. 6:28-3.1 have not been met; nor that Middletown's annual educational plan for special education under N.J.A.C. 6:28-3.5 is deficient (a reading of the rule requiring that the plan list professional staff "and the full-time equivalence of their assignments" does not require the conclusion, as urged by petitioner, that the LDT-C be a full-time consultant without classroom resource teaching assingment).

In short, the presumption favoring the 1975 Board action in combining LDT-C and Reading Resource Teacher functions has not been overcome either (1) by petitioner's expert opinion witness, whose testimony is neither persuasive nor demonstrably an exposition of Departmental policy (she was unaware of the Jan-Tausch report), or (2) by petitioner's own testimony about loss of rapport with students and resource teachers and the irrelevance of resource teachers' meetings to the LDT-C function. Nor, finally, can it be said the statute or rules literally or impliedly forbid such combination.

FINDINGS AND CONCLUSIONS

Having reviewed the arguments, exhibits and respondent's brief, and having heard and observed the witnesses, I FIND as follows:

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

2. The 1975 action of the Middletown Board of Education in combining the functions of LDT-C and Reading Resource Teacher is a reasonable exercise of its educational management power.

3. Such action was in furtherance of its statutory obligation under N.J.S.A. 18A:46-1, et seq, to identify, classify, diagnose and educate the educationally handicapped.

4. Such action was, in addition, a reasonable measure in remediation of inadequacies disclosed in the 1972 Jan-Tausch evaluation of pupil personnel services in the district.

5. The combination of functions was a deployment of teaching staff personnel by job title description and certification that is not demonstrably contrary to or inconsistent with the letter or spirit of N.J.S.A. 18A:46-1, et seq or N.J.A.C. 6:28-1, et seq.

6. I find neither evidence or nor potential for undue dilution of function as alleged in the petition.

Based on the evidence adduced and the findings made, therefore, I CONCLUDE that petitioner has failed to sustain the burden of proof that the Board action in her case was unreasonable or to demonstrate that it was wrong as a matter of law. Accordingly, I ORDER the petition be DISMISSED.

DISCUSSION OF POST-HEARING EVIDENCE SUBMISSION

More than ten (10) days after conclusion of the hearing, that is, on November 20, 1979, petitioner's attorney filed a brief containing "newly discovered evidence of great significance to the outcome of the case:" i.e., the Middletown Township Evaluation of Special Education and Public Personnel Services, released November 9, 1979 by Paul Winkler, Ed.D., Deputy Assistant Commissioner, Division of School Programs, and James Richardson, Ed.D., Director, Bureau of Special Education, New Jersey State Department of Education. Though the submission was consented to by the Board's attorney, it is nevertheless untimely without good cause shown. See N.J.A.C. 19:65-3.2, 4.2, 16.1, proposed 11 N.J.R. 479, 480, 487, September 6, 1979. Because of a peripheral relevance to the findings and conclusions of this Initial Decision (which is of course not final), however, I think it reasonable and proper to relax the closure rule and make the Winkler/Richardson report part of the record herein.

Two things should be noted:

(1) No intimation of its existence was made during hearing; and

(2) The above findings and conclusions of the Initial Decision were completed before its submission.

Chapter 7A of the report, dealing with the LDT-C and listing some ten (10) "Concerns" and "Recommendations", specifies as one (1) of those concerns (no. 5):

> "The primary role of the LDT-C is limited by other assignments in many instances. Job descriptions have not been updated since 1975 and do not clearly define present responsibilities and job titles."

The recommendation was:

> "Following analysis of the role of the LDT-C's a job description should be written that clearly defines primary responsibilities and clarifies job titles."

Transmitting the report to the county superintendent, Drs. Winkler/Richardson cautioned that "the process now requires that Middletown Township School District develop a remedial plan for each non-compliance issue that specifies the corrective action that will be taken, time lines for completion and responsibility for implementation. Please convey to the school district that Branch personnel are available to assist in the development and/or implementation of the remedial plan. Branch personnel are also available to assist district personnel in carrying out professional practice recommendations contained in the report."

Thus, perhaps fortuitously for petitioner, there appears to have been accomplished the administrative evaluation of the LDT-C one would have hoped for. See p. 6 hereinabove. But the very existence and currency of the 1979 Winkler/Richardson report underscores the fundamental unsuitability of petitioner's resort to the hearings process for the relief prayed for. This I think is its peripheral relevance.

SUPPLEMENTAL FINDINGS AND CONCLUSIONS

Having reviewed post-hearing submissions, therefore, I FIND, additionally, as follows:

7. Petitioner's invocation of the Commissioner's controversies and disputes jurisdiction, upon all the evidence herein, is mis-conceived; her statutory interest herein is primary and direct not adjudicatory. N.J.S.A. 18A:46-2,15.

8. To the extent remediation for alleged dilution of function of LDT-C and Reading Resource Teacher is needed, a proposition not herein determined, such remediation should be sought and achieved, if at all, within the exigencies and constraints of the 1979 Winkler/Richardson report.

Based on all of the foregoing, therefore, I CONCLUDE as hereinabove, that the petition should be, and it is hereby DISMISSED.

O.A.L. DKT. NO. E.D.U. 1891-79
AGENCY DKT. NO. 30-2/79A

This recommended decision may be affirmed, modified or rejected by the Commissioner of the Department of Education, Fred G. Burke, who by law is empowered to make a final decision in this matter. However, if the Commissioner of the Department of Education, Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

DATE

JAMES A. OSPENSON, A.L.J.

EDNA KESSLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner in extensive confutation takes exception to the finding of Judge James A. Ospenson in the instant matter that the combination of functions required by the Board of petitioner was not an undue dilution of her function as a learning disabilities teacher-consultant (LDT-C). Petitioner also objects to Judge Ospenson's determination that this matter is not properly under the jurisdiction of the Commissioner. On both counts the Commissioner agrees with petitioner.

The duties, functions and responsibilities of an LDT-C are set forth in N.J.A.C. 6:28-1.1 et seq. pursuant to the authority granted by N.J.S.A. 18A:46-1 et seq. and N.J.S.A. 18A:46A-1 et seq. The Commissioner finds that petitioner's function, or lack thereof, is a matter cognizable under the afore-cited statutes and properly under his jurisdiction.

The Commissioner has examined the record thoroughly and considered the arguments thereto. He finds that petitioner is in the employ of the Board properly within her certification as an LDT-C under N.J.A.C. 6:11-12.15. To assign petitioner functions as a resource reading teacher is impermissible and specifically precluded as a dilution of her function as an LDT-C set down in the applicable regulatory language and expressed opinion of the State Department of Education.

Accordingly, for the reasons stated the Commissioner reverses the initial decision and directs the Board to confine petitioner's duties to those of her function as an LDT-C.

It is so ordered.

COMMISSIONER OF EDUCATION

January 14, 1980

EDNA KESSLER,

PETITIONER-APPELLEE,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 14, 1980

For the Petitioner-Appellee, Greenberg & Mellk, (Alan G. Kelley, Esq., of Counsel)

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

The Petitioner in this case was a certified learning disabilities teacher-consultant (hereinafter LDT-C) who also held certification as a reading resource teacher. She attacked the 1975 action of the Middletown Board of Education in creating and assigning Petitioner to a position which combined her child study team function as LDT-C with reading resource teacher duties. She claimed that this assignment violated provisions of N.J.A.C. 6:28-1 et seq. and constituted an undue dilution of the LDT-C function; and she demanded that she be restored to her former full-time duties as LDT-C.

The Administrative Law Judge upheld the Board's action. He found in essence that nothing in the State Board Regulations prevented a LDT-C from also serving part-time as a reading resource teacher; that there was no inherent incompatibility between the two roles; and that the record did not support Petitioner's claim that she had been unable to perform effectively her function as LDT-C. Concluding that the Board had not abused its general authority in the deployment of the District's professional staff, the Judge ordered that the petition be dismissed.

The Commissioner reversed the initial decision and directed the Board to confine Petitioner's duties to those of LDT-C. He gave no reason for this reversal except to state his conclusion that "to assign petitioner functions as a resource reading teacher is impermissible and specifically precluded as a dilution of her function as a LDT-C set down in the applicable regulatory language and expressed opinion of the State Department of Education".

We respectfully disagree with the Commissioner's conclusion, and we concur generally in the findings and decision of the Administrative Law Judge.

We observe nothing in the pertinent regulations (N.J.A.C. 6:28-1.1 et seq.) which would prevent a LDT-C from also serving as a resource teacher if this can be accomplished in any particular case without detriment to the LDT-C function. We agree with Petitioner that the latter function must not be impaired; and if Petitioner's work load had been too heavy

because of her having to devote much time to reading resource teacher functions, the general purpose of the regulations would not be achieved. Here, however, as the initial decision stated, the record is barren of any evidence that delivery of pupil personnel services has suffered, that the educationally handicapped student has been denied the essentials of identification, classification or prescriptive educational services, or that the intent of the law and regulations are being thwarted.

We see no inherent conflict or incompatibility between the LDT-C and resource teacher functions. On the contrary, we believe that some direct instruction by a consultant from time to time (assuming she is certified as a resource teacher) may work to the advantage of both the consultant and the handicapped pupil. Indeed, the Superintendent of Schools testified that one tangible result of the Board action had been a dramatic reduction in the time spent in the student classification process.

In the educational system of this State the local board of education plays the primary role of employing a professional staff, assigning their duties, and managing the educational program of the district. N.J.S.A. 18A:11-1; 18A:16-1; 18A:27-4. So long as the board conducts its program in conformity with general policies and limits imposed by the State, its actions are entitled to a presumption of correctness. We agree with the Administrative Law Judge that the presumption favoring the 1975 Board action in combining LDT-C and reading resource teacher functions has not been overcome.

For the foregoing reasons the State Board reverses the decision of the Commissioner and affirms the Initial Decision, dismissing the petition.

Attorney Exceptions are noted

August 6, 1980

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY V. RAMSEY TEACHERS ASSOCIATION, BERGEN COUNTY	:	INITIAL DECISION EDU DKT #97-2/78

APPEARANCES:

For the Petitioner, Sullivan & Sullivan (Arthur C. Fullerton, Esq., of Counsel)

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

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

This matter was opened before the Commissioner of Education on February 17, 1978 when the Ramsey Board of Education, hereinafter "Board," filed a Petition for Declaratory Judgment requesting an interpretation of N.J.S.A. 18A:25-7 which provides that:

> "Whenever any teaching staff member is required to appear before the board of education or any committee or member thereof concerning any matter which could adversely affect the continuation of that teaching staff member in his office, position or employment or the salary or any increments pertaining thereto, then he shall be given prior written notice of the reasons for such meeting or interview and shall be entitled to have a person of his own choosing present to advise and represent him during such meeting or interview."

The Board contends and seeks a determination that its assistant superintendent of schools was not required by that statute to give a teacher advance written notice of the subject matter to be discussed at meetings with her on December 14 and 15, 1977 and that the teacher was not entitled by the statute to have present at those meetings a representative of her own choosing. Respondent Ramsey Teachers Association, hereinafter "Association," asserts that the Commissioner is without jurisdiction to issue such as declaratory judgment for the reason that the matter allegedly arises under N.J.S.A. 34:13A-1 et seq. as a violation of a negotiated agreement rather than under education law.

After consideration of legal arguments relating to the Association's Motion to Dismiss and the Board's Motion to Proceed to Plenary Hearing, the Commissioner, on May 25, 1979 issued an Order directing that the matter proceed to a plenary hearing following the completion of discoveries authorized at the pretrial conference held on June 1, 1978. The matter was transferred, as a contested case, to the Office of Administrative Law on July 2, 1979 pursuant to N.J.S.A. 52:14F-1 et seq.

Respondent chose not to appear at the plenary hearing which was scheduled for September 25, 1979 at Woodbridge, electing rather to agree to each and every item set forth in the Board's draft of a Stipulation of Facts (J-1), to which respondent had theretofore raised numerous objections. (Tr. 1-8) Accordingly, the matter is jointly submitted for Summary Judgment in the form of the pleadings, Stipulations of Fact, the Board's Brief, Memoranda of Counsel and the following documents in evidence:

J-1 Stipulation of Fact
J-2 Conference Memorandum, December 14, 1977
J-3 Conference Memorandum, December 15, 1977
J-4 Grievance of the Association, December 22, 1977
J-5 Grievance of the Association, January 10, 1978

The relevant facts are as follows:

A classroom teacher was notified by her principal on December 14, 1977 to report to the Assistant Superintendent that afternoon. In response to the teacher's inquiry, the principal informed her he did not know the reason for the forthcoming conference which lasted approximately 45 minutes. At the conference, the Assistant Superintendent, acting solely on his own initiative and without direction of any superior, discussed with the teacher information he had received concerning her late night telephone calls to the substitute service, her unsolicited late night telephone calls to parents wherein she persisted in discussing private and personal affairs, letters from parents stating concerns or complaints about those unsolicited calls, and her nervous demeanor and conduct in the classroom.

During that conference, attended only by the Assistant Superintendent and the teacher, she volunteered information that she had a family history of shaking hands and nervousness and that she "***had a prior problem with excessive alcohol consumption, (and) that although she had occasional recent mishaps***she felt the problem was being brought under control.***" (J-1 at p. 4)

At the conclusion of the conference the Assistant Superintendent advised the teacher that, if she had no objection, he would dictate a memorandum concerning their discussion. When the teacher voiced no objection, a memorandum was prepared which they both signed. (J-2) He also advised her that a more detailed memorandum with recommendations would be prepared the next day. In that expanded memorandum of December 15, signed without protest and discussed with the teacher, the Assistant Superintendent expressed his willingness to assist her in achieving the goals established at the conference. (J-3) Although the teacher was advised that she had the right to file her own statement thereafter, she did not do so.

At no time prior to or during either conference did the teacher refuse to attend, demand, or request a statement of reasons for the conferences. Nor did she discuss or demand that a representative of her choice attend. The Assistant Superintendent did not at any time make threats of reprisal should she not attend or refuse to sign the aforementioned memoranda. Nor did the Assistant Superintendent call the conferences at the request or direction of the Board or any other superior or thereafter forward any recommendations to any superior, the Board, or any other person concerning the teacher's salary, employment, assignment or position. The entire text of the controverted memorandum is set forth, as follows:

> "Thank you for taking the time to come in and speak with me on Wednesday, December 14, 1977, relative to a variety of topics. Pursuant to our agreement on that date, this will constitute the memorandum dealing with the specific points we discussed:
>
> 1. Concerns have been expressed about your utilization of the telephone late at night to parents and the substitute service. You have agreed that your actions in this regard will cease immediately.
>
> 2. We discussed at some length your evident state of nervousness and how it might be detrimental to the teaching/learning situation in the classroom.

> I am cognizant of the fact that you are aware of this condition, have sought to make efforts to bring the situation to a halt so it doesn't affect the children entrusted to your care.
>
> 3. I was pleased by your willingness to discuss the very sensitive topic of alcoholism with me. Your statement that you recognize you have had a problem in the past with excessive drinking is certainly the first step toward recovery. I accept the fact that you have indicated occasional mishaps recently of excessive drinking. I hope and expect that you will be able to fully correct this situation in the near future.
>
> "As indicated in our conference, it my expectation that you will take immediate steps to rectify the aforementioned points and I would be more than delighted to work with you in any way to help you achieve those goals. Please feel free to call on me at any time."

The Assistant Superintendent, who was at no time a member of the Board or any of its committees, had as his principal duties the evaluation and summarization of written teacher observations and evaluations in conjunction with building principals. He also made recommendations to the Superintendent based on those evaluations. Additionally, he conducted conferences or meetings with teachers at his discretion. He did not, however, make recommendations regarding teacher evaluations directly to the Board. (J-1, at p. 9) Nor did he, at any time, forward any recommendation to the Superintendent or the Board or any other person or party concerning this teacher's employment, assignment or salary. (J-1, at p. 8)

On December 22, 1977 and January 10, 1978, grievances were filed by the Ramsey Teachers Association, hereinafter "Association," with the Superintendent and the Board. (J-4,5) Those grievances complain that the teacher, ante, was not advised in advance and in writing of her rights to have representation or the nature of the December conferences. Therein, the Association charged that such advance written notice was required by both the terms of the negotiated agreement and N.J.S.A. 18A:25-7, supra. (J-4,5) When the Board denied the grievance, the Association moved the matter to arbitration. The arbitrators' award found a violation of the teacher's due process rights under the negotiated agreement and directed that the memoranda of December 14 and 15, 1977 be removed from her personnel file. (In the Matter of the Arbitration between Ramsey Teachers Association and Ramsey Board of Education, Case No. 18 39 0150 78D)

The issue now before the Commissioner is limited to whether the Assistant Superintendent was precluded from taking the aforementioned actions by the provisions of N.J.S.A. 18A:27-5.

The Association's argument that N.J.S.A. 18A:27-5, supra, is inapplicable and that such matters are controlled only by N.J.S.A. 34:13A-1 is in error. When filing the grievance the Association, citing N.J.S.A. 18A:25-7, characterized the controverted conferences ones which could adversely affect the teacher's employment and were thus violative of the statute. (J-5) Having done so, the Association now argues, in error, that the Commissioner is without jurisdiction to promulgate a declaratory judgment. Such authority over matters of education law is implicit among the broad powers granted to the Commissioner. N.J.S.A. 18A:6-9 The Board does not in this proceeding challenge the arbitrator's award which was rendered solely on the basis of interpretation of the terms of the negotiated agreement. Rather, it seeks a determination of whether its Assistant Superintendent's actions were legally precluded under the provisions of N.J.S.A. 18A:27-5.

Compliance with a request for a declaratory judgment by the Commissioner in a matter, part of which is subject to scrutiny under N.J.S.A. 34:13A-1, is not unique. In this regard see Parsippany-Troy Hills Board of Education v. Parsippany-Troy Hills Education Association, 1977 S.L.D. 1080 wherein the Commissioner stated, inter alia, the following:

> "***(I)t is the declared judgment of the Commissioner, that the Board herein and all boards of education, subject only to the provisions of other pertinent statutes such as that which guarantees a duty-free half-hour lunch and the rules of the State Board of Education, have authority to assign teachers to classroom and non-classroom duties including lunch time supervision. It is further declared that no agreement emanating from collective negotiations, unauthorized actions of administrative agents, or award of an arbitrator may nullify or void the inherent and essential authority of a board to assign teachers to supervise pupils during lunch time activities. The Commissioner so holds. N.J.S.A. 18A:11-1; Long Branch, supra; Dunellen, supra; Englewood, supra
>
> "Lest there be misunderstanding of the foregoing declaratory judgment, the Commissioner is constrained to state that he fully ascribes to the principle that the matter of unfair practice charges involving alleged breach of collectively

> negotiated agreements, and scope of negotiations disputes are properly a matter for the jurisdiction of PERC, and that arbitration is an appropriate avenue for the settlement of disputes over terms and conditions of employment when such is provided for in the grievance procedures enunciated in a negotiated agreement.***" (at pp. 1087-1088)

I CONCLUDE that, in this matter also, a declaratory judgment is appropriate to instruct the Board, the Association and all other Boards and associations in such matters.

N.J.S.A. 18A:27-5, supra, requires that a teaching staff member must be given prior written notice of the reasons when "***required to appear before the board of education or any committee or member thereof concerning any matter which could adversely affect the continuation of that teaching staff member in his office, position or employment or the salary or any increments pertaining thereto***." The Assistant Superintendent, however, was not a member of the Board. Nor did he conduct the controverted conferences at the direction of any member or committee of the Board.

The courts have admonished those who engage in the interpretation of a statute such as N.J.S.A. 18A:27-5, which is on its fact, unambiguous, as follows:

> "***In every case involving the interpretation of a statute, it is the function of the court to ascertain the intention of the Legislature from the plain meaning of the statute and to apply it to the facts as it finds them, Carley v. Liberty Hat Mfg. Co., 81 N.J.L. 502, 507 (E. & A. 1910). 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 the doctrine of the separation of powers. Such a statute is clear in its meaning and no one need look beyond the literal dictates of the words and phrases used for the true intent and purpose in its creation.***" Watt v. Mayor and Council of Borough of Franklin, 21 N.J. 274 (1956) (at p. 277)

> "***Where the wording of a statute is clear and explicit we are not permitted to indulge in any interpretation other than that called for by the express words set forth***." Duke Power Co. v. Patten, 20 N.J. 42 (1955) (at p. 49)

> "***The purpose of (statutory) construction is to bring the operation of a statute within the apparent intention of the Legislature.***" Sperry & Hutchinson Co. v. Margetts, 15 N.J. 203 (1954) (at p. 209)

> "***A statute should not be construed to permit its purpose to be defeated by evasion.***" Grogan v. DeSapio, 11 N.J. 308 (at p. 322)
>
> "***We are enjoined to interpret and enforce the legislative will as written, and not according to some unexpressed intention.***" Hoffman v. Hock, 8 N.J. 397 (1952) (at p. 409)

Followed to its ultimate application, the Association's interpretation of the statute would preclude any assistant superintendent, principal or supervisor from conferring with a teaching staff member without first giving written notice of the reasons and that representation may be requested. Such tortured statutory interpretation is an inappropriate enlargment of the legislative will. The supervision of teaching staff members should not be subjected to endless time-consuming, unnecessary, unefficient and costly procedural fetters. In this regard see Dorothy Duffy et al. v. Board of Education of the Township of Brick, 1974 S.L.D. 111.

IT IS ORDERED that Declaratory Judgment be and is rendered in favor of the Board: the provisions of N.J.S.A. 18A:27-5 did not preclude, within the factual context set forth herein, the Assistant Superintendent from conducting the controverted conferences without first giving written notice of the reasons therefor and/or notice of a right to request representation.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner of Education does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1 et seq.

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

November 29, 1979 — Eric G. Errickson
DATE — ERIC G. ERRICKSON, A.L.J.

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
RAMSEY TEACHERS ASSOCIATION,	:	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 adopts them as his own.

Accordingly, Declaratory Judgment is hereby rendered in favor of the Board.

It is so ordered.

COMMISSIONER OF EDUCATION

January 18, 1980

PATRICIA PARKER,	)	
	)	
PETITIONER,	)	
	)	INITIAL DECISION
V.	)	
	)	O.A.L. DKT. NO. EDU 1908-79
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,	)	AGENCY DKT. NO. 72-3/79A
	)	
	)	
RESPONDENT.	)	

APPEARANCES:

For Petitioner Parker, Richard F. Berkey, Esq.

For Respondent Board, Donio & Greco, Esqs. (Samuel A. Donio, Esq., appearing)

BEFORE THE HONORABLE DANIEL B. MC KEOWN, ALJ

J-1 - Paycheck Analysis
J-2 - 1978-79 school calendar
J-3 - 1979-80 school calendar
J-4 - Board policy
J-4A- Board policy
J-5 - Salary Printout
J-5A- Salary Printout
J-5B- Salary Printout
J-5C- Salary Printout
J-6 - Contribution Report
J-7 - Minutes - December 14, 1978
J-8 - Letter - March 2, 1979
J-8A- Paycheck Analysis

Petitioner, who resigned her tenure status of employment as a teaching staff member with the Board of Education of the Town of Hammonton (Board), alleges that the Board owes her an amount of two hundred thirty-one dollars ($231.00) in final compensation for services rendered. Petitioner also alleges the Board failed to pay on her behalf "appropriate amounts of pension and other contributions, contrary to the provisions of *** N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-8." (Petition of Appeal, paragraph three.) The Board denies the allegations and asserts that its actions with respect to petitioner's final compensation was arrived at properly and legally and consistent with its policy. Finally, the Board seeks dismissal of the action on the grounds that neither the Commissioner of Education nor the Office of Administrative Law has jurisdiction to hear the dispute. No proofs nor arguments were presented in support of this assertion. Thus, jurisdiction is asserted pursuant to N.J.S.A. 18A:6-9 pursuant to N.J.S.A. 52:14F-1 et seq.

The matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was conducted October 22, 1979 at the Burlington County Library, Mount Holly and the record was closed and readied for disposition on that date.

The essential facts of the matter are these:

Petitioner had been in the employ of the Board as a teaching staff member a sufficient period of time so as to have acquired a tenure status pursuant to N.J.S.A. 18A:28-5. During the 1978-79 academic year, sometime in December, petitioner, for reasons not material herein, tendered her resignation from the employ of the Board. The Board at a meeting conducted December 14, 1978, accepted petitioner's resignation effective January 1, 1979. (J-7)

The gravamen of the complaint herein is that the Board failed to compensate petitioner through December 31, 1978 in the amount of two hundred thirty-one dollars ($231.00) even though she was still in its employ to that time.

Petitioner's salary for the ten-month 1978-79 academic year was established, subsequent to the completion of salary negotiations between the Board and the Hammonton Education Association, at the rate of $17,140.

The Board followed its then existing payroll policy of distributing paychecks to its employees on a bi-weekly basis which commenced in 1978-79 on September 8, 1978. (See J-4; J-1). This paycheck paid Board employees for services rendered from September 1, 1978, the commencement of the academic year though teachers were not required to report until September 5, 1978, (J-2) through September 8 and for services to be rendered through September 15, 1978. The next paycheck was issued on September 20, 1978 and was compensation for services rendered from September 15, 1978 to September 20, and for services to be rendered to September 29, 1978.

Petitioner's schedule of salary payments, including without specification, adjustments made to her salary upon completion of negotiations, is as follows:

Base salary - 1978-79 = $17,140

September 8	799.09
September 20	799.09
October 6	799.09
October 20	799.09
November 3	799.09
November 17	799.09
December 1	799.09
December 15	799.09
December 29	548.24
Total Paid	$6,780.96

Petitioner asserts that her December 29 paycheck should have been in the amount of $799 or $231 more than she received.

The Board arrived at the final paycheck figure consistent with its policy which provides: (J-4)

> "5. It shall be a policy of the Board of Education that whenever a teacher resigns before the expiration date of his contract, his final salary shall be adjusted and prorated on the basis of the total number of required attendance days school is scheduled for the term; Example: If the term is scheduled for 180 school days, and the teacher resigning will have taught 80 school days during the term, his salary for the period taught shall be 80/180 X his annual salary."

The Board's school calendar for 1978-79 provided one hundred eighty-two days for teachers' attendance. (J-2) The Board then divided petitioner's annual salary of $17,140 by 182 required days of attendance. It arrived at a daily rate of $94.18 per day.

The Board then reasoned that petitioner was required to be in attendance according to its school calendar (J-2) the following number of days, September through December:

September	19 days
October	21 days
November	16 days
December	16 days
	72 days

It applied the per diem rate of $94.18 to 72 required days of attendance to arrive at a gross sum of $6,780.96 that was to be paid petitioner for the months of September through December. This gross figure was compared to the amount paid petitioner between September 8, 1978 and December 15, 1978 which equals $6,232.72. The difference between the two figures is $548.24.

Thus, the issue is joined with respect to whether the Board owes petitioner the amount of $231.00 as she claims, or whether the Board determined her final salary payment in a fashion that is legal or proper.

Firstly, N.J.S.A. 18A:27-6 (3) provides in full as follows:

> "The salary at which he is employed, which shall be payable in equal semimonthly or monthly installments, as the board shall determine, not later than five days after the first and fifteenth day of each month in case of semimonthly installments ***, a month being construed, unless otherwise specified in the contract, to be 20 school days or four weeks of five school days each***." (Emphasis supplied.)

In arriving at an adjudication of the issue presented herein, I am mindful of the Court's admonition regarding statutory construction and interpretation articulated in Caputo v. Best Foods, Inc. 17 N.J. 259:

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

In my view, the statute of reference provides two methods of payments: 1) equal semimonthly payments, or 2) monthly payments. An academic year, September through June, contains ten months. A calendar year, any calendar date in a calendar year running consecutively to the same calendar date in the subsequent year, contains twelve months.

Thus, it may fairly be concluded that a person employed on an academic year basis is to receive paychecks either twenty times, semimonthly or twice a month times ten months, or ten times, once a month times ten months. A person employed on a twelve month calendar year basis is to receive paychecks either semimonthly, twice a month, times twelve months or twenty-four times, or twelve times, once a month for twelve months.

I can find no basis upon which to conclude that it is permissible for a Board to pay its employees who are employed on an academic year basis less than once a month times ten months or more than twice a month for ten months.

An opinion of the Commissioner of Education In the Matter of the Request of the Board of Education of the Township of Brick, Ocean County, 1977 S.L.D. 704 has been reviewed. There, the Commissioner held that a board may pay its ten month employees in twenty-one installments because of difficulties which may be encountered in bank computer payroll distribution.

I FIND no support for such determination. The legislative will must be interpreted and enforced as written, not according to some unexpressed intention. Hoffman v. Hock, 8 N.J. 397 (1952).

Here, petitioner was employed for the 1978-79 academic year on an annual ten month salary of $17,140. Petitioner worked four full months. Petitioner should have received two/fifths of her total annual salary or $6,856. Instead, she received $6,781, or $75.00 less than she should have received.

Accordingly, the Board is directed to pay to Patricia Parker the sum of seventy-five dollars ($75.00) at its next regularly scheduled pay period. The Board is also directed to confer with the Board of Trustees of the New Jersey Teacher's Pension and Annuity Fund to determine whether it owes that Fund additional money on behalf of petitioner because of the relief granted herein.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner of Education does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

PATRICIA PARKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Board takes exception to the holding of Judge Daniel B. McKeown wherein he finds no support for the decision of the Commissioner in Brick, supra. The Commissioner agrees, finding a misapplication by Judge McKeown of the findings in Brick. The issue in this present matter is not the number of bi-weekly payments by which the Board seeks to pay its employees but whether the final amount paid petitioner is proper. The Commissioner finds that the Board violated its own policy of bi-weekly salary payments by reverting to a per diem rate of compensation to determine petitioner's last salary payments. In so finding the Commissioner does not disturb the monetary award to petitioner or the admonition to the Board to confer with the Board of Trustees of the New Jersey Teachers Pension and Annuity Fund to determine its obligation, if any, because of this salary award.

COMMISSIONER OF EDUCATION

January 21, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN RE:	)	INITIAL DECISION
RICHARD ADELL V. BOARD OF EDUCATION	)	OAL DKT. NO. EDU 2418-79
OF THE BOROUGH OF FAIR LAWN,	)	AGENCY DKT.NO. 203-5/79A
BERGEN COUNTY	)	

APPEARANCES:

Theodore Simon, Esq., for Petitioner, Richard Adell

Reginald F. Hopkinson, Esq., for Respondent, Board of Education of the Borough of Fair Lawn

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.

Subsequent to the filing of the petition and answer, and subsequent to a prehearing conference, the parties submitted cross motions for summary decision or summary judgment pursuant to N.J.A.C.6:24-1.16, and Proposed Uniform Administrative Rules of Practice 19:65-13.1 et seq.and the guidelines embodied in New Jersey Court Rules 4:46-1 et seq. Counsel for petitioner submitted to this tribunal a brief in support of his motion for summary decision as well as four exhibits attached to the brief. Counsel for respondent submitted a brief in support of its motion for summary decision as well as four exhibits attached to its brief. This tribunal has carefully reviewed and studied the pleadings, the prehearing order,and the briefs and exhibits attached thereto and feels that this matter is ripe for summary decision.

According to the prehearing order which was drafted as a result of a prehearing conference on October 4, 1979, at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey, the issues identified at that time were:

1. Was respondent's action in termination petitioner's extended sick leave with pay, less substitute salary before June 18, 1979, arbitrary, capricious and/or unreasonable?

2. And if so, what relief is available to petitioner?

The uncontroverted facts which have been gleaned from the pleadings, prehearing order, and briefs and exhibits attached thereto, are as follows:

1. Petitioner, Richard Adell, was an employee of respondent, Board of Education of the Borough of Fair Lawn, from September 1954 until February 28, 1979.

2. On February 28, 1979, pursuant to Board resolution of March 15, 1979, (see exhibit B attached to petitioner's brief), the following official action was taken by respondent:

"Termination of Employment that the employment of Richard Adell, psychologist, be terminated at the end of the day on February 28, 1979, since he moved out of the area to California."

3. On December 17, 1976, petitioner, Richard Adell, sent a letter to Mr. Thomas J. Cannito, Superintendent of Schools, indicating that he would begin sick leave sometime in the beginning of March, 1977.

4. N.J.S.A. 18A:30-2 states:

"All persons holding any office, position, or employment in all local school districts, regional school districts, or county vocational schools of the State who are steadily employed by the Board of Education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, ... shall be allowed sick leave with full pay for a minimum of ten school days in any school year."

5. N.J.S.A.18A:30-3 states:

"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."

6. N.J.S.A.18A 30-6 states:

"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." (emphasis added).

7. N.J.S.A.18A:30-7 states:

"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 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."

8. On or about February 27, 1978, petitioner, Richard Adell's formal sick leave, which was accumulated pursuant to N.J.S.A.18A:30-3 expired. (see Schedule B attached to respondent's brief).

9. On January 27, 1978, petitioner, Richard Adell, wrote to Mr. Tom Cannito, Superintendent of Schools, requesting the Board of Education to grant him extended sick leave, that is 120 days of additional sick leave over the accumulated sick leave that he already received, based on five additional days of sick leave for each of the 24 years that he worked in the district. (see Schedule B attached to respondent's brief).

10. On February 20, 1978, the respondent, Board of Education, passed a motion that "extended sick leave be granted to petitioner, Richard Adell, psychologist, Thomas Jefferson Junior High School and Memorial Junior High School in accordance with and within the limits of Board policy." (see Exhibit A attached to petitioner's brief). (Also see prehearing order #5C in which the date is incorrectly referred to as February 20, 1977.)

11. Pursuant to the Board resolution of February 20, 1978, petitioner Richard Adell, continued to receive extended sick leave benefits until December 5, 1978. (see Stipulation 5C prehearing order).

12. On December 6, 1978, petitioner, Richard Adell, who was now living in California, wrote to the Fair Lawn Board of Education, requesting:

"...I would like to apply, again, for extended sick leave, or rather, continued sick leave. I am most appreciative that the Board has approved my previous request. I believe that I will use up all potential sick leave by June, so this should be my last request." (see Schedule C attached to respondent's brief).

13. On February 22, 1979, petitioner, Richard Adell, wrote to the Fairlawn Board of Education indicating:

"I truly regret that I must submit my notice of retirement at the conclusion of the school year. The indication is strong that I will not be able to return to work in the forseeable future and since this June marks the completion of 25 years of service to Fair Lawn, the time has come to leave. I thank quite deeply the members of this and previous school boards for permitting to work so long with the youth of Fair Lawn,as well as supporting me in my present illness." (see Schedule D attached to respondent's brief).

14. Pursuant to a Board resolution of March 15, 1979, the following action was taken:

"That the employment of Richard Adell, psychologist, be terminated at the end of the day on February 28, 1979, since he moved out of the area to California." (see exhibit B attached to petitioner's brief).

15. On March 15, 1979, the respondent, Board of Education, mailed a letter to petitioner, Richard Adell, indicating that his resignation would be deemed to be effective as of February 28, 1979, and that the remuneration and extended leave will be terminated effective February 28, 1979. (see Exhibit C attached to petitioner's brief).

Petitioner argues that the respondent, Board's action on February 20, 1978, vested petitioner with a right to extended sick leave until June 18, 1979 which could not be taken away by the Board on March 15, 1979. Respondent argues that any extended sick leave granted over and above the accumulated sick leave which petitioner was entitled to pursuant to N.J.S.A. 18A:30-3 was granted pursuant to the Board's discretion and vested no rights to petitioner. Therefore, it follows that the Board could rescind its resolution of February 20, 1978 by the one of March 15, 1979, terminating petitioner's extended sick leave benefits, and such action would not be arbitrary, capricious and/or unreasonable.

With regard to sick leave, the law is abundantly clear that a teacher has an entitlement or right to at least ten (10) days of sick leave per year. (see N.J.S.A. 18A:30-2). If a teacher requires less than the ten (10) days of sick leave in any particular year, such days not utilized shall be accumulative to be used for additional sick leave as needed in subsequent years. (see N.J.S.A. 18A:30-3). Thus, in the instant case, the sick leave which petitioner had an entitlement or right to pursuant to the aforementioned statutes, expired on February 27, 1978.

It is also clear that a local Board of Education may, in its discretion grant extended sick leave benefits, beyond the allowed annual and accumulated sick leave periods, on a case-by-case basis. See Hutchenson v. Board of Education of Totowa, 1971 S.L.D.512, Marriott v. Board of Education of Hamilton Township, 1949-50 S.L.D. 57 and the State Board of Education decision in Ramsey Teachers Association, a New Jersey Teachers Corporation and Cecelia O'Toole v. Board of Education of the Borough of Ramsey, Bergen County, 1978 S.L.D. 120. Again, in the instant case, and in compliance with the applicable law, the respondent on February 20, 1978, granted petitioner, Richard Adell, an extended sick leave beyond his allowed annual and accumulated sick leave which was expected to expire on February 27, 1978. Although the stipulations indicate that petitioner continued to receive extended sick leave benefits until December 5, 1978 (Stipulation #5C), for the purpose of this decision, it is clear that petitioner's extended sick leave benefits terminated officially on February 28, 1979 as a result of the Board of Education resolution passed on March 15, 1979. Thus, petitioner received over one year's payment of extended sick leave benefits from respondent.

Although petitioner argues that the Board resolution of February 20, 1978 vests petitioner with a right or entitlement to extended sick leave benefits which could not unilaterally be rescinded or taken away, this tribunal cannot agree with such a position. As was alluded to in Piscataway Board of Education v. Piscataway Maintenance and Custodial Association, 152 N. J. Super 235 (App. Div. 1977), extended sick leave benefits set forth in a contract to any qualifying employee as a matter of right was illegal. (emphasis added). As stated in Piscataway, supra, at p. 246-7:

> "Our concern is over the payment of salary in whole or in part, for prolonged absence beyond the allowable annual and accumulated sick leave. As to such payment, the controlling statute, N.J.S.A. 18A:30-6, plainly leaves the matter to the discretion of the local Board of Education which may pay any such person each day's salary less the pay or estimated cost of a substitute, for such length of time as may be determined by the Board of Education in each individual case.
>
> 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 uninforcible."

It is readily apparent, therefore, that the Board's granting of extended sick leave benefits to petitioner on February 20,1978 was discretionary and did not vest petitioner with any rights or entitlement to initial payments or their continuation. See Mary Taccone v. Board of Education of the City of Newark, Essex County, 1976 S.L.D. 1045. It follows, therefore, that the Board has the discretionary authority to rescind any action taken at an earlier meeting where no vested rights accrue. The Commissioner has found the existence of vested rights in contractual relationships. See Marion S. Harris v. The Board of Education of Pemberton Township, Burlington County, 1939-49, S.L.D. 164 (1938); Samuel Hirsch v. Board of Education of the City of Trenton, Mercer County, 1961 S.L.D. 189; Anthony Amorosa v. Board of Education of the City of Jersey City, Hudson County, 1964 S.L.D. 105; Leon Gager v. Board of Education of the Lower Camden County Regional High School District Number 1, Camden County, 1964 S.L.D. 81; James Docherty v. Board of Education of West Paterson, Passaic County, 1967 S.L.D. 297; Leonard V. Moore v. Board of Education of the Borough of Roselle, Union County, 1973 S.L.D. 526; and Ronald Glab v. Board of Education of the Borough of Belmar, Monmouth County, 1975 S.L.D. 243.

It is CONCLUDED, therefore, that since there is no genuine issue of material fact, and since the granting of extended sick leave benefits to petitioner on February 20, 1978 was discretionary and since petitioner had no vested right or entitlement to extended sick leave benefits, the rescinding of said sick leave benefits effective February 28, 1979, was proper,and was not arbitrary, capricious and/or unreasonable;

And, therefore, it is further CONCLUDED that respondent's motion for summary decision be and is hereby granted and petitioner's motion for summary decision be and is hereby denied.

Accordingly, it is hereby ORDERED that petitioner's petition be and is hereby DISMISSED with prejudice.

This recommended decision may be affirmed, modified or rejected by the Commissioner of the Department of Education, Fred G. Burke, who by law is empowered to make a final decision in this matter. However, if the Commissioner of the Department of Education, Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

December 11, 1979
DATE

ROBERT P. GLICKMAN, A.L.J.

RICHARD ADELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner argues that the Board, once having granted him extended sick leave, cannot legally rescind that grant. Further exception is grounded in the contention that the Board unlawfully terminated petitioner's tenured employment. The Board's exceptions refute petitioner's arguments contending that it made a discretionary judgment to extend petitioner's sick leave but terminated such leave when petitioner revealed that he had moved to California (Schedule C).

The Commissioner observes that petitioner's regular cumulative sick leave was completed on February 28, 1978. On February 20, 1978 the Board took action to extend petitioner's sick leave at full pay through December 5, 1978.

In the meantime petitioner moved to California. (Petition of Appeal, Item 5)

The Commissioner has carefully examined the record and finds that the Board, showing commendable compassion for a long-time employee, determined to grant extended sick leave at partial pay from December 6, 1978 until February 28, 1979 under a given set of circumstances but subsequently found that those circumstances had changed. Petitioner wrote from his residence in California and indicated an intention to retire in June, 1979. (Exhibit B; Schedules C-D)

The Commissioner cannot agree with petitioner's contention that the Board once having exercised its discretion to grant extended sick leave cannot legally rescind that action. Such action is not graven in stone nor does it rise to the level of a contractual or constitutional deprivation. Piscataway Board of Education, supra

The Commissioner finds that the Board's decision at that time not to extend petitioner's sick leave on a partial pay basis was a proper one and part of its discretionary authority.

The Commissioner does not agree with the action of the Board to summarily dismiss petitioner at that time. Petitioner, a tenured employee of the Board, could not be so terminated and was entitled to proper proceedings. In view of the evidence of petitioner's ill health (Exhibit D), the Commissioner directs that the Board's actions to terminate petitioner's employment as of February 28, 1979, taken at its meeting of March 15, 1979 be and hereby is declared a nullity. The Board is directed to herewith initiate disability retirement proceedings as of February 28, 1979.

With the aforenoted modification and instruction to the Board, the Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

January 28, 1980

ANN MARIE AND MICHAEL CUCI, INDIVIDUALLY AND AS PARENTS OF MICHAEL CUCI; PAUL AND CAROL EVERETT, INDIVIDUALLY AND AS PARENTS OF TERRI EVERETT; LORRAINE AND CARMEN CASTALDI, INDIVIDUALLY AND AS PARENTS OF KIMBERLY FAULKNER; DORIS V. WILSON, INDIVIDUALLY AND AS PARENT OF STEVEN WILSON	)	INITIAL DECISION
PETITIONERS,	)	AGENCY DKT. NO. 208-5/78
V.	)	
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY	)	
RESPONDENT.	)	

APPEARANCES:

Constance Hepburn, Esq., for Petitioners

Donio & Greco (Samuel A. Donio, Esq., of Counsel), for Respondent

BEFORE THE HONORABLE BRUCE CAMPBELL, ALJ

Petitioners, individually and as parents of pupils in attendance at Hammonton High School and Hammonton Middle School, seek an Order declaring the present school dress code invalid, directing expungement from the records of the pupil petitioners any references to disciplinary actions arising from infractions of the code and directing that pupil Michael Cuci not be barred from participation in the cooperative education program because of code violations.

The Board of Education of the Town of Hammonton, hereinafter "Board," avers that the dress code has been promulgated in a lawful manner, is not violative of any constitutional rights of pupils and is a matter which should be left to the discretion of the Board.

The matter was brought before the Commissioner of Education in the form of briefs and oral argument on a Motion for Summary Judgment by petitioners,

before a representative of the Commissioner, on March 19, 1979, at the State Department of Education, Trenton. The matter was transferred thereafter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Petitioners allege that the code adopted by the Board is invalid on its face and as applied. Petitioners allege further that it is arbitrary, unreasonable, in violation of previous decisions of the Commissioner and in violation of the state and federal constitutions.

The code, in its entirety, reads as follows:

R4-3.1 Student Regulations. Students shall conform to the rules and regulations of the board of education, the superintendent of schools and the building principal. Copies of specific regulations governing the students in each school shall be made available to them upon their entrance into that school. Additional rules or rule changes shall be given adequate publicity among the students by the principals.

a. Code of Dress. All school attire shall be neat, clean and reflect an apearance (sic) of modesty and good taste.

Apparel shall not be so tightfitting, sheer, brief, low-cut or revealing above or below the waist as to be embarrassing or indecent.

1. Bermudas, cut-offs, hot pants, shorts and those culottes that appear to look like hot pants, are not to be worn in school.

2. The braless look is not permitted in school..

3. Tank shirts, halter tops, sweat shirts, and tee shirts are not permitted. Any type of shirt similar to the above regardless of color is not to be worn in school.

4. Sweaters, blouses, vests, jackets or combinations of the same are acceptable with pants or slacks. Slacks or skirts made from dungaree or blue denim material are not permitted. Dungaree jackets or any other outdoor jackets are not to be worn in school.

5. Body shirts cannot be worn with hip huggers unless an additional garment is worn covering the hips.

6. Canvass type sneakers are not permitted in school except for the gym class. Heavy type work shoes are not permitted in school unless the weather necessitates. Socks, stockings or peds should be worn at all times.

7. Personal grooming should be done at home or in the appropriate washrooms. Students should maintain a neat, clean and well groomed appearance at all times.

8. Any student attending any school functions (field trips, dances, activities during or after school hours, etc.) will not be permitted to attend unless they are properly attired. Proper attire would be considered the school dress code, unless otherwise designated.

> All interpretations and decisions on the dress code are to be made by the administration. Students should not assume the right to wear any apparel not covered by this dress code or any new fads or fashions.

Petitioners argue that "A reasonable rule implies that there is a rational and substantial relationship to some legitimate purpose." Angell et al. v. Board of Education of the City of Newark, 1959 S.L.D. 141, 143, and argue further that the preface to the code as published in the Hammonton High School Student Handbook, 1977 - 1978 states as the code's only purpose the imposition on pupils of a standard of good taste as a condition of attending school.

The preface to the code as published in the handbook reads as follows:

> Appropriate dress is a mark of good taste. Students are expected to attend classes in clothing that is neat and clean.
>
> The school authorities have no intention of dictating the specific types of hair styles and grooming to be worn by the students. However, certain common sense rules should govern the manner in which students are groomed for class and for school social affairs.

Petitioners cite Pelletreau v. Board of Education of the Borough of New Milford, Bergen County, 1967 S.L.D. 35, rev'd on other grounds, 1967 S.L.D. 45. In Pelletreau, a pupil had been expelled from school for continued violation of the hair length provision of the school's personal appearance code. The Commissioner upheld the Board's action. Petitioners recognize that the crux of Pelletreau was a question of hair length and not of garb. However, they contend the Commissioner stressed therein that the authority of boards of education with regard to pupils' personal appearance was not without limits.

> If respondent adopted its "Guidelines," for instance, in order to produce conformity of appearance of its pupils, or because members of the faculty or of the Board do not personally approve of particular styles affected by some young people, or in order to develop a sense of "good taste," or for similar reason, the validity of its action could be seriously questioned. Indeed, insistence upon conformity of appearance is repugnant to principles of good citizenship which our schools must seek to instill in the future generation. It is also pertinent to question, in any attempt to legislate particular standards of dress or "good taste," whose standards are to serve as the norm. "Good taste" is a matter of education, not legislation. Attempts by school authorities to impose arbitrarily determined standards of appearance upon pupils for the sole purpose of teaching "proper" dress or producing greater uniformity in the student body, is a highly questionable excursion into the realm of parental responsibility, the purpose of which it would be difficult to sustain.
>
> Id. at 41-42.

> [T]here is substantial evidence to support respondent's contention that it acted reasonably to control a condition which threatened the good order of the school, and not from any purpose to deprive pupils of personal liberty or arbitrarily to impose upon them matters of taste in appearance.
>
> Id. at 42.

The State Board of Education reversed the Commissioner's decision on the ground that student body reaction was insufficient basis for a rule of such breadth. Petitioners argue that the State Board did adopt the Commissioner's reasoning as to the limitations of any dress code when it stated "It is essential to the orderly process of education that local boards concern themselves with conduct of the students where such conduct constitutes a threat to the educational process." Id. at 47.

Petitioners allege further that, even if the preface to the code were couched in terms addressed to regulation of disruptive conduct, the code could not pass the test of reasonableness because its list of proscriptions constitutes a dictation of what is good taste in pupil attire.

Petitioners cite Ruth Ann Singer, by her parent and guardian ad litem, Nathan A. Singer, v. Edward Sandall, Walter C. Ande, Frank T. Law, Jr., and the Board of Education of the Borough of Collingswood, Camden County, 1971 S.L.D. 594, in support of their contentions that a dress code must be reasonably related to some purpose other than conformity and that a dress code is unreasonable when it "prohibits a form of attire generally acceptable for adult wear in almost all social and business functions." Id. at 604.

Petitioners also argue that the Commissioner has adopted a statement of the National Association of Secondary Principals set forth in its bulletin, The Reasonable Exercise of Authority[1], by his citation of it in David Harris v. Board of Education of the Township of Teaneck, et al., 1970 S.L.D. 311, 316. The citation reads as follows:

> The courts have clearly warned that freedom of speech or expression is essential to the preservation of democracy and that this right can be exercised in ways other than talking or writing. From this generalization it follows that there should be no restriction on a student's hair style or his manner of dressing unless these present a "clear and present" danger to the student's health and safety, cause an interference with work, or create classroom or school disorder.

Conversely, the Board states that its dress code is properly promulgated, serves and promotes several educational purposes and hence is a matter upon which the local school board should exercise its discretion as provided in N.J.S.A. 18A:11-1. That statute, in pertinent part, reads as follows: "The board shall --- *** c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of business and for the government and management of the public schools ***."

The Board asserts that its right to promulgate a dress code also is clear from the holding of the Commissioner in Singer, supra, where it is stated at 603:

> Petitioner states in her Brief that she is not seeking a ruling prohibiting all or any dress codes, and admits that some regulation of student attire is necessary. (Petitioner's Brief, at p.4)

1. National Association of Secondary School Principals, The Reasonable Exercise of Authority © (1969).

In Pelletreau v. Board of Education of the Borough of New Milford, 1967 S.L.D. 35, 45, the Commissioner determined that the local board of education had the authority to adopt reasonable rules and regulations for acceptable pupil behavior with respect to dress and appearance. The State Board of Education, in its decision in Pelletreau, supra, stated, at p. 48, that a regulation forbidding long hair, in effect regulates outside of school conduct, since it is not possible to have short hair in school and revert to long hair at home. In regard to dress, the State Board stated the following at p. 48:

> "***A regulation relating to dress does not have this effect. A student may well comply with regulations as to what may or may not be worn during school hours and dress as he or his parents see fit during his non-school hours.***"

The State Board further stated the following, also at p. 48:

> "***Of course, the reasonable rules and regulations of local boards of education shall be enforced. We stress the limits of this decision and caution any ingenious and provocative New Jersey public school students that our concern for freedom of expression is tempered by our determination that the proper course of the educational process not be impeded and that the high standards of our schools be maintained.***"

The Board contends the Second Circuit Court of Appeals has held that a teacher dress code is a rational means of promoting the goals of respect for authority and traditional values and of discipline in the classroom. East Hartford Education Association v. Board of Education of the Town of East Hartford, 562 F. 2d. 838 (2nd Cir. 1977).

The Board states, "It is thus obvious that control of disruptive conduct is not the only basis for a valid dress code," (Emphasis in text; Respondent's Brief at p. 11). Further, the Board denies that the only purpose of the controverted code is to impose a standard of good taste.

Respondent agrees the standard in Singer, supra, is that a proscription is not reasonable "if it prohibits a form of attire generally acceptable for adult wear in almost all social and business functions." Id. at 604. The Board avers that none of the prohibitions in its dress code is generally acceptable for adult wear in almost all social and business functions. (Respondent's Brief at p. 11).

At the prehearing conference in this matter, the litigants agreed that the two issues, sub judice, are (1) is the promulgation of a dress code for pupils a proper exercise of Board authority, specifically as provided in N.J.S.A. 18A:11-1 and (2) if the first issue be decided in the affirmative, is the dress code in the instant matter unreasonable and/or arbitrary and/or capricious.

The need for respect, appropriate behavior and discipline in the schools is a valid concern of every school board. That boards of education have the power to adopt and implement policies aimed at achieving and maintaining these ideals is not gainsaid. Administrative agencies and the courts of New Jersey have ever been reluctant to substitute their wisdom for that of a local agency. The words of the Appellate Division of the New Jersey Superior Court in Thomas v. Morris Township Board of Education, 89 N.J. Super. 327, 332 (App. Div. 1965) state this succinctly:

> We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable.

In Pelletreau, supra, the State Board of Education made it clear that regulation of hair length was impermissible since it is not possible for a pupil to have short hair in school yet have long hair outside of school but found that a dress code does not have this effect since it is possible for a pupil to comport with such a code while in school and dress as he or she or his or her parents deem proper in non-school hours. Id. at 48. Further, the State Board stated, "Of course, the reasonable rules and regulations of local boards of education shall be enforced." Id. at 48. I know of no decision in this jurisdiction that holds to the contrary.

Based upon the foregoing, it is abundantly obvious that local boards have the right to create pupil dress codes, subject to challenge on the bases of unreasonableness, arbitrariness or capriciousness. I SO HOLD.

What then remains for determination is whether the code here is subject to failure on the grounds of unreasonableness, arbitrariness or capriciousness of its requirements.

Petitioners maintain that the code, by its very language, is aimed at the dictation of good taste. A careful examination of the preface to the code as published in the Hammonton High School Student Handbook, 1977-78, ante, does not yield this conclusion. The language of the preface is clear and unambiguous. To be sure, it states that appropriate dress is a mark of good taste. It also states that the school authorities do not intend to dictate what must be worn by pupils. In consideration of the several citations, supra, I think argument here tantamount to cavil.

The provisions of the code itself as published in the handbook and as incorporated in the Board's policies, ante, however, yield glaring incongruences when, under the same careful scrutiny, compared with the preface in the handbook.

As petitioners correctly point out, slacks or skirts made from dungaree or blue denim material are not permitted, yet a garment of precisely the same style and cut, in another fabric, is not prohibited. (Petitioners' Brief at p. 6; see also code subsection a. 4., ante.) Similarly, in the case of footwear, "canvass type sneakers" are not permitted in school outside of the gymnasium. (Code subsection a. 6., ante.) Identical shoes made of, say, suede leather are not excluded. Further illustrations are possible but would be superfluous. The inconsistencies within the code render it arbitrary, unreasonable and capricious. I SO HOLD.

In summary, based upon the foregoing, I FIND

1. The Board has acted within the ambit of statutory and case law in undertaking the enactment of a pupil dress code.
2. The expressed purposes of the code are proper and lie within the penumbra of the decisional law of this State.
3. The code as constructed contains restrictions and inconsistencies of a nature to render it arbitrary, unreasonable and capricious.

Accordingly, I CONCLUDE:

1. The code is null and void.

2. Disciplinary actions against pupils solely for infractions of the code are without basis in law.

3. So much of other disciplinary actions against pupils as involve infractions of the code are without basis in law.

Therefore, IT IS ORDERED THAT:

1. The code be remanded to the Board of Education of the Town of Hammonton for revision or, at its discretion, deletion from its policy manual.

2. All mention of disciplinary actions for the aforesaid infractions be expunged from the school records of all pupils presently enrolled in the Hammonton Public Schools and, upon application in writing, from the school records of former pupils.

3. All disciplinary actions for the aforesaid infractions be vacated.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner of Education does not so act in forty-five (45) days and unless such time limit be otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1 et seq.

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

14 December 1979
DATE

Bruce Campbell
BRUCE CAMPBELL, ALJ

ANN MARIE AND MICHAEL CUCI ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Board takes exception to the determination of Judge Bruce Campbell to declare the pupil dress code null and void, arguing that to do so Judge Campbell must, perforce, set forth guidelines as to what would be reasonable as a pupil dress code. The Commissioner does not agree.

Judge Campbell cites examples of restrictions and inconsistencies as to garments made of dungaree or blue denim material and footwear such as the canvas type sneaker which suffice to make the pupil dress code arbitrary, unreasonable and capricious. The Commissioner is in agreement and points to the guidelines established in Pelletreau, supra:

> "***The power of a board of education to make rules and regulations is not unlimited, however. Every rule must be reasonably calculated to achieve a desired and valid educational objective. Thus:
>
> > 'A rule, in order to be valid, must be reasonable. Boards of education cannot exercise the authority given to them in ways that are arbitrary, capricious, or unreasonable, overworked and difficult of precise definition as these words may be. N.J. Good Humor, Inc. v. Bradley Beach, 124 N.J.L. 162 at 164 Reasonable is defined as 'conformable to reasons; such as is

> rational, fitting or proper, sensible'. A reasonable rule implies that there is a rational and substantial relationship to some legitimate purpose.' Angell et al. v. Board of Education of Newark, 1959-60 S.L.D. 141, 143

> Accordingly, while respondent has the inherent power to enact rules to regulate pupil appearance, it may not act capriciously or unreasonably in doing so. Such rules must have as their purpose the realization of an educationally valid and desirable end and they must be reasonably designed to achieve that purpose. If respondent adopted its 'Guidelines,' for instance, in order to produce conformity of appearance of its pupils, or because members of the faculty or of the Board do not personally approve of particular styles affected by some young people, or in order to develop a sense of 'good taste,' or for similar reason, the validity of its action could be seriously questioned.***" (at 41)

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

February 4, 1980

IN THE MATTER OF THE TENURE HEARING OF LOUIS CIRANGLE, SCHOOL DISTRICT OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY	:	INITIAL DECISION EDU DKT #173-6/78

APPEARANCES:

For the Petitioning Board of Education, Gladstone, Hart & Rathe (Marvin H. Gladstone, Esq., of Counsel)

For the Respondent Superintendent of Schools, William F. Nesbitt, Esq.

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

The Maywood Board of Education, hereinafter "Board," pursuant to N.J.S.A. 18A:6-11, on June 6, 1978, at a nonpublic meeting certified and thereafter filed before the Commissioner of Education ten charges of alleged misappropriation of public funds, misuse of public funds, fraud, material alteration of documents, insubordination, threats, falsehoods and other conduct unbecoming a school administrator and employee against its tenured Superintendent who has been employed by the Board since 1971.

Respondent, who was not suspended, thereupon instituted an action in the New Jersey Superior Court, Law Division, Bergen County, seeking an order voiding the tenure charges contending that they were improperly certified at a nonpublic session of the Board contrary to provisions of the Open Public Meetings Act, N.J.S.A. 10:4-15. During the pendency of that proceeding, the Commissioner stayed proceedings on those tenure charges. In an opinion issued January 2, 1979 (J-1) Judge Harvey Smith determined that the Board's

certification of tenure charges at a nonpublic session conformed to the Legislature's intent to exclude the public from such proceeding even in the face of a demand for public session and that the certification of charges was in conformity with both N.J.S.A. 18A:6-11 and N.J.S.A. 10:4-15. Louis Cirangle v. Maywood Board of Education, 164 N.J. Super. 595 (Law. Div. 1979)

Prior to the issuance of Judge Smith's opinion, the Board certified three additional charges of unbecoming conduct against respondent on June 30, 1978.

Respondent denies each and every one of the Board's thirteen charges which were the subject at five days of plenary hearing concluded July 23, 1979. During the process of the hearing the matter was transferred, as a contested case, to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. At the conclusion of the Board's case, respondent's Motion to Dismiss was denied on grounds that a prima facie case had been presented requiring a defense. (Tr. II 46-74) Post hearing briefing was concluded on November 1, 1979. The following exhibits were marked into evidence at the hearing:

J-1 Judge Smith's Opinion, 1/2/79
J-2 Judge Smith's Judgment on Counterclaim, 1/2/79

P-1,2 First and Second Set of Charges
P-3 through 6 Negotiated Agreements, 1974-1978
P-7 Dr. Kurland's Bill, 8/30/77
P-8,9 Mobile Music Man (MMM) Bills, 9/29/76, 8/1/77
P-10 Voucher-Imprest Fund, 9/77
P-11-13 MMM Invoices, 11/17/77, 10/1/77, 11/1/77
P-14 Purchase Order, MMM, 12/19/77
P-15 Check to MMM, 1/10/78
P-16-17 Coupons, MMM, 12/1/77
P-18-19 Purchase Order & Voucher, MMM, 1/24/78
P-20-21 Purchase Order & Voucher, MMM, 2/1/78, 3/1/78
P-22 Check, MMM, 2/22/78
P-23 Purchase Order, MMM, 2/27/78
P-24 Voucher, MMM, 3/12/78
P-25 Check, MMM, 4/11/78
P-26 Invoice, MMM, clarinet, 2/19/75
P-27 Notice, MMM, 2/19/75
P-28 Check, MMM, 2/12/75
P-29 Cirangle Letter, Check, 4/11/78
P-30 Coupon Book
P-32 Singer Voucher, Check, etc.
P-34 Television Charges, Payment, etc.
P-35 Jengo to Gladstone, 6/21/78
P-36 Impreset Fund Items, 9/30/77
P-39 Check, MMM, 9/29/76

P-40	MMM Rental Agreement, 9/26/76
P-41	MMM Clarinet Sale Slip
P-42	MMM Trial Balance
P-46	Policy on Gifts to School, 9/7/73
R-1	June 5, 1978 Work Session Records
R-2	Liebmann Memo
R-3	Board Resolution
R-6	Volpe Statement, 4/18/78
R-7	Caferella Statement, 7/6/78
R-8	Minutes, 8/7/78
R-10	Board Resolution, 7/28/77
R-14	Rental Agreement MMM
R-15	Policy on Physical Exams, 5/12/75
R-16	Training Book
R-17-18	Policies-Conflict of Interest
R-19	Purchase Order, 6/1/77

The thirteen certified charges are herewith set forth, seriatim, together with a concise summary of the relevant documentary and parol evidence, and the findings of fact and conclusions in respect to the truth of those charges. Those findings and conclusions in each instance, are set forth in full consideration of the preponderance of credible evidence within the record.

CHARGE I

"On or about September 8, 1977 Louis Cirangle caused to be paid from public monies entrusted to him, $25 to Dr. David A. Kurland for services rendered to Louis Cirangle personally." (P-1)

CHARGE II

"On or about October 3, 1977 Louis Cirangle knowingly falsely represented to members of the Maywood Board of Education that the said expenditure was made on accout of a special education pupil." (P-1)

CHARGE III

"On or about October 11, 1977 after the aforesaid representation was discovered to be false, Louis Cirangle altered Dr. Kurland's bill by typing or causing to be typed thereon an exculpatory legend, in an effort to induce a reader thereof to incorrectly assume that the same had been inserted by Dr. Kurland or his office." (P-1)

In an October 1977 Board meeting the Chairman of the Board's Finance Committee questioned the basis for payment from the imprest fund (a kind of petty cash fund under control of the Superintendent) of $25 to an optometrist (P-36). She testified at the hearing that respondent, in response to her query, stated that he thought it was probably for an eye examination of a special education pupil. (P-7, 10) She testified that through inquiries she made the next day she learned that the questioned payment was not for services to a special education pupil. She further testified that the Superintendent at the next meeting of the Board advised that the $25 charges was for his own complete eye examination. (Tr. I 72-79)

This was corroborated by the Superintendent who testified that he had in the interim between meetings sought out the actual billing, realized it was for his own visit to the optometrist, and caused his secretary to type thereon the following explanatory words: "Complaint of extreme eye strain and fatigue. Work connected." (P-7) He testified that, since he was on the Board's annual list for physical examinations, he had as the result of problems with his eyes decided that the physical examination he needed that year was an eye examination which he arranged for and charged to the Board. (Tr. IV 145-150; Tr. V 4-9) He also testified that as the result of this examination, for the first time he procured corrective lenses which he purchased at his own expense. (Tr. V 35-39) He further testified that when he sought to explain at the next Board meeting why he had given an incorrect response, he was provoked by certain Board members' insuation of impropriety to utter angry words and fling the doctor's bill on the table before the finance chairman. (Tr. IV 149-150)

As a result of this conflict a resolution censuring respondent for his actions was thereafter drawn up and signed by seven members of the Board. (R-3) That resolution, however, was never officially approved by formal action of the Board. The Board President testified that, although he had intended to read the resolution to respondent at the next Board meeting, he did not do so when respondent was absent that evening. Nor is there in the record evidence that the President thereafter read to or provided to respondent a copy of that resolution. (Tr. IV 26-29)

I FIND, in regard to Charge I, that respondent caused to be paid from public monies entrusted to him in the imprest fund $25 to an optometrist for services rendered to respondent personally by a physician of his own choosing. This action by the Superintendent in selecting his own doctor was not in accord with the specific requirement of the Board's policy statement on physical examinations that such an examiner must be "***approved by the Board in accordance with the policies of the Board.***" (R-15) Respondent, who by contract, enjoys the same benefits as members of his teaching staff (P-6 (12)), knew or should have known as the chief school officer

that he was required by the Board's own policy to seek approval for such expenditure prior to obligating his employer. There is within the record no evidence that the service of optometrists was provided by Board policy to respondent or to any other teaching staff member.

I FIND, in regard to Charge II, the respondent, late at night in the midst of a busy work session wherein approximately three hundred bills were being reviewed did not, intentionally, mispresent to the Board that the controverted bill was in fact for someone other than himself. In any event he forthrightly sought to explain to the Board at the next meeting that he had in fact contracted the obligation.

Accordingly, in consideration of this finding, IT IS ORDERED that Charge II be and is DISMISSED.

I FIND, in regard to Charge III, that respondent did indeed alter the face of the optometrist's bill but that this alteration, made openly in the presence of two employee witnesses after a question about the bill had been raised, was not accomplished covertly or by stealth or with intent other than to explain the reason for his having obligated the Board to a payment. Accordingly, I make no finding that the insertion on the bill was a fraudulent attempt to deceive the Board. Nevertheless, respondent as a chief school officer knew or should have known that good business practice dictates that a document from a vendor in the Board's files should not be so altered on its face. Rather the explanation respondent sought to record should have been provided over his own signature by separate explanatory note affixed to the vendor's billing.

In consideration of the above factual findings, I CONCLUDE that the Board has failed to prove fraudulent intent to deceive but has proven this charge to the limited degree that the controverted bill was improperly altered on its face by respondent.

CHARGE IV

> "On or about October 11, 1977 Louis Cirangle failed and refused to perform his contractual duties as Business Administrator, and continued to so refuse until on or about December 6, 1977, in that he declined to attend the Board office or to supervise the personnel there employed, requiring the temporary appointment of an uncertified person as Acting Business Administrator and an application for approval thereof to the Commissioner of Education." (P-1)

Respondent was employed in July 1977 for a period to begin officially on October 31, 1977 in the dual capacity of Superintendent and Business Administrator. The record is also clear that the previous Business Administrator took vacation days prior to October 31, 1977 necessitating respondent's assumption of some of her duties before October 31. Respondent testified that during his altercation in October 1977 with the finance chairman over the optometrist's bill he had in anger stated that he would not enter the office or perform the financial duties of the Business Administrator while under suspicion. He testified, however, that he had, in fact, entered that office and "***attended to all of the responsibilities of business administrator.***" (Tr. V 64)

I FIND within the record no credible evidence on which to base a conclusion that respondent, who addmittedly in anger threatened not to perform responsibly in that capacity either prior to or following that statement. The Board has failed to sustain its burden of proof that respondent in even one instance did not perform a duty assigned to him or inherent within his title as Business Administrator, that his actions constituted breach of contract, or that he refused to supervise subordinate employees.

Accordingly, IT IS ORDERED that Charge IV is DISMISSED.

CHARGE V

"On or about September 29, 1976 Louis Cirangle caused to be lease-purchased and charged to the Maywood Board of Education a certain new Conn alto saxophone, for his or his family's personal use; and he thereafter secretly made and caused installment payments to be made to the supplier of said instrument out of public funds under his sole or primary control." (P-1)

CHARGE VI

"Prior to curtailment of his Imprest Fund account following discovery of the personal expenditure therefrom to which reference is made in numbered Par. 1 hereinabove, Louis Cirangle made rental and installment payments for the said instrument out of said fund; following said curtailment and beginning in November, 1977, Louis Cirangle caused said installment payments to be doubled and attempted a trebling thereof by causing the same to be falsely vouchered and by approving said false vouchers in an effort to expedite the payment for said personal instrument out of public funds prior to a possible discovery thereof." (P-1)

CHARGE VII

"On or about December 19, 1977 Louis Cirangle signed the name of Dr. Dennis Scott, principal of the Intermediate School on voucher No. J-1081, in the amount of $46.20 representing two installment payments for the aforesaid musical instrument, the aforesaid purported signature of Dr. Scott being placed under the printed legend "Principal Approval", without Dr. Scott's knowledge or consent." (P-1)

CHARGE VIII

"On or about January 24, 1978 Louis Cirangle signed the name of Dr. Dennis Scott, principal of the Intermediate School on voucher No. J-1211, in the amount of $46.20 representing two installment payments for the aforesaid musical instrument, the aforesaid purported signature of Dr. Scott being placed uner the printed legend "Principal Approval", without Dr. Scott's knowledge or consent." (P-1)

CHARGE IX

"On or about March 13, 1978 voucher No. J-1340 executed by Louis Cirangle in the amount of $69.30 indicating payment for a saxophone was questioned by a trustee, whereupon Louis Cirangle falsely stated that he did not know what it was for, falsely suggesting it might have been for the rental of an instrument while one of the school's was in for repair, and later falsely representing that such was, in fact, the case." (P-1)

CHARGE X

"On or about April 12, 1978 Louis Cirangle falsely represented to the President of the Board that the instrument had been acquired for school, rather than for personal purposes." (P-1)

The Board's instrumental music teacher testified that he had never expressed to any administrator or anybody else a need for an alto saxophone. (Tr. I 105) He testified, however, that he observed that a new alto saxophone occasionally appeared at respondent's Maywood Elementary School Office after he had complied with respondent's request for rental forms with Mobile Music Man, a vendor with a program of lease-purchase of instruments. The instructor testified further that, although no pupil in the Maywood Avenue School used the instrument, he again saw that saxophone at respondent's home in Wayne where he occasionally instructed respondent's daughter thereafter on that instrument. (Tr. I 106-113) He also

testified that the Board had never prior thereto rented a musical instrument on a coupon lease-purchase payment basis. (Tr. I 118) The instrumental music instructor testified that respondent had never discussed with him anything about that instrument which appeared and disappeared from the office one or two times each week. (Tr. I 113) See also in this regard R-6.

The principal of the Maywood Intermediate School testified that, although on November 17, 1977 he had at respondent's direction affixed his signature to a purchase order (P-37) to authorize payment for the controverted saxophone, he had neither affixed nor authorized anyone else to affix his signature to subsequent invoices which bore his name but not his valid signature. (P-14, 18)

Respondent testified that, after attending certain professional meetings, he had decided to enter into a purchase lease agreement in an effort to extend the inventory of instruments available to pupils. He testified that a Conn alto saxophone was selected to be paid for on a monthly coupon basis but that he had not personally made the final arrangements. (Tr. IV 153-160; P-11, 13-25, 30, 37) He testified that he occasionally took the instrument to his home in Wayne where the Board's instrumental music instructor gave his daughter private lessons. He further testified that it was his intention, if she maintained interest, to purchase a similar instrument for her use. (Tr. IV 161-162)

Respondent testified that he had on occasion expedited payments for the instrument by signing the principal's name on purchase orders. (Tr. V 20) He also testified that when the payment for this instrument was challenged he reimbursed the Board for the $295 in payments to date and that the Board thereafter paid the balance due on the instrument which thereafter has remained in its musical instrument inventory. (Tr. V 78; P-31, 35)

When questioned about this rental-purchase agreement respondent explained in writing to the Board President, inter alia, as follows:

> "***During the summer of 1977 I was looking for a simple way of building up our instrment inventory to take care of the large number of students interested in learning to play an instrument and to complement the community band program. I inquired about the rental system from Mobile and thought I would give it a try.
>
> "***
>
> "I can only assume from your question to Mr. Volpe that you feel it was wrong to use the school's property at home with my daughter, no matter how short or long a time. There is no doubt you are correct but I didn't think it would cause so much concern.

"***

"Even though my daughter has now explored and made a decision that the sax isn't for her, I sense you feel I should pay for the instrument rental. My sole purpose for using the school's instrument was to avoid getting an instrument and then storing it away if interest left.

"Since you are right about this, I enclose a check for the amount of rental to date. I have no use for the instrument so it will continue to be left in the music room for Mr. Volpe.***" (P-29)

I FIND that respondent did, without Board authorizatioj or operational precedent, obligate the Board to monthly payments for a saxophone costing in excess of $420 (P-9) plus finance and other charges and that this lease-purchase was neither requested by the Board's instrumental music instructor nor in response to a known need for such instrument. Rather, respondent's prime purpose was to avoid a personal expenditure when providing an instrument for his use by his daughter who lived outside the Maywood School District. This finding is based on the instrumental music instructor's testimony which I find to be forthright and credible. I do not find respondent's testimony believable wherein he asserts that the need to build up the Board's instrumental inventory was the motivating factor which caused him to initiate the lease-purchase. Accordingly, I CONCLUDE that the Board has proved by a preponderance of the credible evidence Charges Nos. V through X.

CHARGE XI

"On or about February 19, 1975, Louis Cirangle caused to be purchased and charged to the Maywood Board of Education a certain Bundy clarinet, serial No. 697702 for his own or his family's personal use; and Louis Cirangle noted or caused to be noted the sales slip to read "repair of instruments" when, in fact, no such instrument was then in the school inventory for repair or otherwise; and Louis Cirangle did approve a charge for an alleged repair to be paid from a school fund under his primary or sole control, knowing it to be false." (P-2)

The Board's instrumental music instructor testified that at respondent's request in February 1975 he had arranged the purchase with billing to respondent at the school of an inexpensive Bundy clarinet for use by respondent's son. He testified that later, at respondent's home he instructed respondent's son on that type of Bundy clarinet. He also testified that the clarinet was not entered into the school's inventory. (Tr. I 118-119)

Respondent testified that it was the instrumental instructor who had suggested the purchase of such an instrument. He testified further that he had authorized the purchase, that he had never seen the instrument and that his son had never used it. (Tr. V 21-22, 49) He testified, however, that a clarinet was, in that month, purchased and paid for from the imprest fund. (Tr. V 51; P-26-28)

I FIND that the Board has proven by a preponderance of the credible evidence that respondent in February 1975 caused to be purchased a Bundy clarinet which purchase was not authorized in advance by the Board and allowed that clarinet to be used in instrumental lessons for his son. This purchase which was billed to respondent in his own name at his school address. I find within the record no emergent reason which necessitated this purchase and payment from the imprest fund. These findings are grounded on the documents in evidence bearing respondent's name and signature (P-26-28, 41) and the credible testimony of the instrumental music teacher. In consideration of these findings, I CONCLUDE that the Board has proven that Charge XI is true.

CHARGE XII

> "Louis Cirangle, on or about January 6, 1978, approved for payment Voucher No. J-1098 for the repair of a sewing machine not then owned by or the property of the Maywood Board of Education; Louis Cirangle did falsely verify to the Maywood Board of Education that said repairs and amounts due therefor were lawful debts of the Maywood Board of Education; and Louis Cirangle did thereby cause the Maywood Board of Education to pay for repairs of equipment then owned by or in the possession of Louis Cirangle." (P-2)

The Board's sewing instructer testified that respondent, in December 1978, had brought to her classroom and left a portable sewing machine to which, at his request, she made minor adjustments. She testified that while the machine remained there a service man during the annual Christmas holidays checked and adjusted all twelve machines. The billing for that service shows, without delineating costs for individual machines, a total charge of $59.30 for parts and labor for thirteen machines. (P-32; Tr. II 12-20)

I FIND that the record establishes only that respondent's machine was left in the room and without direction of the sewing teacher was serviced inadvertently by the repair technician who had appeared to comply with Board's service contract. In consideration of this finding, I CONCLUDE that the Board has failed to prove that Charge XII is true. Accordingly, Charge XII is DISMISSED.

CHARGE XIII

"Louis Cirangle, on or about January 6, 1978, approved for payment Voucher No. J-1113 for the repair of a television not then owned by or the property of the Maywood Board of Education; Louis Cirangle did falsely verify to the Maywood Board of Education that said repairs and amounts due therefor were lawful debts of the Maywood Board of Education; and Louis Cirangle did thereby cause the Maywood Board of Education to pay for repairs of equipment then owned by or in the possession of Louis Cirangle." (P-2)

It is uncontroverted that respondent caused a portable television set to be repaired at Board expense of $32.00. (P-34) The Board President testified that he questioned payment for that service as he was unaware that the Board owned any portable television sets. (Tr. II 24)

Respondent testified that he had donated a ten year old portable telvision set to the school and used it in his office for relaxation and educational purposes, during late afternoons and evenings when working late or freshening up for evening Board meetings. When questioned why he had not complied with the Board's policy requiring formal acceptance of gifts worth more than $100 (P-46), he testified that the worth of a ten year old set was questionable and that such gifts had, in any event, previously been received without formal acceptance by the Board. (Tr. V 24-26)

I FIND that respondent, without authorization, obligated the Board to payment of $38 for repair of a portable television set. While there is no reason to dispute that it was his intent to donate the set to the school, he knew or should have known as the Board's chief school officer that the discretionary right to accept such gift, incur such obligation or authorize payment therefor is one which rests with the Board. N.J.S.A. 18A:11-1; N.J.S.A. 18A:19-4 While one cannot fault respondent for having the portable television to use for diversionary purposes during the long days his work schedule required, I CONCLUDE that his obligating the Board for its repairs without prior authorization was poor judgment on his part and that the Board has proven the truth of Charge XIII.

In summary, the Board has proven Charge I, V-XI and XIII to be true in fact; Charge III was proven to the limited degree that respondent altered the optometrist's bill but not with intent to defraud; the Board has failed to prove Charges II, IV and XII which have been dismissed, ante. It remains to determine what penalty, if any, should be ordered.

The gravamen of the above findings and conclusions is that respondent, as the result of faulty judgment, took to himself at the Board's expense benefits, of a pecuniary nature beyond those to which he or other professional staff members were entitled. I am unable, however, to discern within this record fraudulent intent.

When these expenditures were questioned, respondent made partial restitution for the majority of the monetary worth of those benefits, so that the Board's out-of-pocket, unauthorized costs appear to approximate less than $100. The single most expensive item, the saxophone, remains with the Board for instructional use with over half of its cost having been paid by respondent. The loss of confidence by some members of the Board in the judgment of its chief school administrator and the long and costly litigation which has ensued must, however, be considered matters of grave moment. That which was iterated, post, by the Commissioner concerning teachers is surely no less applicable to respondent as a Superintendent of Schools:

> "***(T)eachers *** 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.***" (In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, Camden County, 1972 S.L.D. 302, at p. 321) and
>
> "***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.***" (In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97, at pp. 98-99)

See also in this regard In the Matter of the Tenure Hearing of Michael A. Pitch, School District of the Borough of South Bound Brook, Somerset County, 1975 S.L.D. 764.

It is noted that respondent who has served as the Board's chief school officer for over eight years is not charged with unbecoming conduct or inefficiency in providing leadership in curricular matters. Nor have such gross abuses been discovered as those which resulted in the dismissal of Tordo and Pitch. I conclude that, as in Sammons, supra, dismissal would be an overly harsh penalty. Respondent has already endured a long and bitterly contested tenure hearing wherein his professional career and reputation have been threatened. Nevertheless, it is clear that his gross indiscretions, poor business judgment and assumption of perquisites which were not rightfully his have necessitated a tenure hearing at great cost to the Board.

I CONCLUDE that a further penalty short of dismissal is warranted. Accordingly, it is ORDERED that respondent's annual salary shall, retroactive to the time of the certification of charges on June 6 1978, be reduced in the amount of $1,500 per year. The Board may in ensuing years establish, at its discretion, respondent's salary at a figure no less than that which he will have been paid during the 1979-80 school year after the $1,500 reduction is applied.

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

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

December 21, 1979
DATE

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

IN THE MATTER OF THE TENURE HEARING OF LOUIS CIRANGLE, SCHOOL DISTRICT OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

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

The Commissioner notes that the exceptions filed by respondent were untimely and will not be considered herein.

The Board takes exception to the determination by Judge Eric G. Errickson that a penalty short of dismissal is warranted. The Commissioner agrees with the exception made by the Board and finds that respondent should be dismissed.

The Board certified a series of thirteen charges, ante, against respondent in the employ of the Board in the dual capacity of Superintendent of Schools and Business Administrator. Judge Errickson found that the Board has proven fully Charges I, V - XI and XIII and Charge III to a limited extent. Respondent, entrusted with public monies, diverted funds for his personal use to pay optometrist's bill to provide musical instruments for his children's use and to pay for repairs to his own portable television. The Commissioner is keenly aware of Judge Errickson's language in the initial decision:

> "It is noted that respondent who has served as the Board's chief school officer for over eight years is not charged with unbecoming conduct or inefficiency in providing leadership in curricular matters. Nor have such gross abuses been discovered as those which resulted in the dismissal of Tordo and Pitch. I conclude that, as in Sammons, supra, dismissal would be an overly harsh penalty. Respondent has already endured a long and bitterly contested tenure hearing wherein his professional career and reputation have been threatened. Nevertheless, it is clear that his gross indiscretions, poor business judgment and

> assumption of perquisites which were not rightfully his have necessitated a tenure hearing at great cost to the Board."
> (Emphasis supplied.)

The Commissioner cannot accept such conduct as being appropriate to the person who serves as the Chief School Administrator. For a person serving in a dual position of Superintendent and Business Administrator even greater significance must be attached to the words in Tordo, supra, "***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.***"

As was said In the Matter of the Tenure Hearing of Abraham Altschuler, School District of the Township of Neptune, Monmouth County, 1978 S.L.D. ____ (decided April 25, 1978):

> "The Commissioner has previously ruled In the Matter of the Tenure Hearing of Martin Groppi, Manchester Regional School District, 1970 S.L.D. 159, that respondent's failure to account for certain class monies for which he was responsible as class advisor was sufficient to warrant his dismissal as a teaching staff member.
>
> "In the Commissioner's judgment the corollary between teachers and school administrators who share this enormous responsibility as teaching staff members in the employ of a local board of education needs no further amplification.***" (Slip Opinion, at p. 13)

The position of Chief School Administrator, difficult at best, cannot be exemplified by one who displays less than the self-restraint and controlled behavior requisite as an example to the Board, teachers and pupils alike.

Accordingly, the Commissioner finds that the charges established as true in the hearing herein are sufficient to warrant dismissal of respondent from his employment in complainant's school district. He therefore directs the Board of Education of the School District of the Borough of Maywood to dismiss Louis Cirangle as of the date of the completed certification of charges.

COMMISSIONER OF EDUCATION

February 11, 1980

IN THE MATTER OF THE TENURE :
HEARING OF LOUIS CIRANGLE, :
SCHOOL DISTRICT OF THE : STATE BOARD OF EDUCATION
BOROUGH OF MAYWOOD, BERGEN : DECISION
COUNTY. :
:

Decided by the Commissioner of Education, February 11, 1980

For the Petitioner-Appellee, Gladstone, Hart & Rathe
(Marvin H. Gladstone, Esq., of Counsel)

For the Respondent-Appellant, William F. Nesbitt, Esq.

The State Board denies request for oral argument and affirms the Commissioner of Education's decision.

Robert J. Wolfenbarger opposed in the matter,

May 7, 1980

Date of Mailing

Pending N.J. Superior Court

DAVID MISEK,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,

RESPONDENT.

INITIAL DECISION
OAL DKT. NO. EDU 1905-79
AGENCY DKT. NO. 70-3/79A

APPEARANCES:

For the Petitioner, Joel S. Selikoff, Esq.

For the Respondent, Barbour and Costa, Esqs. (John T. Barbour, Esq., appearing)

BEFORE THE HONORABLE DANIEL B. MC KEOWN, ALJ

Petitioner, formerly employed as a teaching staff member by the Board of Education of the Township of Willingboro, Burlington County, (Board) alleges that the Board violated his asserted tenure protection to continued employment with respect to its determination not to offer him reemployment for 1978-79. The Board denies the allegations and contends that petitioner was not protected by a tenure status at the time of its controverted action.

The Commissioner of Education before whom the Petition was filed, transferred the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The parties agreed at a prehearing conference held on September 10, 1979, that the issues raised herein be adjudicated on the record, which includes the pleadings, Stipulation of Fact, and Briefs of the parties in support of their respective positions. The record was ready for disposition November 26, 1979.

The facts of the matter as stipulated are these:

1. Petitioner had originally been employed by the Board as a teaching staff member for 1966-67 and had acquired a tenure status in its employ.

2. Petitioner was granted a leave of absence for 1973-74 and returned to his position of employment on September 1, 1974.

3. Petitioner completed the 1974-75 academic year in the employ of the Board as a teaching staff member.

4. Petitioner commenced the 1975-76 academic year in the Board's employ.

5. Petitioner resigned from the Board's employ on November 15, 1975.

6. Petitioner returned to the Board's employ on January 13, 1976.

7. Petitioner completed the 1975-76 academic year as a teaching staff member.

8. Petitioner's employment was continued by the Board for the 1976-77 and 1977-78 academic years.

9. Petitioner was notified by the Board on April 25, 1978 that his employment was to be terminated on June 30, 1978.

Though not specifically stated in the stipulated facts there is no question raised between the parties that petitioner's proffered resignation from the Board's employ on November 15, 1975 was accepted by it. (See Evaul v. Camden Board of Education, 65 N.J. Super. 68, 76 (App. Div. 1961), rev'd on other grounds 35 N.J. 244 (1961).)

The issues presented for adjudication are these:

1. What effect has petitioner's resignation upon his tenure status in the employ of the Board on November 15, 1975 with respect to his return to the Board's employ on January 13, 1976 and his employment thereafter? That is, may petitioner count time prior to his resignation plus service time after his resignation for purposes of tenure acquisition pursuant to N.J.S.A. 18A:28-5?

2. Does the manner in which petitioner returned to the Board's employ on January 13, 1976, i.e. did he apply to return or was he proffered employment, affect the resolution of the first issue and, if so, is a plenary hearing necessary?

Petitioner concedes in his Brief that the second stated issue is not relevant to the first issue presented. (Petitioner's Brief, at p. 1, footnote 1) I agree and consequently no determination on the second issue is necessary herein.

Petitioner recognizes that the Commissioner of Education ruled on prior occasions that a resignation extinguishes otherwise acquired tenure rights in a board's employ and cites Elaine Solomon v. Board of Education of the Princeton Regional School District, Mercer County, 1977 S.L.D. 650, aff'd State Board of Education 1977 S.L.D. 657 and Thomas J. Commins v. Board of Education of the Township of Woodbridge, 1967 S.L.D. 11. Petitioner attempts to draw a distinction between the Solomon and Commins matters with the matter presented herein by asserting his period of resignation from the Board's employ was less than two months, including a Christmas recess. Petitioner asserts that Solomon's period of resignation prior to her return to the Board's employ was one year, while Commins' resignation period was three years.

Petitioner argues that because he was away from the Board's employ for only two months, equitable principles demand he be viewed as having maintained his tenure status. Petitioner cites Kleinberg v. Schwartz, 87 N.J. Super. 216 (App. Div. 1965), aff'd 46 N.J. 2 (1965) and Fidelis Factors Corp. v. Du Lane Hatchery Ltd. 47 N.J. Super. 132 (App. Div. 1957) in support of his argument that the substance of the matter, a mere two months of resignation, rather than the form, the fact that a resignation was offered and accepted, must dictate the resolution of the complaint herein.

It is true that petitioner's period of effective resignation from his then tenure protected period of employment with the Board lasted a relatively short period of time compared to the resignation periods in Solomon, supra, and Commins, supra. I am, nonetheless, constrained to acknowledge that the Commissioner, in his Solomon ruling which, it is noticed was affirmed by the State Board of Education, held with respect to the impact of a tendered and accepted resignation upon a then existing tenure status that

> "***petitioner's /Solomon/ resignation effectively terminated her previous tenured employment with the Board on that date and barred all service prior to such date from subsequently accruing to a new tenure entitlement***."
> (at pp. 655, 656)

Petitioner has presented no authority upon which I could adopt a differing view. A resignation, once tendered and accepted as herein, has the same paralyzing effect on prior service for tenure claim purposes on future employment with the same Board even if the period of resignation lasts for one day or for one year.

Little solace is found for petitioner's argument in Kleinberg, supra, or Fidelis Factors Corp., supra, for Kleinberg addresses the statutory requirement of family corporations to file a certificate of reduction of capital. Fidelis, supra, addresses the question of foreclosure

of a chattel mortgage given by a corporation to recover damages for fraudulent conversion of property. Equitable principles applied by the courts in those instances do not apply in the fact pattern herein. The cases do not address the application of equitable principles in a teacher resignation situation.

Petitioner argues in the alternative that he has acquired a tenure status by virtue of serving in the Board's employ more than three academic years of service within a period of four consecutive academic years pursuant to N.J.S.A. 18A:28-5 (c). Petitioner argues that the statute of reference does not require continuous, uninterrupted service as the Commissioner held so affirmatively in Solomon, supra. Petitioner anchors this position on the requisite period of time being served by adding time served prior to resignation with time served after resignation.

Once again, I must find Solomon controlling. There, the Commissioner determined that once Solomon resigned her employment began anew for tenure acquisition once she returned to the employ of the Board. Solomon, supra, at p. 656. N.J.S.A. 18A:28-5c was held not to include periods of time for tenure to include pre- and post-periods of resignation.

Having considered the stipulated facts and petitioner's arguments that he had a tenure status after his resignation and/or that he acquired a tenure status after his resignation by virtue of N.J.S.A. 18A:28-5c. I CONCLUDE that petitioner surrendered his tenure status upon his resignation and further CONCLUDE petitioner did not serve the requisite period of time after reemployment following his resignation to have reacquired a tenure status in the Board's employ.

No issue has been raised with respect to petitioner's nonreemployment as a nontenure teacher pursuant to N.J.S.A. 18A:27-3.1, et seq.

Having arrived at the preceding conclusions, there is no need to address the Board's defense of laches.

The Petition of Appeal IS DISMISSED.

This recommended decision may be affirmed, modified or rejected by the head of agency, Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

December 26, 1979
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

DAVID MISEK,	:	
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 including the initial decision rendered by Daniel B. McKeown, A.L.J.

The Commissioner observes that no exceptions were filed by the parties pursuant to 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 adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

February 14, 1980

DAVID MISEK,	:	
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, February 14, 1980

For the Petitioner-Appellant, Selikoff & Cohen (Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Appellee, Barbour & Costa (John T. Barbour, Esq., of Counsel)

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

July 2, 1980

Pending N.J. Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF	)	INITIAL DECISION
THE TENURE HEARING OF BARBARA ROBERTS	)	**OAL DKT. NO. EDU 800-79**
SCHOOL DISTRICT OF THE CITY OF	)	AGENCY DKT. NO. 22-2/79A
PLAINFIELD, UNION COUNTY	)	

APPEARANCES:

Victor E. D. King, Esq., for petitioner, Plainfield Board of Education

Albert Kroll, Esq., for respondent, Barbara Roberts

BEFORE THE HONORABLE **ROBERT P. GLICKMAN**, A.L.J.:

This matter comes before the Court as a result of charges being certified to the Commissioner of Education by the Plainfield Board of Education hereinafter referred to as "Board" against Barbara Roberts hereinafter referred to as "respondent" for conduct unbecoming a teacher, incapacity and/or other just cause in violation of N.J.S.A. 18A:6-10.

These charges were prepared by Angelo L. Mone, Principal, among others, and certified by the Board of Education at its meeting on January 30, 1979. The charges were forwarded thereafter to the Commissioner of Education. On January 30, 1979 the respondent, Barbara Roberts, was also suspended without pay. After the passage of the statutory 120 days, respondent was placed back on the payroll by the Plainfield Board of Education. (See N.J.S.A. 18A:6-14).

This action comes before this tribunal pursuant to N.J.S.A. 18A:6-10 vesting jurisdiction with the Commissioner to conduct hearings involving tenure charges. 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.

A prehearing conference was held on September 10, 1979 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey at which time the issues in the case were identified as follows:

1. Did the alleged actions of respondent, Barbara Roberts, constitute conduct unbecoming a teacher, incapacity and/or other just cause in violation of N.J.S.A. 18A:6-10?

2. If the charges are found to be true, would such alleged conduct warrant a dismissal, reduction of salary or other action?

At the time of the prehearing conference, the following stipulations were submitted which became part of the prehearing order:

1. Respondent, Barbara Roberts, was a tenured school teacher in the Plainfield school district at the time of the alleged incidents set forth in the petition.

2. Charges were filed against respondent, Barbara Roberts, with the secretary of the petitioner, Board of Education, on January 5, 1979.

3. Copies of said charges were delivered to respondent, Barbara Roberts, on January 5, 1979.

4. A statement in response to said charges was sent by respondent, Barbara Roberts, to petitioner, Board of Education subsequent to January 17, 1979.

5. On January 30, 1979, the petitioner, Board of Education, held a meeting and passed a resolution certifying the charges against respondent, Barbara Roberts, to the Commissioner of Education.

6. Subsequent to January 30, 1979 respondent, Barbara Roberts received a copy of the petitioner's, Board of Education, resolution certifying the charges.

7. On January 30, 1979 the petitioner, Board of Education, passed another resolution suspending respondent, Barbara Roberts, without pay.

8. After the passage of the statutory 120 days from respondent, Barbara Roberts' suspension, petitioner, Board of Education, has placed her back on the payroll.

9. Respondent, Barbara Roberts, was a certified teacher, K-8, beginning the school year 1978-79 and was a teacher at the F.W. Cook Elementary School.

10. All evaluations of respondent, Barbara Roberts, while employed by petitioner, Board of Education, shall be admitted into evidence at the time of the hearing as a joint exhibit without further formal proof.

11. Respondent, Barbara Roberts, has been employed by petitioner for eleven years and all of her evaluations have been meritorious. (This last stipulation was made at the beginning of the hearing.)

The hearing took place with regard to the above matter on November 13, 1979 and November 14, 1979 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. Written summations and post-hearing briefs were requested by the Court, and the proceedings were deemed to be concluded on December 21, 1979. (See Proposed Uniform Administrative Rules of Practice 19:65-16.1).

The following four charges were filed against respondent:

Charge 1. On or about October 12, 1978, while in your classroom at Cook Elementary School, Plainfield, New Jersey and while an elementary teacher in the employ of the Board of Education of the City of Plainfield, you did commit an assault and battery upon the person of M.M., a student under your charge he being then and there a pupil of the Board of Education of the City of Plainfield by striking and hitting M.M.

Charge 2. On or about Monday, December 11, 1978, while in your classroom at Cook Elementary School, Plainfield, New Jersey, and while an elementary teacher in the employ of the Board of Education of the City of Plainfield, you did commit an assault and battery upon the person of J.W., a student under your charge, he being then and there a pupil of the Board of Education of the City of Plainfield by striking and hitting him repeatedly with a stick 20" long and 1 1/4" in diameter and chasing him from your classroom with the aforesaid stick.

Charge 3. On or about Tuesday, December 12, 1978, you did tell Angelo L. Mone, your building principal, that you would not cease hitting or striking individual children in your class when in your opinion the situation warranted striking a child.

Charge 4. On or about Tuesday, December 12, 1978, and again on Friday, December 22, 1978, you were insubordinate to Angelo L. Mone, your building principal, in that you refused to obey his direct order to cease striking the children entrusted to your care, and in that you were intransigent,

persistent, willful, defiant and unwilling to submit to his authority by refusing to accept his directions and recommendations, refusing to let him complete his conference with you, and generally were disrespectful and uninterested in hearing anything Mr. Angelo L. Mone had to say to you by way suggestion, recommendation, or criticism.

At the hearing, the following exhibits were marked into evidence which shall be enumerated hereinafter:

1. P-1, Memo from Angelo L. Mone to Miss Roberts dated Ocober 31, 1978.

2. P-2, Twenty page pamphlet entitled, The Frederick W. Cook School, Plainfield, N.J. Manual of Procedures for 1977-78.

3. P-3, A stick measuring approximately 20" long and 1 1/4" in diameter.

4. P-4, A memorandum from Angelo L. Mone to Ronald H. Lewis, dated December 12, 1978.

5. P-5, Memorandum from Angelo L. Mone to Miss Barbara Roberts dated December 21, 1978.

6. P-6, Document dated December 21, 1978 entitled, Plainfield Public Schools Teacher Evaluation Form, consisting of three pages and involving Barbara Roberts.

7. R-1, Evaluation of Barbara Roberts dated October 17, 1969.

8. R-2, Evaluation of Barbara Roberts dated January 27, 1970.

9. R-3, Evaluation of Barbara Roberts dated April 20, 1970.

10. R-4, Evaluation of Barbara Roberts dated April, 1971.

11. R-5, Evaluation of Barbara Roberts dated March 17, 1972.

12. R-6, Evaluation of Barbara Roberts entitled, Log of Observations, dated school year 1972/73, and consisting of one page.

13. R-7, Evaluation of Barbara Roberts entitled, Log of Observations, dated school year 1973/74, and consisting of one page.

14. R-8, Evaluation of Barbara Roberts entitled, Log of Observations, dated school year 1974/75, and consisting of one page.

15. R-9, Evaluation of Barbara Roberts entitled, Log of Observations, dated school year 1975/76, and consisting of one page.

16. R-10, Evaluation of Barbara Roberts dated March 15, 1977 consisting of two pages.

17. R-11, Evaluation of Barbara Roberts dated June 15, 1977 consisting of two pages.

18. R-12, Evaluation of Barbara Roberts dated April 27, 1978 consisting of two pages.

19. P-7, Charges against Barbara Roberts consisting of two pages.

20. P-8, Resolution of special business meeting of Board of Education dated January 30, 1979 consisting of one page.

21. P-9, Resolution of special business meeting of Board of Education containing resolution #2 dated January 30, 1979 consisting of one page.

22. P-10, Attorney's letter and answer to charges consisting of three pages.

Additionally, the Court heard the testimony of Angelo Mone, Carol Linda Mueller, M. M., Albert Whitiker, J. W., on behalf of petitioner and Barbara Roberts on behalf of respondent. This tribunal very carefully scrutinized and assessed the demeanor and credibility of each witness and their inherent candor. The Court also assessed the inherent probability of each witnesses' version of each event.

At the outset of the hearing, respondent's attorney made a motion to sequester the witnesses which motion was granted.

The first witness to testify on behalf of petitioner was Angelo Mone, the Principal of F. W. Cook Elementary School in Plainfield, New Jersey. Mr. Mone became the principal effective September 1, 1978, but actually began his duties on September 27, 1978. Mr. Mone began his teaching experience in Newark, New Jersey in 1961. He then moved to Dunellen, New Jersey in 1963 and remained an elementary school teacher through 1971 when he became an assistant principal. Mr. Mone received an undergraduate degree from Seton Hall University in 1961 and an EDM and Certificate of Principal from Rutgers in 1973. He presently holds a Teaching K-8 Certificate, a Principal Certificate and a School Administrator's Certificate.

With regard to the October 12, 1978 incident, Mr. Mone indicated that he heard about it on or about October 12, 1978. Mrs. M. the mother of M. M.,

came into Mr. Mone's office. She asked Mr. Mone to remove her son from the class and transfer him to another class. Mrs. M. indicated that Miss Barbara Roberts had hit M. M. (Tr. 17). As a result of Mr. Mone's conversation with Mrs. M., Miss Roberts was asked to come to Mr. Mone's office. On October 12, 1978 a conference was held between Mr. Mone, Miss Roberts and Mrs. M. At the conference, Mr. Mone said to Miss Roberts, "Mrs. M. is here because she told me that you hit M. M. and, Miss Roberts, I want you to simply explain to me and Mrs. M. what were the circumstances that would make you think that there is any substance to what she is saying?" (Tr. 20). According to Mr. Mone the respondent replied, "I hit him." (Tr. 20). Mr. Mone indicated that the respondent added that M. M. comes to school undisciplined and when a child comes to school undisciplined Barbara Roberts will do what is necessary to discipline that child. Mr. Mone asked the respondent, "Do you also include in what's necessary, striking a child?" (Tr. 20). According to Mr. Mone, Barbara Roberts replied, "Yes." (Tr. 20). Additionally, when Mr. Mone indicated to the respondent that it was against the law to strike a child, Barbara Roberts replied, "The law does not come into my classroom. I must deal with the children in the best way I know how." (Tr. 21). Upon being asked why she struck the youngster, Barbara Roberts replied to Mr. Mone that he was talking back to her and had run out of the classroom. The conference ended with Mrs. M. agreeing to have her son remain in Barbara Roberts' class.

Subsequent to the aforementioned conference, Mrs. M. again came to see Mr. Mone to request that M. M. be transferred to another class. Mrs. M. claimed that Barbara Roberts had made some remarks about M. M. in front of the children and that she wanted M. M. out of her class. As a result of Mrs. M.'s request, and since the school was in the process of reorganizing the 5th and 6th grades because of a shift in enrollment, M. M. was transferred from the respondent's class. Mr. Mone indicated that he transferred M. M. because of the constant confrontation between parent and teacher and he thought it might be beneficial for all parties to place him in another 6th grade. (Tr. 24).

With regard to the December 11, 1978 incident, Mr. Mone indicated that he first became aware of it when he left his office during the day at approximately 11:15 a.m. on his way to the lunch room. At that time, he came upon J. W. who was standing in the secretary's office. Mr. Mone asked J. W. what he was doing there and he was told that Miss Roberts had hit him. (Tr. 35). Mr.

Mone indicated that he was shown a bruise on J. W.'s cheek. Mr. Mone does not recall if the bruise was on his right or left side. He idicated that the youngster was very upset. Mr. Mone asserted that the youngster was obviously very frightened and had tears in his eyes. (Tr. 36). Mr. Mone also elicited from J. W. that J. W. pulled a stick from his desk. The stick in question was introduced into evidence as P-3. J. W. admitted to Mr. Mone that the stick in question was the one that he tried to hit the respondent with. The stick is approximately 20" long and 1 1/4" in diameter. (Tr. 39). Shortly after J. W. related the incident to Mr. Mone, the respondent, at Mr. Mone's request came to his office. Mr. Mone asked both J. W. and Barbara Roberts to sit down and explain what had happened in the classroom. According to Miss Roberts, she indicated that J. W. had been out of his seat, had talked back to her and was very disrespectful. Miss Roberts further indicated to Mr. Mone that she told J. W. to sit down and that J. W. then talked back to her and pulled out the stick which she took from him and he hit her. Mr. Mone asked, "Did you hit him with the club?" and according to Mr. Mone she said to me, "No, she did not hit him." (Tr. 42).

The next day, Mr. Mone again met with Barbara Roberts prior to the time that a conference was to be held between her, Mr. Mone, and Mr. W. At this meeting, Mr. Mone asked again whether or not Miss Roberts had hit J. W. At this time, Mr. Mone indicated that the respondent said, "Yes I did hit J. W." (Tr. 45). Mr. Mone again asked the question as to whether or not Miss Roberts hit J. W. and again she said, "Yes, I did Mr. Mone. But he took the stick and he was flailing it and he raised his arms in this manner." (Tr. 45). As a result of the conference held between the respondent, Mr. Mone and Mr. W., Mr. Mone prepared a memorandum which was admitted into evidence as P-4. This memorandum was submitted to Dr. Lewis, Superintendent. Additionally, Mr. Mone prepared a memorandum to Barbara Roberts. (see P-5). It should be noted parenthetically that Mr. Mone never wrote a memorandum about the incident involving M. M. and Barbara Roberts. (see Tr. 53). Mr. Mone testified additionally with regard to the incident involving J. W. that he described J. W.'s injury as an abrasion. (see P-4 and P-5; Tr. 71). Mr. Mone indicated that the skin of J. W.'s face was reddened. It was not bleeding profusely. He indicated that there was a cut or opening. Mr. Mone testified that the skin was broken. After the December 11, 1978 incident, J. W. never returned to Barbara Roberts' class but was reassigned to the other 6th grade class. (Tr. 77). This was done the following day after the incident.

The next witness to testify on behalf of petitioner was Carol Linda Mueller. She testified that during the 1978/79 school year, she had a son M. M. in the F. W. Cook Elementary School. At the beginning of that year, M. M. was in Barbara Roberts' class. On a Friday afternoon, M. M. came home from school before it was time to come home and climbed a tree in their front yard. According to Mrs. Mueller, M. M. appeared to be in a very agitated state. When M. M. came down from the tree, he indicated to Mrs. Mueller that Miss Roberts had hit him. M. M. pulled up his pants and showed Mrs. Mueller four or five marks on his calf. (Tr. 91). Mrs. Mueller believed that it was M. M.'s left leg, but she was not quite sure. M. M. told Mrs. Mueller that he had gotten into trouble at school and that the teacher had locked him out of the room. When M. M. went back to the room, Miss Roberts grabbed him and hit him with a pointer stick. M. M. then ran home.

The incident involving M. M. happened on a Friday and the following Monday was a holiday. Mrs. Mueller went to school on Tuesday morning and met with Mr. Mone. Mrs. Mueller told Mr. Mone what had happened and Mr. Mone went out to get Miss Roberts so that all of them could discuss the incident. Mrs. Mueller asked Miss Roberts, once she was in the conference room, why she hit M. M. Miss Roberts said that she would discipline any child in her classroom but did not use the word "hit". Mrs. Mueller said, "what about the laws in the State of New Jersey?" to which Miss Roberts replied, "those laws are not in my classroom," (Tr. 92). The respondent also indicated to Mrs. Mueller that M. M. was hyperactive and was a troublemaker in the school. Mrs. Mueller asserted that she wanted M. M. out of the respondent's classroom because it was too strict an environment for him. Subsequently, M. M. was transferred to Miss Hudanich's class. Now, M. M. is attending West Lake School in Westfield which is a special school to handle hyperactive and emotionally disturbed youngsters. (Tr. 96).

M. M. testified that he attended F. W. Cook Elementary School during the 1978-79 school year. He was a student in Miss Roberts' class and then Miss Hudanich's class. While he was a student in Miss Roberts' class in October 1978, he admitted he was misbehaving. He indicated that the respondent told him to come up to the front of the class and then she started hitting him with a pointer stick. (Tr. 104). M. M. indicated that the respondent hit him on his right leg. M. M. indicated that he was hit on the inside of the leg by the calf or behind the knee. After he was hit by Miss Roberts, he went home. He indicated that he told his

mother what had happened in school with Miss Roberts. M. M. admitted that he was misbehaving in class by running out of the classroom. Mr. Mone finally came out and got M. M. and brought M. M. back to respondent's classroom. M. M. indicated that Miss Roberts hit him with the pointer five or six times. (Tr. 110). When M. M. got home, he climbed up on the roof. When his mother found him, he was up on the roof.

Albert Whitiker next testified on behalf of petitioner. He indicated that during the 1978/79 school year he had a child in the sixth grade. His youngster, J. W., had Miss Roberts as teacher. Sometime during last year, he and his son and Mr. Mone and Miss Roberts had a conference. He cannot recall the date. Prior to the conference, Mr. Whitiker indicated that his son came home one afternoon and told him that respondent had struck him and he had a scar under his left eye. During the conference, the respondent indicated to Mr. Whitiker that he had a very undisciplined kid. Mr. Whitiker responded that he did not feel that his youngster was undisciplined or bad.

J. W. testified that during the 1978/79 school year he had Miss Roberts as a teacher. He was eventually transferred from Miss Roberts' class to Miss Hudanich's class. J. W. admitted that he had a stick with him (P-3) because some white boys were going to jump him. (Tr. 128). This was the first day that he brought the stick to school. He found the stick in the garbage. J. W. contended that Miss Roberts was coming towards his desk. At that time, he took the stick out of it and held it down towards his leg. Miss Roberts put her hand on the stick as J. W. was holding it toward his leg. He indicated that the respondent was hitting his leg with the stick. J. W. then admitted that he hit her. He indicated that he slapped her and in return she hit him back. (Tr. 132).

Aftre the incident, J. W. ended up in Mr. Mone's office. Miss Roberts and Mr. Mone and J.W. were present and a discussion of the incident took place. The respondent at that time indicated that she did not put the mark on J. W.'s face, but in fact that J. W. put the mark there.

It should be noted that when J. W. took the stick out of his desk and when respondent came to take it out of his hands, a struggle ensued. J. W. had both hands on the stick. (Tr. 136). J. W. indicated that as Miss Roberts was trying

to take the stick from him, she banged his leg with the stick. His leg was banged once. J. W. also indicated that he was mad. As this struggle ensued. J. W. took his left hand off the stick and punched Miss Roberts in the eye. He punched her with his left hand. (Tr. 137). At this point, according to J. W., Miss Roberts hit J. W. across the face with the stick. At this point, J. W. ran out of the classroom.

J. W. admitted that immediately prior to the incident he was talking out loud. He was talking to a friend two rows in front of him. J. W. characterized his talking as "whispering." (Tr. 140). J. W. recalls saying to Miss Roberts, "oh shut up." (Tr. 141). J. W. denied at any time holding the stick above his head. J. W. agreed that Miss Roberts neither said anything, nor did anything, before she started coming towards him. She merely started walking towards him. J. W. claimed that he took the stick out of his desk to defend himself. He contended that her slamming down the scissors at the front of the room caused him to believe that she was going to hit him. (Tr. 144 and 145). J. W. admitted that Miss Roberts and himself were struggling for the stick (Tr. 145). When she got the stick away from him, according to J. W., she hit him on the leg once with it. After the stick was taken away from him, J. W. hit respondent with his left hand. Then, Miss Roberts hit J. W. across his face with the stick. J. W. said that Miss Roberts next hit him twice across the right arm with the stick until he left the room. (Tr. 146).

After the submission of certain documents into evidence, the petitioner rested its case.

Barbara Jean Roberts testified on behalf of respondent. She indicated that she completed undergraduate work at the University of Pittsburgh, School of Education. She received a B. S. degree in elementary education in 1961. She also indicated that she holds an M. A. in early childhood education from Kean College which she received in 1975. Prior to being employed in Plainfield, she worked three years in Pittsburgh, Pennsylvania and three years in Cape May City, New Jersey.

With regard to the incident of October 12, 1978, respondent indicated that she recalls what happened on that date. In the afternoon after lunch, M. M. came into the classroom and sat down and began to do some work. Soon, M. M. raised his hand and asked to go to the lavatory, which respondent permitted. M. M.

did not come back immediately, and Miss Roberts had to send another youngster to find him. The youngster whom respondent sent to find M. M. never found him and M. M. never came back to the class. Sometime later, Mrs. Elaine Scalamoni, who teaches second grade, came into respondent's classroom and said that M. M. was running in and out of the auditorium, through the stage and in and out of the school. Since Miss Roberts taught with her door open, some of the other younsters in her class indicated that M. M. was running through the halls towards the office. Next, Mr. Mone came into class with M. M. Mr. Mone indicated to M. M. that he should go to his seat. Mr. Mone indicated to M. M., "do what Miss Roberts tells you to do, go to your seat." (Tr. 154). Mr. Mone left the class, but M. M. did not return to his seat, but rather went to the back of the classroom and made noises on the radiator by rubbing it. When Miss Roberts again requested M. M. to go to his seat, he indicated that he would not. Four youngsters in the class finally ran to M. M., caught him and put him in his seat. M. M. remained with Miss Roberts and the rest of her class until the youngsters were dismissed at approximately ten minutes to three. Respondent recalls observing M. M. outside on the school grounds climbing a tree right outside of her classroom window. M. M. remained on the school grounds as Miss Roberts was preparing her group for dismissal.

Miss Roberts vehemently denies that she called M. M. to the front of the room or had any dealings with him after he was guided by the other children to his seat. She testified that M. M. performed his studies with the rest of the class until the end of the day. She unequivocally denied that she struck M. M. Miss Roberts also states that M. M. was not crying or anything when he was put in his seat by the other youngsters in the class.

The respondent recalls the conference that was held on Tuesday with Mr. Mone and Mrs. Mueller being present. At that time respondent was informed of the allegation that she hit M. M. on the previous Friday. Miss Roberts indicated that she did not hit M. M. (Tr. 157). Miss Roberts also indicated to M. M.'s mother that he was very hyperactive that afternoon causing a great disturbance and a great interruption to the classroom program. At that meeting, no one indicated to respondent how she supposedly hit M. M. Mrs. Mueller also indicated that she wanted M. M. removed from the classroom because she felt that Miss Roberts was not the type of teacher for M. M. Mrs. Mueller felt that M. M. needed a more permissive type of classroom, less restrictive. The respondent denies saying

anything else at this conference with regard to disciplining a student. Eventually, M. M. was transferred from Miss Roberts' class to Miss Hudanich's class.

With regard to the incident of December 11, 1978, Miss Roberts was asked to take approximately nine or ten fifth graders from Miss Conway's room who was absent from school on that date. When the youngsters returned from art, they resumed their academic studies. J. W. was making noises, talking and being a complete nuisance. J. W., who had a ball of white paper, took a long trip through the classroom to throw the paper in a receptacle, rather than go to the receptacle closest to his seat to throw it away. When Miss Roberts asked him why did he take the long way around, he replied, "oh why don't you shut up? Shut your damn mouth." (Tr. 160). When respondent started to approach J. W.'s desk, he grabbed a pole or stick out of it and began flailing it at respondent. Miss Roberts indicated that J. W. was swinging this pole over his head. She testified that she wrestled the stick from him. While J. W. still had one hand on the stick, he slapped respondent with his right hand across the right eye and then fled from the room. (Tr. 161). Miss Roberts indicated that she had no way of striking J. W. with the stick because he left the room immediately after she went up to him and wrestled the stick from him. Respondent went after J. W. and a Miss Peterson, who was coming down the hall, and who was a lunchroom aid, indicated that she would take charge of respondent's class until Miss Roberts returned. Miss Roberts could not find J. W. and came back to her class. She then dismissed all of the children for lunch.

Immediately thereafter, Mr. Mone came to her room and indicated that he would like to see respondent in his office. Respondent immediately went to Mr. Mone's office and saw J. W. there. Respondent noticed that J. W. had an abrasion on his left jaw and she immediately said, "Mr. Mone, I didn't do that to J. W." (Tr. 162). Mr. Mone never asked respondent whether or not she struck J. W. Mr. Mone was mainly interested in where the stick was. Respondent went back to her room and found the stick and brought it into Mr. Mone.

On or about December 19, 1978 a conference was held with Mr. Mone, respondent and J. W.'s father. This conference took place at the end of the school day after the youngsters were dismissed. Miss Roberts indicated that at no time during the conference did she admit that she struck J. W. with a stick. (Tr. 165).

She furthermore indicated that at no time, to the best of her recollection, did she strike J. W. with the stick. She reiterated that she had no opportunity to strike him since J. W. left immediately after Miss Roberts wrestled the stick from him. Miss Roberts indicated that she told Mr. Mone that if it were a case of self defense and protecting her body, she will protect herself at any cost.

The respondent was shown a document marked into evidence as P-5 which was a memorandum dated December 21, 1978. Point two of P-5 states,

> "Your verbal intimidation of this child. I cannot accept the kinds of things you said to him, such as, I know your home life is no good; I hope your father holds up his end; you have had emotional problems; I submit to you a child at thirteen has no control of his home life. It's up to us to help build, not destroy self-image."

Miss Roberts unequivocally denied making any such statement.

With regard to certain allegations that Miss Roberts would not communicate with parents, she testified that when the need arose, she would notify parents. She did not want to make a nuisance of herself by disturbing parents. She indicated that she would notify parents through means other than the normal report cards and conferences when the need arose. Under point 3D of P-5, it states:

> "You would not accept my recommendations I suggested, in fact you interrupted me repeatedly, raised your voice and would not allow me to complete any thought."

Miss Roberts indicated that at the conference to which the aforementioned quote refers, Mr. Mone came to her classroom around 3:00 p.m. and told respondent that he wanted to see her in his office. On this particular day, Miss Roberts had evening conference at 7:00 p.m. Miss Roberts indicated that Mr. Mone kept her in his office until approximately 5:30 P.M. Miss Roberts indicated to Mr. Mone, "Mr. Mone, I have evening conferences, one starting at 7:00. I have to go home and prepare my dinner and come back." (Tr. 172). Miss Roberts said,

"Would you excuse me so that I may leave?" (Tr. 172).To this Mr. Mone replied, "Miss Roberts, if you don't sit down I will write you up." (Tr. 172). At this time Miss Roberts left the conference and in fact Mr. Mone did write her up. (Tr. 172). Again, with regard to the incident involving J. W. and the stick, Miss Roberts was asked why she didn't walk away from J. W. at that time. Her reply is as follows: "If that pole would have been released with the way he was flailing and wailing - flailing that pole, it would have injured another child in that room. And, it is my place, as a classroom teacher, to protect each individual who comes under my direction, at any cost, which I will do." (Tr, II 13). When Miss Roberts was asked, what does any cost mean, she indicated, "It means whatever it takes retrieving the pole from that child. I'm not going to turn my back on someone who may cause bodily injury to myself or another person. And, I felt that it was my duty, at that time, to do what was best to retrieve the pole from J. W., which I did." (Tr. II 13).

At this point, some reference shall be made to some of the evaluation reports of Barbara Roberts which have been submitted into evidence. Counsel have already stipulated that respondent, Barbara Roberts, has been employed by petitioner for eleven years and all of her evaluations have been meritorious. However, it is felt by this tribunal that reference to some of the specific comments found in the reports would be useful:

1. The evaluation dated October 17, 1969 (R-1) contains the following comment:

   "I am very pleased with your performance to date. Your outstanding reputation can only be enhanced by your fine work and concern for the children of Stillman School. A pleasure to have you on the staff."

2. The evaluation dated January 27, 1970 (R-2) contains the following comment:

   "I am extremely pleased with your performance. You class reflects the time, effort and dedication you bring to your profession. You are a tremendous asset to the Stillman School family."

3. The evaluation dated April 20, 1970 (R-3) contains the following comment:

"...I have been extremely pleased with your performance this year - your class environment reflects the time and effort you give in providing a sound educational program. You are a tremendous asset to Stillman School."

4. The evaluation dated April, 1971 (R-4) contains the following comment:

"I have been extremely impressed with your performance this year - your 'unique' class environment (colorful displays, mobiles, etc.) contribute greatly to learning, your willingness to take many trips to reinforce an assignment, and the outstanding academic program you provide for the youngsters are but a few of the highlights of your fine year."

5. The evaluation of March 17, 1972 (R-5) contains the following comment:

"... I have carefully watched you develop not only student interest through motivational techniques, but a cooperative student pride and willingness to learn. May I congratulate you on your meritorious teaching performance and tell you how much I appreciate you efforts."

6. The evaluation for the 1972/73 school year (R-6) contained comments of the following nature:

"On my many spot visits to your room, I have always been impressed with the excellent atmos

phere and environment for learning which you provide. The climate and rapport appear to be unmatched throughout the building;..."

7. The observation for the 1973/74 school year (R-7) contained comments such as the following:

"I enjoy your student display in the corridor of 'our book jackets and written reports'; the parents and children appreciate your efforts also, I am sure. Congratulations on a fine job well done..."

8. The evaluation for the 1974/75 school year (R-8) contained comments of the following nature:

"...Your efforts in developing self discipline on the part of each boy and girl is quite evident - while your approach to teaching tends to be traditional, I feel you are meeting the needs of each individual - good work..."

9. The evaluation for the 1975/76 school year (R-9) contained comments of the following nature:

"...many parents have expressed their satisfaction regarding the progress of their children in the combination 4-5 grades - they especially appreciated the self-discipline which you are developing, as well as the academic program being forwarded - ..."

10. The evaluation dated March 15, 1977 (R-10) contains the following comment:

"The teaching that I have observed today and throughout the school year has been superior in

every respect. You are always thoroughly prepared with excellent and well developed plans. Your room is most attractive with a variety of materials in evidence. There is a warm, positive atmosphere in the room. Class routines, controls and procedures have been thoroughly established. Good manners and awareness for other people has been taught..."

11. The evaluation dated June 15, 1977 (R-11) contained comments such as the following:

"...It is felt that you are helping our young people grow in all phases of the total curriculm and should find success as they continue in their educational pursuits. Observed was a courtesy, no-nonsense, direct approach to teaching whereby students respond with polite accord."

12. The evaluation dated April 27, 1978 (R-12) contains the following comment:

"...I was pleased with this lesson and observed that the pupils participated eagerly with a sense of understanding and satisfaction; my only concern would be for slower moving students who might not grasp the concept readily, to have the opportunity for special help. Your room provides an excellent environment for learning in all areas of the curriculum..."

Based upon a careful consideration of the foregoing, including a careful review and study of the pleadings, the exhibits, the stipulations, the demeanor and credibility of the witnesses, and the inherent probability of their testimony, this tribunal **FINDS:**

1. Barbara Roberts was a tenured teacher in the Plainfield School District during the 1978/79 school year.

2. The following charges were duly filed against respondent:

   A. On or about October 12, 1978, while in your classroom at Cook Elementary School, Plainfield, New Jersey and while an elementary teacher in the employ of the Board of Education of the City of Plainfield, you did commit an assault and battery upon the person of M. M., a student under your charge, he being then and there a pupil of the Board of Education of the City of Plainfield, by striking and hitting M. M.

   B. On or about Monday, December 11, 1978, while in your classroom at Cook Elementary School, Plainfield, New Jersey,and while an elementary teacher in the employ of the Board of Education of the City of Plainfield, you did commit an assault and battery upon the person of J. W., a student under your charge, he being then and there a pupil of the Board of Education of the City of Plainfield by striking and hitting him repeatedly with a stick 20" long and 1 1/4" in diameter and chasing him from your classroom with the aforesaid stick.

   C. On or about Tuesday, December 12, 1978, you did tell Angelo L. Mone, your building principal that you would not cease hitting or striking individual children in your class when in your opinion the situation warranted striking a child.

D. On or about Tuesday, December 12, 1978, and again on Friday, December 22, 1978, you were insubordinate to Angelo L. Mone, your building principal, in that you refused to obey his direct order to cease striking the children entrusted to your care, and in that you were intransigent, persistent, willful, defiant and unwilling to submit to his authority by refusing to accept his directions and recommendations, refusing to let him complete his conference with you, and generally were disrespectful and uninterested in hearing anything Mr. Angelo L. Mone had to say to you by way of suggestion, recommendation or criticism.

3. On January 30, 1979, the petitioner, Board of Education, held a meeting and passed a resolution certifying the charges aforstated against respondent, Barbara Roberts, to the Commissioner of Education.

4. Subsequent to January 30, 1979, respondent, Barbara Roberts, received a copy of the petitioner's resolution certifying the charges.

5. On January 30, 1979, the petitioner, Board of Education, passed a resolution suspending respondent, Barbara Roberts, without pay.

6. After the passage of the statutory 120 days from respondent, Barbara Roberts' suspension, petitioner, Board of Education has placed her back on the payroll.

7. Respondent, Barbara Roberts, was a certificated teacher, K-8, beginning the school year 1978/79

and was a teacher at the F. W. Cook Elementary School, teaching sixth grade.

8. On a Friday in October, 1978, (the Board of Education charge #1 states that the date of occurence was on or about October 12, 1978 -October 12, 1978 being a Thursday), M. M. was a student in respondent, Barbara Roberts' class at F. W. Cook Elementary School.

9. On the date and place aforementioned, M. M. was misbehaving by running out of Barbara Roberts' classroom.

10. Mr. Mone, the principal, eventually brought M. M. back to respondent's classroom.

11. Although M. M. alleged that Barbara Roberts told him to come to the front of the class and then hit him with a pointer stick five or six times on the back of his right leg, no other student was called as a witness by petitioner to testify with regard to this incident.

12. Once M. M. was returned to respondents' classroom after running through the halls, he remained with the class until dismissed at approximately ten minutes to three.

13. M. M. remained on the school grounds after being dismissed and was seen climbing a tree by respondent out of her window.

14. M. M. was a hyperactive youngster in October, 1978.

15. Now, M. M. is attending West Lake School in Westfield, New Jersey, which is a special school to handle hyperactive and emotionally disturbed youngsters. (Tr. 96).

16. At a conference held on Tuesday in October, between Miss Roberts, Mr. Mone, and Mrs. Mueller, respondent denied she hit M. M.

17. At the conference, Mrs. Mueller indicated that she wanted M. M. removed from respondent's classroom because M. M. needed a more permissive type of classroom.

18. At the conference, Mrs. Mueller indicated that Miss Roberts said she would discipline any child in her classroom but did not use the word "hit." (Tr. 92).

19. Although Mr. Mone, who was at the conference, indicated that respondent stated, "I hit him", Mrs. Mueller who was sequestered during the hearing, and who was also at the conference, stated Miss Roberts did not use the word "hit."

20. Mr. Mone had no memorandum of the aforementioned conference nor of the alleged incident involving M. M.

21. The petitioner has failed to prove by a preponderance of the credible evidence that respondent hit M. M. with a pointer stick in October, 1978.

22. On December 11, 1978, J. W. was a student in Barbara Roberts' class at F. W. Cook Elementary School.

23. On December 11, 1978, J. W. brought a stick to school which was 20" long and 1 1/4" wide, and which appears to this tribunal to weigh approximately twelve ounces.

24. J. W. placed the stick inside of his desk.

25. J. W. had a ball of white paper and took it to a receptacle which was not the closest one to his seat.

26. When respondent, Barbara Roberts, approached J. W. to ask him why he took the long way around to the receptacle, J. W. said: "Oh, why don't you shut up? Shut your damn mouth." (Tr. 160).

27. As respondent approached J. W.'s desk, J. W. took out the stick or pole and began swinging or flailing it at respondent.

28. Respondent wrestled the stick from J. W.'s control.

29. However, while J. W. still had one hand on the stick, he slapped respondent with his right hand across her right eye and then fled from the classroom. (Tr. 161).

30. Although respondent denies hitting J. W. indicating that she did not have enough time since he fled immediately after he hit her, this tribunal finds that it is probable that the struggle for the stick (Tr. 145) may have resulted in J. W. becoming injured in his attempt to hold onto the stick. Additionally, this tribunal finds the stick was a weapon or dangerous object.

31. J. W. ended up in Mr. Mone's office after the incident with respondent, and Mr. Mone observed an abrasion on J. W.'s face.

32. This tribunal finds that insofar as the incident between J. W. and respondent is concerned, J. W. at all times was the aggressor and initiated the incident, respondent in no way provoked the incident, and any injury to J. W. resulted either from a struggle for the control of the stick, which was a weapon or dangerous object, or from respondent acting in self-defense in the face of immediate bodily harm.

33. At a conference on December 19, 1978 between respondent, Mr. Mone and J. W.'s father, respondent indicated that to the best of her recollection she did not strike J. W. Also, she indicated that if it were a case of self defense and protecting her body, she would protect herself.

34. This tribunal finds that respondent did not either on December 12, 1978 or any other date tell Mr. Mone that she would not cease hitting or striking individual children in her class when in her opinion the situation warranted striking a child.

35. This tribunal does not find that respondent was at any time insubordinate to Mr. Mone, that she refused to obey his direct order to cease striking the children entrusted to her care or that she was intransigent, persistent, willful, defiant, or unwilling to submit to his authority by refusing to accept his directions and recommendations, or refusing to let him complete his conference with her, or generally was direspectful and uninterested in

hearing anything Mr. Mone had to say to her by way of suggestion, recommendation, or criticism.

36. With regard to the December 12, 1978 meeting between Mr. Mone and respondent, this tribunal finds that respondent remained at the meeting from 3:00 p.m. until approximately 5:30 p.m., requested to leave, and then left at the that time because she had to go home for dinner and then had to return to school for a 7:00 p.m. conference. This conduct by respondent was not insubordinate.

37. This tribunal finds that respondent received outstanding evaluations on the following dates: October 17, 1969, January 27, 1970, April 20, 1970, April, 1971, March 17, 1972, 1972/73, 1973/74, 1974/75, 1975/76, March 15, 1977, June 15, 1977 and April 27, 1978.

38. The undersigned finds that Barbara Roberts is a credible witness who testified with a great deal of candor and whose version of all incidents is inherently probable.

39. This tribunal finds from respondent's evaluations that she believed in discipline and control for her classes and had a traditional approach to teaching.

The law is abundantly clear that in any tenure hearing, the Court must first determine whether the charges have been proven to be true by a preponderance of the credible evidence. See In the Matter of the Tenure Hearing of Arlene Dusel, School District of the Borough of Sayreville, Middlesex County, 1978 S.L.D. 121; In the Matter of the Tenure Hearing of Madeline Ribacka, Sussex/Wantage Regional School District, Sussex County, 1978 S.L.D. 236; and In the Matter of the Tenure Hearing of Fred Brown, School District of the City of Bayonne, Hudson County, 1970 S.L.D. 239.

This tribunal is also aware of the Commissioner's determination in previous decisions that the testimony of school pupils must be used with great caution. See, In the Matter of the Tenure Hearing of John Birch, School District of the Borough of West Long Branch, Monmouth County, 1978 S.L.D. 16; In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, Middlesex County 1971 S.L.D. 566, aff'd State Board of Education, 1973 S.L.D. 733, aff'd Docket No. A-1680-72, N.J. Super. Ct. App. Div., November 28, 1973 (1973 S.L.D. 733); In the Matter of the Tenure Hearing of Mary Louise Connolly, School District of the Borough of Glen Rock, Bergen County, 1971 S.L.D. 305. It is also clear that the issue of credibility with regard to the testimony of pupil witnesses is the responsibility of the trier of fact. See, In the Matter of the Tenure Hearing of John Birch, supra; and In re Tenure Hearing of Grossman, 127 N. J. Super. 13 (App. Div. 1974). Or, putting it another way, the choice of accepting or rejecting the testimony of any witness is a determination to be made by this tribunal. The undersigned must make a reasonable choice. See Freud v. Davis, 64 N. J. Super. 242, 246 (App. Div. 1960).

With regard to the question of the credibility of the pupil witnesses, as contrasted to the credibility of the respondent, this tribunal **CONCLUDES** after a careful consideration and review and assessment of the demeanor and candor of each witness, that respondent's version of the incidents are more inherently probable.

The law is also clear that the Commissioner of Education has never condoned the use of corporal punishment of students which has been forbidden by statute in this State since 1867. See, In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, Somerset County, 1966 S.L.D. 185; In the Matter of the Tenure Hearing of James Norton, School District of the Borough of Ridgefield, Bergen County, decided by the Commissioner of Education, September 2, 1969; In the Matter of the Tenure Hearing of Pauline Nickerson, School District of Peapack-Gladstone, Somerset County, 1965 S.L.D. 130; and, In the the Matter of the Tenure Hearing of Samuel Ivens, School District of Toms River Regional, Ocean County, 1977 S.L.D. 960.

The applicable statute dealing with corporal punishment of pupils is N.J.S.A. 18A:6-1 which reads as follows:

> "No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:
>
> (1) to quell a disturbance, threatening physical injury to others;
>
> (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
>
> (3) for the purpose of self-defense;
>
> (4) for the protection of persons or property;
>
> and such acts, or any of them, shall not be construed to constitue corporal punishment within the meaning and intendment of this section. Every resolution, by-law, rule, ordinance or other act or authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void."

With regard to charge two (2) filed against respondent, it is clear that respondent applied a reasonable amount of force which was necessary under the circumstances to obtain possession of the stick or pole which was a weapon or other dangerous object in the control of J. W. Thus, respondent's actions, are permissible within the purview of N.J.S.A. 18A:6-1 (2). Any injury to J. W. arising from the struggle for the stick or pole between respondent and J. W. was specifically comtemplated by the aforementioned statute. In addition, under the circumstances of the instant case, it also may be concluded that the actions of respondent were for the purpose of self-defense as provided in N.J.S.A. 18A:6-1 (3). See also State v. Abbott, 36 N. J. 63 (1961). Therefore, it is **CONCLUDED**, with regard to charge two (2), that the actions of respondent were proper within the purview of N.J.S.A. 18A:6-1 (2) and (3) and did not, under the existing circumstances, constitute conduct unbecoming a teacher, incapacity or other just cause pursuant to N.J.S.A. 18A:6-10.

With regard to charge one (1), this tribunal **CONCLUDES** that the petitioner has failed to prove this charge true by a preponderance of the credible evidence.

With regard to charges three (3) and four (4) this tribunal also **CONCLUDES** that the petitioner has failed to prove the charges true by a preponderance of the credible evidence.

Therefore, in summary, this tribunal **CONCLUDES** that the charges against respondent, namely charges one (1), two (2), three (3) and four (4), have not been proven to be true by preponderance of the credible evidence.

It is **CONCLUDED** that all charges against respondent be and are hereby **DISMISSED** with prejudice.

It is further **ORDERED** that respondent be reinstated forthwith to her tenured position and that she be provided with any and all emoluments and salary which she would otherwise have received.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

I HEREBY FILE with the COMMISSIONER OF EDUCATION, FRED G. BURKE, my Initial Decision in this matter and the record in these proceeding.

January 2, 1980
DATE

Robert P. Glickman
ROBERT P. GLICKMAN, A.L.J.

IN THE MATTER OF THE TENURE :

HEARING OF BARBARA ROBERTS, :

SCHOOL DISTRICT OF THE CITY : COMMISSIONER OF EDUCATION

OF PLAINFIELD, UNION COUNTY. : DECISION

:

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

The Commissioner notes that Judge Robert P.Glickman found that the four charges against respondent were not proven by a preponderance of credible evidence.

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

Accordingly, the Board of Education of the School District of the City of Plainfield is herewith directed to reinstate respondent to her tenured position with all emoluments as though her service had not been interrupted. Further the Board is directed to expunge from respondent's personnel file any record of the above matter.

It is so ordered.

COMMISSIONER OF EDUCATION

February 19, 1980

JOHN W. GRIGGS,	)	
	)	
PETITIONER,	)	
	)	INITIAL DECISION
V.	)	OAL DKT. NO. EDU 1850-79
	)	AGENCY DKT. NO. 156-4/79A
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	)	
	)	
RESPONDENT.	)	

APPEARANCES:

Stephen E. Klausner, Esq., for Petitioner

Richard J. Murray, Esq., for Respondent

BEFORE THE HONORABLE BRUCE CAMPBELL, A.L.J.

EVIDENTIARY DOCUMENTS

J-1 1/16/79 Letter, 2 pp., Dwyer to Griggs

R-1 12/21/78 Letter, 2 pp., Dwyer to Griggs
R-2 11/20/78 Letter, Dwyer to Griggs
R-3 11/22/78 Letter, Griggs to Dwyer
R-4 11/27/78 Letter, Dwyer to Griggs
R-5 11/30/78 Letter, Griggs to Dwyer
R-6 11/15/78 Memorandum, 3 pp., Meredith to Crisci
R-7 11/15/78 Statement of Kemps
R-8 11/15/78 Statement of Peachey
R-9 3/10/75 Memorandum, 3 pp., Crisci to Griggs
R-10 4/8/75 Letter, Dwyer to Griggs
R-11 4/15/75 Letter, 5 pp., Griggs to Dwyer
R-12 3/20/78 Memorandum, 2 pp., Griggs to Carpenter
R-13 3/20/78 Memorandum, 2 pp., Griggs to Carpenter
R-14 3/31/78 Letter, Johnson to Dwyer
R-15 4/10/78 Letter, 2 pp., Murray to Johnson
R-16 4/27/78 Letter, Dwyer to Griggs

Petitioner appeals the decisions of the Board of Education of the Borough of Somerville (Board) to withhold his salary increment and adjustment increment for the 1979-80 school year and to suspend him from all duties, with pay, pending analysis of the results of a psychiatric examination of him. Petitioner contends the salary increment and adjustment increment are not withheld for good cause. Petitioner contends further that the Board's actions suspending him pending psychiatric examination and simultaneously withholding his increments are inconsistent, mutually exclusive and constitute a double penalty.

The Board avers its actions are reasonable and proper, under law, are not mutually exclusive and are in no way a double penalty.

The matter is submitted for decision on the record and on Briefs of the parties in support of their respective positions. The record was closed on November 27, 1979.

By agreement dated September 11, 1979, the issues in this matter are:

1. Did or did not the Board act unreasonably, capriciously or arbitrarily in withholding the salary increment and adjustment increment of petitioner for the 1979-80 school year, and

2. Since the action suspending petitioner with pay and ordering a psychiatric examination of petitioner and the action withholding his salary increment and adjustment increment arose out of substantially the same set of facts, did or did not the Board act improperly in ordering both.

Petitioner states that N.J.S.A. 18A:16-2 authorizes a board of education to "***require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.***" Petitioner also states that N.J.S.A. 18A:29-14 authorizes a board of education to "***withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both of any /teaching staff/ member in any year by a recorded roll call majority vote of the full membership of the board of education.***"

Petitioner's position is that the Board has acted inconsistently in ordering a psychiatric examination and withholding the aforesaid increments.

Petitioner states that no case law can be found under which a board of education may withhold an increment solely for illness and "/i/f as respondent argues*** Mr. Griggs is so deviant as to require a psychiatric examination, then they cannot state that he was in control of his faculties and should be punished for his conduct." (Petitioner's Brief at p. 2.)

Petitioner argues that the Board voted to withhold petitioner's salary increment and adjustment increment for 1979-80 for two reasons: first, for unbecoming conduct and language during an incident involving himself and his department chairman in the presence of other staff and second, for abusive and vulgar language used in two memoranda from petitioner to the high school assistant principal on March 20, 1978. (R-12 and R-13) It is petitioner's contention that these incidents singly or together do not constitute good cause since actions based upon them amount to an attempt to punish petitioner for exercising his constitutional right to free speech. Petitioner contends further that the Board, subsequent to the memoranda of March 20, 1978, voted to grant petitioner's increments for the 1978-79 school year thereby rendering use of this incident as a basis for withholding 1979-80 increments inconsistent with its prior actions.

The Board contends that petitioner confuses the content and substance of N.J.S.A. 18A:16-2 and 29-14 and that these statutes stand separately, govern separate circumstances and are not exclusive of each other. The Board asserts, "The same or similar actions which would require a psychiatric examination may also be reason to withhold /an/ increment." (Respondent's Brief at p. 5.)

The Board states that petitioner has been admonished in the past concerning his behavior. The Board further contends it "has the right to withhold an increment as an 'appropriate administrative mechanism' to separate the able from the sufferable." (Respondent's Brief at p. 10.) The Board avers that, as a matter of law, the giving vel non of an increment is discretionary and that petitioner has failed to show that it acted arbitrarily, unreasonably or capriciously in withholding petitioner's salary increment and adjustment increment for the 1979-80 school year.

This case, as noted ante, considers two questions. The first is whether the Board in withholding the controverted salary increment and adjustment increment, acted in an arbitrary, unreasonable or capricious manner. The Board contends it did not. It cites its letter of January 16, 1979 to petitioner (J-1) outlining the bases on which it acted. The Board also states that petitioner was afforded a hearing before the Board for the purpose of persuading the Board to rescind its action and that he was there represented by counsel but chose not to rebut, refute, contradict or otherwise impeach the testimony of the witnesses and the documents. These statements are unchallenged by petitioner who relies on the arguments that the two incidents, even taken together, do not constitute good cause since actions based upon them amount to an attempt to punish him for exercising his right to free speech and that the Board, in approving a salary and adjustment increment for petitioner for the 1978-79 school year, subsequent to the first incident, removed that incident from further consideration in any subsequent withholding action involving petitioner.

Addressing the second of petitioner's arguments, I FIND that the action of the Board in approving a salary and adjustment increment for petitioner for the 1978-79 school year does not bar the Board from considering petitioner's entire record when contemplating a subsequent action. I am of the opinion that a Board not only may but should consider the entire record of an employee when an action such as withholding is being contemplated. Such a review may have value in several ways. It may disclose exemplary experience or other factors favorable to petitioner that might cause a board to mitigate its contemplated action. It may reveal a pattern of behavior not discernable from the review of one year's exerpience yet of vital importance in making management decisions. Whatever may be drawn from such a review, a public, policy making body should have as much information as possible before it when deliberating a matter as serious as the withholding of increments or virtually any other matter.

Petitioner's argument that the two incidents, even if taken together, do not constitute good cause since actions based upon them amount to an attempt to punish him for exercising his right to free speech must be assayed in the context in which they took place. The first incident involves two memoranda (R-12, R-13) dated March 20, 1978, from petitioner to the high school assistant principal.

I FIND, based upon careful examination of these memoranda, that the language therein is intemperate, even crude, and undeniably unprofessional. These memoranda were for the eyes of the assistant principal. There is nothing of record to indicate that they were circulated to other persons. Nor is there anything of record to show that they had any untoward effect upon the recipient. Nonetheless, the language used in them is properly within the consideration of the Board when looking at petitioner's total performance. Petitioner made a choice when he wrote the memoranda. He chose to use the language he did rather than the more moderate, dispassionate prose commonly acknowledged as professional communication. The Board properly evaluated the choice he made.

The second incident involved petitioner and his department chairman. It is uncontroverted that verbal assault and physical intimidation on the part of petitioner were elements of the incident. (R-6) I FIND that the Board properly considered this incident when deliberating its withholding action.

The second question, sub judice, is whether the Board properly may base its order of a psychiatric examination of petitioner and its action to withhold his salary increment and adjustment increment on substantially the same set of facts. Petitioner states that no case law can be found under which a board may withhold an increment solely for illness and that the statutes governing the ordering of a psychiatric examination and the withholding of an increment are mutually exclusive.

I do not doubt that petitioner is correct when he states that no case law can be found authorizing a withholding based on illness. The argument is an ignoratio elenchi, however, since the Board has not made a determination that illness exists. Rather, it has determined to find out whether an illness exists. Nor can I accept the argument that N.J.S.A. 18A:16-2 and 29-14 are mutually exclusive. Whether the decisions to invoke these statutes are bottomed on the same set of circumstances is of no import. N.J.S.A. 18A:16-2 states

> "Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health. ***."

It is established law that words and phrases in statutes are to be given their ordinary meanings unless the context clearly requires otherwise. Duke Power Co. v. Patten, 20 N.J. 42, 49; Watt v. Mayor and Council of Borough of Franklin, 21 N.J. 274, 277. A board may require examinations of employees whenever there is reason to believe there is deviation from normal physical or mental health. It is abundantly clear from the record that the instant circumstances support the Board's decision to invoke N.J.S.A. 18A:16-2. The Board bears the responsibility of protecting the children in and the staff of its school district from any known health condition that could prove harmful to them. In order to fulfill this responsibility it must know whether such a condition exists. I FIND that the Board has properly invoked N.J.S.A. 18A:16-2 for the purpose of determining whether a condition exists in petitioner that is harmful or potentially harmful to others.

N.J.S.A. 18A:29-14 states in pertinent part

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all the members 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 language of the statute is clear and unambiguous. The finding of inefficiency or other good cause is the only condition placed upon the invocation of the statute. There is nothing in the statute that expresses or implies any other condition or bar to its invocation. I FIND that the Board has properly invoked N.J.S.A. 18A:29-14 here. I FIND FURTHER that

no statutory or case law proscription exists that would bar simultaneous invocation of N.J.S.A. 18A:16-2 and 24-14.

In summary, the FINDINGS in the instant matter are these:

1. The action of the Board in approving salary and adjustment increments for petitioner for the 1978-79 school year does not bar the Board from considering petitioner's entire record when contemplating a subsequent action.

2. The Board properly considered petitioner's choice to express himself as he did in two memoranda to the high school assistant principal.

3. The Board properly considered an incident of November 15, 1978, involving petitioner and his department chairman when deliberating its action to withhold petitioner's salary and adjustment increments for 1979-80.

4. The Board properly invoked N.J.S.A. 18A:16-2 for the purpose of determining whether a harmful or potentially harmful health condition exists.

5. The Board properly invoked N.J.S.A.18A:29-14 based upon a review of petitioner's entire record.

6. No statutory or case law proscription exists that would bar simultaneous invocation of N.J.S.A. 18A:16-2 and 29-14.

Based upon the foregoing and a complete review of the record, I CONCLUDE:

1. The Board did not act unreasonably, capriciously or arbitrarily in withholding the salary increment and adjustment increment of petitioner for the 1979-80 school year.

2. The Board did not act improperly in ordering a psychiatric examination of petitioner based upon substantially the same set of facts that based its decision to withhold the aforesaid increments.

The instant Petition of Appeal, therefore, is without merit. Accordingly, decision is entered in favor of the Board of Education of the Borough of Somerville. PETITION DISMISSED.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

7 JANUARY 1980
DATE

Bruce Campbell
BRUCE CAMPBELL, A.L.J.

JOHN W. GRIGGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, 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 to the initial decision were filed by petitioner pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Petitioner argues that Judge Campbell erred in his findings of fact and conclusions of law insofar as he upheld the Board's determination to withhold petitioner's salary increment for the 1979-80 school year, absent its receipt of a psychiatric report. Such report, petitioner avers, could possibly have indicated whether or not his conduct as perceived by the Board was intentional or not, or whether, indeed, he was suffering from a mental abnormality. Petitioner argues that until such time as the Board had received and reviewed a report from the psychiatrist, it could not invoke the "other good cause" provision of N.J.S.A. 18A:29-14, to withhold his salary increment. Petitioner maintains that, in the event such psychiatric report indicated that the conduct he exhibited was unintentional by virtue of mental illness, the Board would be precluded from invoking the "other good cause" provision of N.J.S.A. 18A:29-14.

The Commissioner has considered petitioner's arguments and finds them to be without merit with respect to the context of the factual circumstances pertaining to the matter herein controverted.

In the Commissioner's judgment, the applicable law herein is clear that a salary increment must be earned and that it may be withheld for good cause. Stuart Williams v. Board of Education of the Township of Teaneck, Bergen County 1977 S.L.D. 1008

Accordingly, the Commissioner affirms the findings and determination as rendered in Judge Campbell's initial decision and adopts them as his own.

The Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

February 25, 1980

Pending State Board of Education

IN THE MATTER OF THE TENURE HEARING OF PAUL J. McCORMICK, SCHOOL DISTRICT OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY	:	INITIAL DECISION EDU DKT #166-6/78

APPEARANCES:

For the Complainant Board, Murray, Granello & Kenney
(James P. Granello, Esq., of Counsel)

For the Respondent, Bernhard, Durst & Dilts
(Edmund R. Bernhard, Esq., of Counsel)

BEFORE THE HONORABLE AUGUST E. THOMAS, A.L.J.

A list of Documents in Evidence, or, marked for Identification, is attached.

The Board of Education of the Hunterdon Central Regional High School District (Board), certified to the Commissioner of Education, two tenure charges against Paul J. McCormick (respondent), a supervisor of the instruction of English in its high school. The Board seeks his dismissal, or, reduction in salary pursuant to statutory prescription. (N.J.S.A. 18A:6-11) Respondent was suspended without pay pursuant to N.J.S.A. 18A:6-14.

This matter began in the Department of Education before a hearing examiner, now the undersigned Administrative Law Judge. It was transferred to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. Hearings were conducted in the Hunterdon County Agricultural Building, Flemington, on ten (10) days commencing March 26 and ending June 26, 1979. One hundred and twenty-eight documents were marked in Evidence, or, for Identification and counsel filed Briefs after the hearing.

HISTORY

Respondent had been employed by the Board for ten years when in 1966 he was assigned duties as chairman of the English Department, which position he held until the Board, by unanimous passage of a formal resolution on November 10, 1975, removed him from that position and reassigned him to teaching duties. The Board's determination to demote respondent was based on its assertion that he refused to perform cafeteria monitoring duties as directed by his superiors on and after September 10, 1975. (P-50)

Respondent filed a Petition of Appeal with the Commissioner challenging his demotion, and the Commissioner determined that respondent held tenure as a supervisor of instruction. The Board was directed to reinstate respondent to a position commensurate with his certification and his former duties and to make him whole for monies lost during his illegal demotion. (1978 S.L.D. _____, decided February 28, 1978)

Two weeks later, on March 14, 1978, the tenure charges against respondent were filed with the Board Secretary by the Superintendent of Schools (Superintendent) and a copy was transmitted to respondent. Thereafter, these charges were certified to the Commissioner of Education on April 13, 1978.

Essentially, Charge No. 1 is a re-statement of the Board's resolution leading to respondent's demotion for failure to perform assigned cafeteria duties. Charge No. 2 is insubordination based on allegations of respondent's refusal to follow administrative directives from at least July 1972.

Charge No. I

> Essentially, this charge states that "On or about September 10, 1975, and thereafter, Paul McCormick did willfully refuse to perform a required duty, to wit: cafeteria supervision, contrary to administrative directives issued by his superiors. *** By reason of such acts of deliberate insubordination, Paul McCormick has demonstrated conduct warranting dismissal or reduction in salary, specifically that Paul McCormick is unfit to continue *** as a Supervisor of Instruction *** and should be returned to a teaching position."

Respondent concedes that he did not perform cafeteria duty between the dates September 10 and November 10, 1975. He denies that his refusal is evidence of a willful act of insubordination. (P-1, last page) He states that cafeteria supervision was not a required duty in that the Board did not direct that he perform such a duty, and that there was an improper delegation of authority by those purporting to direct him to perform such duty. (Respondent's Brief, p 5)

The Board's authority is set forth in N J.S.A. 18A:11-1 which reads in pertinent part:

> "The board shall ***
>
> "***c. Make *** rules for its own government and the transaction of its business and for the government and management of the public schools *** of the district and for the employment, regulation of conduct and discharge of its employees *** and,
>
> "d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

Pursuant to this statutory authority, the Board adopted a policy on March 13, 1967 which sets forth the responsibilities of the Superintendent. That policy gives the Superintendent the ordinary responsibility of regulating the operation of the public schools. (P-57) The Superintendent testified that neither his duties nor the policy have changed since the policy was adopted. (6T-6)

The statutes further vest in the Superintendent the authority for the "general supervision over the schools *** and he shall have such other powers and perform such other duties as may be prescribed by the board ***." (N.J.S.A. 18A:17-20) Respondent's contention that cafeteria duty was not a required duty assigned by the Board must be set aside. The Superintendent clearly has the statutory authority, as set forth, supra, to assign staff to the duty of cafeteria supervision.

Further, the Superintendent testified that a meeting with department chairmen was conducted on August 4 1970 at which time one topic of discussion was the general staff supervision of different school areas. (6T-11,12) The minutes of that meeting show that department chairmen were to become more involved in a leadership role in the general supervision of areas of the building. (P-5, 8) Department chairmen responsibilities were further delineated in a manual which set forth certain of their responsibilities as follows:

> "The department chairmen will play a vastly expanded role in the general supervision of the areas of the building in which their offices are located. Some chairmen will of necessity be appointed to building supervision in areas remote from their offices. These supervisory duties transcend department lines. The chairmen are paid members of the administrative hierarchy and conduct themselves accordingly.
>
> "Supervisory duties include
>
> A. Homeroom activities - decorum, announcements, attendance
> B. Faculty attendance at assemblies
> C. Halls in the area of the department office - decorum, appearance
> D. Lavatories in the area of the department office - decorum, appearance
> E. Study halls run by his staff
> F. Library when run by his staff." (P-59, p. 13)

In the performance of his duties, the Superintendent assigned the responsibility for the regular operations of the school to an Assistant Superintendent in April 1973. (6T-26, 28, 34-37) Thereafter, the Board adopted a policy directing the Superintendent to "devise whatever procedures are necessary" in carrying out the supervision of the school. (6T-39; P-61; P-62, p. 5) Because there was a necessity to provide cafeteria supervision, the Assistant Superintendent who was assigned the responsibility for the operation of the school, assigned petitioner and other department chairmen the task of cafeteria supervision. These assignments were made with the prior knowledge and consent of the Superintendent. (6T-44, 49) The assignment of department chairmen to cafeteria duty was caused by the refusal of teachers to further perform that duty when their negotiations with the Board for a new working agreement were stalled in the spring of 1975. (Respondent's Brief, p. 9) The authority for teacher assignments to cafeteria supervision has since been set forth by the Courts. Long Branch Education Association, Inc. v. Board of Education of the City of Long Branch, Monmouth County, 1974 S.L.D. 1189; affirmed State Board of Education, 1975 S.L.D. 1098; affirmed Sup. Ct. (App. Div.) 1976 S.L.D. 1149; affirmed Supreme Court at 73 N.J. 461

The record shows that department chairmen were assigned general campus supervisory assignments necessary for the efficient day-to-day operation of the school. (P-8, P-10) The record shows, also, that respondent notified the Assistant Superintendent in charge of the school on April 30, 1975 that he "must decline this (cafeteria) assignment in the future." (P-9)

Respondent consistently refused to serve in a role as a cafeteria supervisor after September 10, 1975. (P-13, P-14) The Superintendent directed respondent to perform cafeteria duty on September 18, 1975 and respondent replied that he was willing to face the consequences. (6T-69,70) The Personnel Committee of the Board met with respondent and asked him to return to his cafeteria assignment. He replied that he would take the matter under advisement. (4T-11)

Respondent was suspended as a department chairman and returned to duty as a teacher by action of the Board at a special meeting on September 24, 1975. (P-46)

The Board met with respondent regarding this cafeteria problem on October 4 1975 at which time respondent admitted not performing his assigned cafeteria supervision and he submitted to the Board a written statement of his position. (P-47; 6T-77) The Board investigated respondent's complaints regarding the cafeteria assignment (P-52) and on October 13, 1975 it adopted a resolution restoring him to his position as a department chairman provided that he perform his cafeteria duty as assigned by the school administration. (P-49) When respondent failed to report for the cafeteria duty after advice by the Superintendent (6T-78, 79), the Board adopted another resolution on November 10, 1975 reassigning respondent to classroom teaching. (P-50)

As stated earlier this action was set aside by the Commissioner in his decision on February 28, 1978.

It is abundantly clear to this Court from the above recitation, the testimony and the numerous documents in evidence, that respondent willfully refused to perform his assigned cafeteria duties. Further, the evidence cited shows that he displayed needlessly, obstructionist tactics during the entire episode. Therefore, I FIND that Charge No. I is true in fact.

Charge No. II

> "Paul McCormick, while holding the title of English Department Chairman, has had a long and consistent pattern of conduct of refusing to follow legitimate orders of his superiors and has exhibited a disdain for administrative authority dating back at least to July, 1972. At that time, he made clear that the Administration would regret that they had not selected him to the position of Supervisor of Instruction, a position which he had applied for but which was awarded to someone else.

> "Because of a failure to follow directions from the Board which required the dating of all observations for non-tenured teacher evaluations, a full increment was withheld for 1973 - 1974 school year. Because of his obstructionist behavior which created conflicts with the office of Supervisor of Instruction, a partrial increment was withheld for the 1974-75 school year.
>
> "The cafeteria incident referred to in Count One is the most recent in a series of actions which demonstrate that Paul McCormick should not hold a supervisory position. Paul McCormick has been afforded several opportunities to correct his behavior, and has shown no improvement. By reason of such pattern of conduct constituting acts of insubordination, Paul McCormick has demonstrated that his conduct warrants dismissal or reduction in salary, specifically Paul McCormick is unfit to continue in a supervisory position as a Supervisor of Instruction and/or English Department Chairman and should be returned to a teaching position."

This charge has been amply proved by the Board. The numerous documents in evidence and the testimony of Board witnesses show a pattern of discord and disharmony since 1972. Further, evidence of the Board's disatisfaction with respondent is shown by its action withholding his increment and a partial increment as stated in Charge No. II.

The record is lengthy and burdened with memoranda between respondent and his superiors detailing his disagreements with certain of their actions. I am convinced from the testimony educed and a review of the record, that respondent has not been a team player at times, and he has demonstrated an independence verging on defiance of the authority of his superiors. This conclusion can be reached by a review of just one incident - respondent's refusal to date teacher evaluation forms as he was directed to do on several occasions and his contentious meetings and correspondence with his superiors. (3T-15-19, 24, 28-32, 40-41, 46; 8T-130-131; 6T-23; P-24, 26, 27, 28)

One striking written example is found in the first and last paragraphs of a two-page single spaced typed memorandum by respondent to his superior which are quoted below to demonstrate the contentious atmosphere he created by his refusal to follow legitimate administrative directives:

> "I've already told you why I think you're making a mistake in insisting upon placing dates of classroom observations on teacher evaluations. However, it occurs to me that I ought to repeat them for the record. *** and,
>
> "If you choose to 'mandate' the inclusion of observation dates on evaluations, you can do so. However, I request that your directive be in writing and a copy inserted in my personal folder together with a copy of this memo. In addition, I will inform the members of the English Department of my feelings on the matter as I have outlined them here." (P-26)

Based on the foregoing, a review of the record and specifically the above listed transcript cites and the documents in evidence, I FIND that Charge No. II is true, in fact, that respondent has demonstrated a pattern of unbecoming conduct and obstructionist behavior.

The Board seeks reimbursement of monies paid respondent which it avers were paid during periods of delay attributable to him. The Board seeks, also, reimbursement of monies from the Department of Education for its delays during this litigation.

A review of the record shows numerous letters scheduling hearing dates and certain requests for adjournments by respondent. It shows, also, and quite understandably, that the Board was not always prepared to go to hearing on dates acceptable to respondent and the then hearing examiner. There are secretarial notes and notations evidencing unsuccessful attempts made by telephone to establish mutually agreeable hearing dates, and finally, there was some delay caused in the Department of Education which is explained in a Commissioner's Order in this matter dated December 28, 1978. (In the Matter of the Tenure Hearing of Paul J. McCormick, appeal denied State Board of Education, #3-79)

Suffice it to say that the adjournments granted were for good and sufficient reasons including court appearances, counsel out of the country on vacation, unavailability of witnesses and conflicting schedules of counsel. In any event the scheduling was procedural and in accordance with (N.J.A.C. 6:24-1.11(b) and 1.19). The State Board denial of the Board's earlier appeal to suspend payment of respondent's salary was not appealed further; consequently,

I FIND that there has been no delay except as explained in the Commissioner's Order of February 28, 1978. The Board's request for reimbursement from respondent and the Department of Education for salaries paid during these proceedings is DENIED.

Finally, the Board seeks reimbursement from respondent for all wages paid to him after August 21, 1978, the date on which he refused its offer to accept alternate supervisory employment within the district.

The record discloses that respondent was entitled to his full salary by law on the 121st day following his suspension without pay. (N.J.S.A. 18A:6-14) He had been receiving his salary while suspended when on August 21, 1978 the Board offered him by certified letter, an alternate supervisory position. This offer was not accepted; neither is respondent obligated to accept alternate employment. Such a practice would enable Boards to circumvent the intent of the tenure statutes by removing an employee from his tenured position and placing him in another pending the outcome of the Board's complaint.

The Commissioner's function under the Tenure Employees Hearing Act was explained in detail by the Court (In the Matter of the Tenure Hearing of David Fulcomer, 93 N.J. Super. 404, 410, App. Div. 1967) Its language vests solely in the Commissioner the authority to "render a decision" in all tenure matters. This authority includes the obligation to "impose the penalty.***" Further, its language removes from the Board any authority to interfere with the decision making process. (Id. 412-414)

For this reason, I FIND that the Board's employment offer to respondent was made to ameliorate its decision to suspend him without pay, and that its offer went beyond its authority under the tenure statutes and the cited decision law, ante.

SUMMARY OF FINDINGS

1. Charge No. I is true in fact.

2. Charge No. II is true in fact.

3. The Board's request for reimbursement from respondent for his alleged delays is denied.

4. The Board's request for reimbursement from the Department of Education is denied.

5. The Board's request for reimbursement from respondent for wages paid since August 21, 1978 is denied.

Remaining to be considered is the penalty to be assessed respondent in view of the findings of fact on Charges I and II. Clearly, the refusal to perform properly assigned, and reasonable cafeteria duties by the school's administrators can be a matter of serious consequences to the school district. Likewise, the

failure of respondent to respond in a positive manner, e g., the many requests to date evaluations is an example of obstructionist behavior which can prevent the smooth and efficient operation of the school.

Appropriate concerns about the efficient operation of a school have been expressed in Phebe Baker v. Board of Education of the Lenape Regional High School District and K. Kiki Konstantinous, Superintendent, Burlington County, 1975 S.L.D. 471 as follows:

> "The Commissioner is constrained to state that divergent opinion within the members of a teaching staff is not unwholesome when directed toward educational improvement. It must, however, be channeled and expressed in acceptable ways. As was said by the Court in Pietrunti v. Board of Education of Brick Township, 128 N.J. Super. 149 (App. Div. 1974):
>
> > '***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.*** It is the individuality each teacher brings to the educational scheme that contributes to educational success; that individuality however, must be sublimated to 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.***'" (128 N.J. Super. at 165)

The Commissioner upheld that Board's determination to terminate Baker.

In the instant matter the penalty must be tailored to meet the aforementioned circumstances. It is tempered because of the Board's prior action withholding respondent's increments and in view of the record which discloses he was a fit and able department chairman. Accordingly, I CONCLUDE that:

1. Respondent must forfeit his tenure as a Department Chairman, or, Supervisor. He will retain tenure and all seniority as a teaching staff member. N.J.S.A. 18A:1-1

2. Respondent will forfeit the 120 days salary withheld by statute pending this proceeding. (N.J.S.A. 18A:6-14)

3. Respondent will be placed at his appropriate step on the current teacher's salary guide retroactive to January 1, 1980, or the nearest pay period.

4. Respondent will be assigned within the scope of his teacher's certificate(s) by the Board for the balance of this school year ending June 30, 1980.

5. As of July 1, 1980, respondent may be reassigned as a department chairmen if the Board offers, and respondent accepts, such a position. If accepted no tenure attaches to the department chairman position since that tenure has been terminated by this Initial Decision. However, tenure may accrue pursuant to statute. (N.J.S.A. 18A:28-6)

The Interlocutory Interim Initial Decision, dated December 13, 1979 is incorporated herein by reference and all of its provisions are modified by this Initial Decision.

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

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

14 January 80
DATE

August E. Thomas
AUGUST E. THOMAS, A.L.J.

IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL J. MC CORMICK,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
HUNTERDON CENTRAL REGIONAL	:	DECISION
HIGH SCHOOL DISTRICT,	:	
HUNTERDON COUNTY.	:	
	:	

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

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

Respondent contends that the Board abrogated its powers in directing the superintendent to "***devise whatever procedures are necessary in carrying out the supervision of the school", further substantiated by the Board's failure to call its members to testify during the hearing. The Commissioner does not agree. The Commissioner finds the instructions by the Board to the Superintendent of Schools and its determination as to who should testify at the hearing to have been a proper exercise of its discretionary authority. The Commissioner cannot agree with respondent's argument that because Judge August E. Thomas concluded that dismissal is not an appropriate remedy (see Interim Initial Decision, December 13, 1979), Judge Thomas lacked an understanding of the tenure charges. The Commissioner finds the intent of Interim Initial Decision to be clearly one that returns respondent to work. Kathy Windsor, supra

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

The Commissioner determines that Judge Thomas properly considered respondent's entire record in the following determination of a penalty tailored to meet the circumstances of this case:

1. Respondent must forfeit his tenure as a Supervisor while retaining tenure and seniority rights as a teaching staff member.

2. Respondent will forfeit 120 days' salary as per N.J.S.A. 18A:6-14.

3. Respondent will be placed at the proper step on the teachers' salary guide retroactive to January 1, 1980 or the nearest pay period.

4. Respondent will be assigned within the scope of his teaching certificate(s) by the Board for the balance of the 1979-80 school year.

5. On the basis of mutuality between Board and respondent, he may be reassigned as a department chairman without tenure except as earned.

It is so directed.

COMMISSIONER OF EDUCATION

March 3, 1980

IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL J. MC CORMICK,	:	
SCHOOL DISTRICT OF THE HUNTERDON	:	
CENTRAL REGIONAL HIGH SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT, HUNTERDON COUNTY.	:	DECISION
	:	

Decided by the Commissioner of Education, March 3, 1980

For the Petitioner-Appellee, Murray, Granello & Kenney
(James P. Granello, Esq., of Counsel)

For the Respondent-Appellant, Bernhard, Durst & Dilts
(Edmund R. Bernhard, Esq., of Counsel)

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

June 11, 1980

FRANCES EBEL,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF SOUTH AMBOY, MIDDLESEX COUNTY,

RESPONDENT.

INITIAL DECISION

AGENCY DKT. NO. EDU 154-5/77

APPEARANCES:

For Petitioner Frances Ebel, Stephen Klausner, Esq.

For Respondent South Amboy Board of Education, George T. Otlowski, Esq.

BEFORE THE HONORABLE DANIEL B. MC KEOWN, ALJ

EXHIBITS IN EVIDENCE:

C-1	Employing Board resolution - July 22, 1970
C-2	Appointing resolution - October 31, 1973
J-1	Resolution - Aboloshment of Full Time LDT-C - March 28, 1977
J-2	Application for employment
J-3	Job Description LDT-C, January 31, 1977
J-4	Job Description, School Social Worker
P-1	Letter dated May 19, 1977
P-2	1976-77 Child Study Team Survey
P-3	1975-76 Child Study Team Survey
P-5	Documents, excepting affidavits, attached to petitioner's Motion for Partial Summary Judgment
P-6	1973-74 Child Study Team Survey
P-7	1974-75 Child Study Team Survey
P-8	Minutes - Board meeting, December 19, 1977
P-9	Letter dated March 20, 1978
P-10	Memorandum, Pupil Projection, October 17, 1977
P-11	Board resolution dated April 24, 1978 in regard to Social Worker
P-12	Memorandum, March 3, 1977
P-13	Letter dated October 17, 1977
P-14	Letter reply, December 30, 1977

P-15 Letter, September 1, 1977
P-16 Letter, December 5, 1977
P-17 Letter, December 7, 1977, Superintendent to petitioner
P-18 Memorandum, January 5, 1978, petitioner to Superintendent
P-19 Letter, October 6, 1977
P-20 Parental Consent Form, September 15, 1977
P-21 Letter, September 30, 1977
P-22 Letter, March 14, 1978
P-23 Fund Application
P-23A Fund Application
R-1 Comparison for Job Duties

Petitioner is employed as a learning disability teacher consultant (LDTC) by the South Amboy Board of Education on less than a full time basis. Petitioner contends she is entitled to full time employment as an LDTC or, in the alternative, to full time employment as a teacher of reading. The Board denies the allegations and seeks dismissal of the complaint.

Hearings were conducted in the matter on May 22, June 27, 28, September 25, 1978 and February 13, 1979 subsequent to which the parties filed Briefs in support of their respective positions. The matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1, et seq.

The essential facts of the matter are these:

Petitioner was initially employed by the Board full time in the position of LDTC by resolution dated July 22, 1970. (C-1) Petitioner continued in that full time position each academic year thereafter through the completion of the 1976-77 academic year. The Board, on March 28, 1977 determined to abolish its full time position of LDTC and, in its stead, create a part time position of LDTC. (J-1) Petitioner, with objection, assumed the part time position of LDTC for the 1977-78 academic year and has continued in that part time position each academic year thereafter.

The Petitioner of Appeal followed.

Though petitioner recognizes the authority of the Board at N.J.S.A. 18A:28-9 to reduce full time positions to part time positions, she maintains the controverted action herein was motivated by bad faith and ill will towards her by the Superintendent. Petitioner asserts that even if the action of the Board is affirmed as proper herein, she is entitled to a full time position of remedial reading teacher by virtue of her greater seniority as remedial reading teacher than that of other persons the Board employs in that position. Finally, petitioner contends that in any case, her salary since 1977-78 even as a part time LDTC has been improperly established by the Board. The three major allegations shall be discussed seriatim with respect to the proofs presented.

I

The Propriety of the Board's Action in Abolishing the Full Time LDTC Position and Creating a Part Time Position

The Board took this controverted action at a meeting held March 28, 1977 through its adoption of the following resolution:

"WHEREAS, the Board of Education of the City of South Amboy has been ordered to increase its budget to include a contingency item in the amount of $347,000 for a remedy in litigation pending before the Commissioner of Education; and

"WHEREAS, the budget election is March 29, 1977; and

"WHEREAS, there has been a general and persistent increase in the cost of education with a budget limitation imposed by 'caps'; and

"WHEREAS, for reasons of educational efficiency and efficient operation of the public school; and

"WHEREAS, it is incumbent upon the Board of Education to effect certain economics; and

"WHEREAS, the Board of Education deems it necessary to have a reorganization; and

"WHEREAS, it is deemed necessary as hereinbefore stated to abolish the following full time positions in the school system:

(A) Learning Disability Teacher Consultant
(B) Director of Special Services;

"and

"WHEREAS, it is deemed necessary as hereinbefore stated to create the following part time positions in the school system:

(A) Learning Disability Teacher Consultant
(B) School Social Worker
(C) School Psychologist;

"NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City of South Amboy, that the full time positions of Learning Disability Teacher Consultant and Director of Special Services be and are hereby abolished effective June 30, 1977; and in consequency thereof, the contracts of employment of any and all persons presently holding the said positions that are abolished shall not be renewed at the end of their present term, more particularly, June 30, 1977; and the part time positions of Learning Disability Teacher Consultant

> and School Social Worker be and are hereby created effective and commencing July 1, 1977, and said part time positions shall not exceed two and a half days a week; and the part time position of School Psychologist be and is hereby created effective and commencing July 1, 1977; and said part time position shall not exceed one day a week."

It is noticed at this juncture that N.J.S.A. 18A:46-6 requires boards of education to provide for the identification of children between the ages of five and twenty who reside in their respective districts and who, because of a handicap, cannot be properly accommodated through regular school facilities. The statute also requires such identification to be performed according to uniform rules prescribed by the Commissioner with the approval of the State Board. Subsequent statutes in Chapter 46 of Title 18A address further responsibilities of boards of education to those persons who are so identified.

The Commissioner, with the approval of the State Board of Education, has prescribed rules and regulations in regard to the whole of N.J.S.A. 18A:46-1, et seq. Classes and Facilities for Handicapped Children, codified at N.J.A.C. 6:28-1, et seq.

N.J.A.C. 6:28-1.3 provides in relevant portions

> "(a) A basic child study team shall consist of a school psychologist, a learning disability teacher consultant and a school social worker. All members of the basic child study team shall be employees of the local board of education, have an identifiable apportioned time commitment to the local school district and shall be available during the hours pupils are in attendance.
>
> "(b) Each local public school district shall employ basic child study teams in numbers sufficient to ensure provision of required services pursuant to these regulations***."

Once persons are identified pursuant to N.J.S.A. 18A:46-6, a referral is then made of that person to the child study team which must perform a comprehensive evaluation of the person, (N.J.A.C. 6:28-1.6) classify the person according to the discerned handicap, (N.J.A.C. 6:28-1.7) and the child study team prepares an individualized education program to meet the needs of that person. (N.J.A.C. 6:28-1.8)

The former Superintendent of Schools testified that prior to the 1970-71 academic year, the Board did not have a basic child study team as was and is required. (Tr. V-5) He recommended to the Board, which agreed, to employ petitioner as a full time LDTC.

Subsequent to petitioner's employment as full time LDTC, the Board engaged a school social worker and school psychologist on a per case basis to meet its obligation to pupils in its district who could not be served through its regular school facilities. Consequently, between the 1970-71 academic year through the completion of the 1976-77 academic year the Board's basic child study team consisted of petitioner, as full time LDTC in its employ. A school social worker and school psychologist would be retained on a per case bases. (Tr. I-53) (Tr. II - 37)

Petitioner, as the only basic child study team member in the regular employ of the Board between 1970-71 and 1976-77, performed as coordinator of the team, conferred with teachers, parents, and administrators, reviewed records, administer tests to pupils who had been referred to the team for review and evaluation, and attended county meetings in regard to special education. (Tr. II - 35-39) Petitioner assumed these duties without benefit of a job description for the position of LDTC for such was not adopted by the Board until January 31, 1977. (J-3) (Tr. II-34)

In fact, petitioner requested the Superintendent to change her title to that of Director of Special Services in 1973 so that when she attended outside meetings she would feel more comfortable with that title than the title of LDTC. The Board, did in fact, by resolution of October 31, 1973 approve the title change for petitioner to that of Director of Special Services at no increase in salary. (C-2) The uncontroverted testimony of the Superintendent is that the title change was perfunctory, at best, and due solely to petitioner's request. (Tr. I - 99-101)

Petitioner testified that during the spring of 1976, the Superintendent attempted to assign her guidance responsibilities for which she was not certified. (Tr. III - 100) She testified she requested an opinion from the Department of Education whether she was eligible to "counsel emotionally disturbed children." (Tr. III - 100) Petitioner was thereafter advised she was not certificated for such duties. Accordingly, the Superintendent did not require her to continue in that area.

Petitioner argues in her Brief that because she requested an opinion from the Department of Education in regard to whether she could properly perform guidance duties, the Superintendent became annoyed and displayed vindictiveness in regard to the abolishment of her full time LDTC position. She argues that because of that disagreement with the Superintendent he, with ill will towards her, recommended that the Board reduce her employment to part time. Petitioner concludes that the Board followed the Superintendent's recommendation blindly and without a sound basis.

The Superintendent denied ever directing petitioner to perform counseling duties in the context of a "guidance counselor" for which, I notice, a separate certificate is required. N.J.A.C. 6:11-12.13. He explained that a program for emotionally disturbed children had started at the high school. Because petitioner was the LDTC and the only full time member of the child study team he did request her to visit the class regularly to assist the assigned teacher and to talk with the pupils or counsel them if they have problems. (Tr. IV-89)

The Superintendent testified with respect to his recommendation the position of LDTC be reduced to one-half time that in 1975-76 he viewed the child study team, as constituted, inadequate to serve the needs of the district. (Tr. I-69) He explained that sometime prior to March 1977 he requested and received assistance from the Department of Education's Division of School Programs in regard to the improvement of the team. The Superintendent testified he was concerned that the Board's team consisted solely of the full-time LDTC, with a school social worker and school psychologist on a per case basis. (Tr. I - 84)

The Superintendent testified the perceived inadequacy of the child study team was also discussed by him with other administrators, in conjunction with verbal conversations he had had with members of the Department of Education who had done the on-site visit. He concluded that by reducing the full time position of LDTC to half-time, the Board could then employ a half-time school social worker in addition to a school psychologist at least one day a week. The Superintendent reasoned the child study team would then be equivalent to having six days of service per week (two and one-half days for LDTC, two and one-half days for school social worker, one day for school psychologist) as opposed to five days of service per week. (One full time LDTC) (Tr. 84-89)

The Superintendent testified he explained the foregoing to the Board as the basis of his recommendation for it to adopt the resolution of March 28, 1977. (J-1, supra)

Petitioner, in an effort to establish the allegation that the controverted action was taken with malice and ill-will, produced a letter dated May 19, 1977 from the Department of Education to the Superintendent which, in pertinent part, states: (P-1)

> "The Region III Child Study Team and I would like to thank you and your staff for the opportunity of meeting with us on May 2, 1977, to discuss the role and function of your district's Child Study Team ***
>
> "The Regional Team and I were pleased to learn that your district will not be using Child Study Team services on a per case basis for the next school year. It would appear that an ideal ratio to meet your district's needs would be to have all three basic team members employed for three days per week the 1978-79 school year***."

Petitioner argues that because the letter (P-1) from the Department of Education was dated May 19, 1977 and because it alludes to a meeting held on May 2, 1977, the Superintendent could not have had the information therein for the March 1977 meeting.

I disagree. The letter from the Department of Education merely affirms and restates what the Superintendent's testimony establishes to be his concerns. He was concerned with respect to the extent of services being offered by the child study team which had consisted of one full time LDTC. He was attempting to expand services of the child study team. And, he made known to the Board his reasons for recommending the abolition of a full time LDTC and the creation of part time positions for LDTC, for a school social worker, and a one day per week school psychologist.

I have considered petitioner's testimony and the Superintendent's testimony with respect to the alleged request to petitioner to perform counseling duties. The Superintendent's explanation of that incident is completely credible to me. Petitioner was not asked to perform duties beyond the scope of her certificate. Rather, petitioner had to misconstrue what was being asked of her. Because she may have written to the Department of Education setting forth the asserted facts as she saw them and received a favorable response does not create a causal nexus as she asserts with respect to the Superintendent's motivation.

Finally, petitioner asserts that the full time position of LDTC was not really abolished; rather, she claims her duties of LDTC were transferred by the Board to other personnel.

A review of the adopted job description for the position of LDTC discloses seven areas of responsibilities. (J-3) Those areas are the following:

1. Program (divided into seven sub-areas)
2. Staff (divided into three sub-areas)
3. Students (divided into three sub-areas)
4. Educational Advisor (divided into two sub-areas)
5. Operations (divided into two sub-areas)
6. Public Relations, and
7. Perform other duties as requested by the Superintendent

In this context, a person who is employed as an LDTC must possess a certificate issued by the State Board of Examiners for such employment - which petitioner does. The requirements for such a certificate are set forth at N.J.A.C. 6:11-12.15.

Petitioner's testimony with respect to her assertion that her duties have been "diverted" away from her addresses purely ministerial kinds of functions. (Tr. II-70) Petitioner complains she no longer is the coordinator of the child study team efforts; (Tr. II-54) pupils are referred to the team without her knowledge; (Tr. II-57) she no longer signs letters going out to outside agencies; (Tr. II-61) and letters from outside agencies are no longer addressed to her. (Tr. II-69)

I FIND no testimony from petitioner that the substance of her position of LDTC has been assigned to anyone else. In my view, the major function of an LDTC is to be a member of the child study team, participate therein for the benefit of the child, and to provide her expertise of causes and cures of learning disabilities to better assist pupils. Petitioner admits that she still performs these functions though on a part time bases. (Tr. III-102)

In summary, I FIND

1. Petitioner was employed as a full time LDTC by the Board between 1970-71 and 1976-77.

2. During that same period of time, petitioner was the only regularly employed member of the Board's child study team.

3. The Superintendent became concerned with respect to the adequacy of services being afforded pupils by the child study team.

4. The Superintendent consulted with members of the Department of Education and his administrative staff.

5. The Superintendent concluded and so recommended to the Board to abolish the full time position of LDTC and create part time positions of LDTC, school social worker, and one day a week school psychologist.

6. The Board accepted the Superintendent's recommendation on March 28, 1977.

7. Petitioner has been employed part time as LDTC since 1977-78.

8. The Board had legitimate reasons for its action.

I CONCLUDE that the action controverted herein is not abitrary, capricious, unreasonable or, in any fashion, contrary to N.J.S.A. 18A:28-9 as alleged.

As noted earlier, petitioner acknowledges the authority of the Board to abolish or reduce positions pursuant to N.J.S.A. 18A:28-9. Petitioner complains, however, the Board acted improperly. No such finding is made herein.

This portion of the complaint is dismissed.

II

Is petitioner Entitled to a Full Time Remedial Reading Teacher Position by Virtue of Her Experience in the Board's Employ as a Remedial Reading Teacher.

Petitioner testified that when she was first interviewed for the position of LDTC in July 1970 by the former Superintendent, she was told that a requirement of that position was for the person to teach reading. (Tr. II-8) It is noticed that petitioner does possess certification as a reading specialist (N.J.A.C. 6:11-12.20) and, by virtue of her certification as an elementary teacher, may also teach reading, per se. (Tr. II-3)

The former superintendent testified that he did consider the teaching of remedial reading as a condition of employment for the successful applicant appointed to the then vacant position of LDTC. (Tr. V-6)

It is established that petitioner did teach tutorial remedial reading to those pupils who had been identified as being in need of such service but who were not eligible for the Board's Title One, Elementary-Secondary Education Act program. (Tr. V-13, 14) The pupils with whom petitioner worked were pupils who had been identified and classified by the child study team, including herself, as needing such assistance. Such assistance was provided in the form of tutorial remedial reading by petitioner in groups of one, two, three, five pupils. (Tr. III-94)

In my view, the nature of the reading instruction afforded pupils by petitioner was by virtue of her position of an LDTC. The fact that petitioner is certified as a reading specialist or as a reading teacher does not make her claim to have performed under those certificates valid for purposes of seniority.

Tutorial remedial reading duties performed by petitioner is part and parcel of her assignment as an LDTC - to assist pupils where she can.

Finally, petitioner was never employed by the Board as a reading specialist. (C-1, ante) Petitioner was employed solely as an LDTC and the duties she performed within the scope of that employment accrue for seniority purposes to that position.

I FIND, based on the foregoing, no merit to this allegation.

III

Has the Board Illegally Established Petitioner's Salary as a Part Time LDTC Since 1977-78 to the Present.

Petitioner testified that her last year of full-time employment, 1976-77, her salary was established by the Board for the ten month academic year according to the then existing teachers' salary guide. The amount was $19,345. It was stipulated at the conference conducted in the matter that petitioner, since 1977-78, has been employed on a 50 per cent basis of full time. It is also stipulated that her compensation is fifty dollars a day. (See Conference Statement, September 28, 1977)

I observe that an average academic year for teachers in terms of days to be worked hovers around 185 days. Simple mathematics tells one that 50 dollars per day times one-half 185 days to be worked, or 92½, equals $4,625. This figure is much less than one-half of petitioner's last yearly salary of $19,345 which is $9,672.50.

It is agreed that boards of education have the authority to abolish or reduce positions. However, a board may not, in my view, act arbitrary in such action. If a person is employed by a board on a full-time basis, acquires tenure and, accordingly, seniority, and is compensated on a 100 per cent basis, then such a person may not be subjected to a salary reduction except through the provisions of the statutes. (N.J.S.A. 18A:28-5)

If a person, with tenure and seniority, is paid a full salary for a full day's or full year's work by a Board and that Board abolishes the full time position, creates a part time or 50 per cent position, then that Board must compensate that person 50 per cent of the full time position.

I have no specific figures before me in regard to the amount petitioner was compensated since 1977-78. However, the Board is hereby directed to recalculate petitioner's salary since 1977-78 and compensate her, forthwith, the difference between what she received compared to the difference of 50 per cent of what her salary would be had she been employed on a full time basis.

To the extent the foregoing relief is granted, petitioner prevails. In all other respects, the Petition of Appeal IS DISMISSED.

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

EDU 154-5/77

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

January 11, 1980
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

FRANCES EBEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SOUTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of this matter including the initial decision rendered by Daniel B. McKeown, A.L.J.

The Commissioner observes that petitioner has filed lengthy written exceptions to the initial decision in which she takes issue with several conclusions and the determinations rendered in this matter.

In summary the Commissioner observes that petitioner's arguments in support of the exceptions taken pertain to the following:

1. The Board's failure to produce independent witnesses from the State Department of Education to corroborate the testimony of the Superintendent regarding the visitations and assistance he received during February and March 1977 in assessing the Board's child study team program.

2. The testimony of certain witnesses in support of petitioner's contention that the services of the child study team should have been expanded, rather than reduced, by the Board.

3. Petitioner, by virtue of the duties she performed in the Board's employ and her certification as a remedial reading teacher, also acquired tenure and seniority status as a full-time remedial reading teacher.

4. The record of the transcript of the hearing, as well as her employment contract, establishes that petitioner was employed as a full-time teaching staff member on an eleven, rather than a ten, month basis for the 1976-77 school year.

The Commissioner in reviewing the entire record of this matter has carefully weighed the legal arguments advanced by petitioner regarding the rules of evidence, the findings of fact and the application of prior school law and decisions of the court upon which said exceptions to the initial decision are taken.

The Commissioner finds and determines that petitioner has failed to establish that the Board's action of March 28, 1977 in reorganizing the child study team was arbitrary, capricious or contrary to statutory prescription.

It is further found and determined that petitioner's claim that she was employed as a full-time teaching staff member on an eleven month basis during the 1976-77 school year or that she enjoyed a tenure and seniority status as a full-time teacher of remedial reading is without merit. The Commissioner so holds.

Accordingly, the Commissioner concurs with the findings and determination set forth in the initial decision in this matter and adopts them as his own. The Board is directed to compensate petitioner, forthwith, the difference in salary between that amount which she has received since 1977-78 and that amount which is equal to 50 percent of her salary had she been employed full-time.

The Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

March 6, 1980

FRANCES EBEL,	:	
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF SOUTH AMBOY, MIDDLESEX COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLEE.	:	
	:	

Decided by the Commissioner of Education, March 6, 1980

For the Petitioner-Appellant, Stephen E. Klausner, Esq.

For the Respondent-Appellee, George J. Otlowski, Jr., Esq.

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

December 3, 1980

EMILY KUBAS, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY, : DECISION

RESPONDENT. :

For the Petitioner, Rothbard, Harris and Oxfeld (Barry Aisenstock, Esq., of Counsel)

For the Respondent, Magner, Abraham, Orlando, Kahn & Pisansky, (Leo Kahn, Esq., of Counsel)

Petitioner, a teacher of cosmetology, in the employ of the Board of Education of the City of Linden, hereinafter "Board," alleges that her employment was improperly terminated by the Board in violation of her tenure status and property rights. The Board denies that petitioner has acquired a tenured status and contends its action in terminating her employment was a legal and proper exercise of its discretionary authority.

A hearing was held in the office of the Union County Superintendent of Schools, Westfield, on January 20 and February 27, 1978 by a hearing examiner appointed by the Commissioner of Education. At the requests of counsel for each party, time extensions for the filing of Briefs were granted to July 24, 1978. The report of the hearing examiner follows:

The facts of the matter are these. Petitioner, a teacher of cosmetology with an emergency teaching certificate, was employed by the Board in September 1973. (B-1) She taught in the Linden Vocational-Technical High School until March 30, 1977 when the Board terminated her employment by invoking the sixty day notice clause of her contract. (J-2) She was remunerated at her proper salary level during the sixty days without the requirement of teaching duty. Petitioner requested, and was accorded, an appearance with counsel before the Board on May 18, 1977 and on May 23, 1977 the Board affirmed its decision to terminate her employment. (J-3-5) At the time of her termination petitioner held an emergency certificate to teach beauty culture and received standard certification in June 1977. (Tr. I-146)

Petitioner contends that whereas her property rights were violated she was entitled to a full adversarial hearing before the Board, rather than the "Donaldson type" hearing accorded her as in Donaldson v. Board of Education of the City of North Wildwood, 65 N.J. 236 (1974). (Petitioner's Brief, at pp. 2-3) A letter to counsel for petitioner was presented in evidence which states in its entirety:

"On behalf of the Linden Board of Education, I am replying to your letter of April 6, 1977, received in our office on April 11, 1977 concerning your client Emily Kubas.

"Although it is not clear in our minds that your client is entitled to the protections contemplated by the Donaldson decision, as a matter of fair elemental due process, we feel it proper to grant your request and furnish you with this statement of reasons for the actions that were taken by the Board in order to protect the students and the Linden school system from what was a rapidly deteriorating situation.

"The evaluations of Mrs. Kubas indicate a series of difficulties which were presented to the Board and the Board acted as a result thereof. These include the following:

I. Did not meet the needs of students

   A. Feeling of resentment by students

   B. Usage of improper language toward students

      1. insulting students (dumbbells, incorrigible)

      2. ridiculing students in front of peers

   C. Lack of knowledge re individual differences in students

   D. Poor voice inflection (harsh, irritating)

   E. Refusing to answer student's questions

   F. Inefficient and ineffectual teaching methods

      1. lack of classroom control

      2. excessive absenteeism by students especially on Friday (patron day)

      3. students boycotting class

II. Not meeting needs of the community

A. Parents objecting to abuses (verbal) towards their children

B. Feeling of parents that students are not getting thorough and efficient education

C. Telephoning parents after school hours or threatening to visit same regarding classroom conduct of students

D. Parental requests for children to be removed from the program in view of Mrs. Kubas's attitude towards them.***" (J-4)

When questioned concerning her knowledge of the matters to which the letter (J-4) refers, petitioner denied any knowledge of the majority of its contents. (Tr. I-17-27) She admitted to calling a pupil, L.R., a "dumbbell" (Tr. I-18) and refusing to answer pupils' questions when they disruptively sought individual attention. (Tr. I-20) Petitioner said she was aware of a high rate of absenteeism which she reported to the administration (Tr. I-21-24) and that she was aware that some pupils from her class had engaged in a sit-down (Tr. I-24-25) Petitioner testified that she attempted to convince the pupils to return to class and did not understand their failure to do so. She testified that she reported the matter to the administration. (Tr. I-53-55)

A pupil, C.P., called as a petitioner's witness testified that she knew that on occasion pupils R.K. and J.P. disrupted the class by laughing and talking. (Tr. I-89) C.P. also said she remembered petitioner calling the pupils in the class "stupid." (Tr. I-90) She said petitioner was not liked by members of the class. (Tr. I-96)

Another pupil, M.F., testified that the teacher and the pupils "***didn't get along." She said one of the girls, J.P., caused a problem in class by being "***very rowdy." (Tr. I-102) M.F. said petitioner referred to members of the class as "stupid." (Tr. I-104)

The Board called four pupils as witnesses who were sequestered by the hearing examiner. T.D., eighteen years of age, testified that petitioner embarrassed pupils in front of the entire class by laughing at them and calling them "stupid" and that as a result a number of pupils dropped the course. (Tr. I-110-112) She said that petitioner initially had some

control but eventually "***there was no control at all." (Tr. I-112) T.D. testified that petitioner picked on pupils and on several occasions called her "stupid." (Tr. I-116)

The second pupil witness, F.D., called by the Board testified that petitioner on several occasions referred to members of the class as "dumb" and "stupid." (Tr. I-121-123) She said that once when petitioner called her "dumb" she argued with her and received a zero for the day. (Tr. I-124)

The third pupil witness, E.G., testified she was called "stupid" by petitioner and that her initial liking for the class became one of indifference as a result of that and the general atmosphere of the class. (Tr. I-127-128)

L.R., the final pupil witness for the Board, testified that petitioner referred to her hair as a mess in front of the other pupils. (Tr. I-133) L.R. testified that she became very nervous because of her class with petitioner and often cried at home. (Tr. I-137)

The director of the school testified that he had the responsibility of evaluating petitioner's classroom performance. (Tr. II-6) He testified that he visited the cosmetology shop in November 1976 because numerous pupils had complained to him of their treatment in petitioner's class. Additionally he testified that on November 14, 1976 he was called to the classroom by petitioner because of a problem with the pupils. He said he found all of the girls, except one or two, in the lavatory rather than the classroom. He said that upon their return to the classroom the girls expressed resentment because of the teacher's treatment of them. (Tr. II-7-9) He said he conferred with petitioner about the entire situation after school that day. The director testified that on one or two occasions he heard petitioner refer to pupils as "dumbbells," "incorrigibles" and "stupid." (Tr. II-13) The director testified that he received several requests from parents to remove their children from petitioner's class and he found a decrease in the enrollment for that class. (Tr. II-20-21) He said he discussed with petitioner the need for her improvement for a recommendation to the Board from him for tenure for her. (Tr. II-21) The director testified that petitioner's attitude and classroom attire changed for the worse after November 1976 and that he counseled her on many occasions. (Tr. II-28) He said he found an excessive number of failures given by petitioner in the third marking period. He described excessive failures as over fifty percent. (Tr. II-34) The director said that the classroom grading situation improved considerably with a new teacher in the last marking period. (Tr. II-36) He said he also found a change for the good in pupil attitudes, as well as greatly improved attendance. (Tr. II-50)

Petitioner argues that she has been deprived of a property right citing Veronica Smith and Sayreville Education Association v. Board of Education of the Borough of Sayreville, 1974 S.L.D. 1095, aff'd State Board of Education 1160, aff'd Docket No. A-2654-74 New Jersey Superior Court, Appellate Division, February 27, 1976 (1976 S.L.D. 1170) and Joann K'Burg v. Board of Education of the Township of Lower Alloways Creek, 1973 S.L.D. 636. Petitioner relies further on Eva Cardona v. George Claflen et al., U.S.D.C. (D.N.J.) No. 75-787, September 8, 1976. (Petitioner's Brief, at pp. 2-3)

The Board denies petitioner's claims and contends that it exercised its discretionary authority properly by acting to protect the interests of the pupils and the entire program of cosmetology. (Board's Brief, at p. 5) The Board asserts that petitioner had no claim to tenure rights and that "***as a non-tenured employee petitioner had no property rights to continued employment." Patricia Peters v. Board of Education of the Township of North Brunswick, 1977 S.L.D. _____ (decided February 8, 1977) (Board's Brief, at p. 8) The Board denies petitioner's rights to an adversarial hearing citing George Ruch v. Board of Education of Greater Egg Harbor Regional District, 1968 S.L.D. 7 dis. State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, March 24, 1969 (1969 S.L.D. 202). (Board's Brief, at p. 9)

The hearing examiner has assessed the facts and arguments and sets forth the following finding. Petitioner's employment by the Board embraced a total period of three years, seven months of service, a period more than sufficient to have earned her an entitlement to a tenure status as a teaching staff member if all other requirements of the statutes had been met. N.J.S.A. 18A:28-5 However, the statutory mandate in this regard also requires that the teacher who claims such entitlement must possess an "appropriate" teaching certificate which the Commissioner has defined as either a "provisional" or "standard" certificate issued by the State Board of Examiners. (See Robert Anson et al. v. Board of Education of the City of Bridgeton, 1972 S.L.D. 638.) The statute of reference, N.J.S.A. 18A:28-5, provides:

> "The services of all teaching staff members including all teachers, principals, assistant principals, vice principals *** 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***."
> (Emphasis supplied.)

Petitioner, at the time of her termination by the Board, held an emergency certificate and did not satisfy the requisite requirement to hold an appropriate certificate to have achieved tenure. The hearing examiner recommends that the Commissioner find that petitioner was a nontenured teaching staff member at the time of this termination of employment and, accordingly, was not entitled to a full adversarial hearing before the Board as claimed.

Further the hearing examiner finds that the Board acted properly in exercising its discretionary authority to invoke the sixty day release clause in petitioner's contract. The record is replete with sworn testimony by the director, pupils called by the Board as witnesses, pupils called by petitioner as witnesses and petitioner's own admission of her use of the terms "stupid" or "dumbbell" as frequent nomenclature when addressing certain pupils in her class and the class as a whole. Each of the pupils testified that she remembered petitioner had called her or her classmates "stupid" and/or "dumb." The hearing examiner recommends that the Commissioner find such terminology totally inappropriate, unnecessary and insulting to the pupils under the supervision of petitioner or any teacher. The hearing examiner calls to the attention of the Commissioner the impropriety of petitioner's action in using an academic grade as a disciplinary weapon to punish pupils. The Commissioner addressed this problem in Gustave M. Wermuth et al. v. Julius C. Bernstein et al., 1965 S.L.D. 121 as follows:

> "***The use of marks and grades as deterrents or as punishment is likewise usually ineffective in producing the desired results and is educationally not defensible.

> Whatever system of marks and grades a school may devise will have serious inherent limitations at best, and it must not be further handicapped by attempting to serve disciplinary purposes also.***
>
> "This enunciation of a philosophy with respect to suspension and marks should not be interpreted as an erosion of either the authority of the school staff or the desirability of maintaining good order***. Unacceptable behavior must be restrained and discouraged and when necessary appropriate deterrents and punishments must be employed for purposes of correction and to insure conformity with desirable standards of conduct. Such results are attained, to the Commissioner's knowledge, by the great majority of school staffs through use of a variety of techniques adapted to the particular pupil and problem without having to resort to frequent suspensions and grade penalties.***"
>
> (at 128-129)

Further, the hearing examiner recommends that the Commissioner find that the Board satisfied the due process to which petitioner was entitled as a nontenure teacher by according her an appearance before the Board and subsequently releasing her with sixty days' pay without requiring the recompense of service. See Gladys M. Canfield v. Board of Education of Borough of Pine Hill, 1966 S.L.D. 152, aff'd State Board of Education 1967 S.L.D. 345, aff'd 97 N.J. Super. 483 (App. Div. 1967), rev'd 51 N.J. 400 (1968).

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in this matter, including the Hearing Examiner Report, the exceptions and objections pertaining thereto filed by petitioner and respondent's reply to said exceptions.

Essentially two issues are projected by the within controversy: whether petitioner had attained tenure at the time her employment was terminated by the Board and, if she had not attained tenure, what, if any, procedural due process rights attended her removal. Although petitioner had been employed in the district as a teacher of cosmetology for a period sufficient to have qualified her for tenure had all the statutory conditions for tenure been met, she held only an emergency teaching certificate in March 1977 when the Board terminated her employment. Emergency certification is effective for only one year. It is designed to enable a board of education to fill teaching vacancies when there is a shortage of qualified instructors. N.J.A.C. 6:11-4.4(b) But holders of emergency certificates have not fully satisfied the educational prerequisites for standard certification, nor are they entitled to automatic renewal of the privilege to teach accorded them by the emergency certification process. Because of the uncertainty surrounding continued eligibility to teach, the protection of the tenure laws was not intended to extend to holders of substandard certificates and has not been so extended. Delli Santi v. Board of Education of City of Newark, 1977 S.L.D. 1213, 1217, 1219, aff'd State Board of Education June 7, 1978; Cf. K'Burg v. Board of Education of Township of Lower Alloways Creek, 1973 S.L.D. 636, 640

This conclusion is compelled by canons of statutory construction as well. While possession of a "valid and effective" emergency certificate qualifies a teacher for employment in a district as a teaching staff member under the school laws, N.J.S.A. 18A:1-1, 26-2; N.J.A.C. 6:11-3.4, the statutory provisions governing tenure use different language. N.J.S.A. 18A:28-4 specifically requires that a candidate for tenure hold an "appropriate" certificate for the position in which he claims tenure status. And N.J.S.A. 18A:28-5 expressly excepts from the class of teachers otherwise eligible for tenure "those who are not the holders of proper certificates in full force and effect..." (Emphasis added) To construe the tenure provisions as authorizing tenure for holders of substandard, as well as standard, certificates renders meaningless and superfluous the exception clause contained in N.J.S.A. 18A:28-5, since no one who is eligible for employment in the first instance could be ineligible for tenure by virtue of its limiting language. To avoid this result, as we must under well established rules of statutory analysis (Gabin v. Skyline Cabana Club, 54 N.J. 550, 555 (1969); Abbotts Dairies, Inc. v. Armstrong, 14 N.J. 319, 328 (1954); 2A Sands, Sutherland Statutory Construction §46.06 (3rd ed. Rev. 1973), the exception clause can have no meaning other

than that here attributed to it -- that substandard certification does not constitute "proper" certification within the meaning of the Tenure Laws.

Accordingly, the hearing examiner properly concluded that, at the time of her termination, petitioner had not acquired tenure status and so was not entitled to the protection of the Tenure Hearing Law, N.J.S.A. 18A:6-10 et seq.

With respect to the second issue identified herein, petitioner argues that because her termination was effected by invoking the 60 day notice provision in her employment contract prior to the conclusion of the 1976-77 school year (by which time she had secured standard certification), her removal deprived her of an anticipated property right that would otherwise have accrued. This argument is not a novel one. It was advanced and rejected in Arzberger v. Board of Education of Township of Neptune, 1976 S.L.D. 835, aff'd State Board 1977 S.L.D. 1271, rev'd o.g. 1977 S.L.D. 1271 Superior Court, Appellate Division. Petitioner in that case, relying on Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), had argued that while not entitled to tenure, she enjoyed a sufficient property right in continued employment so that she could not be terminated without a prior adversarial hearing. Rejecting this argument, the Appellate Division said:

> "***[The nontenured employee] did not have a property interest in continued employment in light of the contractual right of the employer to terminate on 30 days' notice. Such a consensual reservation removes this case from those wherein the employee's right is protected as a property interest within the ambit of the opinions of the United States Supreme Court... In the absence of a constitutionally protected interest, such as freedom of speech, or other discriminatory practice, the Board was free to exercise the right to terminate even without cause***" (1977 S.L.D. at 1273)

Arzberger, bookkeeper, was held to enjoy a sufficient liberty interest in seeking future employment in a position governed by the Civil Service regulations to entitle her to a post-termination hearing, solely for the purpose of neutralizing any potential damage to her reputation occasioned by the specific reasons for termination which accompanied the board's notice of termination. Williams v. Civil Service Commission, 66 N.J. 152 (1974) However the Court made clear that:

> "***[S]uch hearing cannot lead to an order for reinstatement or back pay, since, as already noted, appellant is not entitled to such relief in the absence of a protected property interest.***" (Id. at 1273)

Even if the same potential disability for clerical employees attended the future employment opportunities of teachers, the remedy afforded in Arzberger is not indicated in this case where the reasons for termination were furnished neither at the Board's initiative nor contemporaneously with the notice of termination, but were only provided later at petitioner's request and an opportunity to refute them was afforded. While the Commissioner commends the procedure followed by the Board in this case in the interest of fairness, he recognizes that by virtue thereof petitioner was accorded a measure of due process beyond that to which she was legally entitled. Accordingly, the Commissioner adopts the recommendations of the hearing examiner. The relief demanded in the Petition of Appeal filed in this matter is denied.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN RE:	)	INITIAL DECISION
PATRICIA LYNCH	)	OAL DKT. NO. EDU 3059-79
V.	)	AGENCY DKT. NO. 236-6/79A
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY	)	

APPEARANCES:

Stephen B. Klausner, Esq., for Petitioner, Patricia Lynch

William G. Snedeker, Esq., for Respondent, Board of Education of the Borough of Highland Park, Middlesex County

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.

Subsequent to a prehearing conference which was held on October 23, 1979 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey, the petitioner filed a motion for summary decision pursuant to N.J.A.C. 6:24-1.16, and Proposed Uniform Administrative Rules of Practice 19:65-13.1 et seq. and the guidelines embodied in New Jersey Court Rules 4:46-1 et seq. Counsel for petitioner submitted to this tribunal a brief in support of his motion for summary decision and counsel for respondent submitted a brief in opposition to petitioner's motion for summary decision. This tribunal has carefully reviewed and studied the pleadings, prehearing order, and briefs filed herein and feels that this matter is ripe for summary decision.

According to the prehearing order of October 23, 1979, the issues in this matter were identified as follows:

1. Was the transfer of petitioner from the position of Learning Disabilities Teacher Consultant (L.D.T.C.) to the position of Reading Teacher arbitrary, capricious and/or unreasonable and in violation of N.J.S.A. 18A:28-11, N.J.S.A. 18A:28-13 and N.J.A.C. 6:3-1.10?

2. If so, what relief is available to petitioner?

Pursuant to the prehearing order of October 23, 1979, the parties have entered into the following stipulations:

1. Petitioner is tenured with respondent as a Learning Disabilities Teacher Consultant (L.D.T.C.).

2. Petitioner was first hired by respondent in 1966. (It should be noted that the parties agree in their briefs that petitioner was hired effective September 1, 1966.).

3. In March, 1967 the State Department of Education changed the title of Remedial Instructor to Learning Disabilities Specialist. (L.D.S.).

4. On May 25, 1967 the Middlesex County Supervisor of Learning Disabilities Specialists approved Patricia Lyndon,also known as Patricia Lynch, as a Learning Disabilities Specialist.

5. On or about March, 1971 the State Department of Education changed the title of L.D.S. to a newly certified category, Learning Disabilities Teacher Consultant (L.D.T.C.).

6. On April 9, 1979 the respondent, Board of Education, by resolution, reduced the number of L.D.T.C.'s from four to three.

7. Petitioner was relieved of her position as an L.D.T.C. and transferred to a classroom reading teacher position for the 1979/80 school year.

It is also uncontroverted, as appears from both petitioner's and respondent's briefs,that at the time the respondent abolished one of the L.D.T.C. positions,the petitioner, Patricia Lynch, had more seniority than one Jennie Feigenbaum, Patricia Lynch having been hired on September 1, 1966 and Jennie Feigenbaum having been hired on September 1, 1967. It is also not disputed that when the respondent abolished the aforementioned position, Jennie Feigenbaum was kept on as an L.D.T.C. and petitioner, Patricia Lynch, was transferred from that position to the position of reading teacher at its middle school.

Thus, petitioner asserts that as a result of the abolishment of one of the L.D.T.C. positions, because she had more seniority than Jennie Feigenbaum, she had an entitlement to one of the remaining positions and should not have been transferred to the position of reading teacher. Respondent, on the other hand, contends that the concept of seniority is inapplicable in the instant case since seniority would only give petitioner a priority right to reemployment once there was a reduction in force; but, in the instant case, petitioner was not affected by a reduction in force, but was merely involuntarily transferred to another position which was within the discretion of the Board and which was a management prerogative. This Court cannot agree with respondent's position.

N.J.S.A.18A:28-9 states:

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

Additionally, N.J.S.A.18A:28-10 must be considered in pari materia with N.J.S.A. 18A:28-9:

> "Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the Commissioner with the approval of the State Board." (Emphasis added).

Finally, N.J.A.C. 6:3-1.10(h) provides that:

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

It is abundantly clear, in the instant case, that the respondent abolished one of four L.D.T.C. positions. With regard to the remaining three L.D.T.C. positions, petitioner, Patricia Lynch, because of her seniority, had an entitlement to one of them over Jennie Feigenbaum. Respondent may not circumvent petitioner's seniority rights with regard to the L.D.T.C. position by involuntarily transferring her to a reading teacher position. This Court

does not dispute a Board's right to transfer a teacher pursuant to N.J.S.A. 18A:25-1 and recognizes that a teacher's seniority would not give one either a vested right to one's assignment, nor would it be a bar to one's re-assignment. See Frances Bigart v. Board of Education of the Borough of Paramus, Bergen County, 1979 S.L.D. 28. The aforementioned law is inapplicable to the instant case because of the abolishment of a position and the retention of a teacher therein who had less seniority than petitioner.

As stated by the Commissioner in Mary Ann Popovich v. Board of Education of the Borough of Wharton, Morris County, 1975 S.L.D. 737, 745:

> "...In fact, she has greater seniority than the Board's teacher of instrumental music who likewise is certificated as a teacher of music. Each of these teachers is certified to teach both instrumental and choral music courses. Petitioner, however, has greater seniority and is entitled to full-time employment with the board as long as a full-time position is maintained in her category and as long as she performs acceptably those duties to which she is assigned."

It is CONCLUDED, therefore, that the respondent, Board's, abolishment of one of four L.D.T.C. positions and its failure to keep petitioner, Patricia Lynch, in one of the remaining three positions, which she had an entitlement to, based on her seniority over Jennie Feigenbaum, was an arbitrary, unreasonable and/or capricious act. Additionally, it is CONCLUDED that the Board's transfer of petitioner to the position of reading teacher, under the existing circumstances, was improper, arbitrary, unreasonable, and/or capricious and created the anomolous result of retaining a less senior teacher for one of the remaining L.D.T.C. positions in violation of statute.

Accordingly, it is ORDERED that the Board restore the petitioner, Patricia Lynch, to the position of her entitlement as a Learning Disability Teacher Consultant. It is further ORDERED that the Board provide petitioner with salary and other emoluments equal to the difference, if any, between that which she received as a reading teacher and that which she would have received as a Learning Disability Teacher Consultant during the period of employment controverted herein.

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

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

January 10, 1980
DATE

ROBERT P. GLICKMAN, A.L.J.

PATRICIA LYNCH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

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

Accordingly, the Board is directed to reinstate petitioner as a Learning Disabilities Teacher-Consultant with accompanying salary and such other emoluments equal to the difference, if any, between that which she has received as a reading teacher and that which she would have received as a Learning Disabilities Teacher-Consultant during the period of employment controverted herein.

COMMISSIONER OF EDUCATION

"T.K.," a minor by his parent,	)	
	)	
PETITIONER,	)	
	)	INITIAL DECISION
V.	)	OAL DKT. NO. EDU 3508-79
	)	AGENCY DKT. NO. 182-5/79A-
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	)	
	)	
RESPONDENT.	)	

APPEARANCES:

For Petitioner, on behalf of his son, T.K.: Camden Regional Legal Services, Inc. (Joyce D. Miller, Attorney at Law, appearing)

For Respondent Board of Education, et al.: Wodlinger & Kell, Esqs. (Marvin M. Wodlinger, Esq., appearing)

BEFORE THE HONORABLE DANIEL B. MC KEOWN, ALJ

Documents in Evidence:

C-1	Notice of Charges and of Hearing
C-2	Board's Finding of Fact, Conclusions of Law and Determination
C-2A	Pages 15 through 17 of transcript of hearing afforded March 5, 1979
C-3	Child Study Report
C-4	Transcript of hearing afforded January 23, 1979
C-5	Transcript of hearing, excepting pages 15 through 17, afforded March 5, 1979
C-6	T.K.'s affidavit

Petitioner seeks to have set aside as illegal and improper an action of the Board of Education of the City of Millville (Board) taken on March 5, 1979 by which his son T.K. was permanently expelled from attendance at its regular day-school program. The Board denies its controverted action was in any fashion illegal or improper and, to the contrary, contends its determination to expel T.K. from attendance at its regular day-school program was taken consistent with statutory and constitutional requirements.

The matter was originally filed with the Commissioner of Education on May 3, 1979 accompanied by a Motion for Interim Relief. The Commissioner, by way of a written opinion dated July 31, 1979, denied petitioner's Motion for Interim Relief on the grounds that material issues of fact were raised by petitioner which precluded such relief being granted. (See T.K., a minor v. Board of Education of the City of Millville, et al., 1979 S.L.D. _____ (decided on Motion, July 31, 1979) at p. 2)) Thereafter, the matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted in the matter at which it was agreed that the issues raised may be decided upon the already established record and letter memoranda of the parties. No material issue of fact exists. Prior to a recitation of the relevant issues to be adjudicated, a brief discussion of the facts of the matter agreed to and established in the record by the pleadings as true, is presented. This matter was readied for disposition on November 10, 1979.

During the 1978-79 academic year, T.K., a sixteen year-old male pupil, was enrolled in the eleventh grade of Millville High School. Prior to the beginning of school on October 26, 1978 groups of white pupils congregated on or about school property in a manner perceived by school authorities as threatening to the safety and well-being of a certain pupil population whose arrival was anticipated. (See C-4, at pp. 75 to 95) It may reasonably be inferred from the testimony given by Chambers at T.K.'s expulsion hearing before the Board, and who is employed by the Board as a social studies teacher and who was present during the morning of October 26, 1978, that the perceived threats were directed at the pending arrival of black pupils. (C-4, at p. 78)

T.K. was suspended from school that day. On or about November 1, 1978 T.K. was advised that his suspension was referred to the Board for determination and that he, T.K., may not return to school until it acts.

T.K.'s counsel on November 14, 1978, received from the Board Secretary a written Notice of Charges and Hearing into those charges against T.K. scheduled for November 27, 1978. That document was also served upon T.K.

It is observed that the Notice advises, inter alia, that a hearing was to be afforded T.K. by the Board on November 27, 1978 in regard to certain allegations against him filed by school administrators with the recommendation he be permanently expelled. T.K. was advised that if any or all charges were proven true he could be expelled from school. He was further advised of the witnesses who would appear against him; that he may be represented by counsel; that he may testify in his own defense; that he may cross-examine witnesses who testify against him; that he may call witnesses in his defense; and that he may subpoena witnesses and the production of books and documents for, ostensibly, refutation of the charges. (C-1A)

T.K. was also advised that the following alleged incidents formed the specific charges against him: (C-1B)

DATE OF INCIDENTS	CHARGE
November 9, 1977	Threw an object in class which struck another pupil
December 14, 1977	Assault upon another pupil, J.C.
April 27, 1978	Steal articles from the auto shop
May 11, 1978	Assault another pupil, M.K.
May 11, 1978	Openly defy the vice-principal
September 28, 1977	Assault another pupil, D.K. (a cousin of M.K. (C-4, at p. 68))
October 25, 1978	Incite pupils to be truant, resulting in truancy by other pupils, refuse to return to school when ordered, used profanity.

It is pleaded and admitted that T.K., on November 20, 1978 requested copies of statements which may have been prepared by witnesses who were to appear against him at the hearing.

T.K. pleads that the scheduled hearing for November 27, 1978 was postponed because the requested statements were not received. However, in his filed Brief, T.K. also admits he was out-of-state at the time of the scheduled hearing. (Petitioner's Brief, unnumbered, first and second pages) In my view, if T.K. were not present at his own expulsion hearing becuase of his own presumably voluntary absence, any postponement of the scheduled hearing may not innure to the detriment of the Board.

In any event, another hearing date was not set for whatever reason by December 14, 1978. On that date, T.K. moved before New Jersey Superior Court, Chancery Division, for a restraint against his continued suspension pending the outcome of his expulsion hearing to be afforded him by the Board. It is agreed that T.K. was reinstated to regular school attendance pending his expulsion hearing, though it is not clear in the record before me whether such reinstatement was by Order of the Court or by Consent between the parties.

T.K.'s expulsion hearing was conducted on January 23, 1979. The transcript (C-4) of that hearing, prepared by a certified shorthand stenographic reporter, reveals that six members of the seven member Board were in attendance. The transcript also reveals that the Board engaged an outside attorney to present the evidence in support of the charges, while its regular Board counsel acted as an advisory hearing examiner to the Board in regard to objections raised by counsel to T.K. (See, e.g. C-4, 3-28) T.K. was present as was his father.

The Board heard testimony from a teacher, Carol Nago, with respect to the charge that on November 9, 1977 T.K. threw an object in class which struck another pupil. The Board also heard testimony of the assistant principal to whom T.K. was sent by Nago following the incident. T.K. testified in refutation to this charge. (C-4, at pp. 28-42)

The Board heard testimony with respect to the charge that T.K. assaulted a pupil, J.C., on December 14, 1977 from J.C. and L.M., another pupil who witnessed the incident. (C-4, at pp. 42-47) T.K. did not testify with respect to this charge.

The Board heard testimony with respect to the charge that T.K. had stolen articles from its auto shop from the school principal. He had observed T.K. place a bag which contained auto testers, small wrenches, kits of tools, and screwdrivers in a trash container. (C-4, at pp. 48-50) T.K. did not testify with respect to this charge.

The Board heard testimony with respect to the charges that on May 11, 1978 T.K. assaulted M.K. and openly defied the instruction of the vice-principal from M.K. and from the vice principal. (C-4, at pp. 51-59) T.K. did testify in defense of this charge. (C-4, at pp. 60-63)

The Board heard testimony with respect to the charge that T.K. assaulted D.K. on September 28, 1977 from a pupil who witnessed the incident and from T.K. who testified in defense of the charge. (C-4, at pp. 63-67; 73-75) It is noticed that D.K., upon whom the assault was to have been committed, is no longer a pupil in the Board's schools and could not be located to testify at the hearing. (C-4, at pp. 67-72)

Finally, the Board heard testimony with respect to the charge that T.K., on October 25, 1978, did incite pupils to be truant, refused to return to school when ordered, and used profanity from a school security aide, a teacher, a Millville City police sergeant, a pupil, and from T.K. (C-4, pp. 75-131)

The Board, at the conclusion of the testimony with respect to the charges, considered and listened to testimony in regard to a child study report (C-3) which had been prepared by its child study team upon T.K. (C-4, at pp. 137-168) A review of that report establishes that T.K. had been classified as socially maladjusted on March 11, 1976 and declassified on April 25, 1977 by the child study team. The child study team reevaluated T.K. following the October 25, 1978 incident, ante, which included reports by a psychiatrist, the Board's social worker, the school psychologist, and the Board's learning disability teacher consultant.

The conclusion and recommendation of the child study team in its report dated January 3, 1979 (C-3) is that T.K. be classified as socially maladjusted and that he be placed in an alternative education program.

Subsequent to the hearing on January 23, 1979 the Board had scheduled February 19, 1979 to reconvene and determine whether to continue T.K.'s suspension or to expel him from further school attendance. Because of inclement weather that date had to be cancelled. The

Board did reconvene on March 5, 1979 at which time it allowed T.K. to produce the testimony of two more witnesses in defense of the charges. (C-5, at pp. 5 - 8) The Board had, in the meantime, signed a fourteen page finding of fact, conclusions of law, and determination based on the evidence it heard at the hearing held on January 23, 1979. (C-2)

After listening to the testimony of the two additional witnesses on March 5, 1979, the Board amended its written findings (C-2) with respect to the charge of assault by T.K. upon M.K. on May 11, 1978. The Board determined that it was not an assault; rather, it determined the two boys engaged in "***an ordinary fight***." (C-2A, at p. 16)

In all other respects, the Board set forth specific findings on each charge based on the testimony it heard. The Board found the charges to be true and determined that

> "T.K. be expelled as a regular student at Millville Senior High School.
>
> "The child study team and the administration shall meet with T.K. and/or his parents, if they so desire, and shall attempt to find and place T.K. into an appropriate alternative educational program.
>
> "In the event T.K. successfully completes an appropriate alternative educational program, he is to be given a regular diploma from the Millville Senior High School and he may attend commencement, if he so wishes." (C-2, at pp. 13, 14)

The Board did afford T.K. the opportunity to enroll in its evening program. T.K. attests in his affidavit filed in support of his Motion for Interim Relief which was denied, supra, that

> "***
>
> "6. The Millville Board of Education voted that I could attend evening sessions with pregnant girls and other former dropouts.
>
> "7. I reported to the evening session. I learned that I would not be able to receive any shop courses. Only basic subjects such as math and English are taught in the evening session***." (C-6)

It is unrefuted that T.K. reported to the evening session for one day. He has not returned. It is also unrefuted that T.K. has failed to present himself to the Board's child study team since March 5, 1979 to seek an alternative education program. (See Board's letter memorandum, page 4)

This concludes a recitation of the essential facts of the matter upon which the following issues emerge:

A. Did the Board act improperly (which allegedly resulted in prejudicial bias to petitioner) in regard to its determination to expel him /T.K./ from its schools by relying upon advice of its duly appointed counsel with respect to the preparation of the charges against petitioner, the conduct of the hearing it afforded petitioner, and his preparation of a written findings of fact, conclusions of law, and determination which was accepted by six of the seven member Board.

T.K. argues that because the Board relied upon the advice of its regular counsel during the conduct of the hearing and because he prepared the written recommended findings of fact, conclusions of law, and determination (C-2) he, T.K., was denied due process of law.

I disagree. A thorough review of the transcript of the hearings on January 23 and March 5, 1979 (C-4) (C-2A) (C-5) discloses no bias, prejudice or animus on the part of regular counsel to the Board or on the part of the Board, individually or collectively.

B. Did the Board act improperly by allegedly basing its determination to expel petitioner from its schools by considering and finding as true in its determination (C-2) a charge allegedly not set forth in its earlier notice of charges to him. (C-1)

T.K. argues in this regard that with respect to the incident of October 25, 1978 he was charged that he "did incite pupils to be truant, resulting in truancy by other pupils; refuse to return to school when ordered; use profanity." (Petitioner's Brief, unnumbered)

T.K. contends that the Board states in its finding of fact (C-2, ante) with respect to the incident of October 25, 1978 that the proofs establish he "openly /was/ defying authorities and that he was intimidating black students. T.K. asserts these were new charges and that the Board erred in arriving at such findings.

In my view, T.K. would have this Court adopt the view that the charges against him are to be viewed in isolation of the context of the circumstances which gave rise to the charges. Such shall not be the case. The Notice of Charge (C-1, ante) given to T.K. and to his attorney was sufficiently specific for him to prepare a proper defense. The testimony given before the Board is sufficient for it to have arrived at a finding of truth as to the charge in addition to its two controverted findings, ante.

C. Was the Board required to establish as true the most recent allegation against petitioner /T.K./ (October 25, 1978) and to determine that that finding by itself would warrant expulsion before it considered his prior disciplinary record as a basis upon which to determine the discipline to be imposed.

T.K. did not specifically address this issue in his Brief. It is a fair assessment of the lengthy argument he presents, however, to consider T.K. argues that before the merits of the incidents prior to October 25, 1978 could fairly be considered by the Board as reason for his expulsion, the incident of October 25, 1978 had to first be proven. T.K. contends that the next logical step was for the Board to determine that that incident, if proven true, would be just independent cause for his expulsion.

I disagree. The incident of October 25, 1978 may be properly considered as one of several incidents in T.K.'s disciplinary record while enrolled in the Board's schools which call into question whether his continued attendance in the regular school program is in his best interests and/or in the best interests of the total pupil population. Moreover, the testimony adduced at the hearing conducted by the Board on January 23, 1979 with respect to that incident supports the finding of the Board that T.K. did behave in the fashion by which he was charged.

D. Prior to its expulsion action, was the Board's Child Study Team required to prepare more of a specific program of study other than placement***" (C-3) and, if so, should the controverted expulsion action be set aside.

Firstly, the Board's child study team report recommended placement of T.K. in an alternative education program and classified him as socially maladjusted. (C-3, ante) The Board offered him placement in its alternative evening program, which he refused, and/or in the alternative, made its child study team available to him to arrange a more suitable program. T.K. has refused to take advantage of either offer.

Secondly, the child study team does not have the authority to determine whether T.K. should be expelled. Such authority is vested solely in the Board. N.J.S.A. 18A:37-2. The fact that the child study team did not unequivocally recommend T.K.'s expulsion does not, in any fashion, inhibit the Board, which sat at the hearing, from imposing that discipline.

E. Is the discipline of expulsion imposed upon petitioner excessive when compared to the allegations and the findings of the Board and is such discipline contrary to N.J.S.A. 18A:37-2.

The New Jersey Constitution affords all persons between the ages of five and eighteen years the opportunity of a free public school program of instruction. N.J. Const. 1947, art. 8, sec. 4, par. 1. Such opportunity is not unbridled. Pupils enrolled in public schools are subject to the rules established for the operation of the schools and are subject to the authority of those officials over them. N.J.S.A. 18A:37-1. Pupils who do not obey such rules or who comport themselves in a manner which disrupts the tranquility of the school setting, are subject to punishment by way of suspension or expulsion from continued school attendance. N.J.S.A. 18A:37-2.

Prior to the imposition of a suspension or expulsion punishment being meted out upon a particular pupil, school authorities and boards of education must afford the pupil procedural and substantive due process. This includes notice of charge, witnesses to testify in support of charge, hearing, right of cross-examination, right to counsel and right to call witnesses in support of the charge. (See Tibbs v. Franklin Township Board of Education, 114 N.J. Super. 287 (App. Div.) aff'd 59 N.J. 506 (1971); R.R. v. Shore Regional Board of Education, 109 N.J. Super. 337 (Chan. Div. 1970); and Goss v. Lopez, 419 U.S. 565 (1975))

The Board afforded T.K. all procedural and substantive process his due. Consequently, no violation of N.J.S.A. 18A:37-2 is found.

Furthermore, the Board, finding the charges to be true, had a reasonable basis to conclude that T.K. was a threat to other pupils in its schools. In my view, the punishment imposed for the incidents proven true, is not excessive.

F. Does the entire record herein reasonably support the findings of the Board against petitioner with respect to his expulsion or is there a lack of a residuum of competent evidence to support the controverted action of expulsion.

A careful consideration of the entire record in the matter establishes that the Board listened to the testimony of eyewitnesses to the allegations and listened to T.K.'s testimony, when offered, in defense of the allegations. It then arrived at a finding on each of the charges. The transcript (C-4) of the hearing compared to its adopted findings (C-2) on the charges convinces me the record supports its controverted determination for which a residuum of competent evidence exists.

Accordingly, I FIND no basis presented by T.K. herein to set aside or modify the Board's action to expel him from further school attendance.

The Petition IS DISMISSED.

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

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

January 2, 1980
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

"T.K.," a minor by his parent,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, DR. GENE STANLEY, Superintendent and LARRY MILLER, Principal, CUMBERLAND 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. 6:24-1.17(b).

The Commissioner finds no merit in petitioner's argument that T.K. should be reinstated even if the Commissioner upholds the Board's expulsion decision. A thorough examination of this matter convinces the Commissioner that the Board accorded T.K. his entitled due process. Subsequent to its decision to expel T.K., the Board offered him placement in its alternative evening program which he refused, as he did the proffered services of the child study team. The Commissioner cannot consider references made by petitioner to a criminal court record which forms no part of the instant matter.

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

FRENCHTOWN EDUCATION ASSOCIATION V. BOARD OF EDUCATION OF THE BOROUGH OF FRENCHTOWN, HUNTERDON COUNTY	:	INITIAL DECISION DKT. NO. EDU 2716-79 AGENCY DKT. NO. 49-3/79A

APPEARANCES:

For the Petitioner, Stephen E. Klausner, Esq.

For the Respondent, Herr & Fisher (Cowles W. Herr, Esq., of Counsel)

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

Petitioner, the Frenchtown Education Association, hereinafter "Association," alleges that a visit and observation at a constituent teacher member's classroom by a member of the Board of Education was violative of the Board's own policy and N.J.S.A. 18A:25-7. The respondent Board, conversely, denies that the controverted visit was other than a proper and legal action.

Both parties to the dispute have moved for Summary Judgment and rely on the facts alleged and admitted in the pleadings and on the following joint exhibits of documentary evidence entered in accordance with an order emanating from the pretrial conference of October 10, 1979. Memoranda of Law were filed by the parties.

I FIND the following facts material to the dispute:

1. The Board, on October 31, 1978, adopted a rule relating to visitation by parents which provided that "***visitors will not be permitted to disrupt the education program. Maintenance of order is necessary for the staff to perform their assigned tasks. Persons will be permitted to visit the school and/or classrooms for no more than one (1) hour per classroom. Visiting hours are to be scheduled between the hours of 9:30 a.m. and 2:30 p.m." (Petition of Appeal and Answer, par. 3)

2. On or about November 9, 1978 a Board member appeared at 8:45 a.m. to visit a teacher's classroom. Despite the urging of the administrative principal to wait until scheduled visiting time, the Board member, insisting that as an "employer" he had the right to visit at any time, did visit and remained until 10:30 a.m.

3. During this visit the Board member interrogated the teacher, and examined and photocopied her planbook.

4. After the Association protested these actions (J-2, a,b), the Board discussed the visit but, perceiving no wrong, took no action on the protest. (J-2)

Thereupon, the Association filed before the Commissioner of Education the within Petition of Appeal. The issue presented is whether the controverted classroom visit by a Board member was violative of the Board's rule on classroom visitation, ante, and/or N.J.S.A. 18A:25-7 which provides that:

> "Whenever any teaching staff member is required to appear before the board of education or any committee thereof concerning any matter which could adversely affect the continuation of that teaching staff member in his office, position or employment or the salary or any increments pertaining thereto, then he shall be given prior written notice of the reasons for such meeting or interview and shall be entitled to have a person of his own choosing present to advise and represent him during such meeting or interview."

Petitioner argues that a member of the Board is barred from visiting classrooms in contravention of the Board's own policies on classroom visitation. That policy as set forth, ante, states "*** persons will be permitted to visit the school and/or classrooms for no more than one (1) hour per classroom *** between the hours of 9:00 a.m. and 2:30 p.m." One must conclude that, while Board members stand in a fiduciary relationship in discharging their duties concerning the operations of the school, pursuant to N.J.S.A. 18A:11-1 et seq, they are, nevertheless, "persons" within the common meaning of the word which the Board chose to incorporate into its own policy statements and spread on its minutes.

The Commissioner of Education in Paul J. McCormick v. Board of Education of the Hunterdon Regional High School District, Hunterdon County, 1978 S.L.D. ____ (decided February 20, 1978) spoke of the Hunterdon Central Board's disregard of its own stated policy as follows:

> "***A policy once adopted and spread on the minutes of a board of education may not be so lightly disregarded. While it is true that in matters of management prerogative one board may not bind its successor, except as provided by law, the record is barren of evidence that any successor board rescinded the existing policy that supervision be provided by certificated supervisors. Absent such rescission, the policy remained viable. Neither the inaction of the Superintendent in implementing that policy nor the adoption by the Board of a subsequent policy statement on supervision which was silent on the matter of supervisory certificates could by indirection negate the March 13, 1972 policy. The Commissioner so holds. It is not within the authority of a Superintendent by action or inaction to establish or alter Board policy. Nor may such authority as is statutorily required of boards be delegated. Mary Ann Popovich v. Board of Education of the Borough of Wharton, Morris County, 1975 S.L.D. 737.
>
> "The familiar canons of statutory interpretation requiring that words be given their ordinary meaning are similarly applicable to the interpretation of a policy. Hoeganaes Corporation v. Division of Taxation, 145 N.J. Super. 352, 359 (App. Div. 1976) Absent forthright action rescinding the policy adopted on March 13, 1972, the policy remained viable.***" (at p. _____)

In the instant matter, one member of the Board had no authority to act contrary to the ordinary meaning of the Board's policy restricting length and times of visitation. Nor was it within the authority of that Board member to alter, amend or set aside Board policy.

Accordingly, I CONCLUDE and DECLARE that that member's visit which began before visiting hours and lasted for more than one hour was contrary to the Board 's own policy which, in absence of statutory law or State Board of Education rule governing visitation of classrooms, was the prevailing education law governing such visits.

Petitioner also contends, inter alia, that the member of the Board was barred by N J.S.A. 18A:25-7 from visiting a teacher's classroom. In this broad assertion petitioner errs. Nothing within statutory law, rules of the State Board of Education nor applicable case law divests board members of their rights as resident citizens to visit public school classrooms if such privilege is in harmony with reasonable, existing local board policies.

The Board, in the instant matter, contends in its Brief that the information gathering function of the Board concerning its employees is not limited to records compiled by administrators but may be actively pursued in classroom observations of individual Board members. The body of applicable education law does not bar such classroom observations. Indeed, in a small school district such as Frenchtown where there is limited depth of administrative and supervisory personnel, classroom observations by Board members carried out in reasonable manner may enhance the Board's ability to upgrade curriculum and upgrade the teaching effectiveness of its faculty.

Such activity as is herein stipulated, involving interrogation of the teacher and copying of her lesson plans, and visitation contrary to the limits set by Board policy is contrary to the restriction wisely iterated by the Legislature in N.J.S.A. 18A:25-7. A teacher experiencing such a visit would ordinarily conclude that there was compulsion to "appear" before the member of the Board and that that unexpected and unsettling appearance, albeit in her own classroom, "could adversely affect the continuation of *** employment or *** salary***." (N.J.S.A. 18A:25-7)

I CONCLUDE and DECLARE that any such visit with interrogation of a teacher, examination and photocopying of a planbook should in the future only be made with approval of the Board and in keeping with established Board policy and with the right of the teacher to have a representative present during such visit pursuant to N.J.S.A. 18A:25-7. It is so ORDERED. Due consideration by the Board should be given when changing its visitation policy (which is now in revision) not to undermine the authority of its own administrator which would aversely affect the thorough and efficient operation of the school. N.J.S.A. 18A:7A-1 et seq.

There is no showing that any teacher has been adversely treated as a result of the controverted visit. Accordingly, relief, other than that set forth in the conclusions, declarations and order, ante, is DENIED.

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

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

January 22, 1975
DATE

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

FRENCHTOWN EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRENCHTOWN, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

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

The Commissioner directs that visitations by an individual board member to a teacher's classroom comport with established board policy and N.J.S.A. 18A:25-7.

It is so directed.

COMMISSIONER OF EDUCATION

March 10, 1980

IN THE MATTER OF THE TENURE HEARING OF EARMOND DEMARCO, SCHOOL DISTRICT OF GLASSBORO, GLOUCESTER COUNTY,	:	
AND	:	
EARMOND DEMARCO,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	
	:	

For the Complainant Board, Trimble & Master (John W. Trimble, Esq., of Counsel)

For the Respondent DeMarco, Richard F. Berkey, Esq.

The Board of Education of the School District of Glassboro, hereinafter "Board," filed a series of charges with the Commissioner of Education on June 17, 1977 against respondent, a tenured teaching staff member in its employ, pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., which the Board avers will be sufficient, if true in fact, to warrant dismissal or reduction of salary. Subsequently, respondent filed an Answer to the charges and advanced a Motion to Dismiss them. Respondent argued that the Commissioner was estopped from hearing the detenuring charges under N.J.S.A. 18A:6-11 by reason of the Board's action to withhold an increment under N.J.S.A. 18A:29-14 and, finally, respondent invoked the doctrine of laches, election of remedies and judicial economy. The Board contended that its action was legal and proper in all respects and charged respondent with procedural maneuvering economically prejudicial to the Board. (Board's Brief, at p. 11)

A fact hearing concerned with these specific allegations was conducted on December 12, 13 and 14, 1977 and January 11, 1978 at the office of the Gloucester County Superintendent of Schools, Sewell, by a hearing examiner appointed by the Commissioner. The facts adduced at this hearing were presented directly to the Commissioner for adjudication.

In this matter the Commissioner rendered a Decision on Motion on March 20, 1978 in which he said:

"***Respondent alleges that the Board is barred from raising the charges relating to the furs theft incident.

"The Commissioner agrees; more importantly, he observes that respondent was cleared of such charges by decree of Judge Paul T. Cunard, J.C.C., under date of June 17, 1976 and, accordingly, orders that such portion of the statement of charges which refers to this matter be hereby dismissed.

"The Commissioner finds no merit in respondent's argument for the application of the doctrine of election of remedies and judicial economy. There are two distinct statutory provisions providing independent redress to the Board for appropriate action as set down in N.J.S.A. 18A:29-14, withholding of increment, and N.J.S.A. 18A:6-10 et seq., the Tenure Employees Hearing Law. The Board was presented sufficient detail on which to make a decision to withhold respondent's increment (J-1) and accordingly took action authorized by the statute. The Commissioner cannot agree with respondent's argument that the increment withholding charges are broader than the tenure charges and the Board, having elected to withhold respondent's increment is precluded from pursuing tenure charges. Such was not the intent of the Legislature when it established the two separate remedies spelled out by the statutes in question and to so argue places form over substance.

"The Commissioner cannot agree with the Board's argument that the tactics of respondent's procedural maneuvering are prejudicial to the Board. Respondent has every right to exercise his legal options, which include the right to move for dismissal with the resulting legal arguments. The Commissioner is aware that respondent is continuing to receive salary payment resumed on the 121st day of suspension; accordingly he directs the matter to proceed to a full plenary hearing on the merits of the remaining charges as expeditiously as possible."

(Slip Opinion, at pp. 4-5)

The respondent teacher appealed this decision of the Commissioner on March 30, 1978 to the State Board of Education which rendered a decision on July 6, 1978 which said:

> "The State Board of Education dismisses this appeal as an interlocutory determination of the Commissioner and not a final decision. The State Board further directs that this matter proceed to hearing."

Subsequently, hearing was held in this matter on August 3, 10 and 28 and September 14, 1978 in the office of the Gloucester County Superintendent of Schools. Thereafter Briefs were submitted.

The report of the hearing examiner follows:

Respondent received a letter from the Superintendent of Schools dated April 11, 1977 in which allegations were made concerning the poor judgment of respondent as evidenced in several instances. (J-1) On May 4, 1977, respondent, accompanied by a NJEA representative, was accorded an appearance before the Board for the purpose of rebutting the contents of the letter and both individuals made statements to the Board. Subsequently, that evening the Board closed the meeting to the public and a discussion was held concerning the contents of the letter (Tr. II-49) and the Board moved to withhold respondent's increment for 1977-78. Respondent was informed of the Board's decision by letter of May 6, 1977 (J-2) and the Board subsequently ratified its decision at the public meeting of May 11, 1977. (J-4)

On the evening of May 4, 1977, after the discussion by the Board of the withholding of respondent's increment, the Board attorney presented to the Board Secretary copies of charges and affidavits to be presented to respondent concerning conduct unbecoming a teacher, if the Board so decided. (Tr. II-50) The Board then instructed its Secretary to serve copies of the charges on respondent within the time set forth in Title 18A, Education, which was done by letter of May 5, 1977. (J-5) Respondent answered the charges by filing opposing affidavits; the Board certified the charges to the Commissioner at its meeting of June 7, 1977 and suspended respondent without pay effective July 1, 1977. (J-8)

The hearing examiner at this point observes that the first three charges against respondent have been set aside by the Commissioner in his decision on Motion on March 20, 1978, ante.

The remaining charge against respondent is stated in its entirety:

> "On or about February 2, 1977, the said Earmond DeMarco threatened a Glassboro student, [J.B.], with bodily harm while at a ski club function at Ski Mountain, Pine Hill, New Jersey. The details of the threats of

> the said Earmond DeMarco are detailed in the Affidavits attached hereto as Exhibits 'C' & 'D'."

The Superintendent testified that about the middle of February, 1977 he received a letter from Mrs. B., a parent of a pupil at the Glassboro Intermediate School. The letter referred to an incident involving respondent and her son, J.B., while on a ski trip and alleged that the teacher used foul and abusive language to her son with threats on his life. (B-4; Tr. V-8) The Superintendent said that as a result of the letter he met with Mrs. B. and the school principal to discuss the matter and that he subsequently met with respondent, taking notes of that meeting. (Tr. V-10; J-21) The Superintendent said that the Board, at its meeting on March 2, 1977 authorized him to contact the Board attorney to have him investigate the matter. The Superintendent said he did so on March 3, 1977 by telephone and by letter of March 7, 1977 with an enclosed list of names of pupils involved in the matter. (Tr. V-11; J-22) The Superintendent testified that he sent respondent a letter under date of April 11, 1977 in which he made a critique of repondent's "***performance and behavior both in and out of the classroom***." (J-1)

The hearing examiner observes that J-1 is a lengthy document set down herewith in its entirety:

> "This letter is with reference to the meetings we had with parents during the past school year, to the subsequent observations and conferences conducted by Mr. Hallenbeck and Mr. Todaro regarding your teaching and other performance during January and February, 1977, and to other aspects of your performance and behavior both in and out of the classroom which I believe are related to the matters at hand.
>
> "As you are aware, the observations of your classroom teaching and subsequent conferences came about as a result of the Intermediate School Back-to-School night in the fall of 1976, and the meetings with concerned parents.
>
> "During January, February and early March of 1977 I have met on several occasions with Mr. Hallenbeck and Mr. Todaro to review their evaluations of your performance as a teacher.
>
> "In general, the following aspects of your classroom teaching were observed:

That classroom methodology appeared to be good, with evidence of a variety of teaching techniques.

There were examples of your concentration on student understanding, and on reinforcement of previous learnings.

That you were making a strong effort to adopt content to the level of student ability and achievement.

That you have a good classroom control and good rapport with students.

That the appearance of your classroom has improved in cleanliness and orderliness and is more conducive to learning than at some times in the past.

That there was some evidence of hands-on science activities appropriate for the students.

That student assignments are reasonably clear.

That there is evidence of good planning in most instances.

"We would like to indicate the following matters and aspects of your teaching and other performance that we believe need attention and improvement.

"We are concerned that there are times when you present content that is beyond the understanding of students, or that is treated in such detail that it would be more appropriate at the high school or college level rather than at a seventh grade level. The consequence of too much depth and detail is observed as posing problems for seventh grade students in understanding what is being taught. Further, there are serious questions about whether students, at that level, need content in such detail, particularly since such content is also presented later in their school program; for example, in high school biology. (Examples of such content include detailed classification of plants and related detailed treatment of structure and function).

"It appears that, too often, you are attempting to take content and concepts usually taught at higher levels and attempting to teach them to seventh grade students.

"A possible reason for this is that you have relied on instructional materials of your own selection, rather than instructional materials and programs, including reading materials, that have been designed and tested with seventh grade students.

"A further illustration of this problem is the fact that, this past summer, you had ordered a large number of texts, for use at the Intermediate School, which were found to be texts designed for college level students. I find such an order to be poorly considered, particularly when there are such a variety of texts and instructional materials already on the market and designed for the level at which you teach.

"Since Mr. Todaro and I, in our examination of science texts and materials at the past fall NJEA Conference, found a number of items which would have been possible for you to use, we do not understand why you were not also able to identify such materials. We would state that it is indeed your responsibility to do so.

"Another manifestation of this problem is the way by which you have chosen to teach vocabulary on some occasions - long lists of science words, some quite difficult for seventh graders, presented to students before the content or concept is being taught, and requiring the student to find the definitions of such words. This approach to teaching vocabulary has been discussed in another memo to you, and you are asked to change your approach to teaching the vocabulary of science so that words and their definitions are learned when they are needed by students, and in relation to the concepts and understandings that underlie the words.

"In general, it is expected that you will identify the level of ability and achievement of students in your classes and adapt your program to this ability and achievement. It

is expected that you will identify reading materials appropriate to the reading levels of your students, and that learning tasks will be suitable for the students. Assistance may be obtained from reading teachers in the Intermediate School or from Mrs. Wriggins.

"It seemed quite clear to me, in our meetings with parents cited above, that many of the questions and concerns were directed to you and your teaching rather than other staff members. This was particularly true regarding the so-called anxieties and apprehensions of entering seventh grade students during the first few weeks of school.

"It will be expected that you will be particularly sensitive to the needs of students entering your classes, and during the first few weeks of school, and that you plan appropriate classroom practices that enable students to have a comfortable transition from a previous grade level into your classes. In particular, it will be expected that you avoid practices that tend to cause anxiety and apprehension in students during the first few weeks of school.

"It is also expected that, if deficiences in learning of students are discovered (in study skills, for example), you identify such deficiencies and take appropriate steps to work from the level at which you find the students. Furthermore, you are asked to convey this information to the principal, so that if deficiencies are because of the program at earlier levels, they might be corrected.

"Among the other concerns and questions of parents that were directed to you were:

Why seventh grade students had to type term papers.

Whether you had called some students in your classes 'dummies' in class.

Why students who thought they did not understand something were reluctant to come to you for help.

"Regarding the typing requirement, this matter first came to my attention two years ago, at which time I asked Mr. Hallenbeck to inform you and any other staff members that requiring typed papers was an unrealistic and inappropriate requirement at this level, and there should be no such requirement. The following year the matter was raised again, with respect to yourself, and I again asked Mr. Hallenbeck to tell you that this could not be a requirement -- this time in writing. In one of our meetings this year with parents, some parents again asked about whether typed papers were required, directing their question to you. You answered with a vague statement that you had said something about it in class to some pupils. At that meeting I stated again, emphatically, that there was no requirement that papers be typed. I fail to understand why we should have to go through this every year. It seems to me that your statements to students in class about typing term papers ignores the clear instructions you have to the contrary, and if not insubordinate, borders on insubordination.

"When asked by a parent at a parent meeting as to whether you had called students 'dummies' in class, you stated that you would not call a person or student a dummy, but that you had on occasions said to students that things that they had said or done were 'dumb.' Apparently you seem to feel that there is some fine distinction here, that it is inappropriate to call someone 'dumb,' but it is appropriate to call something someone says or does 'dumb.' Apparently you fail to understand how the latter can be interpreted, or misinterpreted, and why, to say it either way, it may have the same or similar result. In this regard let me say unequivocally that calling actions or statements of students 'dumb' is not acceptable professional behavior on your part, and is belittling and demeaning to students. We would expect a far more positive approach from a teaching staff member. It is expected that you will no longer use such belittling and demeaning statements to students in your classes.

"With regard to the statement of some parents that some students feel they cannot come to you for help, you should be aware that apparently this is the case early in the school year. It seems to me that Mr. Todaro and Mr. Hallenbeck have observed that you do go out of your way to help students who have problems learning and understanding. We would expect that you would continue to do so.

"As I have expressed to you in the past, it is my opinion that you have not done an effective job in planning for back-to-school nights. The purpose of such meetings is to communicate with parents, to explain the educational program, content, methods, expectations of students, marking system and other relevant matters. As a result of our meetings with parents, it is clear to me that they have a substantial number of questions that go unanswered -- that they appear to take away misunderstandings that then have to be clarified later.

"It will be expected that you will plan carefully and effectively for such parent meetings, and that you put much of what you have to say into writing to avoid misunderstandings.

"It is also expected that you will pay particular attention to long term assignments for pupils, and that you will break such assignments down into shorter assignments and checkpoints, adapting them to the level of ability and maturity of your students.

"You and I have discussed in the past certain incidents that have caused me to question your judgment, and I have stated to you that I felt that your behavior in regard to those incidents was poor judgment. One incident in the past was with regard to your involvement in selling furs. A recent incident involved your behavior on a ski trip, when, among other things, you threatened some pupils from the Intermediate School who were on the trip. There were other incidents involving students on science field trips, and I have previously sent you a memorandum in this regard. I have recited above a number of situations in the classroom and outside the classroom that indicate to me poor judgment on your part.

> "I can no longer accept your demonstration of poor judgment regarding so many matters.
>
> "I will be recommending to the Board of Education that the Board withhold any increments to you for the 1977-78 school year. I have previously indicated to you that I was considering this recommendation, and would discuss it with the Board on April 13, 1977. If you care to meet with the Board on this matter at this time, please inform me.
>
> "It should be clear that when problems arise, such as those stemming from a back-to-school night and parent conferences, it is the obligation of the Board and administrative staff to investigate and evaluate the situation. Where this means a careful evaluation of a staff member, it is our administrative responsibility to carry out such an evaluation.
>
> "You should be aware that copies of evaluations by administrators carried out in January and February, and copies of my correspondence to you have been placed in your personal file." (J-1)

At this juncture, respondent's Motion to Dismiss because J-1 referred to "***selling furs and ***the ski trip***" which allegedly constituted fact-finding by the Board was denied. The hearing examiner finds J-1 replete with other concerns and criticisms and he finds respondent's argument one that places form over substance.

The mother of J.B. testified of her concern when her husband received a call that her son could not be found for the return trip from Ski Mountain on the night of February 8, 1977. The mother said when she went to the school he was not there and she returned home to find that J.B. had returned from the ski trip with a neighbor and seemed very frightened. (Tr. V-49) The mother testified that approximately at midnight the teacher, Mrs. Fuller, with whom J.B. had gone to Ski Mountain, called to see if he had returned home safely but, when questioned, told the mother that she did not know what had happened. (Tr. V-43-45) The mother said she went to school late the next day to talk with the principal because of the expressed concern of her son about talk around school that he had tripped respondent with resulting injury to him. (Tr. V-50-52) The mother said that because of her concern she spent a lot of time to determine who was involved so she "***could get to the bottom of the truth." (Tr. V-54) She said that on the day after the incident, J.B. and his friend, J.F., prepared statements of their versions of the incident. (B-7, B-8, Tr. V-54-57)

The hearing examiner observes that both documents are replete with statements which the pupils claim were made by respondent in which he allegedly used vulgar and obscene terms in his threats on the life of J.B.

On cross-examination the mother of J.B. admitted that Mrs. Fuller had mentioned that some of the pupils had run into her which caused the teacher concern because she was shaky on her skis. (Tr. V-67) Mrs. B. denied wanting respondent punished for his conduct. (Tr. V-72) She testified that she did not help the boys prepare the statements. (Tr. V-81) The mother said that because of her concern for the truth of the matter and to clear her son's name she sent a letter to each Board member in which she proffered the results of her investigation of the matter. (Tr. V-91; B-4)

The father of J.B., a teacher in another school district, testified that he was home on the night of the ski trip, that his son did not return at the usual time and that someone telephoned to see if J.B. had arrived. The father testified that his son returned home with the mother of J.N. and that J.B. and J.N. were "***trying to explain to me that respondent was all upset over a hat that was taken and he was cursing at them and he was going to kill [J.B.]***." (Tr. V-114) The father said he heard Mrs. Fuller say on the telephone to his wife that the pupils ran into her. He testified he observed that the boy was scared and very upset. (Tr. V-113-115) He said he remembered that on the day after the incident his son and J.F. wrote statements about the incident. (Tr. V-123-125)

The mother of J.N., a professor at Glassboro State College, testified that on that night when she went to pick up J.N. and J.B. she found them waiting for her at the parking lot and they both seemed agitated and scared and wanted her to leave at once. (Tr. V-127-129) She said that there was confusion at the time but when she arrived at her home she was concerned and asked her son to dictate a statement of what had occurred which she typed and they both signed. (Tr. V-132-133; J-20) She testified that she contacted the principal the next day because of her concern. She said she saw respondent two days later roller skating without apparent difficulty. (Tr. V-135-136)

J.B., a member of the ski club who was at Ski Mountain the evening of February 8, 1977, testified that J.F. took respondent's hat and threw it to him. He said he skied down the hill around the sled used to transport injured people, with respondent in pursuit. He said he thought the teacher hit the sled. J.B. testified that he threw the hat back to J.F. (Tr. V-147) He said that he and pupils, J.N., J.F., and D.T. skied down the slope to the vicinity of respondent at the bottom. J.B. testified that he heard respondent threaten J.F. by shouting in an angry manner and that respondent "***came up after me and he said, 'I'm going to f_____ break your arm and I'm going to kick your ass.'" (Tr. V-149) J.B. testified that respondent said,

"[Y]ou have to come down to the lodge some time. I'll get you there." (Tr. V-150) J.B. said that he then cut through some woods to the parking lot and got a ride home with J.N.'s mother. J.B. testified that he prepared a statement, without assistance from any other person, describing the incident. (Tr. V-158; B-8) He said that because of the incident he felt that teachers were "***really getting strict with me***". (Tr. V-162) J.B. testified that it seemed as though teachers were picking on him. (Tr. V-163)

Other pupils on the ski trip affirmed that they heard respondent in an agitated manner threaten J.B. using intemperate, profane and obscene language:

D.T., a 15 year old male pupil, said "*** he was chasing *** [J.B.] *** yelling, 'I'm going to break your neck. I'm going to kill you ***'." (Tr. VI-9)

J.N., a 15 year old male pupil, testified "***he said that he was going to f_____ kill J.B." (Tr. VI-30)

J.F., a 15 year old male pupil, testified that the document B-7 had been prepared by him the following day and that the statements concerning respondent's threats to J.B. were correct. (Tr. VI-55)

C.F., a 14 year old male pupil, testified, "He was shouting one thing that he was going to break your neck and that is all I heard." (Tr. VII-11)

C.M., a 15 year old female pupil embarrassed to give verbal testimony about obscenities, wrote on a piece of paper what she had heard which was transcribed into the record as follows, "I'm going to break your f_____ legs." (Tr. VIII-12)

Mrs. Fuller, a tenured teacher in the employ of the Board and a personal friend of respondent, had transported pupils to Ski Mountain the night of February 8, 1977. She testified that she was not a competent skier and had remonstrated with J.B. that evening for trying to release her ski bindings. (Tr. VI-100-101) Mrs. Fuller testified that some girls had complained to her that J.B. had taken their hats which she had reported to respondent, along with her incident. (Tr. VI-103-104) She said she remembered respondent warning the boys of their behavior and that someone took his hat which ended in J.B.'s possession who skied downhill with it with respondent following him. (Tr. VI-114-115) Mrs. Fuller testified that she next saw respondent bent over, holding his ankle seemingly in pain. When questioned by her he said he thought his ankle was hurt but that he would try to make it on his own. (Tr. VI-119-120) She said she remembered him saying he had been tripped by J.B. (Tr. VI-121) She said she did not see respondent fall. (Tr. VI-137) Mrs. Fuller testified that she met him at the

bottom of the hill but could not recall the identity of the pupils there. She said she heard no cursing or obscenities (Tr. VI-123) and that she was not even close enough to hear. (Tr. VI-125)

The hearing examiner observes that Mrs. Fuller had difficulty reconciling her testimonial remembrances with the details of an affidavit completed by her and sworn on May 31, 1977. (Tr. VI-134-137)

Mr. Vanaman, a tenured teacher in the employ of the Board, a personal friend of respondent and an organizer of the Ski Club, was present on the night of February 8, 1977. He testified that there were no set regulations for members of the club who were only going to Ski Mountain. (Tr. VI-172) He said that J.B. toppled him over by crossing his skies which caused him to warn J.B. who said "Okay" and skied away. (Tr. VI-167) Mr. Vanaman said he did not see respondent fall. (Tr. VI-170)

Respondent, a teacher of biological science in the employ of the Board since September 1969, testified that he was studying for a master's degree in Environmental Education. He said he had served on various committees including the curriculum committee, the science committee and the articulation committee, as well as serving as salary chairman on the teachers' negotiating committee with the Board on an active basis. (Tr. VI-176-179) He testified that he also held a fur, fish and game club and was involved with the ski club. (Tr. VI-182) He said that during January and February 1977 he had some forty observations of his class by administration as indicated by the Superintendent of Schools. (Tr. VI-180-181)

Respondent testified that on the night of the incident at Ski Mountain he received complaints from several girls, including C.M., that J.B. had taken their hats or unloosened their ski bindings. (Tr. VI-193-194) He said he warned J.B. and J.F. "to quit messing around." (Tr. VI-194) He said shortly after this he warned J.B. and J.F. about their behavior with Mrs. Fuller. (Tr. VI-196)

Respondent testified that a few minutes later someone took his hat and he saw it going through the air and being caught by J.B. whom he started to pursue. (Tr. VI-199-200) He said he approached J.B. to within a foot and a half or two feet of him. (Tr. VI-200) The hearing examiner deems it important that respondent's testimony be herewith set down as it appears in the record.

***

Q. "I would like you to try and go into a technical explanation of specifically what happened, how you fell and how your foot came to be twisted?

A. "Well, I have a Kubko binding *** and it's an expert binding, too. For me to come out of my boot or out of my skis, takes a lot of force. It must be, it's a total release binding, total release sideways. I don't know how to answer. It's very technical. It takes a lot of force to pull me out of my skis. It's as better you become as a skier, the tighter and more restrictive your binding has to become because of the speed and turns that you do.

Q. "So what specifically happened when you fell?

A. "When I skied up over his pole, the trap -- there is a little basket at the end of the ski pole, caught my buckle. I've got a four buckle boot and when he pulled, of course, he released me -- that is the same thing as putting a lot of pressure sideways. When he pulled, he pulled my foot out of the ski at the same time. He was still going down the hill and I was still on the ground. My leg just wouldn't move inside my boot and the pressure, of course, twisted my leg inside the boot.

Q. "What happened next?

A. "Well, it was a very sharp pain in my ankle. In fact, I heard something pop. I tried to get up and in the meantime, Mrs. Fuller skied over to me.

Q. "What happened when Mrs. Fuller came over to you?

A. "She asked me if I was okay and I told her I think my first remark to Mrs. Fuller was I thought I broke my ankle. I thought I broke my ankle. I heard a pop." (Tr. VI-201-203)

Respondent said he then put his skis back on and skied down to the bottom on the hill. (Tr. VI-205) Respondent testified that he could not recall using profanity or threats directed toward J.B. or any pupils on that evening. (Tr. VI-215)

When later asked what treatment he received for his injury respondent testified that, after X-rays at a hospital, he had six or seven cortisone treatments for a lateral tear in the muscle tissue. (Tr. VI-217-218)

The hearing examiner observes that respondent's testimony and memory are at variance with the jurat of May 31, 1977. Respondent testified he could not remember swearing to the statement in that affidavit although he acknowledged his signature on the document. (Tr. VI-230-231)

The Board argues that it has sustained the burden of proof in showing that respondent did, in fact, threaten a pupil with bodily harm using extraordinarily vile and threatening language in the presence of both male and female pupils of tender ages. The Board argues further that a school employee's duty to maintain good behavior extends beyond his immediate employment and into his private activities. In the Matter of the Tenure Hearing of Jacque L. Sammons School District of Black Horse Pike Regional, 1972 S.L.D. 302 (Board's Brief, at p. 3)

Respondent argues that the Board failed to comply with N.J.S.A. 18A:6-11 and contends that the Board is estopped from filing the tenure charge because it made findings of fact when it acted to withhold respondent's increment. Respondent argues that he should not be exposed to two separate penalties for exactly the same set of facts. (Respondent's Closing Argument, at pp. 5-16) Respondent contends that the Commissioner's Decision on Motion lacks factual or legal basis and is therefore in error. In re Plainfield-Union Water Company, 11 N.J. 382 (1953) Respondent argues that discrepancies in the record of what happened on Ski Mountain seriously undermine the credibility of the Board's case. (Respondent's Closing Argument, at pp. 7-8) Finally, respondent states that he was in considerable pain that evening and whatever language used was appropriate for the situation under dangerous and trying circumstances. (Respondent's Closing Argument, at pp. 14-16)

In the hearing examiner's view the truth or falsity of the charges herein rests on the credibility of the witnesses heard and their observed demeanor and resulting testimony.

The hearing examiner finds discrepancies in the record that damage the credibility of respondent. Respondent testified that his ski binding was that of an expert, a Kubko binding. He said he skied over J.B.'s pole and when J.B. pulled on his pole the basket on the end of the pole released respondent's four buckle boot. He testified further that "My leg just wouldn't move inside my boot and the pressure of course twisted my leg inside the boot." (Tr. VI-202) Respondent claims J.B. tripped him. (Respondent's Closing Argument, at p. 12) The hearing examiner finds such testimony contradictory and the record is devoid of any credible evidence that J.B. overtly tripped respondent. The hearing examiner, rather, finds that respondent, an expert male adult skier, in a fit of rage, pursued a fourteen year old less-than-expert skier and ran up and over him. Respondent testified that he heard his ankle "pop," he felt a sharp pain and said "***I thought I broke my ankle." (Tr. VI-203) The

hearing examiner observes that, in spite of these indications of very possible serious injury, respondent said he got up and put his skies back on and skied down the hill. (Tr. VI-205) The hearing examiner does not find this to be considered prudent action of an expert skier who suspects he may well have a broken ankle. Respondent characterizes his injury as a lateral tear of muscle tissue of a painful nature requiring six or seven cortisone injections. (Tr. VI-217-218) The hearing examiner points to the testimony of J.N.'s mother wherein she said that two days later she saw respondent roller skating without apparent limp or difficulty, which testimony stands undenied and unrefuted on the record. (Tr. V-136)

Respondent relies on the testimony of two teachers, Mr. Vanaman and Mrs. Fuller. Mr. Vanaman did not see respondent fall and his testimony may be characterized as critical of J.B. and, at most, that of a friendly character witness on behalf of respondent. Respondent makes much of Mrs. Fuller's testimony that she heard no shouting by respondent at pupils. Her testimony establishes "*** I wasn't even close enough to hear." (Tr. VI-125)

The hearing examiner observes only minor discrepancies in the testimony of the fourteen and fifteen year old pupils who were accompanied by parents and sequestered during testimony. The hearing examiner finds no major contradiction between testimony at the hearing and the detail of affidavits sworn up to one and one half years prior to the date of testimony. Rather, the hearing examiner finds a repeated assertion by each pupil of the remembrance of a threat by respondent against J.B.'s physical well-being couched in varying forms of profane or vulgar epithets. The hearing examiner recommends that the Commissioner find such conduct unbecoming a teacher and totally inappropriate behavior on the part of one who deals with children in their formative year. The Commissioner has addressed the problem In the Matter of the Tenure Hearing of John H. Stokes, School District of the City of Rahway, 1971 S.L.D. 623 wherein he said:

> "***the Commissioner cannot agree that a teacher may be categorized as a professional person *** if he resorts to hastily-flung epithets***. To the contrary, when, as herein, the evidence is conclusive that a teacher has displayed a pattern of such reaction, resorted to such expressions and exhibited such conduct, that person must be adjudged as one who is unprofessional and unworthy of the protection, which the tenure law affords.***" (at 643)

Similarly in Sammons, supra, the Commissioner said:

> "***He is constrained to remind the teachers of this State, however, that they are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.***"
> (Emphasis supplied.) (1972 S.L.D. at 321)

Also In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville, 1973 S.L.D. 157 as follows:

> "***The teaching profession is chosen by individuals who must comport themselves as models for young minds to emulate. This heavy responsibility does not begin at 8:00 a.m. and conclude at 4:00 p.m., Monday through Friday, only when school is in session. Being a teacher requires, inter alia, a consistently intense dedication to civility and respect for people as human beings. The Commissioner has, on past occasions, determined tenure charges arising from incidents which happened in the evening both on and off school property. See In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County, 1969 S.L.D. 159, affirmed State Board of Education 1970 S.L.D. 448; In the Matter of the Tenure Hearing of John H. Stokes, School District of the City of Rahway, Union County, 1971 S.L.D. 623.***"
> (at 163)

The hearing examiner finds that respondent's action in threatening bodily harm to J.B. was not justified by dangerous and trying circumstances. Under the nimbus of Stokes, Sammons, and Beam, supra, such action is not warranted and cannot be condoned. The hearing examiner finds no merit in respondent's

argument that the Board, having elected to withhold respondent's increment, is precluded from pursuing tenure charges. As the Commissioner said in his decision on Motion, March 20, 1978, "***Such was not the intent of the Legislature when it established the two separate remedies spelled out by the statutes in question and to so argue places form over substance.***" The hearing examiner does not agree that respondent has been judged on exactly the same set of facts. The Board was presented with a multi-detailed document (J-1) by the Superintendent of Schools constituting a critique of respondent's classroom performance. Respondent's own testimony refers to "forty some observations" made by administration. (Tr. VI-180-181) The inclusion by the Superintendent of one sentence in J-1, "A recent incident involved your behavior on a ski trip, when, among other things, you threatened some pupils from the Intermediate School who were on the trip" cannot negate the thrust of all other details therein catalogued.

The hearing examiner recommends that the Commissioner find respondent's use of profane and vulgar terms to threaten bodily harm to a pupil to be a flagrant example of conduct unbecoming a teacher of such severity to warrant dismissal from his tenured post as of the date of his suspension.

The hearing examiner now turns his attention to the pleadings involved in respondent's Petition protesting the action of the Board to withhold his increment. Respondent contends that the Board failed to provide him with the elemental requirements of due process, that the Board made no finding of fact to reach its conclusion to withhold respondent's increment and that he was not given an opportunity to cross-examine witnesses. (Respondent's Brief on Withholding of Increment, at pp. 1-2)

The Board argues that N.J.S.A. 18A:29-14 provides the authority to withhold increments so long as it observes the basic element of fair play and provides the affected employee with the elemental requirements of due process as articulated by the Commissioner in J. Michael Fitzpatrick v. Board of Education of the Borough of Montvale, 1969 S.L.D. 4.

N.J.S.A. 18A:29-14 provides in full 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 action to the commissioner under rules prescribed by him. The commis-

> sioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

The hearing examiner observes that subsequent to Fitzpatrick, supra, in Westwood Education Association v. Board of Education of the Westwood Regional School District, Docket No. A-261-73, Superior Court of New Jersey, Appellate Division, June 21, 1974, the Court stated:

> "Essentially for the reasons stated by the trial judge in his oral opinion, we affirm his determination that a local board of education, pursuant to N.J.S.A. 18A:29-14, has sole discretion to withhold a member's salary increment for inefficiency or other good cause and that this right is not negotiable under the provisions of N.J.S.A. 34:13A-5.3. See Assoc. of N.J. State Col. Fac. v. Dungan, 64 N.J. 338 (1974).
>
> "Appellant, relying upon previous decisions of the Commissioner of Education, contends that N.J.S.A. 18A:29-14 has no application to salary schedules in excess of statutory minima, unless the local board first adopts a salary policy pertaining to such increments. We find no basis, statutory or otherwise, for the Commissioner's limiting construction and hold this contention to be without merit. cf. Kopera v. Board of Education of West Orange, 60 N.J. Super. 288 (App. Div. 1960).
>
> "Finally we call attention to the views expressed in Dunellen Bd. of Education v. Dunellen Education Association, 64 N.J. 17, 31-32 (1973) and reiterated in Dungan, supra, 64 N.J. at 356 that some 'timely voluntary discussions' of the subject matter herein involved between the parties is desirable."

The Supreme Court of New Jersey said in Board of Education of the Township of Bernards, Somerset County v. Bernards Township Education Association et al., Docket No. A-49 decided March 15, 1979:

> "***The decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the Legislature to the Board. It cannot be bargained away. See Ridgefield Park, supra; State Supervisory Employees, supra; Dunellen Bd. of Educ., supra; Clifton Teachers Ass'n., Inc. v. Clifton Bd. of Educ., 136 N.J. Super. 336 (App. Div. 1975).***"
>
> (Slip Opinion, at p. 14)

The Board argues that respondent knew full well of its dissatisfaction with his performance as a teaching staff member. The hearing examiner finds that respondent had been notified by administration of its concern with his performance. (BI-1) Respondent's testimony refers to "forty some observations" made by administration. (Tr. VI-180-181) The hearing examiner finds no merit in respondent's allegations of lack of due process. He was asked to appear before the Board with a representative and both spoke to the Board. There is no provision of rule or statute that requires fact-finding by the Board or cross-examination of witnesses by respondent. The hearing examiner finds that the dicta in Dunellen, supra, "that some 'timely voluntary discussion' of the subject matter herein involved between the parties is desirable" has been satisfied.

Accordingly, the hearing examiner recommends that the Commissioner find and determine that the action of the Board on May 11, 1977 to withhold the employment increment of Earmond DeMarco is, in all respects, proper and legal and accordingly respondent's Petition be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record, including the report of the hearing examiner rendered in this matter, and he has considered the exceptions and objections pertinent thereto filed by the parties pursuant to N.J.A.C. 6:24-1.17(b).

In his first exception, respondent contends that the Board failed to adhere to the procedure dictated by N.J.S.A. 18A:6-11 in that it failed to make a determination that sufficient probable cause existed to credit the evidence forming the basis for the charges certified against him. Because of this alleged procedural irregularity, respondent argues, the tenure charges should be dismissed. This issue was raised by the motion to dismiss those charges disposed of in advance of the hearing in this case. However, to the extent that the Commissioner's decision denying the motion did not expressly address the question, the Commissioner finds at this time that the procedure followed by the Board adequately satisfied its statutory obligation under N.J.S.A. 18A:6-11. It is admitted that the Board did not conduct a hearing on the issue of probable cause. Nor was a specific finding of probable cause included in the minutes or the resolution certifying charges (J-8 in evidence). However, in strict compliance with N.J.S.A. 18A:6-11 the Board made its determination to certify charges only after it had considered affidavits supporting the charges, afforded respondent an opportunity to respond to those affidavits and considered the answering affidavits he submitted. (J-8 in evidence) (See Point VI of the Board's brief in opposition to the motion to dismiss and Tr. VI:22-1 to 16.) A more rigorous inquiry into the truth of the charges is not contemplated by the statute at this preliminary stage. While the minutes of the Board meeting at which the certification of charges is considered and the resolution to certify charges should have included a specific finding of probable cause, the Board's failure to separately consider probable cause in this case is not fatal in view of the measures taken to weigh competing versions of the facts underlying the tenure charges.

Respondent further excepts to the holding on motion that the Board's action in withholding increments for the 1977-78 school year does not preclude a subsequent decision to certify tenure charges based, in part, on the same facts. That issue was conclusively disposed of by the decision on motion. The finding therein made became the law of the case, and the Commissioner declines to disturb it now. 5 Am. Jur. 2d., Appeal and Error, §744 at 189 (1962) See discussion contained in State v. Hale, 127 N.J. Super. 407, 410-411 (App. Div. 1974).

The third exception raised by respondent is that as the evidence offered in support of the charge was contradicted by De Marco and witnesses who testified on his behalf, the hearing examiner should not have found credible the testimony of the Board's witnesses and so erred in concluding that the board had

proved its charge. Where conflicting evidence is offered on any issue and there is sufficient evidence contained in the record to reasonably support the findings made, the Commissioner will defer to the judgment of the hearing examiner on questions of credibility since he had the opportunity to hear and observe the witnesses and so was in a better position to assess credibility. Cf., Close v. Kordulak Bros., 44 N.J. 589, 599 (1965); Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976) With respect to the critical question whether respondent uttered profanities on the evening in question, however, such deference is not even required since a review of the record discloses that the evidence readily supports the conclusion that he did. The testimony calling for a contrary result to which respondent directs attention in his exception, particularly the testimony of C.M., Jeffrey Vanaman and Kathy Fuller, does not even permit a contrary inference, much less a different result. C.M., while unwilling to testify orally as to the language she heard, did write down the offensive words, which were duly transcribed by the court reporter. (Tr. VIII:10-24 to 12-7). Mrs. Fuller testified that she heard no obscenities, but that she was not even close enough to hear anything. (Tr. VI:123-12 to 15; 125-14) And nowhere in the record was Mr. Vanaman even asked if he heard respondent swear. (Tr. VI: 159-7 to 173-17) He testified only that he had received no complaints about respondent's language. (Tr. VI:173-2 to 5) As the record clearly supports the charge of unbecoming conduct, the third exception is also without merit.

However, respondent complains in his fourth exception that the penalty of removal is excessively harsh, and with this the Commissioner must agree. While a single incident will, if sufficiently flagrant, furnish just cause for the removal of a tenured teacher, unfitness to teach may also be, and usually is, shown by cumulative instances of inefficiency or unbecoming conduct. 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); In the Matter of the Tenure Hearing of Inez McRae, School District of the City of Trenton, 1977 S.L.D. 572, 584-5 Certainly respondent's intemperate behavior exhibited a lack of self control that departs sharply from the standard of conduct exacted of one in his position of public trust. But this incident does not, alone, warrant his removal. See In the Matter of the Tenure Hearing of Samuel Ivens, School District of Toms River Regional, 1977 S.L.D. 960; In the Matter of the Tenure Hearing of Basil Fattell, School District of Paterson, 1977 S.L.D. 941. While removal was directed for profanity and inefficiency, In the Matter of the Tenure Hearing of Juanita Zielenski, School District of Guttenberg, 1977 S.L.D. 786, that case does not afford suitable precedent here for several reasons. Removal in that case was predicated upon proof of several instances of inefficiency in the classroom, as well as profanity. But, more significantly, the use of vulgar language from which the unbecoming conduct charge there derived occurred in the classroom, where the teacher should have been in a better position to assert control over students

than was respondent, whose objectionable conduct occurred in the less structured context of a skiing trip. Also a factor is the age of the students involved. In the Zielenski incident, the students were considerably younger and more impressionable (9 and 10) than those involved here (14 and 15). Of course these considerations in no way excuse the behavior of respondent herein. He deserves a stern reprimand and is hereby admonished that any further incidents of this nature will not be tolerated. However, in view of the distinctions made between the context in which the Zielenski and the instant controversy arose and, further, in light of the deposition made in the Ivens and Fattell matters cited herein, the Commissioner concludes that dismissal would be unduly harsh and is not warranted in this instance. Accordingly, it is ordered that respondent be reinstated to his teaching position but at the same annual salary he was earning immediately prior to his suspension, without the benefit of adjustments of increments to which he might, in the ordinary course, have become entitled. In all other respects, the Commissioner accepts the findings of fact and conclusions of law contained in the hearing examiner's report and adopts them as his own.

COMMISSIONER OF EDUCATION

March 10, 1980

IN THE MATTER OF THE TENURE HEARING OF EARMOND DE MARCO, SCHOOL DISTRICT OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	
AND	:	
EARMOND DE MARCO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	
	:	

Decided by the Commissioner of Education, March 10, 1980 and June 2, 1980

Decided by the State Board of Education, July 2, 1980

For the Petitioner-Appellant, Trimble and Master (John W. Trimble, Esq., of Counsel)

For the Respondent-Appellee, Richard F. Berkey, Esq.

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

Susan Wilson opposed in the matter.

October 1, 1980

WYCKOFF EDUCATION ASSOCIATION,	)	
	)	
PETITIONER,	)	INITIAL DECISION
	)	OAL DKT. NO. EDU 901-79
V.	)	AGENCY DKT. NO. 5-1/79A
	)	
BOARD OF EDUCATION OF THE BOROUGH OF WYCKOFF, SOMERSET COUNTY,	)	
	)	
RESPONDENT.	)	

APPEARANCES:

For Petitioner, Goldberg & Simon, Esqs.
(Theodore M. Simon, Esq. appearing)

For Respondent, Sullivan & Sullivan, Esqs.
(Mark G. Sullivan, Esq. appearing)

BEFORE THE HONORABLE DANIEL B. MC KEOWN

Petitioner, the Wychoff Education Association (Association) alleges the Board of Education of the Township of Wychoff (Board) has assigned and continues to assign personnel not properly certificated pursuant to N.J.A.C. 6:11-12.8 and 9 to perform school nurse duties contrary to the provisions of N.J.S.A. 18A:40-1 and N.J.S.A. 18A:40-3.1, within the meaning of N.J.S.A. 18A:1.1. The Board, by way of Answer and Amended Answer, denies the factual allegations and, in its own right, asserts the Association is without standing to move the matter and, additionally, asserts that Petitioner, even if held to have proper standing, fails to state a cause of action upon which relief could or should be granted.

The matter, filed before the Commissioner of Education pursuant to N.J.S.A. 18A:6-9, was transferred to the Office of Administrative Law as a contested case for disposition pursuant to N.J.S.A. 52:14F-1, et seq. Subsequent to a prehearing conference and a hearing in the matter conducted at the Office of Administrative Law, Newark, on October 18, 1979, the parties filed proposed finding of fact and Briefs in support of their respective positions. The matter was readied for disposition December 18, 1979 when Petitioner, the Association, filed its' Brief.

Initially, it is observed that the Board moved to dismiss the matter at the conclusion of Petitioner's case-in-chief on the grounds the action was not timely filed pursuant to N.J.A.C. 6:24-1.2 and it moved to dismiss upon the grounds that the named Petitioner, the Association, lacks standing to press the matter.

The Board's Motion to Dismiss with respect to N.J.A.C. 6:24-1.2 was denied upon the grounds that the controverted action herein is not a precise action; that is, an action which has been taken and its effects are terminal. To the contrary, the controverted action continues into the 1979-80 academic year and, presumably, will continue into future years. Consequently, the issues raised are ripe for adjudication in light of the above-cited statutes and rules as regulations of the State Board of Education. (Tr.-151)

The Board's assertion that the Association, as the named Petitioner, lacks standing to press the matter was and is denied. The Association, through the presentation of testimony of witnesses, several nurses, was found to have made a prima facie case that the Board may have acted illegally with respect to the allegations herein. (See Winston v. Board of Ed. of Borough of South Plainfield, 125 N. J. Super 131 (App. Div. 1973), aff'd 64 N.J. 582 (1974)

This concludes a recitation of essential fact established by the Petitioner upon which it asserts the Board has assigned duties to clerical aides which may only be assigned properly certificated school nurses.

It is noticed that N.J.S.A. 18A:40-1 requires "Every board of education shall employ one or more physicians *** to be known as the medical inspector *** and *** one or more school nurses *** " N.J.S.A. 18A:40-3.1 requires that several nurses be employed only by appointment of the board and that school nurses so employed shall be under the direction of that board or its designated officer or employee.

A School nurse to be properly employed by a board pursuant to the above referenced statutes and as a teaching staff member pursuant to N.J.S.A. 18A:1-1 must be in possession of an appropriate certificate to be a school nurse. N.J.A.C. 6:11-12.8 and/or 6:11-12.9. Freehold Regional High School Education Association, et al. v. Board of Education of the Freehold Regional High School District, 1978 S.L.D. - (Decided December 26, 1978)

Petitioner, by way of unrebutted testimony, documentary evidence, and stipulation entered into by the Board, established the following facts:

1. The Board since at least 1973-74 through 1977-78 had employed four fully certificated school nurses which certificates were issued pursuant to the State Board rules at N.J.A.C. 6:11-12, 8 and 9. (Stipulation; Tr. 12)

2. The Board operates one middle school and four elementary schools. The Board, during the period 1973-74

through 1977-78, assigned one school nurse to its middle school on a full time basis. The remaining three school nurses, each of whom was employed on a six/sevenths of a full time basis, were assigned to the Board's four elementary schools. (Stipulation; Tr. 13)

4. The Board filled that position by employing a substitute school nurse through the conclusion of the 1977-78 year. (Tr. 155) The Board has not filled that position since the end of 1977-78. Thus, it began 1978-79 with three school nurses in its employ and continues through the present 1979-80 year with three school nurses. (Stipulation; Tr. 13)

5. The Board, at or about the commencement of the 1978-79 year assigned four clerical aides it had in its employ to assist the three school nurses. No one of the clerical aides is in possession of a school nurse certificate. (Tr. 92, 118, 129, 141)

6. The collective testimony of the four clerical aides establish that at one time or another they have individually assisted the school nurse by

*taking temperatures of pupils
*sending children who are ill home
*contacting parents of children who report to the school nurse's office they are ill
*applying band-aids to minor cuts
*applying ice packs
*washing minor cuts
*removal of splinters
*soothing bee stings
*treating nose bleeds
*applying ointment and/or cream.

7. The job description for the position of Clerical Aide II, prepared by the Superintendent, though not presented to the Board for its approval, does not provide for a clerical aide to perform the kinds of duties enumerated above. (J-2)

8. Two of the three school nurses are assigned one-half time to two of the Board's elementary schools. The clerical aide takes over for the nurse while she is at the other school

Boards of education are granted authority to employ school aides and/or classroom aides pursuant to N.J.A.C. 6:11-4.9. N.J.A.C. 6:11-4.9 requires boards of education to develop job descriptions and standards for appointment prior to the employment of such aides. N.J.A.C. 6:11-4.9(c) requires such job description to be adopted by the board prior to its submission to the County Superintendent of schools for approval.

It is established herein that the job description for the position of clerical aide, the duties of which are controverted herein, was prepared by the Superintendent. The Board, however, did not at any time approve that description. Nor was the job description presented to the County Superintendent for approval for 1978-79.

Furthermore, it is established that the kinds of duties being performed by the clerical aides in their efforts to assist the three school nurses are not set forth on the administratively adopted job description for clerical aides. (J-2) The Board's explanation that those duties are properly categorized under the general responsibility set forth in the job description "assumes other responsibilities as apparent or assigned" is without merit. The specific duties the clerical aides perform in assisting the school nurse are closely akin, if not identical, to those duties and responsibilities of a school nurse.

Within the factual circumstance presented herein, it is found (1) that the clerical aides assigned to assist the school nurse are performing duties set forth above which are not set forth in the job description for clerical aides; (J-2) (2) that the Board has not in the first instance adopted that job description; and (3) that the Bergen County Superintendent of Schools has not had the opportunity to approve the job description.

The Board is directed to immediately cease the practice of using clerical aides to perform duties in the school nurse's stead while the school nurse is away from that school. Should the Board determine to assign clerical aides to assist school nurses, it shall approve a job description specifying the duties to be assigned such aides.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

January 30, 1980
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN

WYCKOFF EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

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

The Board is directed to stop using clerical aides to assist school nurses absent a job description setting down the duties of such aides adopted by the Board and approved by the Bergen County Superintendent of Schools.

COMMISSIONER OF EDUCATION

March 17, 1980

IN THE MATTER OF THE TENURE)
HEARING OF LAURA FRAZIER,)
SCHOOL DISTRICT OF THE)
TOWNSHIP OF UNION, UNION)
COUNTY)

INITIAL DECISION
OAL DKT. NO. EDU 799-79
AGENCY DKT. NO. 13-1/79A

APPEARANCES:

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

For the Respondent, Rothbard, Harris and Oxfeld
(Sanford R. Oxfeld, Esq., of Counsel)

BEFORE THE HONORABLE BRUCE CAMPBELL, A. L. J.

EVIDENTIARY DOCUMENTS

P-1	9/76	Job Description - Library Media Specialists
P-2	4/6/78	Criteria for evaluation - Library Media Specialists
P-3	2/24/77	On-site review of Burnet Library 2/18/77
P-4	3/1/77	Letter to Laura Frazier from Pat Donatiello covering 2/18/77 on-site review
P-5	4/26/77	Progress report to Laura Frazier, Period 2/18/77 to 4/25/77
P-6	8/8/77	Summer work report, Polgar-Marshall to Petracco covering 6/27/77 to 8/8/77
P-7	10/6/77	Letter to Laura Frazier from Robert M. Petracco covering Title IV-B meeting 10/7/77
P-8	12/77	Memo to Laura Frazier covering 12/9/77 meeting with recommendations and requests, Title IV-B at Union High School, Layout, Burnet report
P-9	2/78	Conference report of February 3, 1978 to Laura Frazier covering delays, Title IV-B, Supplies orders

P-10	3/10/78	Letter to Laura Frazier from R. J. Bergen covering conference with Mr. Petracco on February 3, 1978, Review progress and make recommendations
P-11	10/6/77	Letter to Laura Frazier from Mr. Petracco covering activities to be completed
P-12	4/17/78	Letter to Laura Frazier from Mr. Petracco covering meeting of 4/17/78 discussing problem areas and progress
P-13	9/29/78	Letter to Laura Frazier from Mr. Petracco arranging Meeting for October 4 1978 to review activities
P-14	10/6/67	Memo to Laura Frazier covering conference of 10/4/78 listing problem areas, results and requests for improvement
P-15	6/27/78	Letter to Laura Frazier from Mr. Petracco requesting training for Union School media aide and clerk
P-16	9/26/78	Letter to Laura Frazier from Mr. Catino covering lack of progress in cataloging
P-17	10/17/78	Letter to Laura Frazier from Mr. Catino covering lack of progress from 9/26 to 10/17
P-18	12/5/78	Letter to Howard Schwartz from Dr. Lawrence covering Laura Frazier from 1968 to 1972
P-19	12/1/78	Letter to Dr. Caulfield and Howard Schwartz from Pat Donatiello covering Laura Frazier through June, 1977
P-20	6/78	Copies of Title IV-B shelf list cards completed by Laura Frazier from 9/77 through 6/78
P-21	4/6/78	Letter to Laura Frazier from Mr. Petracco requesting a meeting on April 13, 1978 show up
P-22	4/14/78	Letter to Laura Frazier from Mr. Petracco rescheduling the April 13 meeting to April 7

P-23	9/7/78	Letter to Laura Frazier from Mr. Petracco covering discussion and recommendations
P-24	9/28/78	Hamilton School monthly Report for September 1978
P-25	9/78	Elementary School Monthly Report Format
P-26	10/23/78	Letter to Joan Polgar from Mr. Petracco requesting training of Union High School media aide and clerk
P-27	10/25/78	Letter to Rose Bergel, Kathleen Smith from Mr. Petracco scheduling training to be held at Connecticut Farms
P-28	1/24/78	Gifted Child Program organizational worksheet covering orientation to be provided by the librarian and the gifted child teacher
P-29	4/78	Letter to Dr. Caulfield from Mr. Petracco outlining problems concerning Laura Frazier
P-30	1/77	Minutes of monthly meeting January 1977 - see item 7
P-31	1/12/78	Letter to Mrs. Truhe from Mr. Petracco requesting a report covering training and duties at Burnet
P-32	1/27/78	Letter to Mr. Petracco from Mrs. Truhe covering library experiences and training
P-33	9/78	Secondary School Monthly Report Format
P-34	9/28/78	Union High School Monthly Report for September 1978
P-35	10/5/78	Letter to Mr. Petracco from Kathleen Smith covering reprimand
P-36	6/19/78	Letter to Laura Frazier from Mr. Petracco requesting cataloging and processing supplies restrictions
P-37	12/4/78	Letter to Dr. Caulfield from Mr. Holcombe covering Laura Frazier during the period 1977-1978
P-38	9/15/78	Cover sheet to Mr. Petracco from Laura Frazier

P-39	9/15/78	Sample requisition prepared by Laura Frazier - errors in quantities ordered
P-40	9/18/78	Letter to Laura Frazier from Mr. Petracco covering problems in requisitions submitted on Sept. 15
P-41A	9/21/78	Requisitions resubmitted to Mr. Petracco
P-41B	9/21/78	Requisitions resubmitted to Mr. Petracco
P-41C	9/21/78	Requisitions resubmitted to Mr. Petracco
P-42	9/69	Letter to Dr. Stahuber from Dr. Lawrence covering Laura Frazier recommending loss of raise and increment for 1970-71
P-43	9/10/69	Letter to Dr. Stahuber attached to letter to Laura Frazier from Dr. Lawrence outlining areas of required improvement and lack of results
P-44	5/15/77	Letter to Laura Frazier from Dr. Lawrence outlining areas of continued problems
P-45	12/2/74	Observation report to Laura Frazier from Pat Donatiello covering problem areas
P-46	10/28/77	Monthly Report for Burnet from June Deleo to Mr. Petracco, check item II, par. 2
P-47	1/18/78	Letter to Dr. Barbato from Mr. Petracco requesting Board approval of college course for Laura Frazier
P-48	12/23/77	Letter to Laura Frazier from Mr. Petracco covering attendance at college for a refresher course in cataloging
P-49	1/19/78	Requisition - Voucher to Caldwell College in payment of college course for Laura Frazier
P-50	5/11/78	Board of Education voucher, payable to Caldwell College for tuition for course enrolled - by Mrs. Frazier
P-51	1/19/78	Refund from Caldwell College to Board - $10.00

P-52	11/30/78	Letter to Laura Frazier from Mr. Petracco covering conference of November 22, 1978 with sample planning sheets and activity sheets attached
P-53	6/21/78	Letter to Laura Frazier from Mr. Petracco covering items not cataloged at Livingston School from Sept. 1977 through June 1978
P-54	12/78	Letter to Mr. Petracco from Mr. Zwillman covering Laura Frazier Sept. 1977 through June 1978
P-55	9/28/78	Monthly Report to September, Union High School Media Center to Mr. Petracco from Kathy Smith, see items VII and Page 3
P-56	10/30/78	Monthly Report for October, Union High School Media Center to Mr. Petracco from Kathy Smith, see items VII page 2 and page 3 and 4
P-57	11/29/78	Monthly Report for November, Union High School Media Center to Mr. Petracco from Kathy Smith, see items VII, page 3, page 4
P-58	9/28/78	Hamilton School Monthly Report for September 1978
P-59	10/30/78	Hamilton School Monthly Report for October 1978
P-60	9/28/78	Union High School Monthly Report for September 1978
P-61	11/9/78	Union High School Monthly Report for October 1978
P-62	9/1/78	Sample Lesson Plan Format for Elementary School Librarians
P-63	11/8/78	Lesson Plan prepared by Laura Frazier for Hamilton School
P-64		Instructional planning schedule for Hamilton School - Library Orientation
P-65		Lesson Plan prepared by Laura Frazier for Hamilton School covering Library Orientation
P-66		Weekly Planning Schedule prepared by Laura Frazier for Hamilton School - Month of October

P-67	10/23/78	Letter to Laura Frazier from Mr. Petracco request for staff conference on System 80 materials and correlation report covering films and lessons
P-68	11/6/78	Letter to Laura Frazier from Mr. Petracco covering items requested
P-69	11/15/78	Letter to all librarians from Mr. Petracco covering library supply order due December 1, 1978
P-70	12/18/78	Letter to Laura Frazier covering conference of December 15, 1978 and requested meeting on December 19 rescheduled for December 21 at the request of Laura Frazier. Conference covered continued deficiencies and problem areas
P-71	9/78	Memo to all staff members from Mr. Petracco covering due dates of Monthly Reports
P-72	12/21/78	Lesson Plan prepared by Laura Frazier for Hamilton School for goals #3 and #4
P-73	12/21/78	Lesson Plan prepared by Laura Frazier for Hamilton School for goals #3 and #4
P-74	12/21/78	Lesson Plan prepared by Laura Frazier for Hamilton School for goals #3 and #4
P-75	11/30/78	Letter to Laura Frazier from Mr. Petracco covering conference of November 22, 1978, review of deficiencies and problem areas, with sample planning sheets and activity sheets attached
P-76	11/29/78	Hamilton School Monthly Report for November, 1978 submitted 12/8/78 with four attachments
P-77	12/21/78	Monthly Report for December, Union High School Media Center to Mr. Petracco from Kathy Smith, see items IV last two lines, page 4, page 5
P-78	12/11/78	Letter to Laura Frazier from Mr. Petracco requesting a meeting on December 14 to discuss problem areas

P-79	12/8/78	Cataloging activities for Hamilton School for December 4th and 5th prepared by Laura Frazier
P-80	9/12/78	Letter to all librarians from Mr. Petracco covering development of library media center manual
P-81	10/25/78	Letter to librarians covering due dates and content - handbook project
P-82	12/20/78	Handbook information prepared by Laura Frazier and submitted to Mr. Petracco
P-83		Copy of Mr. Petracco's New Jersey principal certificate
P-84		Copy of Mr. Petracco's New Jersey school administrator's certificate
P-85	1/23/78	Letter to Laura Frazier from Mr. Petracco advising of right of representation
C-1	6/12/79	Letter to Mr. Oxfeld from Dr. Pande V. Josifovski re Laura Frazier
C-2	6/14/79	Letter to Mr. Oxfeld from Dr. Josifovski re Laura Frazier

The Board of Education of the Township of Union (Board) certified a series of charges of incompetence, insubordination and other good cause to the Commissioner of Education for adjudication on January 22, 1979, against Laura Frazier (respondent), a teaching staff member with a tenure status in its employ. The Board suspended respondent from her duties, without pay, pending a determination on the merits of the charges against her.

The matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on April 5, 1979. A prehearing conference was held on May 14, 1979, at which the Board was directed to recast charges and submit a list of proposed witnesses. The Board did so in a timely manner and respondent's Answer to the original set of charges was accepted as Answer to the recast charges.

Hearing was held in this matter on June 12, 13, 14, 19 and 20, 1979, at the Union Township Municipal Court, Union. Briefs were filed by the parties in support of their positions. The record was closed on December 7, 1979.

Respondent was represented by counsel but did not appear at the first day of hearing. At the direction of the administrative law judge presiding, a letter under date of June 12, 1979 from Pande V. Josifovski, M. D., respondent's physician, was submitted on June 13, 1979. That letter (C-1) reads as follows:

" June 12, 1979

" Re: Mrs. Laura Frazier

" Mr. Sanford Oxfeld
744 Broad Street
Newark, N. J. 07102

" Dear Mr. Oxfield as per our telephone conversation on 6 12 79 with You and Mrs. Laura Frazier please be advised that Mrs. Laura Frazier, patient of mine, was disabled From June 5, 1979 thru June 11, 1979, because of medical reasons.

"Sencerely,

"/S/ Pande V. Josifovski, MD" (sic)

Respondent did not appear on any other day of hearing. At the direction of the presiding judge, a second letter from Dr. Josifovski was submitted on June 19, 1979. That letter (C-2) reads as follows:

"June 14, 1979

"Re: Mrs. Laura Frazier

" Mr. Sanford Oxfeld
744 Broad Street
Newark, N. J. 07102

" Dear Mr. Oxfeld:

" As You know Mrs. Laura Frazier was seen in my office on June 5, 1979, with symptomes of dizziness. Medications were prescribed and she was advised to return to this office for further evaluation - if symptomes persist.
However she never showed up for fallow up visit. At this point I am not able to make any statement about her present medical status.

" Very truly yours,

" /S/ Pande V. Josifovski M.D." (sic)

It is noticed that counsel for respondent, in addition to making of record an objection to this matter proceeding each day that respondent was absent, made every effort to pursuade respondent to appear or to provide competent medical evidence as to her inability to appear. Despite counsel's efforts, respondent neither appeared nor put forward any such evidence.

The series of charges will be treated as a composite charge. Such a treatment of extensive testimony and documentary submissions is consistent with the observation of the Commissioner of Education in In the Matter of the Tenure Hearing of Francis M. Starego, Borough of Somerville, Middlesex County, 1967 S.L.D. 271, aff'd State Board of Education 1968 S.L.D. 273, where, in pertinent part it is stated:

> " ***Each of the school administrators testified as to detailed observations which had been made of the teacher's (Starego) performance in the classroom***. The Commissioner finds no necessity to attempt to analyze and evaluate each of the incidents or instances related. Evaluation of a teacher's competency is generally a matter of total impression resulting from a synthesis of observations made over a period of time.*** "
> (1967 S.L.D. at 272.)

In the instant matter, the Director of Media, five principals, one librarian and nine clerks or aides each testified to his or her observations, formal and informal, and experiences with respect to respondent's overall performance as a teacher-librarian. Eighty-seven documents were entered in evidence, the great majority without objection. From a careful review of the testimony adduced and the documents in evidence in support of the testimony, the following facts became clear.

Petitioner, at all times here in question, had in her possession the Union Township Schools job description for Librarian-Media Specialist (P-1) and knew or should have known the eight basic areas of responsibility covered in that document. The record is replete with examples of administrative directions and administrative suggestions for improvements that were carried out only partially or not at all notwithstanding additional suggestions and extensions of time for accomplishing them. (P-3, P-4). A memorandum to respondent from the Director of Media under date of April 26, 1977 (P-5), e.g., deals with six actions required of respondent by certain dates but past due. One action, the submission of a list of lost, missing or nonreturned reference and library books, was accomplished but was received 26 days after the due date. A second action requiring a general cleaning out and reorganization of the librarian's work area and the processing room was, in the main, not complied with. A third action, the processing of new books received prior to September, 1976, was not accomplished to any discernable degree. A fourth action, the cleaning of storage closets and selective "weeding out" of outdated materials, was not effected. Books scheduled for rebinding showed last circulation dates of 1968; nine-year-old copies of the New York Times Book Review Section remained in storage; acquisitions were still in boxes and uncirculated. A fifth action, the establishment of book classification and processing

activities together with a schedule for same, was not done. The sixth action, writing of an outline covering areas of training being provided for library media center aides was not accomplished.

The testimony of all six supervisory personnel is similar in the kinds of inadequate performance observed. They related that in each instance in which they were in a supervisory relationship with respondent she failed to carry out the basic responsibilities of a teacher librarian to an acceptable level, that directions and suggestions for improvement received little or no response and that the assignment of aides to respondent in order to help her perfrom her required functions was successful only insofar as those personnel assumed initiative and undertook certain work since direction from respondent was negligible or nonexistent. The latter point was corroborated by the testimony of nine clerks and aides. Vast amounts of routine work simply were not accomplished. The record bears out the Board's assertion that respondent was given sufficient, clear direction as to what was expected of her, adequate time in which to accomplish it and the resources and tools necessary to the job.

In total, 71 specifications of incompetence and insubordination on the part of respondent were put forth by the Board. Each of these was supported by parol and documentary evidence. In many of the 71 instances, respondent was given from several days to several months to rectify deficiencies. The record is clear that she did so not at all or to an unacceptable degree. The record is also clear that supervisory personnel on more than one occasion had to do work that respondent had failed to do.

Respondent argues that, at most, the Board proved she was an inefficient teacher as that term is used in N.J.S.A. 18A:6-11. The cited statute treats of written charges, written statement of evidence, filing, statement of position by employee, certification of determination and notice in connection with the dismissal or reduction in compensation of tenured public school personnel. In pertinent part it states:

> "***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 charge made here and proven by a preponderance of the credible evidence is that respondent is incompetent to perform her assigned duties. This is not a charge of inefficiency. The cited portion of N.J.S.A. 18A:6-11 is inapposite and the procedures attendant to charges of inefficiency do not apply. Respondent's argument is without merit.

Respondent also argues that the conduct of the hearing in her absence constitutes a violation of her due process rights. I cannot agree. Respondent was given ample opportunity to appear or to present competent medical evidence as to her inability to appear. In the face of advice from her counsel to do one or the other, she did neither. She was represented throughout the hearing by counsel. All charges, all potential documents in evidence and all potential witnesses were made known to her well in advance of hearing. That she failed to appear or to offer any good reason for her failure to appear cannot now be the basis for a violation of due process argument.

I FIND, therefore, that there is more than sufficient evidence in this case to support the charges made. It is established law that

> "***Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. ***(Emphasis supplied) (Redcay v. State Board of Education, 130 N.J.L. 369,371 (1943), aff'd 131 N.J.L. 326 (E & A 1944)"

The proven charges here, in my judgment, are the "series of incidents" referred to in Redcay, which are the best evidence that respondent should be dismissed.

Based upon this finding and a complete review of the record herein, I CONCLUDE that respondent shall be and is hereby dismissed from her employment as a teaching staff member retroactive to the date of her suspension by the Board.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

16 JANUARY 1980
DATE

Bruce Campbell
BRUCE CAMPBELL, A.L.J.

IN THE MATTER OF THE TENURE	:	
HEARING OF LAURA FRAZIER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF UNION, UNION	:	
COUNTY.	:	
	:	

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

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

Respondent's objections include a claim that she was denied due process because the five-day hearing was conducted without her presence. The Commissioner finds no merit in this contention. The record is clear that respondent was afforded, through counsel, appropriate notice of all hearing dates. Furthermore, respondent's counsel was given ample opportunity to offer medical or other valid reasons for respondent's inability to appear. Counsel never provided any such valid reason and none has been advanced now. The Commissioner can only conclude that respondent's absence was voluntary and done with full knowledge of the impact it might have on the litigation and decision of the case. Respondent's further claim that at the most she should have been granted a 90-day probationary period as an inefficient teacher pursuant to N.J.S.A. 18A:6-12 is without merit.

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

The Commissioner directs that the Union Township Board of Education dismiss respondent from her employment as a teaching staff member as of the date of her suspension by the Board.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

In the Matter of: BERNARD KOBB and SHERRIL KOBB, parents of KENNETH KOBB v. BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY	INITIAL DECISION O.A.L. DKT. NO. EDU 2262-79

APPEARANCES:

Leonard Rubin, Esquire, attorney for petitioners

Shebell & Schibell, Esquires, by Peter Shebell, Jr., Esq., attorneys for respondent

EXHIBITS MARKED IN EVIDENCE:

P-1 Report; 2/21/79, Maryanne Zuchowski, M.A., C.R.C., School Social Worker (Child Study Team)

P-2 Report, 2/1/79, Geraldine R. Venino, M.A., School Psychologist (Child Study Team)

P-3 Report, 2/15/79, Aileen Marino, LDT-C (Child Study Team)

R-1 Records, including:
- PSAT scores
- Disciplinary memo 7/17/78
- Secondary School Record
- Memo 3/14/79, re halt of home instruction
- Test attendance delinquency memo 1/9/76
- Student Progress Report, undated
- Student Progress Report, 1/6/76
- Course change record, 8/29/78
- Course change record, 1/18/78
- Course change record, 11/17/78
- Interim reports of unsatisfactory progress dated 10/18/77, 10/24/77, 12/9/77, 1/19/78, 3/8/78, 5/17/78, 10/12/78, 10/27/78, 10/16/78, 1/27/79, 1/24/79, 11/6/78, 12/19/78, 1/2/79

EXHIBIT R-1, Continued:

Notices of class cut, 4/20/78, 4/30/78, 6/20/78 (truancy 6/19/78)
Notices of suspension 5 days 11/8/78, 3 days 12/4/78, indefinite 12/19/78, 4 days 1/28/77
Extract of Board of Education policy re Narcotics from Student Handbook
Agenda, Board of Education meeting 2/13/79
Memo to Superintendent re marijuana sale on 2/2/79
Statement of security guard re marijuana sale 2/2/79
Letter to parents re suspension 2/9/79
Letter to Board of Education from Jewish Family & Children's Service, 2/9/79
Letters from Superintendent to parents, 2/14/79, 2/27/79, 3/14/79
Minutes of Board of Education and resolution of expulsion, 3/20/79
Child Study Team, Classification Conference Report, 3/1/79
Letter to Assistant Commissioner of Education from Walter H. Gehricke, J.D.C., 5/15/79

BEFORE THE HONORABLE JAMES A. OSPENSON, A.L.J.:

Petitioners appeal to the Commissioner of Education under N.J.S.A. 18A:6-19 from the action of respondent, Board of Education of the Township of Ocean, in expelling the infant petitioner, an 11th grade student, on March 20, 1979, for conduct of such character as to constitute a continuing danger to the physical well-being of other pupils, contrary to N.J.S.A. 18A:37-2(c): specifically, sale of marijuana to students in Ocean Township High School on February 2, 1979. Their petition of appeal alleges that under the circumstances expulsion was unwarranted, excessive, arbitrary and capricious. The Board denies the allegation.

The petition was filed in the Division of Controversies and Disputes of the Department of Education on April 23, 1979. An Answer was filed April 24, 1979. The matter was transmitted to the Office of Administrative Law on July 13, 1979 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14B-9, 10. On November 15, 1979 a prehearing conference was conducted and an Order entered. Hearing was held in the Office of Administrative Law on January 17, 1980 and the matter was finally concluded 10 days thereafter by submission of letter memoranda of law.

At prehearing it was stipulated the procedural facts of the expulsion process are not disputed. Thus, there is no Tibbs issue: i.e., petitioners do not allege any constitutional due process insufficiency or irregularity under the doctrine of Tibbs v. Board of Education, Franklin Twp., 59 N.J. 506 (1971). Nor does there appear any statutory irregularity in the suspension process under N.J.S.A. 18A:37-4, 5.

EVIDENCE AT HEARING

Kenneth Kobb, age 17 years, was born November 30, 1962 and adopted when 5 days old. He entered Ocean Township school system in grade 6. According to school records (P-1), his school progress was uneventful until grade 9 when anxiety about his academic performance and behavior prompted his mother to request Kenneth's reference to the school psychologist, who in turn requested a learning evaluation. Following the evaluations family therapy was recommended. On January 9, 1979, when Kenneth was in 11th grade at Ocean Township High School, his mother again requested child study team evaluation as a result of continued behavioral problems at home. Indeed, behavioral problems were apparent at school as well during 1977-78, when numerous instances of unsatisfactory progress in school, class cutting, course changes, truancy, and suspensions dotted Kenneth's records and were reported to his parents (R-1). The instances of unsatisfactory progress, on review, seemed not to be instances of defiant or anti-social behavior requiring disciplinary intervention but instead to suggest that Kenneth was not working up to potential. Below-potential performance may have had causes rooted in the family: a school psychologist reported on February 1, 1979 (P-1) Kenneth's full scale I.Q. fell within the high average range of intelligence:

> ".....he does not exhibit overt hostility. No signs of impulsivity were noted. (He) exhibits an ambivalent attitude towards school. This may be the result of a need to be recognized as academically successful concomitant with an ability to achieve desired levels of success. This results in an effort to avoid perceived failure. It is also possible that Kenny's poor attitude towards school and truancy may represent a form of passive resistance against a parent (the father) whom he perceives as critical and demanding. It is also suggested that he may not fully comprehend the motives underlying his behaviors."

By mid-year of 1978-79, he was failing all subjects.

Full child study team evaluation, though in progress, remained unfinished when the event precipitating expulsion occurred.

On February 2, 1979, Kenneth was seen by the security guard at the high school parking lot to take a plastic bag from his pocket and offer its contents to 3 or 4 other students. In the high school office it was determined he had 25 marijuana cigarettes in his possession. He admitted having sold 5 others to students. He was suspended from school for possession and sale of marijuana, acts which are contrary to Board policy (published in the 1978-79 Student Handbook (R-1)):

> "The Township of Ocean Board of Education has established a policy regarding student possession, use or sale of drugs while on school property. Students may (emphasis added) be subject to expulsion if found to be involved in possession of, using or selling drugs while on school property."

Kenneth readily admitted the acts in the presence of his mother and juvenile authorities. Suspended indefinitely pending a hearing before the Board on February 20, 1979, where he again admitted his acts, he and his parents were told on February 27, 1979 that interim home instruction would be provided until the Board reached a decision on expulsion. On March 14, 1979 they were told the Board has considered the evidence at hearing on February 20, 1979 and, as required by N.J.A.C. 6:28-1.5(e), the full child study team evaluation (R-1) - then completed - and had determined to include Kenneth's expulsion on the agenda of the Board meeting of March 20, 1979. Home instruction by the district was terminated on March 15, 1979.

The child study team's Classification Conference Report of March 1, 1979 (R-1) classified Kenneth Kobb as "Emotionally Disturbed." (See N.J.S.A. 18A:46-6, 8, 13; and N.J.A.C. 6:28-1.1, 1.2(4), et seq.). The Report summarized the reports of school social worker (P-1), the school psychologist (P-2), the LDT-C (P-3), and the psychiatrist, who said:

> "In Kenneth Kobb, we see a boy with very confused identities. He cannot identify with his parents because he looks different and acts different. He cannot identify with his religious background. He cannot identify with

the self image that his parents would like him to have although he is bright enough to live up to it. He is depressed and apparently has some difficulty in identifying himself with his environment. Last, but not least, he probably has an extensive fantasy concerning his biological parents and his relationship to them impinges on his self image to my mind. Therefore, on the basis of this examination, I feel we are dealing with an emotionally disturbed boy who is also socially maladjusted and on the basis of this examination, all the ancillary benefits should be extended to him. Whether he can return to school in view of his fears, remains to be seen. Somehow or other, I feel he is in dire need of psycho-therapy immediately and the parents have made arrangements toward that end after I spoke to them following the examination."

The Report concluded:

"Classification: Emotionally Disburbed

Team Conclusions:

Kenneth is an eleventh grade student who has demonstrated behavioral difficulties both at home and at school. Psychological evaluation indicates that Kenneth is currently functioning within the high average range of intelligence. His academic achievement as assessed by individual learning evaluation is in above average range with the exception of mathematics, where developed skills are appropriate for grade placement, although some gaps were evident in computational skills. Perceptual skills were adequately developed. Nevertheless Kenneth's actual classroom performance is poor, suggesting that other factors are influencing his progress.

Social evaluation indicates the presence of home difficulties, particularly in Kenneth's relationship with his father which was corroborated by results of the personality assessment. Establishing satisfactory social relationships was also seen as an area of difficulty. The report of the psychiatric evaluation further elaborated on these difficulties, noting

> Kenneth's inability to identify with his parents and social environment.
>
> During the course of the Child Study Team evaluation, Kenneth was suspended for an incident involving his distribution of marijuana on school grounds and is now facing possible expulsion.
>
> Since this incident, parents have made arrangements for psycho-therapy for Kenneth.
>
> On the basis of the results of the combined evaluations, the Child Study Team classifies Kenneth Kobb Emotionally Disturbed. He is therefore eligible for the services described in the regulations pertaining to N.J.A.C. Law 6:28-1.1. Thus an appropriate individualized educational program may be developed by the Child Study Team in cooperation with parents to be implemented within the Ocean Township High School."

The Board voted on March 20, 1979 "to approve the expulsion" of Kenneth effective March 13, 1979. There was no explanatory resolution.

Kenneth appeared in Juvenile Court on May 9, 1979 before Hon. Walter H. Gehricke, J.D.C. The complaints against him were conditionally discharged by the Court under R. 4:9-9, the Court having been satisfied from the probation reports and from his demeanor that he was contrite and that there was reasonable prospect for his future if he were given a second chance. (See the Court's letter to the Commissioner dated May 15, 1979 in R-1).

Between February, 1979 and June, 1979 Kenneth was seen in psychiatric consultation some 6 or 7 times. His mother testified Kenneth was not discharged from such therapy but that Kenneth saw nothing "constructive" in the sessions and so stopped attending them. She agreed. She felt the treatment was "long-range" and that Kenneth's trouble was "short-range". His father agreed: he saw "no value" in the therapy. (His mother is employed as a supplemental instructor in special education at Ocean High School. His father is a supervisor at Fort Monmouth).

Kenneth testified openly and without equivocation about the marijuana sale. He said he got the marijuana cigarettes from another student who had asked him to sell them at $1.00 apiece. He had never sold them before but knew marijuana was

available on school grounds. He was aware of injunctions against drug sale in the Student Handbook. He intended to return the money realized from the sale to the student. He cooperated with juvenile authorities and disclosed to them the name of the student-supplier.

Since his expulsion, Kenneth has held a series of jobs in restaurant labor in local restaurants and clubs. He has worked as regularly as he could, presently is a sandwich-maker at a restaurant in Ocean Township, has tried to get other jobs but could not for lack of job qualifications and age, and would like to attend some kind of trade school. He did not say what kind.

In July, 1979 Kenneth obtained a high school equivalency diploma after testing under the high school completion program of the Bureau of Adult, Continuing Community Education, Division of Field Services, Department of Education, at Eatontown. (See N.J.S.A. 18A:50-12 to 14; N.J.A.C. 6:44-6.1, et seq.).

The superintendent of schools for Ocean Township, Robert J. Mahon, testified there have been other instances of pupil expulsion in the district for narcotics-related offenses. In his view, Board policy as stated in the Student Handbook is permissive and not obligatory for expulsion. The circumstances of each case, he said, differ. More frequently than not, he said, students are not expelled for such offenses but lesser sanctions are imposed. The stated policy does not differentiate "narcotics" or "drugs" from marijuana. Kenneth's offense was of particular gravity, in his opinion, because of its commercial aspect, that is, a sale, and because there were so many marijuana cigarettes (25) involved: the implications of risk to the safety and physical well-being of other students seemed obvious.

He said on the basis of PSAT scores (R-1) alone and on the assumption, obviously, of successful completion of high school programs, strengthened particularly in mathematics, Kenneth is a "possible" candidate for college admission.

DISCUSSION

The menace of marijuana or drug abuse to the health and well-being of pupils in the public schools of this state is plain. See "J.W." by his gdns. ad litem v. Board of Education Hammonton, 1975 SLD 776, 781, 783:

> ".....Possession or use by pupils in a schoolhouse or on school grounds of marijuana or any other controlled dangerous substance ... may not be condoned. To leave such conduct unpunished would only create a school atmosphere that would encourage younger pupils and other pupils to experiment with controlled dangerous substances. Local boards of education must deal with such problems in a manner that will discourage violations of the law. ... Marijuana or any drug abuse is a serious menace to the health and well-being of the pupils enrolled in the public schools of this State ..."

Sanctions of suspension or expulsion under N.J.S.A. 18A:37-2 for such offenses have in given instances been upheld. See, for example, "E.F.", parent and guardian ad litem of "J.F.", 1978 SLD 2/27/78; and "O.P." v. Board of Education Paterson, 1976 SLD 658. Review of board action to suspend or expel is a form of appellate review. Because a board can apply its sanction for any good cause under the statute (N.J.S.A. 18A:37-2), the administrative appellate review will sustain any reasonable board action absent a showing of impropriety or illegality. See Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd. 46 N.J. 581 (1966).

Was the action of the Ocean Township Board in expelling Kenneth Kobb a reasoned and reasonable sanction under the circumstances? To the extent the action was a suspension of the pupil's presence in the schools and, thus, an interdiction of the risks inherent in his presence there, one cannot, perhaps, deny its reasonableness and propriety. That is to say, the sanction was promptly taken and, as has been agreed by the parties here, taken with due and careful regard to procedural due process of law. But expulsion is an irreversible act bearing consequences impinging on society at large:

> "Termination of a pupil's right to attend the public schools is a drastic and desperate remedy that should be employed only when no other course is possible. It involves a momentous decision that members of a board of education, most of whom have had little specific training in education, psychology or medicine are called upon to make. The board's decision should be grounded, therefore, on competent advice. ..... It is obvious that (the board) cannot wash its hands of a problem by recourse to expulsion. While such

> an act may resolve an immediate problem for the school, it may likewise create a host of others involving not only the pupil but the community and society at large. ... Boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see the child comes under the aegis of another agency able to deal with the problem ... (and) to recognize expulsion as a negative and defeatist kind of last-ditch expedient resorted to only after and based upon competent professional evaluation and recommendation." See John Scher v. Board of Education West Orange, 1968 SLD 92, 96, 97; rev. other grounds, St. Bd., 1968 SLD 97.

Here, expulsion by the Ocean Township Board was expulsion of a pupil clearly and plainly classified by the child study team under N.J.S.A. 18A:46-8, N.J.A.C. 6:28-1.2(4), and N.J.A.C. 6:28-1.6(h)(4) as emotionally disturbed. The team's recommendation was to develop an appropriate individualized educational program, which under ordinary circumstances would have clearly been the pupil's right to have and the Board's duty to furnish. N.J.S.A. 18A:46-9, 10, 13, 14; and N.J.A.C. 6:28-1.1, et seq. and 6:28-2.1 et seq.

There are two circumstances that give one pause, however, to justify the irreversibility of the expulsion process in this pupil's case: (1) the circumstance that on the basis of past school records the classification might not have been accomplished earlier than it was and, perhaps, before the incident of February 2, 1979; and (2) the disinclination of the Board to explain its sanction in resolution form on March 20, 1979 in the face of the child study team evaluation before it. There seems little point to a speculation whether, had classification been accomplished before the incident, guidance and therapy might have forestalled the act. The point remains, however, that to the extent the expulsion action was more than a suspension, and to the extent of its irreversibility, one must on the evidence here question its reasonableness and propriety. In particular, one cannot fail to heed the psychiatric evaluation (R-1) that the pupil is "an emotionally disturbed boy who is also socially maladjusted" and "all ancillary benefits should be extended to him," a conclusion shared, perhaps, by his juvenile court judge (R-1) and the child study team.

Having carefully reviewed the exhibits herein, having heard the arguments of counsel and having observed the demeanor of the witnesses in testimony, I FIND and DECLARE as follows:

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

2. On February 2, 1979, Kenneth Kobb, an 11th grade student at Ocean Township High School, sold marijuana cigarettes to other students on school grounds and was apprehended with some 25 other such cigarettes in his possession, which he had received from, and was selling for, a friend.

3. There is no evidence in this record that the offense was repetitive, nor is there evidence that his school record demonstrated prior drug-related refractory behavior.

4. His school record does demonstrate, however, reasonable grounds for initiation of child study team evaluation independently of and before the occurrence of the event of February 2, 1979. Indeed, reference for such evaluation had been made and evaluation was in progress when the event occurred.

5. The pupil is emotionally disturbed, and thus educationally handicapped, within the meaning of N.J.S.A. 18A:46-1, et seq.

6. Such educational handicap pre-existed the event of February 2, 1979 to a degree and for such time that it should have been evaluated and classified before that date.

7. The pupil's offense was sufficiently grave to warrant his separation, by immediate suspension, from the school environment for protection of the health and well-being of other pupils.

8. To the extent the school administration and the later Board action of March 30, 1979 effected such separation and to the extent the Board has continued it to date, the Board action was for good cause and was a reasonable and proper exercise of its powers and duties under N.J.S.A. 18A:37-2.

9. To the extent Board action of March 20, 1979 constituted expulsion, it is unreasonable under the circumstances hereinabove; instead a suspensory period of one year from date of offense is reasonable and proper.

10. Thereafter, at the conclusion of such suspensory period, the pupil is entitled to conditional re-enrollment in the district.

11. The condition of such re-enrollment is that the Board provide, and the pupil submit to, such further classification and evaluation as may be required under N.J.S.A. 18A:46-13, 14, 15 for special or supplementary education of the handicapped in the district according to an education program individualized for him as required by N.J.A.C. 6:28-1.8.

12. A further condition of such re-enrollment is that the pupil be and remain free of violation of any juvenile court probation imposed upon him under R. 5:9-9.

13. A final condition of such re-enrollment is that the pupil undergo a reasonable regimen of psycho-therapy until discharge therefrom by the therapist.

Based on the foregoing, therefore, I hereby AFFIRM such part of the Board action of March 20, 1979 as suspended Kenneth Kobb from educational services in the district for the offense of February 2, 1979, i.e., sale of marijuana to other students on school grounds. I REVERSE such action insofar as it constituted expulsion. Lastly, I ORDER re-enrollment of Kenneth Kobb on or after February 2, 1980 upon the terms and conditions hereinabove set forth.

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

OAL DKT. NO. EDU 2262-79

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

January 29, 1980
DATE

JAMES A. OSPENSON, A.L.J.

Receipt Acknowledged:

BERNARD KOBB & SHERRIL KOBB, parents of KENNETH KOBB,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Board takes exception to the determination of Judge James A. Ospenson that petitioner's classification might have been accomplished sooner and that there was no evidence that petitioner's offense was repetitive. The Board further excepts to the condition for petitioner's re-enrollment that he remain free of the violation of any juvenile court probations imposed upon him. The Commissioner has examined the record, considered the evidence and cannot agree with the Board. The Commissioner does not find the responsibility of determining petitioner's standing with Juvenile Court to be an excessive or galling task for the Board and its staff.

The Commissioner will now consider the Board's exceptions to the condition for re-enrollment of petitioner which requires him to undergo a reasonable regimen of psychotherapy. The Commissioner notes the Board's question of the authority to impose such a condition because it has no money to pay for such therapy and further expresses doubt as to the meaning of a "reasonable" regimen of therapy.

The Commissioner determines that wherein the pupil has been found to be emotionally disturbed it is a prudent and proper enjoinment that he receive help in overcoming his problem. The Commissioner further determines that the cost of such psychotherapy is the responsibility of the parents. The meaning of reasonableness as it applies to such therapy is to be determined by the therapist in consultation with the child study team as deemed necessary.

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

As the Commissioner said in John Scher v. Board of Education of the Borough of West Orange, 1968 S.L.D. 92, 96,"*** Termination of a pupil's right to attend the public schools of a district is a drastic and desparate remedy which should be employed only when no other course is possible.***"

Accordingly the Board is directed to re-enroll Kenneth Kobb on or after February 2, 1980 under the terms and conditions hereinbefore set forth. The Board is further directed to monitor his progress through the services of its child study team.

COMMISSIONER OF EDUCATION

BERNARD KOBB AND SHERRIL KOBB, parents of KENNETH KOBB,	:	
PETITIONERS-APPELLEES,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 17, 1980

For the Petitioners-Appellees, Leonard Rubin, Esq.

For the Respondent-Appellant, Shebell & Schebell (Peter Shebell, Jr., Esq., of Counsel)

Petitioner's son, an 11th grade pupil, was expelled from school after he was found to have 25 marijuana cigarettes in his possession and after he admitted that he had sold five others to students. The Board's policy on drug abuse, as set forth in the Student Handbook, declared that "students may be subject to expulsion if found to be involved in possession of, using or selling drugs while on school property." The Commissioner upheld the student's suspension as reasonable and proper, but further ruled that expulsion was too drastic a penalty. He directed that the boy be readmitted, but on certain specified conditions including a regimen of psycho-therapy to be paid for by the parents.

We believe that expulsion, as provided in the Board's policy known to the students, was within the Board's authority and that such exercise thereof should not have been disturbed by the Commissioner. Sale of drugs on school property is a serious offense. Particularly in the case of this student, who

had demonstrated behavioral difficulties both at home and in school, the Board could properly determine that the welfare of other pupils in the school system required the student's permanent separation therefrom.

We recognize that the Board's authority to expel the pupil overrides pupil's entitlement to an appropriate educational program under the Special Education statutes and regulations. Accordingly, the State Board of Education reverses the decision below. The petition is dismissed.

Jack Bagan, E. Constance Montgomery, Katherine Neuberger and Susan N. Wilson opposed in the matter.

November 5, 1980

RICHARD STOLTE,	)	
	)	
PETITIONER,	)	INITIAL DECISION
	)	OAL DKT. NO. EDU 2261-79
V.	)	AGENCY DKT. NO. 84-79A
	)	
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	)	
	)	
RESPONDENT.	)	

APPEARANCES:

For Petitioner, Parker, McCay and Criscuolo, Esqs.
(Stephen J. Mushinski, Esq., appearing)

For Respondent, John J. Barbour, Esq.

BEFORE THE HONORABLE DANIEL B. MC KEOWN, A.L.J.

Petitioner, employed by the Board of Education of the Township of Willingboro, (Board) alleges that the action of the Board by which he is assigned to teach physical education is illegal and in violation of his accrued seniority rights to the position of assistant principal within which position he acquired a tenure status. The Board denies the allegations and asserts that its assignment of Petitioner to teach physical education is in all respects proper and legal.

The matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A.52:14F-1, et seq. Subsequent to a prehearing conference at which the essential parts of the matter were stipulated, the parties filed cross-motions for summary judgment with supporting Briefs. The matter was readied for disposition by way of summary judgment on December 18, 1979 when the Board filed its Brief.

The stipulated facts of the matter are these:

1. Petitioner had been employed for twelve years by the Board as Assistant Principal assigned to its Levitt Junior High School. The school contained grades seven through twelve.

2. The Board determined during March, 1978 to close the Levitt Junior High School, which closing was effective for the 1978-79 school year.

3. Pupils who would have attended Levitt Junior High School, grades eight and nine had it not been closed were assigned to the Board's remaining junior high school, the Memorial Junior High School. Pupils who would have entered grade seven at Levitt Junior High School were assigned to another school.

4. The Board determined to reassign Petitioner to the position of physical education teacher, effective 1978-79, at no loss of salary compared to what he would have earned had he remained in the position of Assistant Principal for 1978-79.

5. The Board in the meantime assigned another person to a position of Assistant Principal at its Memorial Junior High School who had lesser seniority in that position in the Board's employ than does Petitioner.

6. Petitioner was continued in his assignment of teacher of physical education for 1979-80. However, Petitioner's salary for 1979-80 is less than he would have received had he been assigned as Assistant Principal and had his salary determined according to the Board's Administrators' salary policy.

This concludes a recitation of the stipulated facts entered in the record by the parties (See Prehearing Order, dated October 15, 1979, p.2)

Other facts of the matter may be inferred from the pleadings. They are:

1. Petitioner had been employed by the Board as a teaching staff member for twenty years, twelve of which he was assigned the position of Assistant Principal. (Petition of Appeal, Paragraph Three; Answer, Paragraph Three)

2. Subsequent to the Board's action to close the Levitt Junior High School and to reassign Petitioner from the position of Assistant Principal to the position of teacher of physical education, Petitioner filed a grievance by which he alleged his assignment as a teacher was in violation of the Administrators' Agreement. The grievance proceeded to arbitration wherein his grievance was finally denied by an arbitrator on January 31, 1979. (Petition of Appeal, Paragraph Five; Answer, Paragraph Five)

The Petition of Appeal was filed before the Commissioner on April 2, 1979 and an Amended Petition was filed on April 30, 1979.

This completes a recitation of the facts upon which the parties cross-move for summary judgment in their favor.

The Board initially moved for dismissal of the matter upon its assertion the matter was not timely filed in accordance with N.J.A.C. 6:24-1.2. This State Board rule provides, inter alia, that

> " *** /A/ petition must be filed /before the Commissioner/ within 90 days after receipt of the notice by the Petitioner of the order, ruling or other action concerning which the hearing is requested ***"

The Board argues that its controverted action occurred during August, 1978 but that the Petition was not filed until March 21, 1979. It is noticed here that the verification of the Petition was executed March 21, 1979; the fact is the Petition was not filed with the Department of Education until April 2, 1979. (See cover letter, dated March 16, 1979 attached to Petition, stamped as received April 2, 1979)

The Board does not suggest that Petitioner inexcusably delayed filing the Petition and that such delay works to its detriment in regard to witnesses or documentary evidence it may have lost, otherwise necessary to its defense of the action.

Furthermore, it can be reasonably stated that Petitioner sought redress at the local level by asserting the Agreement between the Board and the Administrators' Association, of which he is a member, was violated with respect to his reassignment. That avenue of relief being denied him, he filed a Petition of Appeal before the Commissioner whereby he alleges specific violations of Title 18A, Education Law with respect to his reassignment.

I FIND no merit to the argument of the Board that the Petition was filed in an untimely manner within the context of N.J.A.C. 6:24-1.2. Petitioner is entitled to seek relief at the local level through the agreed upon grievance procedure. That process concluded January 31, 1979. Ninety days thereafter would be April 30, 1979. The Petition was filed April 2, 1979 well within the required ninety days.

Petitioner argues in his Brief that the Board, by assigning him to a position of teacher, did, in fact, reduce his rank contrary to his tenure status at N.J.S.A. 18A: 28-5. Petitioner also argues that because he acquired a tenure status as Assistant Principal he also acquired seniority rights to continued employment as Assistant Principal over someone with lesser seniority in the same position pursuant to N.J.J.A. 18A:28-11 et seq.

The Board argues to the contrary that within the factual circumstances of this case, Petitioner's assignment to the position of teacher

from his former position of Assistant Principal is not a demotion or reduction in rank as contemplated within N.J.S.A. 18A:28-5. The Board asserts its controverted action is merely a transfer of Petitioner from one position to another. The Board contends it has the authority to transfer its personnel at N.J.S.A. 18A:25-1. The Board cites Lascair v. Bd. of Ed. of Borough of Lodi, 36 N.J. Super 426 (App. Div. 1955); Cheeseman v. Gloucester City, 1 N.J. Misc. 318 (1923); and Greenway v. Bd. of Ed. of City of Camden, 129 N.J.L. 416 (1923) in support of this position.

The Board also argues that Petitioner does not have a tenure status claim to the position of Assistant Principal at its Memorial Junior High School. The Board argues Petitioner was never assigned that position at the facility; thus, he has no seniority claim to that position at Memorial. The Board, in support of this argument, cites the whole of N.J.A.C. 6:3-1.10, the State Board rule which sets forth the standard for determining seniority. Specifically, the Board relies therein upon N.J.A.C. 6:3-1.10(k) which provides in relevant portion:

> (k) The following shall be deemed to be specific categories but not necessarily numbered in order of precedence:
>
> 1. Superintendent of Schools;
> 2. Director of County Vocational Schools;
> 3. Assistant Director of County Vocational Schools;
> ***
> 14. High School Vice-Principal or Assistant Principal;
> 15. Junior High School Vice-Principal or Assistant Principal;
> 16. Elementary School Vice-Principal or Assistant Principal;
> ***
> 21. Assistant to the Vocational School Principal;
> (Each vice-principalship, assistant principalship, or assistant to the principalship in Paragraphs 14 through 21 of this subsection shall be a separate category)

The Board argues this cited provision in N.J.A.C. 6:3-1.10 provides that tenure as Assistant Principal is acquired within a specific category in, it appears, a specific school within the supervision of the employing board and that tenure does not accrue to the separate category of Assistant Principal which that employing board may have at other schools it operates. The Board in this regard cites Eyler, et al v. Board of Education of the City of Paterson, et al, 1959-60 S.L.D. 68.

The pivotal statute applicable herein is N.J.S.A. 18A:28-5, last amended by L. 1962, C.231, which provides in pertinent part as follows:

> " The services of all teaching staff members including all teachers, principals, assistant principals, vice principals *** serving in any school district or under any board of education *** shall under tenure during good behavior and efficiency and

> they shall not be dismissed or reduced in compensation /except as provided by law/ after employment in such district or by such board for: ***
>
> "(b) three consecutive calendar 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 ***"

Prior to the enactment of L. 1962, C.231 which amended the then existing N.J.S.A. 18:13-16 which is the progenitor to the existing N.J.S.A. 18A:28-5, the legislative status of tenure accrued only to those persons employed in the positions of teacher, principal, assistant superintendent, and superintendent. Tenure at that time did not attach to any gradations within any one of those categories.

Thus, the cases cited by the Board that its controverted action is not a demotion, Lascari, supra; Cheeseman, supra; and Greenway, supra were all decided prior to the 1962 amendment to the tenure statute.

By the enactment of L. 1962, C.231 the legislature amended N.J.S.A. 18:13-16 (N.J.S.A. 18A:28-5) adding, among others, the positions of assistant principals and vice principals to the list of teaching staff members who could acquire a tenure status.

Thus, in view of the stipulated fact that Petitioner has been an assistant principal in the Board's employ for twelve years he has met the precise conditions articulated by the statute N.J.S.A. 18A:28-5 for the acquisition of a tenure status. Zimmerman v. Board of Ed. of City of Newark, 38 N.J.65 (1962)

Thus, Petitioner having acquired a tenure status in the employ of the Board simultaneously acquired seniority rights to that position of employment.

It is well established in this state that a teaching staff member with a tenure status and seniority rights cannot be transferred or dismissed upon the abolition of his position for statutorily permitted reasons, while another teaching staff member with lesser experience is assigned that very same position. Dawes, et al v. Board of Education of District of Hoboken, 127 N.J.L. (1942)

Here, Petitioner, who had acquired a tenure status with seniority to the position of Assistant Principal in the Board's employ, was replaced by a person with lesser experience in the same position. Such action I FIND to be contrary to Petitioner's tenure rights at N.J.S.A. 18A:28-5 and his seniority rights at N.J.S.A. 18A:28-10.

There is nothing in the statute by which a person who acquires a tenure status in the employ of a board has that earned status qualified to a

particular school. The State Board rule cited by the Board in this regard, N.J.A.C. 6:3-1.10(k) merely states that each listed vice principal position and assistant principal position is a separate category and that a person who acquires seniority as vice principal does not simultaneously acquire seniority as assistant principal and vice-versa.

Based on the foregoing, I CONCLUDE the Board has violated Petitioner's tenure rights (N.J.S.A. 18A:28-5) and seniority rights (N.J.S.A. 18A:28-10) in its assignment of him to the position of teacher of physical education. Petitioner has suffered no seniority loss for 1978-79; consequently, no relief here is necessary. Petitioner did suffer a loss of salary otherwise his due for 1979-80 and is continuing to suffer such loss.

The Board is directed to immediately reinstate Petitioner to the position of Assistant Principal at its Memorial Junior High School at his appropriate salary as Assistant Principal, retroactive to September 1, 1979, together with all other emoliments his due.

Summary judgment is hereby entered on behalf of Petitioner. Summary judgment is denied the Board.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A 52:14B-1, et seq.

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

January 30, 1980
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN

RICHARD STOLTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY	:	DECISION
RESPONDENT.	:	

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

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

The Board takes exception to the finding of Judge Daniel B. McKeown that petitioner did not exceed the time limit of N.J.A.C. 6:24-1.2. The Commissioner agrees. The record shows that petitioner pursued his claim against the Board through the grievance procedure set down in the agreement between the Board and the Administrators Association without filing with the Commissioner during the pendency of the arbitration proceedings, although warned by the Board that he was in the wrong forum.

The Commissioner rejects the determination as rendered in the initial decision in this matter. Sara Riely v. Board of Education of Hunterdon Central High School, Docket No. A-1862-78 New Jersey Superior Court, Appellate Division, March 4, 1980.

The Commissioner rejects the determination in the initial decision and dismisses the Petition of Appeal. Summary judgment is accorded the Board.

COMMISSIONER OF EDUCATION

March 17, 1980

RICHARD STOLTE,	:	
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	STATE BOARD OF EDUCATION DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, March 17, 1980

For the Petitioner-Appellant, Parker, McCay & Criscuolo (Stephen J. Mushinski, Esq., of Counsel)

For the Respondent-Appellee, Barbour & Costa (John J. Barbour, Esq., of Counsel)

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

July 2, 1980

ADELE VEXLER,	)	
	)	
PETITIONER,	)	
	)	INITIAL DECISION
V.	)	AGENCY DKT. NO. E.D.U. 293-8/78
	)	
BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY,	)	
	)	
RESPONDENT.	)	

APPEARANCES:

For Petitioner, David A. Knapp, Esq.

For Respondent, Reusille, Cornwell, Mausner and Carotenuto (Martin M. Barger, Esq., of Counsel)

BEFORE THE HONORABLE BRUCE CAMPBELL, A.L.J.

Petitioner, a school psychologist formerly in the employ of the Board of Education of the Borough of Red Bank (Board) and not now so employed by reason of a reduction in force, requests an Order directing the Board to offer to her the position of school psychologist which she alleges is available and restraining the Board from employing any other person in the position pending resolution of this dispute.

The Board avers that the position of full-time school psychologist was abolished properly and legally, that petitioner was offered a part-time school psychologist position but refused the offer and that such refusal constitutes abandonment of her tenure entitlement.

This matter was opened before the Commissioner of Education. It subsequently was transferred to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. The matter is submitted for Summary Judgment on the pleadings including exhibits attached thereto and Briefs submitted by the parties in support of their respective positions.

Petitioner was employed by the Board as a full-time psychologist from 1967 through June, 1975. By resolution duly made, seconded and passed, the Board on April 15, 1975, determined to abolish the position of full-time psychologist. On or about May 28, 1975, Vexler filed a verified Petition of Appeal and Motion for Restraint before the Commissioner of Education requesting that the Board's April 15, 1975, action be set aside and the Board be restrained from carrying out the resolution. The Commissioner denied the application in an Order dated June 30, 1975. On or about August 10, 1975, petitioner filed a Notice of Motion to Reopen Hearing based in

part on her knowledge and belief that the Board had employed two persons to perform psychological services on a part-time basis. The Commissioner dismissed the action. 1977 S.L.D. 625. On or about May 17, 1978, the office of the Superintendent of the Red Bank Public Schools published a notice that the position of school psychologist would be available for the 1978-79 school year. (Petitioner's Exhibit A.) In that month, the superintendent notified petitioner of the availability of the position. By letter dated June 15, 1978, petitioner advised the superintendent that she was considering reinstatement in the position of school psychologist, which position she understood was open and available to her. By letter dated June 19, 1978, the superintendent informed petitioner that her (petitioner's) understanding was incorrect. In pertinent part the letter states, "The position is open and you are more than welcome to put in an application. However, the position is not available to you automatically. Your application will be considered among others submitted." (Petitioner's Exhibit B.) On June 28, 1978, petitioner wrote a letter to the superintendent saying "I have decided that I would like to return to Red Bank and am hereby applying for reinstatement as School Psychologist in the current opening." (Petitioner's Exhibit C.) On the same day, petitioner's then attorney wrote to the Board's counsel requesting clarification of the Board's position as expressed in the June 19, 1978 letter from the superintendent to petitioner (Petitioner's Exhibit D.) By letter dated July 17, 1978, the Board's attorney advised petitioner's former counsel that the Board considered petitioner to have waived her right to priority employment by virtue of having refused offers of priority (part-time) employment on several occasions and that petitioner's application therefore would be considered among all others. (Petitioner's Exhibit E.)

Petitioner contends that she did not waive any rights to priority employment under N.J.S.A. 18A:28-12 by refusing part-time employment at a daily rate less than the calculated daily rate she received while under full-time contract. Petitioner contends further that she has been denied procedural due process in that "she has not been formally notified of her seniority status and that she has not been placed on any preferred eligible list, it being admitted that no such list exists." (Petitioner's Brief at p.2.)

The Board avers that petitioner was offered priority employment, albeit part-time, and that she abandoned her tenure status by refusing to accept such employment when proffered on more than one occasion.

It was agreed at prehearing conference that the issues, sub judice, are these:

1. Did or did not petitioner waive the right to priority employment by refusing part-time employment as a school psychologist.

2. Could there have been a waiver in that there was no formal preferred eligible list or notification of petitioner's position on such list.

3. Did or did not the offer of part-time employment as a school psychologist to petitioner substantively and procedurally meet the requirement of N.J.S.A. 18A:28-12.

The parties also agreed that appropriate relief in this matter would be the establishment of a seniority list with petitioner being notified of her position on that list.

In support of her position, petitioner argues that N.J.S.A. 18A:6-10, 28-5, 28-11 and 28-12 are applicable to this dispute. In pertinent part, the cited statutes read as follows:

N.J.S.A. 18A:6-10.

No person shall be dismissed or reduced in compensation,
(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state***except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner ***.

N.J.S.A. 18A:28-5.

The services of all teaching staff members[1]*** 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 [N.J.S.A. 18A:6-9, et seq.]

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

In the case of any such reduction the board shall determine the seniority of the persons affected *** and shall notify each person as to his seniority status ***.

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

If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a

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[1] N.J.S.A. 18A:1-1 defines "teaching staff member" as a member of the professional staff of any district, regional or county vocational board of education "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 *** certificate appropriate to his office, position or employment, issued by the state board of examiners ***."

> preferred eligible list in the order of seniority for re-employment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be re-employed by the body causing dismissal, if and when such vacancy occurs ***.

Petitioner states that under the statutes cited she enjoyed tenure status and could not be reduced in compensation except by invocation of N.J.S.A. 18A:6-10. She also states that when the Board offered her part-time employment at the rate of $75.00 per day it was, in effect, reducing her compensation because she calculates her per diem rate under her last full-time contract to be $103.00 per day. Petitioner concedes the Board's right to reduce a full-time position to a part-time position but states that to also reduce the compensation therefor violates N.J.S.A. 18A:6-10.

Petitioner contends that she did not waive her tenure rights and rights to priority employment since there was no formal preferred eligible list and there was no notification of her place on such list. In support of this contention, petitioner cites Theodore G. Vork v. Board of Education of the Township of North Bergen, Hudson County, July 1, 1961 - June 30, 1962 S.L.D. 51. In Vork, petitioner had lost, as a result of a reduction in force, a position as principal and had accepted a position as teacher. When a principal in the district resigned, petitioner wrote to the Board requesting reinstatement as a principal in the open position. The Board did not maintain a preferred eligible list and had not given Vork any notice as to his seniority. At p. 53, the Commissioner states:

> *** /The/ statute places a clear duty on the Board of Education to establish and maintain a preferred eligibility list for reemployment whenever reductions in staff are made as occurred here. It was also the duty of respondent, in compliance with the statute, to notify petitioner of his seniority status.

Similarly, the Commissioner stated in Charles Lautenschlager, et als. v. Board of Education of the City of Jersey City, Hudson County, July 1, 1961 - June 30, 1962 S.L.D. 98, 102:

> The Commissioner finds and determines that it is the mandatory duty of the Jersey City Board of Education to determine the seniority of each of the petitioners according to the standards established pursuant to /statute/ to place the petitioners on preferred eligible lists in order of such seniority, and to notify each petitioner as to his seniority status. The Commissioner so directs.

Petitioner states that the Board violated statutory and case law in not establishing the required preferred eligible list and therefore violated her rights to procedural due process. Petitioner states also that the Board must adhere strictly to the statutory provisions, must promulgate a preferred eligible list, must formally notify petitioner of her position on that list,

must maintain that list with petitioner's name on it and then, when a position is available that she is qualified to fill, must notify her of that opening. In that way, petitioner contends, she will be able to evaluate her circumstances in light of the rights due her by virtue of being on the list.

Petitioner, in conclusion, prays for a determination that the offer to her of part-time employment at a lower hourly rate of pay was a violation of her tenure rights; that even if the offer were not such a violation, it was premature because the Board did not comply with N.J.S.A. 18A:28-11 and 28-12, supra; that the Board be required to promulgate and maintain a formal preferred eligible list with petitioner's name on it and to notify petitioner of her position on the list.

The Board argues that the instant matter appears to be a case of first impression and hence no precedent in case law can be found. The Board states that the reasoning in Josephine DeSimone v. Board of Education of the Borough of Fairview, Bergen County, 1966 S.L.D. 43 should be adopted. In DeSimone the Commissioner ruled that a part-time teacher could be assigned to a full-time position. The Board claims that DeSimone is the reverse of the situation in the instant matter and that if a part-time teacher can be assigned to a full-time position it must follow that a full-time teacher can be re-assigned to a part-time position, pending reestablishment of the full-time position. (Respondent's Brief at p. 2.) The Board further states that petitioner was so assigned, rejected the assignment and therefore abandoned her tenure rights. (Ibid).

It is the Board's position that petitioner had the right and obligation to accept the part-time position until such time as a full-time position again became available, that she chose to seek and accept employment elsewhere and that she cannot now claim seniority rights in the Red Bank Public Schools. In support of this position, the Board cites Anne U. Clark v. H. Francis Rosen, Superintendent of Schools, and Board of Education of the City of Margate, Atlantic County, 1974 S.L.D. 678. In Clark, petitioner refused reassignment from one full-time special education assignment to another. The Commissioner held that petitioner had been formally and properly reassigned to another position for which she was qualified, that she had refused to do so and that she had thereby abandoned her position and her rights to tenured employment. The Board argues that, in the instant matter, petitioner's position was abolished, she was offered another position that she refused and that refusal, as in Clark, constitutes abandonment of her tenured entitlement. (Respondent's Brief at p. 3.)

The Board, in conclusion, states that petitioner no longer has any employment rights in the Red Bank Public School District and cannot, therefore, claim placement on a seniority list; that petitioner cannot have seniority in one school district and employment in another; that she cannot reject employment in her original school district and still claim seniority in that district; and that her abandonment of tenure constituted an abandonment of all rights. The Board demands the petition be dismissed.

The threshold consideration here is whether petitioner waived the right to priority employment when she refused part-time employment as a school psychologist following a legal and proper reduction in force action by the Board. The law is clear that a person in petitioner's circumstances must be offered a part-time position, when such exists, following abolishment of the full-time position. Adele Vexler v. Board of Education of the Borough of Red Bank, Monmouth County, 1977 S.L.D. 625; Margot Outslay v. Board of Education of the Borough of Midland Park, Bergen County, 1977 S.L.D. 1033. It is not clear, however, in case law that a person in petitioner's circumstances must accept such offer. In this respect, the Board's observation that this appears to be a matter of first impression is correct.

At common law, a discharged employee bears the burden of mitigation. In discharging this burden, however, the employee need not seek or accept a position of lesser rank (Mitchell v. Lewensohn, 251 Wis. 424, 29 N.W. 2d 748 (1947),) or at a reduced salary (Crabtree v. Elizabeth Arden Sales Corp., 105 N.Y.S. 2d 40 (Sup. Ct. 1951), aff'd 279 App. Div. 992, 112 N.Y.S. 2d 494 (1st Dep't 1952), aff'd 305 N.Y. 48, 110 N.E. 2d 551 (1953),) or at a location unreasonably distant (San Antonio & A.P.R.R. v. Collins, 61 S.W. 2d 84 (Tex. Com. App. 1933).).

These common law principles must be tempered by holdings in this jurisdiction in areas closely related to the issue under consideration. The Commissioner has held that a reduction in salary, where a position is abolished and the person holding such position is lawfully transferred to a lower paying position, is not a reduction in salary under the tenure laws, supra. (Arthur L. Page v. Board of Education of the City of Trenton, et al, Mercer County, 1973 S.L.D. 704, remanded 1974 S.L.D. 1416, on remand 1975 S.L.D. 644, aff'd St. Bd. 1976 S.L.D.1158.) (Cf. David Dedrick v. Board of Education of the Town of Hammonton, Atlantic County, 1977 S.L.D. 1043.)

This disposes of petitioner's argument that the offer to her of part-time employment at a lower hourly rate of pay was a violation of her tenure rights. It does not, however, settle the question of whether petitioner had the right to refuse the offer of part-time employment. New Jersey school law being silent on the point, it is my judgment that the common law principle be adopted. Petitioner, therefore, was under no obligation to accept the proffered part-time employment. The Board's argument that the reasoning in DeSimone, supra, can apply in reverse is without merit.

Had petitioner not been offered part-time employment in the Red Bank Public School District, she could rightfully and lawfully have accepted employment in another school district without surrendering seniority rights or preferred reemployment rights. It being established that she was not required to accept the proffered part-time employment, she is in the same position as if such employment had not been offered. She is free to take no employment whatever or to take other employment without waiver of seniority rights or preferred reemployment rights. I SO FIND AND CONCLUDE.

The threshold question having been answered in the negative, it is not necessary to address the remaining issues.

The question of relief does remain to be addressed. As noted, ante, the parties agreed appropriate relief would be the establishment of a preferred eligible list for the position of full-time school psychologist and the notification of petitioner of her position on such list.

Therefore, the Board of Education of the Borough of Red Bank shall promulgate a preferred eligible list for the position of full-time school psychologist, shall notify petitioner of her place on such list, shall maintain such list and shall notify petitioner when and if the subject position becomes open, all in accordance with N.J.S.A. 18A:28-9 et seq. IT IS SO ORDERED.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

22 JANUARY 1980
DATE

Bruce Campbell
BRUCE CAMPBELL, A. L. J.

ADELE VEXLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that 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 adopts them as his own.

The Commissioner notes that the initial decision establishes petitioner's right to refuse the offer of part-time employment without waiver of seniority rights or preferred reemployment rights. Such right was previously established in decisional law in Boguszewski v. Demarest, decided by the Commissioner June 6, 1979. The Board is directed to establish a preferred eligibility list for the position of full-time school psychologist with notification to petitioner of her place on such list and shall in accordance with N.J.S.A. 18A:28-9 maintain such list with notification to petitioner if such position becomes open. Boguszewski, supra

COMMISSIONER OF EDUCATION

March 18, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

CAROLE VANDERCHER, Petitioner	:	INITIAL DECISION
	:	OAL DKT. NO. EDU 2258-79
vs.	:	
	:	
BOARD OF EDUCATION OF PISCATAWAY TOWNSHIP, Respondent	:	

APPEARANCES:

Carole Vandercher, Petitioner

Mandel, Wysoker, Sherman, Glassner
& Weingartner, Esqs., Attorneys for Petitioner
by Jack Wysoker, Esq.

Rubin, Lerner & Rubin, Esqs., Attorneys for
Respondent by David Rubin, Esq.

EXHIBITS MARKED IN EVIDENCE

J-1 Teacher Evaluation Form, March 20, 1979, marking Petitioner Unsatisfactory in the "most important professional quality" of punctuality; recommending denial of salary increment.

J-2 Letter to Petitioner, May 1, 1979, giving notice of denial of increment for 1979-80 by Respondent Board.

J-3 Agreement, Piscataway Education Association and Piscataway Board of Education, 1978-81, including Article VII, Section A 1, 2, concerning teacher work day, arrival time and reporting procedure.

R-1 Teacher sign-in sheets at Grandview School documenting Petitioner's lateness:

9/5/78	8:55 A.M. (first day of school)
9/11/78	8:40 A.M.
12/12/78	8:45 A.M.
1/9/79	8:35 A.M.
1/22/79	9:55 A.M.
2/5/79	8:35 A.M.
2/16/79	8:40 A.M.
2/22/79	8:35 A.M.
2/27/79	8:50 A.M.

R-2 Teacher Evaluation Form, March 7, 1978, with narrative comment by principal: ". . . I would like to see more effort on (Petitioner's) part to be more punctual in reporting to work as has been called to her attention on numerous occasions . . .".

R-3 Supervisory Report, November 14, 1974, Re five instances of lateness in October 1974, cautioning Petitioner principal would recommend withholding increment on final evaluation unless tardiness ceases.

R-4 Memo to principal from Petitioner, March 9, 1979, noting ". . . Arriving late for sign-in only three times in four months is quite an accomplishment for me (September-January 1978 /sic/)".

BEFORE THE HONORABLE JAMES A. OSPENSON, A.L.J.:

This is an appeal to the Commissioner of Education, pursuant to N.J.S.A. 18A:29-14, by a tenured teaching staff member from denial of salary increment for the school year 1979-80 by the Board of Education of the Township of Piscataway for alleged deficiencies in performance in 1978-79 in the "most important professional quality of punctuality". J-1.

The petition of appeal was filed with the Commissioner on May 21, 1979 and the Board's answer on June 20, 1979. The matter was transmitted to the Office of Administrative Law on July 18, 1979 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14B-9,10. On October 22, 1979 a pre-hearing conference was scheduled and conducted and a pre-hearing order entered. An interim decision allowing petitioner's request for discovery was entered on November 2, 1979. Hearing in the matter was scheduled and completed on January 8, 1980; closure of the record was established to be twenty (20) days thereafter by which time letter memoranda of law were to be filed by the parties. They were so filed within time.

It is agreed that Petitioner is a tenured, certificated staff member (elementary art teacher) who has been employed by the Board since 1962. For the 1978-79 school year she was paid $20,473 at the top of the salary guide and under other circumstances would have been eligible for incremental salary increase for 1979-89 of $998 to $21,471. On April 26, 1979, however, the Board denied her that increment for the reason advanced in J-1, 2. At issue, therefore, are petitioner has met the burden of proof that the action of the Board was arbitrary, capricious or unreasonable and whether the given reason therefor constitutes "inefficiency or other good cause" within the meaning of N.J.S.A. 18A:29-14. At issue is not whether petitioner was in fact satisfactory in her performance during 1978-79, but whether the Board had a reasonable basis for its conclusion that she was not. Cf. Kopera v. West Orange Bd. Ed., 60 N.J. Sup. 288, 295 (App. Div. 1959).

EVIDENCE AT HEARING

On May 1, 1979, petitioner was notified the Board had determined on April 26, 1979 to withhold her salary increment for 1979-80. Basis for the Board action was the principal's evaluation of March 20, 1979 that petitioner's performance in 1978-79 in a "most important professional quality of punctuality" was unsatisfactory:

> "In the area of punctuality, I must mark Miss Vandercher unsatisfactory. I certainly agree that there may be an occasion when a staff member might be tardy for work but in Miss Vandercher's case, she has been late for her teaching assignment excessively. At the beginning of the school year, I had occasion to have a conference with Miss Vandercher because she did appear late for school by twenty-five minutes, this being the first day of school for teachers. At this time I did convey to her that based on her poor record of punctuality, her arrival at school would be monitored, and if not corrected, could result in my recommending the withholding of a salary increment. During the period of time from September 5, 1978 until the present time, she has been officially late for work nine times. The dates and approximate times for her arrival after the contracted time of 8:25 A.M. are as follows:
>
> | | |
> |---|---|
> | September 5, 1978 | 8:55 |
> | September 11, 1978 | 8:40 |
> | December 12, 1978 | 8:45 |

January 9, 1979	8:35
January 23, 1979	9:55
February 5, 1979	8:35
February 16, 1979	8:40
February 22, 1979	8:35
February 27, 1979	8:50

Based on her record of excessive lateness, I must recommend that Miss Vandercher be denied a salary increment for the school year 1979-1980."

It was agreed by the parties that 8:25 A.M. was the contract employment time. The Board's agreement with the Piscataway Education Association so provided. J-3, Article VII A. The latenesses listed in the principal's evaluation (J-1) were based on the school sign-in records (R-1). In her testimony, petitioner conceded all latenesses except those on September 11, 1978 and February 5, 1979. As to the latter, her assertion was supported by another teacher.

In 1978-79 petitioner was a special area teacher at Grandview with no assigned home-room. She first made pupil contact at 8:50 A.M. each day and would do planning work between arrival time and pupil contact. She denied the principal ever told her at beginning of the school year her arrivals would be monitored. Despite her latenesses, she said, she never failed to be on time to meet her pupils at 8:50 A.M. except once on January 23, 1979 when she overslept and arrived late at 9:55 A.M. She said the principal never told her her latenesses had an adverse effect on her pupils. She calculated her total time lost was only 160 minutes. She admitted that up to the beginning of 1978-79, she had had a chronic lateness problem. She conceded disciplinary action might be imposed on her but not, she felt, the extreme of increment withholding. She acknowledged, however, her written response in 1974 (R-3) to a Supervisory Report admonishing her then for lateness and cautioning her that her 1975-76 increment might be jeopardized. In fact, it was not withheld, a circumstance petitioner said showed improvement on her part.

Two elementary teachers in the district, one the present and the other a former president of the education association, testified they knew of no verbal or written policies or standards in the district regarding lateness and had never been told by administration or Board that teacher increments might be withheld for such cause.

For Respondent, the principal testified about the admonitory conference he had with petitioner at the beginning of the

school year (referred to in J-1). The instances of her lateness, he said, were brought to her attention by supervisory reports as they occurred.

DISCUSSION

"Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any (teacher) in any year . . ." N.J.S.A. 18A:29-14. Justification for withholding a salary increment for unsatisfactory performance may be found in a single, serious infraction of the rules of the school or in a series of incidents. See Hillman v. Bd. of Ed. Caldwell-West Caldwell, 1977 SLD 218, 222. But so long as the withholding is not unreasonable and so long as it has a rational basis in fact the withholding is not wrong for want of previously stated standards or criteria. Specifically, the withholding here is not wrong, as Petitioner argues it is, for want of previously stated standards or criteria on what number or duration of latenesses would become cause for withholding. Cf. Hillman, supra, at p.225 of 1977 SLD, citing and quoting in full the opinion of the Court in Westwood Ed. Ass'n v. Bd. Ed. Westwood, A261-73, Superior Court, Appellate Division, 6/21/74:

> ". . . a local board of education, pursuant to N.J.S.A. 18A:29-14, has sole discretion to withhold a member's salary increment for inefficiency or other good cause and this right is not negotiable under N.J.S.A. 34:13A-5.3. (The contention) that N.J.S.A. 18A:29-14 has no application to salary schedules in excess of statutory minimum unless the board first adopts a salary policy pertaining to such increments (has no basis, statutory or otherwise), and we . . . hold this contention to be without merit. Cf. Kopera v. Bd. Ed. West Orange, 60 N.J. Sup. 288 (App. Div. 1960)."

See also Longo v. Bd. Ed. City of Absecon, 1975 SLD 336, 340; Dunellen Bd. of Ed. v. Dunnellen Ed. Assoc., 64 N.J. 17, 31-31 (1973); Clifton Teachers v. Clifton Bd. Ed., 136 N.J. Sup. 336, 339 (App. Div. 1975).

The Piscataway Education Association Agreement (J-3) itself provides that each teacher, except those who have been denied an increment, shall be placed on the proper step of the salary level in accordance with the adopted guide (Art. VIA); that no teacher shall be deprived of any increment without just cause (Art. IVB); and that annual increments for merit (emphasis added) shall be according to guide (Art. VIG). The reservation of the right to withhold increments for good cause, however, is

a right granted by N.J.S.A. 18A:29-14 and must be accepted as implicit in every negotiated agreement. See Clifton Teachers, supra, p.339 of 136 N.J. Sup.

Petitioner argues that if a penalty is in order, it lies within the power of the Board to lessen (and that of the Commissioner to order) the sanction of withholding increment to docking petitioner's pay for the few hours her lateness totalled. Such molding of the sanction under N.J.S.A. 18A:29-14 is ultra vires. See Coniglio v. Bd. Ed. Township of Teaneck, 1973 SLD 449, 459; and N.J.S.A. 18A:29-15. Again, the only issue in this case is whether the Board's action was reasonable. If so, it must be upheld. Cases cited by petitioner under education tenure laws (18A:6-10, et seq) are not apposite in support of her argument here.

Petitioner argues her latenesses were inconsequential, at least against the extremity visited upon her here, because she always met her classes on time. In the one exception to that, she says, she made up the time. But lateness, it is said, is inefficiency. See I/M/O Tenure Hearing of Simmons, 1973 SLD 721, 739; aff'd St. Bd. 1975 SLD 1160. And the fact that a teacher may not have teaching duties until after sign-in time does not lessen responsibility to report to school on time. See I/M/O Tenure Hearing of Campbell, 1976 SLD 65, 70.

Petitioner argues the Board's action was arbitrary because she was constitutionally entitled to, but did not receive, a prior hearing before her increment was withheld. I do not agree. Nor do I think the authorities relied on by Petitioner to support the argument do so. In the first place, Petitioner's salary increment is not hers by right. That is, it was not hers as property, expropriation of which may not be done without compensation or without due process of law. It is an inchoate contract right, if it is a right at all, that is subject to being withheld for cause and must be earned. In the second place, Petitioner on March 20, 1979 was given ample notice in writing by administration before the Board action that increment denial was being recommended. She responded to that notice in writing. R-4. She could, moreover, have asked to address the Board directly before it acted on April 26, 1979. She did not. Lastly, Petitioner has been afforded a hearing on the matter. This very proceeding is her day in court. The intent of the notification requirement in N.J.S.A. 18A:29-14 is to give the teacher opportunity to appeal Board action to the Commissioner. Petitioner received such notice. J-2. The argument that prior adversary hearings before a board of education in increment cases are a constitutional requisite has been made and rejected before. I reject it here. See Hillman, supra, 1977 SLD 218, 223-226. I reject it because increment withholding by government action carries with it none of the exquisite immediacy to the teacher

as, perhaps, expulsion has to the pupil (see Tibbs v. Bd. Ed., Twsp. Franklin, 114 N.J. Sup. 287, 320 (App. Div. 1971); aff'd 59 N.J. 506 (1971)) or termination of welfare assistance has to the welfare recipient (see Goldberg v. Kelly, 397 U.S. 254, 263-265, 25 L.Ed. 2nd 287, 90 S. Ct. 1011 (1970)):

> "It is true, of course, that some government benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing . . . When welfare is terminated, only a pre-termination hearing provides the recipient with procedural due process. . . For qualified recipients, welfare provides the means to obtain essential food, clothing, housing and medical care. . . Thus the crucial factor in this context - a factor not present in the case of the black-listed government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose government entitlements are ended - is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits . . ." Brennan, J. in Goldberg, supra, at p. 264 of 397 U.S.

Base on the above, therefore, I FIND as follows:

1. To the extent of any mediate conclusions of fact hereinabove, they are adopted herein.

2. Petitioner, a tenured teacher in respondent district, was denied a salary increment for 1979-80 for deficiencies in performance in 1978-79 in punctuality.

3. Petitioner reported late at school for the contract employment time of 8:25 A.M. at least eight times, which were documented by her principal.

4. The latenesses were brought to her attention as they occurred by supervisory reports; the latenesses were persistent and unexcused.

5. Her lack of punctuality was officially noticed the previous year in March 1978. R-2.

6. Her lack of punctuality was officially noticed in November 1974, when she was expressly cautioned that if her delinquency persisted, her salary increment was in jeopardy. R-3.

7. An evaluation documenting the latenesses in 1978-79 was given to petitioner and to the Board on March 20, 1979.

8. The Board's action to withhold petitioner's salary increment for 1979-89 on the strength thereof was reasonable in that petitioner's delinquency constituted "ineffiency or other good cause" within the meaning of N.J.S.A. 18A:29-14.

9. Petitioner has failed to sustain her burden of proof to the contrary.

Accordingly, in view of the foregoing, I hereby AFFIRM the action of the Piscataway Board of Education on April 26, 1979 inwithholding Petitioner's salary increment for 1979-80 for the reasons given. I ORDER the petition of appeal DISMISSED.

This recommended decision may be affirmed, modified or rejected by the Commissioner of the Department of Education, Fred G. Burke, who by law is empowered to make a final decision in this matter. However, if the Commissioner of the Department of Education does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1.

I HEREBY FILE with the Commisioner of the Department of Education, my Initial Decision in this matter and the record in these proceedings.

January 31, 1980
Date

JAMES A. OSPENSON, A.L.J.

CAROLE VANDERCHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner excepts to the determination of Judge James A. Ospenson that the Board had a reasonable basis for withholding petitioner's increment and argues that her punctuality record is an inadequate basis for withholding petitioner's increment in view of her total record over the years. Petitioner contends that because the Board had not established any criteria or standards with regards to lateness and possible punishment that any punitive action taken by the Board would be improper. The Commissioner does not agree. He finds petitioner's rationale and proffered excuses for the incidents of lateness to be unacceptable. The Commissioner does not find it necessary for the Board to create a laundry list of frequency of tardiness with proposed scaled punishments. He determines that tardiness in itself is an infraction of the rules recognized by teachers themselves for possible punishment when pupils are tardy to their classes. Nor can the Commissioner accept petitioner's submission that because her tardiness added up to only one and two-third hours of lack of punctuality that this should mitigate the importance of such a record of tardiness.

Petitioner's exception to the possible ultimate and excessive severity of such punishment in light of N.J.S.A. 18A:29-14 has merit. The last sentence of the aforementioned statute states:

> "It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

The Commissioner determines that to continue to withhold such increment over the possible remainder of petitioner's teaching career of approximately twenty years would be an excessive punishment. Such a determination must not be taken

as an indication that the Commissioner does not hold consistent punctuality to be a desirable characteristic in each and every school employee. However, in these circumstances the Commissioner directs that the Board should consider the withholding of petitioner's increment for the school years 1979-80 and 1980-81 to be a probationary period in which petitioner, barring truly extenuating circumstances, simply should not be tardy. Petitioner must realize that the restoral of her increment is dependent on her record of punctuality to be established over the indicated two year period.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

March 21, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN RE: **CIRO D'AMBROSIO** V. BOARD OF EDUCATION WARREN HILLS REGIONAL, HUNTERDON COUNTY, NEW JERSEY	))))))))	INITIAL DECISION **O.A.L. DKT. NO. E.D.U.** 3061-79 AGENCY DKT. NO. 287-7/79A

APPEARANCES:

Stephen E. Klausner, Esq., for Petitioner

David A. Wallace, Esq., for Respondent

BEFORE THE HONORABLE **ROBERT P. GLICKMAN,** A.L.J.:

This matter comes before the Court on respondent's motion to dismiss petitioner's amended petition pursuant to N.J.A.C. 6:24-1.10 on the grounds that no sufficient cause for determination has been advanced. Respondent has submitted a letter memorandum dated January 11, 1980 in support of its motion and also relies on its brief in support of its motion directed at the original petition. Petitioner relies on a letter memorandum dated January 24, 1980 in opposing respondent's motion to dismiss.

The following procedural history of this matter is relevant:

1. The original petition of appeal was filed with the Commissioner of Education on or about July 17, 1979.

2. An answer was filed on behalf of respondent on or about August 2, 1979.

3. 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.

4. A prehearing conference was held at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey on October 23, 1979.

5. On or about November 1, 1979 respondent filed a notice of motion to, among other things, dismiss the petition on the grounds that no sufficient cause for determination has been advanced.

6. On or about November 16, 1979 petitoner filed a letter memorandum in opposition to respondent's motion.

7. On or about November 19, 1979 this Court ordered that petitioner file an amended petition containing a more definite statement.

8. On or about November 29, 1979 petitoner filed an amended petition of appeal.

9. On or about January 11, 1980 respondent filed a letter memorandum in lieu of formal notice of motion and brief moving to dismiss petitioner's amended petition pursuant to N.J.A.C. 6:24-1.10 on the grounds that no sufficient cause for determination has been advanced.

10. On January 24, 1980 petitioner submitted a letter memorandum in opposition to respondent's motion to dismiss the amended petition.

In determining whether or not the amended petition should be dismissed on the grounds that there is no sufficient cause for determination, this Court has carefully read and reread the amended petition which it shall summarize as follows:

1. The first paragraph indicates that the petitioner is a non-tenured teacher employed by respondent;

2. The second paragraph indicates that the respondent is responsible for the operation of and supervision of Warren Hills Regional Schools;

3. The third paragraph indicates that by letter dated April 6, 1978 respondent informed petitioner that it would not renew his contract as a teacher for the school year 1978/79 for the reasons that:

   A. "Lack of an acceptable performance in the verbal presentation of the subject matter of physics in a manner and degree affording an adequate explanation for the students' comprehension."

   B. "Lack of an acceptable degree of performance in English enunciation in classroom presentation of subject materials."

4. Paragraph four indicates that on May 9, 1978, after a special meeting, the respondent reversed itself and offered petitioner re-employment for the 1978/79 school year.

5. Paragraph five indicates that petitioner was reassigned on or about May 18, 1978 to its junior high school where he would teach general science during 1978/79. It was also pointed out that petitioner held a Master's Degree from Rutgers University in nuclear physics.

6. Paragraph six indicates on or about May 18, 1978 petitioner's chairperson, Harold Musselman, informed petitioner that the transfer was the first step towards his non-renewal for the school year 1979/80.

7. Paragraph seven indicates that petitioner's evaluations contain criticism of his ability to speak and use the English language.

8. Paragraph eight indicates that on or about September 21, 1978 petitioner's new chairperson evaluated him with the comment that, "taking lessons to improve his English."

9. Paragraph nine indicates that in an October 5, 1978 evaluation, it was pointed out that petitioner had a problem of language and that it was difficult to understand some of his statements.

10. Paragraph ten indicates that respondent informed petitioner on or about March 16, 1978 that it would not renew his contract for the 1979/80 school year for the following reasons:

    A. "Lack of contemporary communication with students."

    B. "Inability to establish himself as the authority figure in class."

    C. "Student control is not always satisfactory."

    D. "Students are confused as to the expectations of teacher. This confusion existed in both academic and behaviour matters."

11. Paragraph eleven indicates that the reasons proferred by respondent were knowingly and intentionally false, discriminatory and violated petitioner's constitutional and statutory rights not to be discriminated against because of his national origin, Italian.

12. Paragraph twelve indicates that respondent's actions were in retaliation for petitioner's successfully petitioning respondent to renew him for school year 1978/79.

Petitioner then sought the following relief in this amended petition:

A. Directing respondent to reinstate petitioner to a teaching position for the school year 1979/80.

B. Directing respondent to cease and desist from illegally discriminating against petitioner because of his national origin.

C. Such other and further relief as the Commissioner deems just and proper.

The thrust of petitioner's petition is that the Board discriminated against him because of his national origin. It is only in paragraph eleven of the petition, for the first time, that one learns that petitioner's national origin is Italian. None of the factual allegations set forth before paragraph eleven, directly or indirectly, indicate that the actions of the Board against petitioner are based on his Italian origin. Additionally, no inference can be drawn from any of the factual allegations which would indicate that the Board discriminated against petitioner because of his Italian origin. This Court is unable to infer from the fact that the Board gave petitioner a negative evaluation based upon his inability to speak and use the English language that it was discriminating against him based upon his Italian origin. A teacher's deficiency in speaking and using the English language would certainly seem to be a ground for non-renewal of his contract irrespective of his national origin. Similarly, it would be illogical to conclude that either a Chinese, Russian, Hungarian, Israeli or Egyptian teacher, by way of example, who was deficient in English speaking or usage, and who was not re-employed, was being discriminated against because of his national origin. It follows, therefore that the general allegation contained in paragraph eleven is totally insufficient.

Petitioner was afforded an opportunity to amend his petition to cure the vague and general allegations contained therein. Petitioner's amended petition does not accomplish this. Respondent is entitled to defend against specific acts, not vague generalities.

In Winston v. Board of Ed. of So. Plainfield, 125 N.J. Super. 131 (App. Div. 1973), aff'd 64 N.J. 582 (1974) the Court discussed whether a petition which contained nothing more than naked allegations was subject to dismissal on its face. In Winston, supra, the Appellate Division clearly stated that:

> "It may be acknowledged that the bare assertion or generalized allegation of infringement of a constitutional right does not create a claim of constitutional dimensions."

125 N.J. Super at 144. Additionally, the Commissioner has held that where a petition lacks the required supportive detailed factual allegations, the petition should be dismissed. John C. Roy, II v. Board of Education of the Township of Middle, Cape May County, 1976 S.L.D. 569, 572 aff'd State Board of Education, 1976 S.L.D. 574; Dee Foster and The Neptune Township Education Association v. Board of Education of the Township of Neptune, Monmouth County, 1976 S.L.D. 693. In addition, as stated in Alice W. Cardman, et al v. Board of Education of the Township of Millburn, Essex County, 1977 S.L.D. 746, 749-50:

> "...in the absence of specific allegations with respect to petitioner's conclusion that the Board's action of not re-employing her was based on constitutionally proscribed reasons, an adversary hearing is not warranted."

Also, the Commissioner in the case of Barbara Hicks, v. Board of Education of the Township of Pemberton, Burlington County, 1975 S.L.D. 332, 336 stated:

> "When a teaching staff member alleges that a local Board of Education has refused re-employment for proscribed reasons (i.e. race, color, religion, etc.) or in violation of constitutional rights such as free speech, or that the Board was arbitrary and capricious or abused its discretion, and is able to provide adequately detailed specific instances of such allegations, then the teaching staff member may file a petition of appeal before the Commissioner which will result in a full adversary proceeding..." (Emphasis added).

Applying the well-established principals of law just enunciated to the facts in the instant case, it is clear that the amended petition must be dismissed. Reading the amended petition in a light most favorable to petitioner, and giving petitioner the benefit of every reasonable inference, the amended petition still contains nothing but bare and generalized allegations unsupported by specific facts.

Accordingly, it is **CONCLUDED** that respondent's motion to dismiss petitioner's amended petition on the grounds that no sufficient cause for determination has been advanced be and is hereby granted.

It is, therefore, **ORDERED** that petitioner's amended petition be and is hereby **DISMISSED** without prejudice.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1 et seq.

I HEREBY FILE with the **COMMISSIONER OF EDUCATION, FRED G. BURKE,** my Initial Decision in this matter and the record in these proceedings.

February 6, 1980
DATE

ROBERT P. GLICKMAN, A.L.J.

CIRO D'AMBROSIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Commissioner observes that two of the reasons expressed to petitioner by the Board when it informed him it intended not to renew his contract as a teacher for the school year 1978-79 were:

> "A. Lack of an acceptable performance in the verbal presentation of the subject matter of physics in a manner and degree affording an adequate explanation for the students' comprehension.
>
> "B. Lack of an acceptable degree of performance in English enunciation in classroom presentation of subject materials."

The Commissioner notes that the Board reversed itself after a special meeting and offered petitioner reemployment for the 1978-79 school year. The record is devoid of the reason(s) for the Board's reversal nor does the record show that such a decision was motivated by improvement in petitioner's verbal presentation and English enunciation. The Commissioner notes that reference was made during the school year 1978-79 to petitioner's problem of language.

The Commissioner observes that the record before him, while referring to deficiencies in English enunciation and usage, gives no examples or verification of such allegations. Nor is there in the record evidence of any standards of usage applied nor is there expressed therein the opinions of any language experts. The decision is based solely on the written record and a Motion to Dismiss.

Petitioner contends that the Board erred in its determination that he was not competent in language suage. He alleges that he has mastery of the language and that the nonrenewal was a subterfuge.

The Commissioner is concerned with the paucity of the record in this matter and accordingly remands this decision to the Office of Administrative Law for a full hearing. The Commissioner directs that, in the circumstances of this case, in addition to the regular court stenographer the court use a tape recorder with a good sound resolution and with high tonal quality to compile a good acoustical record of petitioner's speech.

It is so directed.

COMMISSIONER OF EDUCATION

March 24, 1980

CIRO D'AMBROSIO,	:	
PETITIONER-APPELLEE,	:	
V.	:	
BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, March 24, 1980

For the Petitioner-Appellee, Stephen E. Klausner, Esq.

For the Respondent-Appellant, Dorf, Wallace & Glickman (David A. Wallace, Esq., of Counsel)

The State Board of Education reverses the Commissioner's decision for the reasons expressed in the Administrative Law Judges decision.

October 1, 1980

Pending N.J. Superior Court

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

For the Petitioner, Philip Feintuch, Esq.

For the Respondent, Robert W. Taylor, Esq.

Petitioner, a tenured teaching staff member employed by respondent, Board of Education of the City of Hoboken, alleges that since the 1971-72 school year the Board has established her annual salary improperly in that it has repeatedly refused to recognize her Juris Doctor degree from the Brooklyn Law School as a doctoral degree for purposes of placement on the salary scale. Petitioner seeks to secure proper placement on the Board's salary scale henceforth, and to recover the additional compensation she would have earned had she been so placed in 1971-72. The Board asserts that the refusal to recognize petitioner's J.D. degree as a doctorate degree for salary purposes was entirely proper, and hence her placement on the salary scale for each of the years in question has been correct.

The matter is referred to the Commissioner for determination on the parties' Cross-Motions for Summary Judgment. Review of the pleadings and exhibits filed in this matter discloses the following uncontroverted facts:

Petitioner has been employed by the Board as a teaching staff member since February 1959. At all times relevant herein, she has been assigned to teach United States History and American Government, for which she holds appropriate certification.

Petitioner holds a bachelor of science degree, a master of arts degree and has earned at least 30 additional credits in the field of education beyond her master's degree. She further holds a Juris Doctor degree from the Brooklyn Law School, which degree was substituted in 1967 for the Bachelor of Laws degree (L.L.B.) earned from the same school in 1962.

As of September 1960 petitioner has been compensated at the 6th year level (BA and 60 credits). (C-37) In June, 1973 the Board revised its rules to provide extra compensation for teaching staff members holding a master's degree, as opposed to

its equivalent. (C-19) And since July 1973, petitioner's salary has been established according to the masters plus thirty scale of the Board's salary policy. (C-40)

By letter dated October 30, 1970, petitioner requested the Board, through its salary adjustment committee to establish her salary according to the doctoral scale of the salary policy as of the 1971-72 academic year. (C-5) The request was denied by the salary adjustment committee by memorandum dated June 30, 1971. (C-6) The Committee quoted the applicable rule which provided:

> "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 subject for which the teacher holds an appropriate New Jersey certificate."

Relying thereon, the committee declined to recommend placement on the doctoral scale, advising petitioner that "credits for graduate work completed outside the field of Public School Education cannot be accepted." (C-6) Petitioner renewed her request in September 1971 (C-9) and it was again denied. (C-12) The language of the rule upon which the committee's decision had been based was modified in February 1972 to require that one seeking advanced placement on the salary scale must have earned credits in the field of education, "except that credits earned in other fields will be accepted if they are closely related to the teacher's subject area or his teaching proficiency in that area." (C-13)

Arguing that the study of law is closely related to United States History and Government, the subjects she was assigned to teach, petitioner disputed the committee's past conclusions and renewed her request for advanced placement at the doctoral level in February 1974 (C-24), September 1974 (C-30), February 1975 (C-33), June 1975 (C-35), October 1975 (C-37), February 1976 (C-41), June 1976 (C-42) and February 1977 (C-43). On the first two occasions, the committee denied the request on the same grounds as had been furnished for its initial decision. (C-26A, C-32, C-28) Thereafter the record does not reflect that any further response to petitioner's requests was made by the Board or its salary adjustment committee. As no formal action has thus been taken with respect to the last six applications, disposal of the underlying controversy is technically premature. However, in view of the considerable period of time that has elapsed since the within controversy arose, the Commissioner assumes that by its continued placement of petitioner at the MA + 30 level, coupled with its defense of the within action, the Board's reticence constituted denial of each application submitted subsequent to September 1974.

The issue presented for determination herein, then, is whether, under the circumstances of this case, the Board's refusal to recognize petitioner's J.D. degree as the equivalent of a Ph.D. or Ed.D., thereby depriving her of placement at the Doctoral Level of the board's salary policy, was proper.

Recently, in Smith v. Jersey City Board of Education (Docket No. A-3686-77, decided December 28, 1979), the Superior Court, Appellate Division, upheld the decision of a local board of education not to recognize the J.D. as an advanced degree in education. There a tenured teacher of English claimed that as holder of a J.D. degree he was entitled to compensation at the master of arts level on the board's salary scale. The Commissioner had sustained the board's decision against him, reasoning that:

> "***[W]hile a Board may legally recognize a J.D. degree or law courses for advanced salary standing, a salary policy that does not recognize such studies, other than education law, is not without rational basis." 1977 S.L.D. 1186, 1190

The Commissioner noted that the study of law by petitioner in that case was peripheral to the subject of English which he was assigned to teach. Id.

While the case at hand is distinguishable on the grounds that part of petitioner's legal education was undoubtedly related to the area in which she teaches, not all credits completed toward a law degree can be so characterized. Absent an express recognition of the J.D. degree as an advanced degree (here doctorate) for salary purposes in the board's salary policy, the reasoning in Smith, supra, compels the Commissioner to conclude that the Board's refusal to so recognize petitioner's degree here was not arbitrary, capricious or unreasonable. Since petitioner already qualified for placement at the master of arts plus thirty range due to credits earned in the education field, recognition of any of her law credits for purposes of placement at that level was unnecessary. Unless all law credits earned toward her law degree qualified under the "closely related" standard, the degree awarded upon completion of such credits could not be accepted as the equivalent of an advanced degree in education. Accordingly, the sole basis upon which the decision in Smith can be distinguished herein does not avail petitioner. While the Board's refusal to recognize law credits earned in areas closely related to petitioner's teaching area would have been improper had she submitted those credits in support of an application for placement at the MA + 30 range, the refusal was harmless here as petitioner could not have benefitted from anything short of recognition of her J.D. degree, and that recognition was properly declined.

COMMISSIONER OF EDUCATION

March 23, 1980

JULIA BAHAM,	:	
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLEE.	:	
	:	

Decided by the Commissioner of Education, March 27, 1980

For the Petitioner-Appellant, Robert E. Margulies, Esq.

For the Respondent-Appellee, Robert W. Taylor, Esq.

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

August 6, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

In the Matter of:	)	INITIAL DECISION
	)	
RICHARD STEGEMANN v.	)	O.A.L. DKT. # E.D.U. 2505-79
BOARD OF EDUCATION OF THE	)	
TOWNSHIP OF UNION, HUNTERDON	)	Agency Dkt. # 255-6/79A
COUNTY	)	

APPEARANCES:

For the Petitioner:

Gerald M. Goldberg, Esq.

For the Respondent:

Howard Schwartz, Esq.

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

Petitioner alleges that he was improperly transferred from his position as C.I.E. (Cooperative Industrial Education) coordinator and also that he is tenured in that position.

Respondent avers that Petitioner is not tenured as C.I.E. coordinator and the action of the Board which relieved him of coordinator responsibilities therefore could not have violated any tenure rights which he did not possess.

The matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1, et seq.

A prehearing conference was held on October 16, 1979 at which time the parties agreed to submit the matter for Summary Decision. The matter was briefed and the record closed upon the receipt of Petitioner's reply brief on December 28, 1979.

The following facts were stipulated at the prehearing conference, with #5 a post conference stipulation received in letter form from Petitioner and undisputed in respondent's brief:

1) Petitioner has been properly certified as a teacher of industrial arts since July 1967.

2) Petitioner has been properly certified as a Coordinator of Cooperative Industrial Education since May 1973.

3) Petitioner has been employed continuously with respondent since September 1967 as follows:

   a) Teacher of industrial arts (woodshop) from September 1967 to present.
   b) C.E.I. coordinator from September 1974 through June 1979.

4) There has been no additional compensation associated with Petitioner's responsibilities and assignment as C.I.E. coordinator.

5) The position of C.I.E. coordinator is an existing position in respondent's school district and has continued to exist since the time of Petitioner's transfer.

The authority to transfer tenured teaching staff members and the limitations on such authority stem essentially from three (3) statutes:

> 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."
>
> N.J.S.A. 18A:28-5, which provides that "the services of all teaching staff members ... as are in positions which require them to hold appropriate certificates issued by the board of examiners ... shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation" except as set forth in the Tenure Employees Hearing Act.
>
> N.J.S.A. 18A:28-6, which grants tenure in a new position after a prescribed probationary period for any teaching staff member "under tenure or eligible to obtain tenure under this chapter, who was transferred or promoted with his consent to another position covered by this chapter".

In the instant matter it is undisputed that Petitioner is a tenured teaching staff member. However, the litigants dispute the acquisition of tenure by the Petitioner in the position of Cooperative Industrial Education Coordinator pursuant to N.J.S.A. 18A:25-6.

It has been stipulated that Petitioner had held proper certification as Cooperative Industrial Education Coordinator since May, 1973 and was employed in that position from September 1974 through 1979. It was further stipulated that the position of Coordinator of Cooperative Industrial Education has not been abolished.

Petitioner argues that his claim of tenure is based on the operation and interrelation of N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6. These statutes, he alleges, respectively provide the requirements for achieving tenure as a teaching staff member in the district and in any "new" position to which a staff member is transferred, and submits that he is entitled to tenure in the position of Cooperative Industrial Education Coordinator.

Respondent argues that Petitioner was a teacher in 1967 as that phrase is used in N.J.S.A. 18A:28-5 and continued to be a teacher until the present time. He further argues that Petitioner was never transferred " ... to another position ... " under N.J.S.A. 18A:28-6 but was given a new teaching assignment within the tenure law..

It is admittedly conjectural to state that the Board would have assigned the coordinating responsibilities of the Cooperative Industrial Education position to Petitioner if he had not held proper certification for same. However, I think not. Those responsibilities must be construed to be beyond the limitations of the scope of his teacher certification. The argument of respondent that Petitioner was given a new teaching assignment as coordinator must be rejected.

I FIND that Petitioner is tenured as a Coordinator of Cooperative Industrial Education.

The State Board of Education addressed the vital issue of how far the power of a board of education to transfer teaching staff members is limited by tenure rights in Jeannette A. Williams v. Board of Education of the City of Plainfield. (Decided by the Commissioner of Education, June 1, 1979 and July 27, 1979 and by the State Board of Education on September 6, 1979 and January 9, 1980).

In its January 9, 1980 decision the State Board said:

> "Where the transfer is to a position of equivalent rank, the Board may act without the staff member's consent. Boor v. Newark Board of Education, decided by Commissioner August 31, 1979. The phrase "with his consent" appearing in section 18A:28-6 applies only to transfers which are promotions or demotions, i.e. to a different rank. We cannot rationally construe the statute in any other fashion, for a tenured staff member already enjoys tenure within his rank, albeit in no particular assignment therein. Bigart v. Paramus Board of Education, supra; Clark v. Rosen and Margate City Board of Education, 1974 S.L.D. 678, aff'd St. Bd. 1975 S.L.D. 1082, aff'd App. Div. 1976 S.L.D. 1134. The legislative history of the statute bears out this interpretation ...."

The State Board further stated that:

> "The law thus protects the rank or status of a tenured professional employee. It also prevents the employing board from reducing the compensation of such an employee except by proceedings under

> N.J.S.A. 18A:6-10 et seq. But for these two limitations, which may be said to give job security and financial security, the board of education has plenary authority, by a majority vote of the whole board, to transfer its professional personnel in good faith for the best interests of the school system. Lascari v. Lodi Board of Education, supra; Bradley v. Freehold Board of Education, 1976 S.L.D. 590,600; Di Nunzio v. Pemberton Township Board of Education, 1977 S.L.D. 24. ...."

In the instant matter, financial security is not an issue. However, the protection of rank or status of a tenured professional employee must be considered. The Petitioner was stripped of his responsibilities to coordinate the program of Cooperative Industrial Education by his transfer from his position that carried with it the status of one which required a special certificate. I SO FIND.

I CONCLUDE, therefore, that Petitioner was improperly transferred from his position as Cooperative Industrial Education Coordinator, and direct the Board to reinstate him to that position, forthwith. IT IS SO ORDERED.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

DATE

WARD R. YOUNG, A.L.J.

RICHARD STEGEMANN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Respondent excepts to the conclusion of Judge Ward R. Young that the position of Cooperative Industrial Education Coordinator has duties other than those of a classroom teacher. Respondent contends that there cannot be tenure to such a position and that there is no evidence that the rank of Cooperative Industrial Education Coordinator is any different from that of other teachers. Petitioner's exceptions oppose those of respondent and are supportive of the initial decision.

The Commissioner finds no merit in respondent's exceptions. The Regulations and Standards for Certification (1976 Edition) in describing the certificate endorsement requisite for a Coordinator of Cooperative Industrial Education states:

> "This endorsement is required for the position of teacher and coordinator of part-time vocational education in skilled trade, industrial and/or service occupations. The endorsement entitles the holder to teach related vocational subjects in such classes and to act as coordinator between school and industry."

Petitioner's exceptions argue that inherent in such certification is the indication that the Coordinator performs functions other than a regular classroom teacher.

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

Accordingly, the Board of Education of the Township of Union is directed to reinstate petitioner forthwith to the position of Cooperative Industrial Education Coordinator.

COMMISSIONER OF EDUCATION

March 27, 1980

RICHARD STEGEMANN,	:	
PETITIONER-APPELLEE,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 27, 1980

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

For the Respondent-Appellant, Howard Schwartz, Esq.

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

July 2, 1980
Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

In the Matter of:	)	
ALAN SCHWARTZ	)	INITIAL DECISION
vs.	)	OAL DKT. NO. E.D.U. 2503-79
BOARD OF EDUCATION OF THE RIDGEFIELD PUBLIC SCHOOL, BERGEN COUNTY	)	Agency Dkt. No. 261-6/79A

Appearances:

Carl John Kerbowski, Esq.
for Petitioner, Alan Schwartz

Stanley Turitz, Esq.
Bartlett & Turitz, P.A.
for Respondent, Ridgefield Public School
Board of Education, Bergen County

BEFORE THE HONORABLE JACK BERMAN, A.L.J.:

On June 29, 1979, petitioner, Alan Schwartz, filed with the Division of Controversies and Disputes a petition charging respondent with discrimination in abolishing petitioner's position as Curriculum Coordinator in violation of N.J.S.A. 18A:28-10 and avers that respondent never provided him with advance notice in writing that he would be a topic of discussion at the meeting held by respondent on February 8, 1979. Petitioner also charges that respondent acted ultra vires in abolishing petitioner's position, and further violated his due process rights by not properly evaluating him, noticing him and protecting his privacy, etc. Respondent avers that petitioner's position was eliminated for reasons of economy and budget CAP requirements.

This action comes before the Commissioner of Education pursuant to N.J.S.A. 18A:6-9. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on September 19, 1979 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey, at which time the issues in the case were identified as follows:

1. Whether the respondent-Board's action of abolishing the position of Curriculum Coordinator was arbitrary, capricious or unreasonable.

2. Whether petitioner was entitled to a written notice of respondent-Board's meeting on February 8, 1979.

3. Was respondent-Board's action in eliminating petitioner's position ultra vires.

At a hearing on December 3, 4, 5 and 6, 1979 the court received into evidence 71 exhibits, 26 from petitioner and 45 from respondent. They are as follows:

P-1 Letter dated May 5, 1979 from Joseph H. Anderson, Superintendent of Schools, to Alan Schwartz

P-2 Ridgefield Public Schools to Alan Schwartz from Joseph H. Anderson, 3 pages.

P-3 Ridgefield Public Schools "second evaluation conference for the purpose of accomplishing the purposes of administrative evaluation" dated November 6, 1978, 5 pages.

P-4 Board of Education, Ridgefield dated March 31, 1978 to Alan Schwartz, signed John Kowalsky.

P-5 May 31, 1979 "Position Open Notice-Job Description for teacher-supervisor", 3 pages.

P-6 Ridgefield Public Schools by John H. Anderson, Superintendent of Schools, to Alan Schwartz dated March 19, 1979.

P-7 February 9, 1979 from Ridgefield Public Schools to Administrative Counsel from Joseph H. Anderson re: Actions taken at Board of Education meeting February 8, 1979.

P-8 Shaler School, Shaler Boulevard, March 29, 1979 to Joseph Anderson from Alan Schwartz

P-9 March 30, 1979 from Ridgefield Public Schools to Alan Schwartz

P-10 April 4, 1979 Shaler School to Joseph Anderson from Alan Schwartz

P-11 Ridgefield Memorial High School dated April 4, 1979 from Philip Lockitt, President to Ridgefield Board of Education

P-12 Ridgefield Memorial High School April 6, 1979 to Board of Education from the Administrative Council

P-13 Annual report July 1, 1978 "Basic skills remedial and preventive" 3 pages

P-14 Document dated February 8, 1979 "Cut one staff member-"

P-15 Middle School, 7 pages, December 1978 2 pages

P-18 Form A, Ridgefield New Jersey Administrative Appraisal, Alan Schwartz, May 31, 1979, 2 pages

P-19 Form A, Administrative Appraisal, Alan Schwartz, May 31, 1979, 1 page, comments filled in

P-20 Ridgefield Public Schools, May 31, 1979, 3 pages

P-21 Ridgefield Public Schools, May 29, 1979, 1 page

P-22 Form A, Ridgefield New Jersey, Alan Schwartz, May 29, 1979

P-23 Accomplishing purposes of administrative evaluation, 5 pages

P-25 Policy statement covering the duties and responsibilities of the Curriculum Coordinator 2 pages

P-26 The final review and evaluation of progress regarding 1976-1977 goals for Mr. Alan Schwartz Curriculum Coordinator, Ridgefield, 3 pages

P-27 Progress Report-Program for Education and Administrative Development, major goals conference February 13, 1978, 3 pages

P-28 April 17, 1979 to Administrative Council from Joseph H. Anderson, Ridgefield Public Schools

P-30 Letter December 18, 1978 to Victor Scallo from William M. Klepper, 2 pages, (not being received for the truth of its contents).

RESPONDENT'S EXHIBITS

R-1 Ridgefield Memorial High School to the Board of Education from the Administrative Council April 6, 1979

R-2 School district budget statement, January 12, 1979, 22 pages

R-3 Ridgefield Board of Education proposed 1979-80 school budget, 11 pages

R-4 State of New Jersey, Department of Education, 3 pages, 1979-80 net current expense budget cap calculations prepared November 30, 1978

R-5 Proposed school budget "to the citizens of Ridgefield"

R-6 Board of Education Ridgefield resolution introducing the tentative school budget for the 1979-80 school year, January 11, 1979

R-7 Ridgefield Board of Education proposed 1979-80 school budget, 15 pages

R-8 Ridgefield Board of Education proposed 1979-80 school budget, 15 pages with add-ons

R-9 Ridgefield Board of Education proposed 1979-80 school budget, 15 pages with add-ons

R-10 Board of Education Ridgefield, New Jersey, December 14, 1978 to Board Trustees from John Kowalsky re proposed budget 1979-80 3 pages

R-11 Letter Board of Education Ridgefield, January 6, 1979 to Dr. Adler, signed John Kowalsky

R-12 Board of Education Ridgefield, New Jersey, budget adjustment as per board action, February 8, 1979

R-13 Board of Education Ridgefield, March 8, 1978 to Bergen News etc. from John Kowalsky re schedule of meetings April 1978 thru March 1979

R-14 Board of Education Ridgefield, New Jersey, November 10, 1978 to Bergen News, etc., from John Kowalsky, re meeting Tuesday, November 14, 1978

R-15 Board of Education Ridgefield, New Jersey, to Bergen News etc., from John Kowalsky, dated November 17, 1978, re meeting, Tuesday, November 21, 1978

R-16 November 28, 1978 Board of Education Ridgefield New Jersey to Board Trustees, etc., re special meeting Thursday, November 30, 1978

R-17 Board of Education Ridgefield, New Jersey December 22, 1978 to the Board Trustees from John Kowalsky, re: meetings Wednesday, December 27, 1978 and Thursday, December 28, 1978

R-18 Board of Education Ridgefield, New Jersey to Board Trustees, etc., from John Kowalsky re: meetings cancelled and Thursday, January 4, 1979

R-19 Board of Education Ridgefield, New Jersey January 5, 1978 to Board Trustees etc., from John Kowalsky, re: meeting Monday, January 8, 1979

R-20 Board of Education, Ridgefield, New Jersey, January 29, 1979 to Board Trustees, etc., from John Kowalsky re: meeting Thursday, February 1, 1979

R-21 Board of Education, Ridgefield, New Jersey, February 2, 1979 to: Board Trustees, etc., from John Kowalsky re: special meeting Monday, February 5, 1979 and regular monthly meeting, Thursday, February 8, 1979

R-22 Board of Education February 23, 1979 to: Board Trustees from John Kowalsky re: meeting Wednesday, February 28, 1979

R-23 Board of Education Ridgefield, New Jersey March 13, 1979 to: Board Trustees, etc. from John Kowalsky re: public hearing March 15, 1979

R-24 Organization meeting Board of Education Ridgefield, New Jersey, February 21, 1978 8 pages

R-25 Special meeting Board of Education Ridgefield, New Jersey, November 14, 1978, 2 pages

R-26 Special meeting Board of Education Ridgefield New Jersey, November 21, 1978, 2 pages

R-27 Special meeting Board of Education Ridgefield New Jersey, November 30, 1978, 2 pages

R-28 Regular meeting Board of Education Ridgefield New Jersey, December 14, 1978, 6 pages

R-29 Special meeting Board of Education Ridgefield New Jersey, December 28, 1978, 4 pages

R-30 Special meeting Board of Education Ridgefield New Jersey, January 4, 1979, 2 pages

R-31 Special meeting Board of Education Ridgefield New Jersey, January 8, 1979, 2 pages

R-32 Regular meeting Board of Education Ridgefield New Jersey, January 11, 1979, 6 pages

R-33 Special meeting Board of Education Ridgefield New Jersey, February 1, 1979, 4 pages

R-34 Special meeting Board of Education Ridgefield New Jersey, February 5, 1979, 2 pages

R-35 Regular meeting Board of Education Ridgefield New Jersey, February 8, 1979, 8 pages

R-36 Special meeting Board of Education Ridgefield New Jersey, February 28, 1979, 2 pages

R-37 Special meeting budget hearing, Board of Education Ridgefield, New Jersey, March 15, 1979, 2 pages

R-38 Borough of Ridgefield, March 22, 1976 to the Board of Education from Mayor and Council, 2 pages

R-39 Ridgefield Board of Education, secretary's notes-executive session, January 4, 1979

R-40 Special meeting Board of Education Ridgefield New Jersey, June 7, 1979, 2 pages.

R-42 Letter Board of Education Ridgefield, New Jersey, June 5, 1979, to: Board Trustees, etc., from John Kowalsky re: meeting June 7, 1979.

R-43 Ridgefield Board of Education secretary's notes executive session, June 7, 1979, 3 pages.

R-44 Board of Education Ridgefield, New Jersey, May 22, 1978 to Board Trustees, etc., re: meetings May 25, 1978.

R-45 Ridgefield Public Schools to Alan Schwartz from Joseph Anderson, June 8, 1979, return receipt certified.

R-46 Ridgefield Public Schools to Turitz, June 28, 1979 from Anderson. Attached is sealed envelope addressed to Alan Schwartz with certified mail attached to it.

All the exhibits have been carefully studied by the court prior to this decision. The court also heard the testimony of Alan Schwartz, petitioner, John Kowalsky, School Business Administrator and Board Secretary, Lloyd Woodcock, Principal of W. Arthur Skewes Middle School and Joseph Anderson, Superintendent of Schools, Ridgefield Public Schools. The court has also studied all of the pleadings, arguments and briefs.

The hearing was closed on January 31, 1980 when post trial briefs, proposed findings of facts and conclusions of law were submitted.

Mr. Alan Schwartz, the petitioner, testified. He had been Curriculum Coordinator for the district of Ridgefield for the grades K-12 from October 26, 1976 until his position was abolished, effective July 1, 1979.

He received a letter from the Ridgefield Public Schools, dated May 5, 1978, written by Joseph H. Anderson, Superintedent of Schools, (P-1), which reads as follows:

"Dear Mr. Schwartz:

The Board of Education is of the opinion that you lack the necessary personality traits which will aid you and the district in generating the most efficient and cooperative responses from the staff, parents and students.

> The Board of Education feels that your attitude has had a reverse effect upon the motivation of those people with whom you have come in contact.
>
> For the above reasons, your contract as Curriculum Coordinator for the 1978-79 school year is not being renewed by the Ridgefield Board of Education."(emphasis added)

As things subsequently worked out, Mr. Schwartz's contract as Curriculum Coordinator was renewed. Nonetheless this letter evidences the foundation of petitioner's charge against respondent that his position as Curriculum Coordinator was abolished, was based upon religious discrimination.

The abolishment of the position of Curriculum Coordinator was brought to Mr. Schwartz's attention in a letter dated March 19, 1979 written by Mr. Anderson, Superintendent of Schools, (P-6), which reads as follows:

> "Dear Mr. Schwartz:
>
> This letter is to inform you that at its public board of education meeting held on February 8, 1979, the Ridgefield Board of Education acted to abolish the position of Curriculum Coordinator for the 1979/80 school year.
>
> In the judgment of the Board of Education it is advisable to abolish the position for reasons of economy and budget CAP requirements.
>
> For the reasons cited above, you are, therefor, notified that you will not be reemployed for the school year 1979/80."
>
> Signed: Joseph H. Anderson
> Superintendent of Schools

Mr. Schwartz claims he received no notice of the Board of Education meeting held on February 8, 1979, which resulted in the abolishment of his position. He said that he subsequently was made aware of that meeting the following day, at a meeting of the Administrative Council. At that meeting, Superintendent Anderson informed Mr. Schwartz as to the action taken by the Board of Education the preceeding night.

Mr. Schwartz stated that prior to the meeting of February 8, 1979, Mr. Anderson on February 7, 1979 had given him information to believe that his position was secured and that there would be no problem regarding the renewal of his contract.

At the Administrative Council meeting of February 9, 1979, many members expressed their concern with the abolishment of the position of Curriculum Coordinator. In fact, according to Mr. Schwartz, they were surprised and dismayed. They wrote a letter of concern requesting a meeting of the Board of Education to express their feelings (P-12). They stated in the letter that the "Council, in its entirety, was not consulted on the effect of the Board decision and the ramifications of the loss of a Curriculum Coordinator to our school system". As a result, a meeting was held in May of 1979 with the members of the Board of Education and the members of the Administrative Council concerning the elimination of the Curriculum Coordinator position. Mr. Schwartz stated that he was present and was given an opportunity to speak. He stated that he had told the Board that the figures they had before them as well as the facts that were given to them for the February 8, 1979 meeting were incorrect. He knew this to be the case as he learned from a Board member, John Peters, that certain budgetary facts relative to teachers' salaries were not presented to the Board that evening.

Another contention asserted by Mr. Schwartz in his petition was that he was not evaluated correctly. Various evaluation forms received by him from Mr. Anderson, the Superintendent of Schools pertained solely to the position of school principal, not Curriculum Coordinator. He brought this to Mr. Anderson's attention and Mr. Anderson instructed him to strike out those areas in the form not applicable to the position of Curriculum Coordinator and to insert in its place those answers to questions that were relevant to the position of Curriculum Coordinator. Thus P-18, P-19 and P-22 are exhibits entitled "Administrative Appraisal" were received in evidence illustrative of Mr. Schwartz's assertion that proper evaluations were not made of him in his position as Curriculum Coordinator.

Regarding non-renewal of his employment with respondent in 1978, Mr. Schwartz testified that he subsequently had a meeting with the Board of Education on May 25, 1978. At that meeting, he stated that the evaluation procedure was lacking and was not in keeping with Title 18A. Discrimination for antisemitic reasons was also discussed. He testified that there had been a planned action by the Board members to seek his dismissal and it was his belief that the Board's motivation centered on a discriminatory basis. The Board of Education voted at the meeting, to reinstate him to his former position.

"The personality remarks" that were stated to Mr. Schwartz in P-1 regarding his non-renewal as Curriculum Coordinator in 1978 was mentioned again in a memorandum following a meeting that was held between Mr. Schwartz and Mr. Anderson on September 29, 1978. Thus in Mr. Anderson's memorandum to Mr. Schwartz, (P-2) Item #3 states "I discussed with Mr. Schwartz the still prevelant feeling of the Board of Education regarding his work in the school district. The Board is still concerned regarding his lack of necessary personality traits in motivating teachers to cooperative and voluntary efforts in curriculum development. At times they feel that you may have a reverse effect upon motivating professional staff and lay persons as they work with you. To focus upon this concern, it was suggested and decided that Mr. Schwartz will become intimately involved with the Curriculum Development Committee for the Gifted and Talented. This committee will involve community members, professional staff and Board of Education representatives." (emphasis added). Mr. Schwartz subsequently discussed this memorandum with Mr. Anderson and was told by Mr. Anderson to write him a letter, that he could present to the board. The letter appears on Page 3 of P-3 in evidence. The letter is dated November 17, 1978 and states:

> "I am making reference to paragraph #3 on evaluation of September 29, 1978 and refer to an Item #2 of evaluation of November 6, 1978.
>
> If indeed, the Board of Education had still expressed, 'the still prevelant feeling...' up to the conference date of September 29, 1978, I am requesting documentation and awareness of the reasons for that feeling."

The reference to "Item #2 of evaluation of the November 6, 1978" appears on Page 2 of P-3. It states:

> "The Superintendent responded that no opinions have been communicated to him either positive or negative. Mr. Schwartz then asked for reasons and documentation for the Board's feelings as stated in paragraph 3. Mr.Anderson then asked Mr. Schwartz to put his questions in written form so that they may be shared with the Board of Education. In this manner Mr. Schwartz's questions will be clarified and the Board can respond accordingly."

No response was ever received by Mr. Schwartz from the Board of Education.

Mr. Schwartz testified that at many meetings of the Board of Education, the Board went into executive sessions and excluded him from participating in those meetings. He listed the following meetings when this occurred: April 6, 1978; May 25, 1978; June 7, 1979 and April 12, 1979.

At the conclusion of Mr. Schwartz's testimony, the petitioner rested.

Mr. John Kowalsky, employed by the Ridgefield Board of Education as its School Business Administrator and Board Secretary, testified for respondent. Mr. Kowalsky is responsible for maintaining the business records of the Board of Education and through him R-2 through R-40 in evidence were admitted. The functions, he testified, of the Business Administrator and Board Secretary are:

1. Budgetary preparations.

2. Final operations in accounting of the school system.

3. Attendance at Board meetings and preparation of minutes of those meetings.

4. Custodial and cafeteria operations of the district for all personnel.

Concerning budget preparation, he said, it is his responsibility to correlate the complete budget. He is required to gather all data from the State Department of Education, including revenue, state aid, and federal aid. He has the sole responsiblity of preparing the revenue side of the budget, i.e. source of funds. He explained the budget Cap as being a State formula that permits a district to increase by a stated percentage its budget from the preceeding budgetary period. This percentage, he said, is also arrived at by the State based on the rateables of the district and the cost of education per pupil of spending by the budget Cap indicated by the State Department. He testified that the Board determined as of December 14, 1978 that the budget was over the Cap figure allowed by the State. Various alternatives for cutting the budget were considered by the Board, including eliminating two compensatory education teachers in order to effectuate savings at the local level. He explained that an important factor necessitating reduction was that enrollment had decreased causing the Board to tentatively decide to eliminate nine teachers from the staff.

As secretary to the Board of Education, it is Mr. Kowalsky's responsibility to send out notices of all Board of Education meetings. In compliance with the Sunshine Law, he submits or posts these notices outside the Administrative Building of the Board of Education. Notices are delivered to the Borough Clerk who posts them. Notice is also sent to the Board Trustees, and two or three local newspapers. Notices are also posted in each school.

The Court notes the following statement is read at each meeting of the Board of Education, regarding the New Jersey Open Public Meetings Act.

> "The New Jersey Open Public Meetings Law was enacted to ensure the right of the public to have advance notice of and to attend the meetings of the public bodies at which any business affecting their interests is discussed or acted upon. In accordance with the provisions of this act, the Ridgefield Board of Education has caused notice of this meeting to be published by having the date, time and place thereof posted at the Administration Building, and having notified the Bergen News, The Record and the Ridgefield Borough Clerk."

This statement appears on all respondent's minutes.

R-7, R-8 and R-9 are the proposed 1979-80 school budget prepared by Mr. Kowalsky and submitted by him to the Board for its budget meetings. During the course of the budget meetings, various Board members questioned many items contained in the school budget. Mr. Kowalsky was present at all budget meetings conducted by the Board of Education from November 14, 1978 through February 28, 1979.

Mr. Kowalsky testified regarding the surplus funds available to the Board during the period that the 1979-1980 budget was being considered, that $59,921.11 represented the free appropriated balance towards the 1979/80 budget. Of this amount, the Board appropriated $46,515.00 leaving a balance of $13,406.11. When the official audit was received after the school year ended, it indicated that the surplus was in excess of $118,000.

He stated that when the position of Curriculum Coordinator was discussed by the Board members, the evaluation of the person in that position was never discussed. In fact, at the regular meeting of the Board held on February 8, 1979 wherein the position of Curriculum Coordinator was abolished, the President of the Board, Mr. Scallo, explained to the audience "that there are provisions in the law that protect public employees and discussions of same at open meetings. Mr. Scallo stated that the Board will be discussing, at this time, possible staff reductions within the Ridgefield Schools and its effect on the proposed budget. Discussions will only be on positions and not on any individual school employees. He reiterated that a position which might be singular could be eliminated, but the staff person not as they might have tenure or a seniority in other areas. Mr.Scallo stated that if the disucssion at anytime was on specific people he will immediately stop the meeting procedures." (Minutes of meeting February 8, 1979, R-35). Mr. Kowalsky admitted that there was only one Curriculum Coordinator for the Ridgefield Schools and that was Alan Schwartz. He also admitted that no notice was sent to Mr. Schwartz regarding the subject of the meeting- the abolishment of certain positions, one of which was the position of Curriculum Coordinator.

A discussion concerning the position of Curriculum Coordinator first occurred at the February 1, 1979 meeting. The minutes indicate the following:

> "On request of Mr. Scallo, Mr. Anderson indicated the duties of the Curriculum Coordinator. No decision by the Board was made regarding the elimination of this position. It was agreed that the Board would discuss this fully at the next budget meeting." (R-33)

The next meeting, a special meeting, was held on February 5, 1979. Notice of that meeting as well as the February 8th meeting were combined (R-21). It reads:

> "A special meeting of the Ridgefield Board of Education, open to the public and press, will be held on Monday, February 5, 1979, at 8:00 p.m. in the Administration Building located at 555 Chestnut Street, Ridgefield, New Jersey. The purpose of the meeting is to continue work on the proposed budget.
>
> The regular monthly meeting will be held on Thursday, February 8, 1979, at 7:30 p.m. in the Administration Building."

The minutes of the February 5th meeting reveal:

> "Regarding the position of Curriculum Coordinator, it was agreed that this not be discussed until a determination was made as to what other staff member positions will be reduced in this budget."

Mr. Kowalsky admitted that he knew Mr. Schwartz was not tenured. The roll call vote of the February 8, 1979 meeting on the motion to eliminate the position of Curriculum Coordinator was five for, and one opposed.

On March 15, 1979 a public hearing to explain the proposed budget to the citizens and to receive their comments was held. Until a vote was taken at this meeting, the Board could make changes in the budget.

Mr. Kowalsky explained the various meetings the Board of Education holds. They are: (1) regular monthly meetings, (2) special meetings, where specific actions are taken, (3) open public meetings and (4) executive sessions, which may or may not be open to the public. The monthly Board of Education meetings are required by law to be held. At such meetings, action may be taken on personnel matters. The public is permitted to attend and participate at these meetings. The Board may, at such meetings, adjourn into closed session, barring

the public from entering. This is accomplished by bringing a motion to enter into executive session. When personnel matters are to be discussed, either the Superintendent or Mr. Kowalsky would send letters prior to the meeting to the individuals who may be discussed during the closed session. When the Board adjourns into executive session where specific matters are discussed, the public is not permitted to sit in or listen to their deliberations. The procedure to adjourn into executive session follows: (1) call to order of the open public session, (2) reading to the public, the Open Public Meetings Act, (3) a roll call is taken and (4) the purpose of the meeting is explained to the public. Special meetings are called specifically by the Board in order for it to act on certain specified matters. At the discretion of the Board's president, the public is permitted to attend and participate. At the request of Mr. Schwartz a special meeting of the Board was held on June 7, 1979, to discuss the riffing of his position. Mr. Schwartz and his attorney, Mr. Kerbowski participated.

The exhibits R-40 and R-43 in evidence are reproduced here in part. R-40 are the minutes of the special meeting of the Board of Education, held on June 7, 1979. R-43 are the Secretary's personal notes of the executive session that occurred during the course of the special meeting held on June 7, 1979.

Thus in R-40 after the New Jersey Open Public Meetings Act statement was read to the members of the public, the minutes reflect that "at 8:02 p.m., on motion by Mrs. Ferrante and seconded by Mr. Petrillo, it was unanimously approved to recess into executive session to discuss personnel matters". The secretary's notes (R-43) state:

> "An executive meeting of the Board of Education was held to discuss personnel. At 8:03 p.m., Mrs. Merwede, President, opened the meeting.
>
> Mr. Schwartz, Curriculum Coordinator, of the Ridgefield Public Schools and Mr. Carl Kerbowski, Esq., were also present.
>
> Mrs. Merwede stated that after completion of the executive session, the Board will meet in public and make a decision regarding the position of Curriculum Coordinator.
>
> In response to a question from Mr. Turitz, Mrs. Merwede stated that no notice was received either from Mr. Schwartz or Mr. Kerbowski to hold an open meeting on this matter.
>
> Mr. Kerbowski stated that the intention of this meeting was to try and persuade the Board to reinstate the Curriculum Coordinator's position for 1979-80, and Mr. Alan Schwartz to that position."

Following Mr. Kerbowski's lengthy remarks to the Board, Mr. Kerbowski and Mr. Schwartz voluntarily left the room notwithstanding an invitation from the Board permitting them to remain in the room.

> "The Board of Education then discussed at length the feasibility of continuing the position, the economic situation of the Board regarding exceeding the budget Cap and the comments made by Mr. Kerbowski.
>
> The executive session was adjourned at 9:55 p.m." (R-43)

Referring again to R-40, the minutes of the special meeting, states:

> "The special meeting was called back to order at 9:56 p.m. by Mrs. Merwede. A role call indicated that all members were present. Also present were Mr. Anderson, Mr. Kowalsky and Mr. Turitz.
>
> Mr. Felderman moved, and Mr. Peters seconded, that the Board confirm the action of the Board of Education at the February 8, 1979 meeting in abolishing the position of Curriculum Coordinator for reasons of economy and meeting the budget cap, and the superintendent be directed to notify Mr. Schwartz in writing that his position has been abolished for the 1979-80 school year and this being the Board of Education's final determination after having conducted a hearing pursuant to N.J.A.C. 6:3-1.20.
>
> A roll call vote on the motion was as follows

Voting - Yes	Voting - No
Dr. Eyerman	None
Mr. Felderman	
Mr. Fenelle	
Mrs. Ferrante	
Mr. Peters	
Mr. Petrillo	
Mrs. Merwede	

> Motion by roll call carried unanimously."

It is interesting to note, that the sole vote opposing the abolishment of the Curriculum Coordinator's position on February 8, 1979 was made by Mr. Felderman, who petitioner "presumes" to be of the same religious faith as he. Nonetheless, Mr. Felderman at the June 7, 1979 meeting, not only voted with the Board to confirm its previous position but was also the maker of the motion.

Mr. Kowalsky traced the history of the position of Curriculum Coordinator in the Ridgefield Public School System. It is approximately eight or nine years old. He stated that a letter dated March 22, 1976 from the Borough Clerk of the Borough of Ridgefield, (R-38), sets forth that the Mayor and Council had held a special work session meeting on March 20, 1976 and determined to eliminate certain positions in an effort to reduce its budget. One of the positions recommended by the Mayor and Council to be eliminated, was the position of Curriculum Coordinator. This action by the Mayor and Council preceded Mr. Schwartz's entry into the district as Curriculum Coordinator.

The principal of the W. Arthur Skewes Middle School, Lloyd Woodcock's testimony reveals that although he had a number of differences of opinion with petitioner, he was not involved in any conspiracy to terminate petitioner from his position or to abolish the position of Curriculum Coordinator.

Joseph Anderson, Superintendent of Schools of the Ridgefield Public Schools, was respondent's final witness. He evaluated the petitioner. He recalled that sometime around May 29 through May 31, 1979, petitioner felt that the major areas of his performance was not adequately described in P-18 (Administrative Appraisal). This was the only time petitioner had brought this to his attention. This occurred subsequent to petitioner being informed of the Board of Education's action in abolishing the position of Curriculum Coordinator. His response to petitioner is articulated in P-21 which is a summary of a conference he had with petitioner on May 29, 1979, respecting evaluation. Thus he states in P-21, "Take Job Responsibility, each topic, each indicator under each topic. a. if appropriate- deal with it, b. if not appropriate - say why, c. include substitution topics and/or indicators and why you have made substitutions".

He explained the Administrative Council. It is a body, created by him, consisting of high level administrators, who make recommendations to him. The Board of Education is considering to give the Administrative Council a more definitive role. He is encouraging the Board and the Council to work together in a team management capacity.

Following the Board of Education meeting of June 7, 1979, a letter was written by Mr. Anderson to Mr. Schwartz (R-45) dated June 8, 1979, informing Mr. Schwartz that the Board had confirmed its position of its action taken on February 8, 1979 abolishing the position of Curriculum Coordinator. This letter was sent to petitioner by certified mail return receipt. The letter was later returned to Mr. Anderson, unopened.

He recalled the Board having terminated petitioner's employment in 1978. On May 25, 1978 at a Board meeting, petitioner requested the Board to reconsider its position. Mr. Anderson, at that

meeting, requested the Board to renew petitioner's contract as Curriculum Coordinator. Mr. Schwartz, at that meeting, was represented by an attorney. Mr. Schwartz's attorney presented many reasons why the Board should reverse their decision. One reason provided was that the Board had acted in an antisemetic fashion, violating Mr. Schwartz's civil rights. Board members could be sued in their individual capacity. Another reason stated was that Mr. Anderson had not evaluated the petitioner correctly. The Board changed its position and a new contract was offered to Mr. Schwartz for the school year.

Mr. Anderson was not aware of any conspiracy to terminate Mr. Schwartz's employment or to abolish Mr. Schwartz's position. He stated Mr. Schwartz was not dismissed because he was Jewish.

Based upon consideration of the foregoing, THE COURT FINDS:

1. Petitioner is a non-tenured employee and was employed by respondent's as its sole Curriculum Coordinator.

2. Petitioner's position was abolished effective July 1, 1979.

3. Respondent did not abolish Petitioner's position because of religious discrimination.

4. Respondent did not provide petitioner with advanced notice in writing that his position of Curriculum Coordinator would be the topic of discussion and/or action at the meeting of February 8, 1979.

5. At respondent-Board's meetings of February 1 and February 5, 1979 it was agreed that respondent would discuss the duties of Curriculum Coordinator at its next budget meeting and not until a determination was made as to what other staff members positions will be reduced in its budget.

6. On February 8, 1979 respondent abolished the position of Curriculum Coordinator for reasons of economy and budget cap requirements. This was confirmed unanimously by respondent at its June 7, 1979 meeting requested by petitioner after petitioner and his attorney presented petitioner's case to respondent.

Petitioner was the sole Curriculum Coordinator in respondent's school district. By abolishing that position respondent determined that the school district no longer required a Curriculum

Coordinator. The public should have been notified in advance of this momentous action being taken. This is precisely the purpose of the public policy of the State in the Open Public Meetings Act, ". . . to insure the right of its citizens to have adequate advance notice of andthe right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way. . ." N.J.S.A. 10:4-7. Adequate notice is defined in N.J.S.A. 10:4-8 as meaning "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. . ."

Respondent submits that the procedures it followed were similar to the procedures followed by the School Board in the case of Oliveri v. Carlstadt-East Rutherford Board of Education, 160 N.J. Super. 131, where the court held the Board complied with the Open Public Meetings Act. However that case is distinguishable. There the agenda of the first meeting included "personnel". In this case the agenda did not include "personnel". The resolution in Oliveri, supra, was "to adopt a resolution regarding personnel". The resolution there adopted set forth:

> "1. All employees shall take notice that possible reductions in staff may occur as a result of the aforesaid limited funding available for our 1977-1978 school year.
>
> 2. All employees that are affected by this reduction in staff will be notified on or before April 15, 1977, and in accordance with law."

Here no formal resolution was adopted by respondent at its February 1st meeting. The minutes merely reference that "it was agreed that the Board would discuss this (duties of Curriculum Coordinator) fully at the next budget meeting".

At the next meeting, February 5, 1979, again the minutes refer "that this (position of Curriculum Coordinator) not be discussed until a determination was made as to what other staff member positions will be reduced in this budget."

Thus the public was never notified by way of formal resolution or specifically when the discussion and action concerning the abolishment of the position of Curriculum Coordinator would occur.

Petitioner was never notified. The respondent rendered "useless and inoperative the statutory right granted an employee to have a public discussion of his or her personnel matter". Rice & Union County Regional High School Teachers Assoc., Inc. v. Union County Regional High School Board of Education, 155 N.J. Super. 65. Thus the Court stated in Rice, supra, regarding N.J.S.A. 10:4-12b(8),

"It is clear that the sole purpose for the personnel exception is to protect individual privacy. The statute provides a method by which the individual may forego this personal privacy and have a public discussion on the matter. . ." Further, the court stated, "The plain implication of the personnel exception to the New Jersey Open Public Meetings Act is that if all employees whose rights could be adversely affected decide to request a public hearing, they can only exercise that statutory right and request a public hearing if they have reasonable advance notice so as to enable them to (1) make a decision on whether they desire a public discussion, and (2) prepare and present an appropriate request in writing."

The fact that petitioner was afforded an opportunity on June 7, 1979 to meet with respondent for it to reconsider its previous action of abolishing his position, does not cure the defect that no notice was given him of the February 8th meeting. He shouldn't have been placed in the uncomfortable and disadvantaged position on June 7th of a losing litigant pleading for reversal.

Although petitioner has failed to prove by a preponderance of the evidence that his position was abolished because of discrimination, Peper v. Princeton University Board of Trustees, 77 N.J. 55 (1978), respondent's actions of failing to notify petitioner is viewed questionably, especially in view of its history in allowing to remain unanswered petitioner's query of "the necessary personality traits" that he lacks and reinstating him in 1978 to his position following charges of anti-semitism.

I do not find that respondent abused its discretion in its action abolishing the position of Curriculum Coordinator for reasons of economy and budget Cap. N.J.S.A. 18A:28-9 sanctions such action.

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

During the period respondent was considering the 1979-1980 budget the unaudited surplus after Board appropriation of $46,515.00 was $13,406.11. The subsequent official audit received after the school year ended indicated surplus of $118,000. Although hindsight may be clearer than foresight the Board never knows until the official audit after the school year has ended exactly how much of a surplus will be revealed by the official audit. In Board of Education of Fair Lawn v. Mayor, Coun. Fair Lawn, 143 N.J. Super. 259 (Law Div. 1976) the court pointed out:

> "It is also clear that the board has the right, subject to ultimate review by the Commissioner of Education, to maintain a reasonable surplus in order to meet unforseen contingencies. See Penns Grove-Upper Penns Neck Reg'l School Dist. Board of Ed. v. Penns Grove Mayor and Council etc., 1971 School Law Decisions 372; City of East Orange Bd. of Ed. v. East Orange Mayor and Council, 1976 School Law Decisions (March 26, 1976). Patently, the whole purpose of the board's maintenance of a surplus would be defeated if it were required to be expended for regularly budgeted and appropriated purposes. (at 273)."

Therefore, the COURT CONCLUDES:

1. Petitioner was entitled to a written notice of respondent's meeting on February 8, 1979 and the failure to furnish him with same violated his due process rights and was in violation of the Open Public Meetings Act.

2. Respondent's action in abolishing petitioner's position, under the circumstances stated in #1 above, was ultra vires.

3. Respondent's action, under the circumstances stated in #1 above, was arbitrary, capricious and unreasonable.

It is ORDERED that the position of Curriculum Coordinator be reinstated and it is FURTHER ORDERED that petitioner be reinstated to his former position as Curriculum Coordinator together will all attendant emoluments and back pay from July 1, 1979.

This recommended decision may be affirmed, modified or rejected by the head of agency, the Commissioner of Education, Fred G. Burke, who by law is empowered to make a final decision in this matter. However, if the Commissioner of Education does not so act and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 2503-79

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

February 13, 1980
DATE

Jack Berman
JACK BERMAN, A.L.J.

ALAN SCHWARTZ,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, 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 the Board pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Respondent Board excepts to the determination of Judge Jack Berman that the Board failed to notify petitioner of its proposed action, citing Cale v. Woodcliff Lake Board of Education, 155 N.J. Super. 398 (Law Div. 1978) The Board argues that its obligation regarding adequate notice for its meetings is discharged upon publication of an annual notice. The Commissioner does not agree. In Cale the Court noted that the board had passed a resolution at its public meeting to hold a private session in order to review the performance of individual personnel, a secretary in the school system, which affected only her. In the present matter, no such action was taken by the Board nor does the Commissioner deem the posting of the Board's annual listing of meetings sufficient notification that at some one of those meetings personnel matters could be discussed.

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

The Commissioner directs that the Board reinstate the position of curriculum coordinator with petitioner in that position as of July 1, 1979 with all emoluments and benefits mitigated by any earnings in alternate employment during that time.

COMMISSIONER OF EDUCATION

March 31, 1980

ALAN SCHWARTZ,	:	
PETITIONER-APPELLEE,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	STATE BOARD OF EDUCATION DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 31, 1980

For the Petitioner-Appellee, Carl John Kerbowski, Esq.

For the Respondent-Appellant, Bartlett & Turitz (Stanley Turitz, Esq., of Counsel)

The Commissioner invalidated the abolition by the Ridgefield Board of the position of Curriculum Coordinator. Petitioner, who held that position, alleged that the Board had abolished it from motives of unlawful discrimination rather than for reasons of economy; and, further, that the Board had acted in violation of the Open Public Meetings Act in failing to give Petitioner individual notice of the proposed action to abolish his position. Both the Commissioner and the Administrative Law Judge found no evidence of unlawful discrimination or of other abuse of discretion by the Board in abolishing the position of Curriculum Coordinator for reasons of economy and budget cap. However, the Commissioner further held that Petitioner was entitled to a written notice of the Board meeting of February 8, 1979, at which the original action was taken, and that therefore the Board's action was ultra vires. He ordered the Board to reinstate the position and to continue the Petitioner therein.

The meeting of February 8, 1979, had been regularly scheduled and was one of the meetings of which notice was given to the public in the initial annual notice of its schedule of regular meetings. The key question, therefore,

is whether any further notice of that meeting or of action to be taken thereat was required to be given to Petitioner or anyone else who might be affected by the Board's reorganization of its administrative structure. The answer is clearly in the negative. N.J.S.A. 10:4-8(d) specifically provides that:

> "where annual notice or revisions thereof in compliance with section 13 (N.J.S.A. 10:4-18) of this act sets forth the location of any meetings, no further notice shall be required for such meeting."

Construing that section, several decisions have held that nothing in the Open Public Meetings Act requires an individual notice to any particular individual who may be affected by a contemplated Board action, nor need an agenda be published prior to a regularly scheduled meeting. Crifasi v. Governing Body of Oakland, 156 N.J. Super. 182 (App. Div. 1978); LaFronz v. Weehawken Board of Education, 164 N.J. Super. 5 (App. Div. 1979); Cole v. Woodcliff Lake Board of Education, 155 N.J. Super. 398 (Law Div. 1978).

Furthermore, even if the Board action of February 8, 1979, had not been taken in conformity with the provisions of the Open Public Meetings Act, the action was only voidable, and not void (N.J.S.A. 10:4-15(a)), and any defect was effectively cured and ratified at the Board meeting of June 6, 1979, pursuant to N.J.S.A. 10:4-15.

For the foregoing reasons, the State Board reverses the decision of the Commissioner, and the Petition herein is dismissed.

Sonia Ruby and Robert J. Wolfenbarger opposed in the matter.
Attorney Exceptions are noted.

October 1, 1980
Pending N.J. Superior Court

SOUTH RIVER EDUCATION ASSOCIATION AND DEBORAH SWANSON,	:	INITIAL DECISION
	:	EDU DKT. NO. 142-3/78
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

APPEARANCES:

For the Petitioner, Rothbard, Harris & Oxfeld (Sanford R. Oxfeld, Esq., of Cousel)

For the Respondent Board of Education, Wilentz, Goldman & Spitzer (Gordon J. Golum, Esq., of Counsel)

BEFORE THE HONORABLE LILLARD E. LAW, ALJ

Petitioner, a tenure teaching staff member in the employ of the Board of Education of the Borough of South River, hereinafter "Board," was the subject of a reduction of force as of June 30, 1977, pursuant to N.J.S.A. 18A:28-9 et seq. and, subsequent thereto, was recalled, employed and in receipt of substitute pay for the period from October 17 to December 5, 1977. Petitioner asserts that she had the right to be reemployed to the Board's vacant teaching position commencing on October 17, 1977 by virtue of her placement on the Board's preferred seniority list pursuant to N.J.S.A. 18A:28-12. Petitioner prays for an order to make her whole as if she had been a full time contractual teacher as of October 17, 1977, together with any other relief which is deemed just and equitable. The Board denies that it violated N.J.S.A. 18A:28-12 and asserts that the vacant teaching position to which petitioner was eligible occurred subsequent to December 5, 1977.

At a prehearing conference held on July 6, 1978, the parties agreed that the issues raised herein be adjudicated on the record and each, subsequently, filed Motion for Summary Judgment with accompanying Briefs. On July 2, 1979, the matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

The undisputed facts in the instant matter are these:

1. On June 30, 1977, petitioner, a tenured Business Education teaching staff member employed during the 1976-77 school year, was terminated by the Board pursuant to N.J.S.A. 18A:28-9 et seq. and placed upon the Board's preferred eligible list for reemployment pursuant to N.J.S.A. 18A:28-12.

2. On June 23, 1977 the Board was in receipt of a letter from a tenured Business Education teacher, who possessed more seniority than petitioner, requesting a maternity leave of absence and child care leave commencing October 17, 1977. (Affidavit of Anthony Agnone, dated July 25, 1978, Exhibit A.)

3. On September 27, 1977, the Board, by an unanimous roll call vote, adopted a resolution to grant the regular Business Education teacher a maternity leave from October 17, utilizing sick leave time until November 15, 1977, and a Child Care leave of absence from November 15, 1977 to June 30, 1978. (Affidavit of Anthony Agnone, dated July 25, 1978, Exhibit B.)

4. The Board, on September 27, 1977, appointed petitioner to be employed from November 15, 1977 to June 30, 1978 at the annual salary of $11,100 pro-rated. (Affidavit of Anthony Agnone, dated July 25, 1978, Exhibit B.)

5. On October 14, 1977, the regular Business Education teacher advised the Board by letter that she wished to have her maternity leave commence on October 17, 1977 and continue until she had exhausted her accumulated sick leave of twenty-nine (29) days which would occur on December 5, 1977. (Affidavit of Anthony Agnone, dated July 25, 1978, Exhibit C.)

6. On October 25, 1977, the Board adopted a resolution wherein it:

> "***approved to delay the employment of Mrs. Deborah Swanson, re-employed last month to serve

> as Business Education teacher from November 15 upon the commencement of a Child Care Leave by Mrs. Linda Linke. Mrs. Linke wishes to have maternity leave utilizing her sick leave extend from October 17 to December 5, instead of November 15. The Superintendent recommends that Mrs. Linke's request for maternity leave from October 17 to December 5, 1977 and a Child Care Leave from December 6, 1977 to June 30, 1978 be approved and that Mrs. Swanson's employment be delayed until December 6, 1977 and to extend to June 30, 1978 at an annual salary of $11,500 pro-rated." (Affidavit of Anthony Agnone, dated July 25, 1978, Exhibit D.)

7. Petitioner commenced employment on October 17, 1977 as a substitute teacher and continued to act in such a capacity until December 5, 1977 (Petitioner's Memorandum of Law at p. 2.)

8. Thereafter, from December 6, 1977 until June 30, 1978, petitioner was employed by the Board at the annual salary of $11,500 pro-rated

9. Subsequently, the South River Education Association, hereinafter "Association," filed a grievance on behalf of petitioner contending that she was entitled to a full contractual status to the teaching position vacated by the regular Business Education teacher commencing on October 17, 1977. (Petitioner's Memorandum of Law, Appendix A.)

The issues presented for adjudication are these:

1. Did the Board have a "vacancy" to which petitioner might have had a claim as the result of the regular Business Education teaching staff member's sick leave from October 17 until December 5, 1977?

2. Did petitioner waive her rights to a claim when she accepted the position as a substitute teacher for a teacher on a sick leave of absence which occurred between October 17 and December 6, 1977?

3. Does the doctrine of estopple apply to petitioner with regard to her acceptance of the position as a substitute teacher to replace a teacher on sick leave between the periods of October 17 and December 5, 1977?

The Board contends that petitioner was not entitled to be paid as other than a substitute teacher during the period that the regular teacher was on maternity/sick leave of absence. It cites Schultz v. State Board of Education, 132 N.J.L. 343 (E. & A.1945), wherein a teacher claimed tenure on the premise that she had served during four consecutive academic years the equivalent of more than three academic years and the court held that she did not posses a tenure status because she had served as a substitute teacher. The Board recognizes that the issue in the instant matter is not whether petitioner possessed a tenure status but, rather, whether it could employ a stubstitute teacher during the absence of a regular tenured teaching staff member who was on sick leave. (The Board's Brief at p. 5) It argues, moreover, that the courts have held that tenure accrual may not be counted for employment as a substitute teacher pursuant to N.J.S.A. 18A:25-8. Biancardi v. Waldwick Board of Education, 1974 S.L.D. 360; aff'd State Board of Education, 1974 S.L.D. 368; 139 N.J. Super. 175 reversed; aff'd. 73 N.J. (1977); Joan Driscoll v. Board of Education of the City of Clifton, Passaic County, 1976 S.L.D. 7, aff'd. State Board of Education, 1976 S.L.D. 1281; reversed 1977 S.L.D. 1281 (App. Div 1977). It argues further, that the Court held in Driscoll that a substitute teacher was properly paid as such while substituting for a regular teaching staff member who was on a maternity leave of absence for a full academic year.

The Board asserts that a review of the statutory law with respect to sick leave supports its view that petitioner was properly classified as a substitute teacher and that no vacancy in a teaching position existed pursuant to N.J.S.A. 18A:28-12 while the regular teacher was on maternity/sick leave of absence. It cites N.J.S.A. 18A:30-1, which defines "sick leave" as follows:

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

and; N.J.S.A. 18A:30-6 provides for additional sick leave where absence exceeds the annual sick leave provided by N.J.S.A. 18A:30-2 and the accumulated sick leave allowed by N.J.S.A. 18A:30-3. N.J.S.A. 18A:30-6 states:

> "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."

It contends that N.J.S.A. 18A:30-6 recognizes that one replacing a teacher on sick leave will serve as a substitute. In providing that a teacher on sick leave may be paid each's day's salary less the pay of a substitute, the statute contemplates that one replacing a regular teacher on sick leave may be paid as a substitute.

It argues that to hold that a board of education must pay full-salary to a substitute for a regular teacher on paid sick leave would jeopardize a board's ability to hire substitutes. Such a holding would cause grave questions about where to draw the line for substitutes and preclude a local board of education from paying a teacher as a substitute during a continuing absence of a regularly employed teaching staff member.

It contends that because a board of education invites a teacher who has been dismissed pursuant to N.J.S.A. 18A:28-9, et seq., to serve as a substitute does not require that the board pay other than a substitute's salary. Any other conclusion, it asserts, would encourage a board not to offer temporary employment to a teacher who has lost her position pursuant to N.J.S.A. 18A:28-9 et seq., when the regular teacher is on a paid sick leave of absence. A teacher whose services have been terminated because of a reduction in force and who is properly offered a position as a substitute, is only entitled to be paid as a substitute. It avers that the Commissioner of Education has held that "an employee's compensation is at the rate of his present assignment and no claim can be made to be continued at the higher rate of a position formerly held when lawfully reassinged to a lesser paid job." Michael J. Keane v. Flemington Raritan Regional Board of Education, Hunterdon County, 1970 S.L.D. 176, 178-79.

The Board argues that petitioner's claim is barred under the doctrine of waiver and/or estoppel. It asserts that petitioner was aware, prior to her commencement of employment on October 17, 1977, that the Board would pay her as a substitute teacher while

the regular teacher was on a paid maternity/sick leave. It contends, moreover, that while petitioner did not agree to the payment as a substitute, her acceptance of employment with the knowledge that she would be paid as a substitute bars her claim. It avers that the Court defined waiver in Long v. Board of Chosen Freeholders, Hudson County, 10 N.J. 380 (Sup. Ct. 1952) as follows:

> "Waiver is a designation of the act, or of the consequences of the act, of one side only, and it refers to an intentional abandonment or relinquishment of a known right." 10 N.J. at 386.

The Board suggests that estoppel is similar to waiver but may arise where there is no intention to abandon a right. Prejudice is generally regarded as an element of waiver. The distinction between the doctrines is not always clear where implied from conduct. See generally, 28 Am. Jur. 2d, Estoppel and Waiver, §30, at pp. 633-34.

The Board asserts that while petitioner protested the payment of a substitute's salary, her acceptance of the payments received from the Board constitute a waiver which precludes recovery on her claim for greater pay. Love v. Mayor and Alderman of Jersey City, 40 N.J.L. 456 (Sup. Ct. 1878); Edmondson v. Jersey City, 48 N.J.L. 121 (Sup. Ct. 1886); Long v. Board of Chosen Freeholders, supra.

On the basis of the foregoing, the Board argues that petitioner is barred by waiver from recovery on her claim for a greater salary than that paid to her during the controverted period of employment. It alternatively asserts that petitioner is barred by the doctrine of estoppel, although it recognizes that the distinction between waiver and estoppel is not always readily definable in a given case.

It is petitioner's position that when the regular teaching staff member left her teaching position on October 17, 1977, a vacancy was created to which petitioner, a tenured teacher who was terminated due to a reduction of force, was entitled to fill by virtue of the Board's preferred eligibility list for reemployment pursuant to N.J.S.A. 18A:28-12. Petitioner refutes the Board's contention that she had a choice to refuse the substitute teaching position when the Board recalled her to duty. In support of such argument, petitioner quotes from an answer by her building principal which was in response to a grievance filed on her behalf as follows:

> "***I appreciate the fact that Ms. Swanson exhibited her dedication as a teacher, her interest in her students and her desire to continue the learning process by accepting a teaching position and the full responsibility of a regular teacher by doing the grading, lesson planning, attending meetings, taking inventories and working after school with students who require extra help.
>
> "However, Ms. Swanson had the choice of refusing the substitute teaching work until Mrs. Linke's contract ran out on December 5, and then being hired as a returning riffed teacher on December 6, at a pro-rated salary wherever her place was on the salary guide. She chose to accept the substitute position at $43 per day." (Petitioner's Exhibit A)

Petitioner asserts that the principal was incorrect when he stated that she had a choice to refuse the substitute teaching assignment. (Petitioner's Exhibit A) She contends that if a teacher terminated because of a reduction of force has a duty to mitigate damages, then she had no choice but to return to duty when called upon by the Board. (Petitioner's Memorandum at p. 2-3)

Petitioner argues that the Board's position that "no vacancy existed ***" when she was first reemployed as a substitute teacher was not supported by the Board's employment history. She relies upon the affidavit filed by the Association's Grievance Chairperson wherein it was asserted that two tenured teachers were granted sick leave with pay, and subsequent to the expiration of the paid sick leave were thereafter granted extended sick leave and/or maternity leave without pay, with both teachers having been replaced by teachers who were in receipt of either full or pro rata contracted salaries. Petitioner contends that her circumstances were identical to those as set forth in the affidavit and, therefore, she should be granted similar consideration.

Petitioner avers that the Commissioner of Education has, in other matters, commented on what factors should be considered to determine whether or not an individual is a regular teaching staff member within the ambit of N.J.S.A. 18A:28-5 Kuboski v. Board of Education of South Plainfield, Middlesex County, 1978 S.L.D. _____ (decided March 28, 1978) Petitioner contends that pursuant to Kuboski, supra, she was not a substitute but, rather, a regular teacher employed to replace a regular teacher who was unable to

complete a school year. She argues that Biancardi, supra, is therefore not applicable to the matter sub judice.

Petitioner asserts that the Commissioner has recently relied upon the decision of the State Board of Education in the matter of Zielinski v. Board of Education of the Town of Guttenberg, 1970 S.L.D. 202, reversed State Board of Education, 1971 S.L.D. 664, 665, affirmed Appellate Division, 1972 S.L.D. 692, when considering substitute employment as follows:

> "***Schulz vs. Board of Education, 132 N.J.L. 345 (E & A 1974) held that substitute teachers were not included in the phrase "all teaching staff members including all teachers" as used in the tenure statute. Nevertheless, other cases make it clear that whether an employment is as a regular teacher or substitute teacher is not to be determined by the designation given the employment by the employing board, but by an examination of the factual picture presented. Downs vs. Board of Education of Hoboken, 13 N.J. mis. 853 (1935); Board of Education of Jersey City vs. Wall, et al, 117 N.J.L. 308 (Supp. Ct. 1938). The testimony was polaristic as to whether the five-month employment of petitioner was as a regular teacher or as a substitute. We must, therefore, turn our attention to the evidence concerning the nature of that employment and a review of the pertinent statutes and judicial decisions to determine the character of that employment *** (Emphasis supplied by Petitioner's Memorandum at p. 7)

Petitioner contends that merely because the Board considered her to be a substitute teacher for the period of time that that regular teacher was exhausting her sick leave was of no relevance. The pertinent inquiry was not the name or title the Board bestowed upon petitioner but, rather, the nature of the duties she actually performed. Kuboski, supra.

Petitioner argues that there is a distinction between the instant matter and those cases upon which the Board relies. Biancardi, supra; Driscoll, supra. She asserts that those matters dealt with the issue of whether or not the controverted period of employment of Biancardi and Driscoll should be counted towards tenure accrual. Petitioner avers that tenure is not at issue in the instant matter since she had already achieved a tenure status. She argues, however, that because of a vacancy to which she was entitled and the nature of her duties and responsibilities, she was entitled

to be compensated pursuant to the contractual rate of pay, on a pro rata basis, for the period of time the Board commenced her assignment as a substitute teacher.

Petitioner refutes the Board's claim that she was barred to initiate the instant matter under the doctrine of waiver because she accepted employment while the regular teacher exhausted her paid sick leave. She argues that, as a tenured teacher on the Board's preferred eligibility list, she had a legal obligation to mitigate the damages against the Board. She contends that when she was recalled by the Board she did not have the option to reject its offer to assign her to a substitute status until such time as the regular teacher had exhausted her sick leave and, therefore, assume the teaching position pursuant to her standing on the Board's preferred eligibility list. Petitioner argues further that the Board admits that "***she did not agree to payment as a substitute ***" teacher when she was recalled (Board's Brief at p. 13) With such admission by the Board and under such circumstances with respect to petitioner's recall to duty, petitioner requests that the Board's argument that her claim is barred under the doctrine of waiver and/or estoppel be dismissed.

Having carefully considered the undisputed facts, Briefs of counsel with the respective arguments set forth therein, the applicable statute and case law, I am persuaded by the Board's argument that "no vacancy" existed at the time of petitioner's recall or, indeed, thereafter. The statutes which caused the Board to terminate petitioner, a tenured teacher, are found in N.J.S.A. 18A:28-9 et seq., and in pertinent part, as follows:

> "18A:28-9. REDUCTION OF FORCE; POWER TO REDUCE AND REASONS FOR REDUCTION
>
> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article."

Upon the Board's action to terminate petitioner, her rights to reemployment in the school district under specific conditions and circumstances, were protected by statute as follows:

> 18A:28-12 DISMISSAL OR PERSONS HAVING TENURE ON REDUCTION; REEMPLOYMENT
>
> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service."

Those specific conditions, under which the Board was required to reemploy petitioner, include, inter alia, "*** a vacancy *** in a position for which such person shall be qualified *** when such vacancy occurs ***." It was undisputed that petitioner was qualified, as a certificated Business Education teacher, to replace the regular teacher who applied for an was granted sick/maternity leave. The question to be resolved is whether or not the Board had a "vacancy" to which petitioner might have had a claim. Black's Law Dictionary (5th Edition, 1979) defines vacancy as follows:

> "***An existing office, etc., without an incumbent. The state of being distitute of an incumbent, or a proper or legally qualified officer. The term is principally applied to an interruption in the incumbency of an office, or to cases where the office is not occupied by one who has a legal right to hold it and to exercise the rights and perform the duties pertaining thereto. The word 'vacancy,' when applied to official positions, means, in its ordinary and popular sense, that an office is unoccupied, and that there is no incumbent who has a lawful right to continue therein until the happening of a future event. ***." (at p. 1388)

The record is clear that the regular tenured teacher did not resign her teaching position as required by N.J.S.A. 18A:28-8. Instead, she applied for and was granted a leave of absence and, therefore, protected and maintained her tenure rights to the teaching position upon the expiration of her leave. Accordingly, I FIND that no "vacancy" existed to which petitioner could claim seniority and employment rights pursuant to N.J.S.A. 18A:28-8.

The Board, under its statutory authority pursuant to N.J.S.A. 29-16 employed petitioner as a substitute teacher to replace the regular tenured teacher on leave. Biancardi, supra; Driscoll, supra. In Wall v. Board of Education of Jersey City Hudson County, 1938 S.L.D. 614, reversed State Board of Education 618, affirmed 119 N.J.L. 308 (Sup. Ct. 1938), the State Board said, in agreement with the Commissioner's opinion that"

> "The word 'substitute' *** denotes one put in place of another, or one acting for or taking the place of another.***'" (at p. 619)

It is clear that petitioner was "acting for" the regular tenured teacher and, in so doing, accepted the position to substitute teach. Having done so, petitioner accepted the contractual conditions offered to her by the Board. As the Commissioner said in the matter of Cossaboon v. Board of Education of the Township of Greenwich, Cumberland County 1974 S.L.D. 706, 708:

> "***Once the employment was offered and accepted, the action of the parties effectively established a contractual relationship. ***"

In summary, I CONCLUDE that no vacancy occurred pursuant to N.J.S.A. 18A:28-9 et seq. to which petitioner could make a claim, and that the Board exercised its statutory authority to employ petitioner as a substitute teacher to replace a regular tenure teaching staff member.

Having arrived at the preceeding conclusions, there is no need to address the Board's assertions of waiver and/or estoppel.

Accordingly, the Petitioner of Appeal IS HEREBY DISMISSED.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1 et seq.

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

DATE

LILLARD E. LAW, ALJ

SOUTH RIVER EDUCATION ASSOCIATION AND DEBORAH SWANSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

April 8, 1980

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

The Watchung Hills Regional Education Association on Behalf of Gabrielle Testa, Et Al. v. The Board of Education of the Watchung Hills Regional High School	))))))	INITIAL DECISION **O.A.L. DKT. EDU 1901-79** Agency Dkt. 56-3/79A

APPEARANCES:

For the Petitioners:

Sanford R. Oxfeld, Esq.

For the Respondent:

William S. Jeremiah, Esq.

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

Petitioners allege that the practice of the Board of Education, hereinafter "Board", in advancing half-time teachers one-half step on the salary guide for each academic year of part-time employment was an abuse of the Board's discretionary authority. They pray for proper salary credit and placement on the salary guide and back pay.

Respondent avers that it's practice has been consistently applied for twenty-two years, is not ultra vires, and prays for dismissal of the petition.

The petition was filed with the Commissioner of Education on March 12, 1979, and the matter was transferred to the Office of Administrative Law as a contested matter on June 27, 1979 pursuant to the provisions of N.J.S.A. 52:14F-1, et seq.

A prehearing conference was held on September 6, 1979, at which time the parties agreed to submit the matter for summary decision.

The parties requested by letter under date of November 19, 1979 that the matter be held in abeyance, pending an arbitration decision, which was granted.

The arbitration decision was rendered on November 29, 1979, and a second prehearing conference was held on December 17, 1979 for clarification of issues. A Prehearing Order was issued on December 18, 1979, which superceded the previous order.

The record was closed upon receipt of Petitioner's reply brief on February 11, 1980, and the matter is now ripe for summary decision.

The heart of the controversy is the practice of the Board in advancing half-time teachers one-half step on the salary guide for each academic year of employment, and compensating them accordingly.

It is hereby noted that the Arbitrator was restricted to a determination of the questions before him which related solely to an alleged violation of the negotiated agreement between the Association and the Board.

The relevant uncontroverted facts in the instant matter is best conveyed by the reproduction of the salary guide placement of Petitioner Friedman, employed initially as of September 1, 1973 and continuously as a half-time teacher:

Year	Salary Guide Step
1973-74	0
1974-75	1/2
1975-76	1
1976-77	1 1/2
1977-78	2
1978-79	2 1/2
1979-80	3

It is noted that respondent was requested to consider the suggestion that the first step of the salary guide be know as Step 1.

The significance of the controverted matter relative to compensation lies in the computation of salary. Assuming, arguendo, that the salary guide was never changed, and included annual increments of $500 following an initial salary of $5000 for full-time teachers. The Board's practice could compensate the half-time teacher for her second academic year in the amount of $2625 (one half of $5250) or $2750 ($2500 initial salary plus one half increment).

Petitioners obviously contend that the second year salary must be $2750, which is one half of the salary received by second year full-time teachers.(Based on the assumption)

It was also stipulated by the parties that the Board has no written salary policy relative to part-time teachers, and that the Board's practice has existed for twenty-two years.

Petitioners argue in support of their contention by reference to Josephine De Simone v. the Board of Education of the Borough of Fairview, Bergen County, 1966 S.L.D. 43 and Lucille Chaump v. Board of Education of The Town of Belleville, Essex County 1979 S.L.D. - (decided June 6, 1979).

The Petitioner's reference to De Simone is to support the contention that regardless of whether a properly certified teacher is employed full or part time, that individual is entitled to credit for whatever purposes for that school year.

It is presumed that Petitioner's reference to Chaump is due to the fact that the Commissioner decided that the Board improperly determined her salary during her fourth year by granting her credit of one year for two years of half-time teaching.

Respondent supports his contention that the Board did not abuse it's discretionary authority by reference initially to N.J.S.A. 18A:29-4.1 which grants the Board the authority to adopt a salary policy. Reference is then made to N.J.S.A. 18A:29-6 and the statutory definitions therein as follows:

> "Member" shall mean a full-time teaching staff member as defined in this title except one who is the holder of an emergency certificate;...
> "Full time" shall mean the number of days of employment in each week and the period of time in each day required by the state board of education, under rules and regulations prescribed for the purposes of this article, to qualify any person as a full-time member;
>
> "Year of employment" shall mean employment by a member for one academic year in any publicly owned and operated college, school or other institution of learning for one academic year in this or any other state or territory of the United States;..."

Respondent argues that "if the legislature intended to treat part-time teachers and full-time teachers the same for purposes of the salary guide, there would be no reason to provide so carefully by definition that 'years of employment' applies only to full-time teaching staff members teaching for one academic year."

Respondent also argues that the discretionary authority of Board's was reiterated by the Commissioner in Chaump, when he stated:

> "The Commissioner recognizes that boards of education have the statutory authority to adopt a policy statement equating less than full-time service to appropriate steps on the salary guide...."

Respondent distinguishes Chaump due to the consistency of practice in the instant matter, and takes issue with the Commissioner's dictum in that decision which stated that:

> "N.J.S.A. 18A:29-6 provides no reference of equating experience credit for salary guide placement of teaching staff members employed for less than a full day".

The recitation of relevant facts and arguments of the parties is hereby concluded.

Reliance on De Simone by the Petitioners is misplaced. De Simone involved a claim of tenure for four years of half-time teaching, which the Commissioner determined she had acquired. To conclude from that decision, however, that De Simone was entitled to credit "for whatever purposes" for that school year is erroneous. The Commissioner, for example, did not address either salary credit or seniority credit, which are issues distinctly different from employment recognition for the acquisition of tenure. **I SO FIND.**

The authority of the Board to adopt a salary poolicy, including salary schedules, pursuant to N.J.S.A. 18A:29-4.1 is undisputed. It was stipulated, however, that the Board has no written policy relative to salary for part-time teachers. As the Commissioner stated in Chaump, reference must therefore be made to N.J.S.A. 18A:29-8, which states in pertinent part:

> "Any member holding office, position or employmennt in any school district of this state, shall be entitled annually to an employment increment until he shall have reached the maximum salary provided..."

I FIND that reference must therefore be made to the salary guide which was adopted by the Board, but which made no provision for salary for teachers who are employed for less than a full day (See Exhibit A of respondent's brief).

Reference by respondent to definitions found in N.J.S.A. 18A:29-6 and the legislative intendment of same excluded the first sentence of the statute which reads af follows:

> "As used in this subarticle the following words shall have the following meaning:..."(emphasis supplied)

The subarticle pertains to the statutory minimum salary guide, and application of its contents for any other purpose must be rejected. I SO FIND

It is noted that although respondent distinguishes the instant matter from Chaump relative to consistency, the similarity of the two matters lies with the failure of the Boards to adopt salary policy for teaching staff members employed for less than full time.

After a thorough and careful review of the entire record, arguments of the parties, and applicable case and statutory laws, **I HEREBY CONCLUDE** that Petitioners are entitled to placement on the proper step of the salary guide adopted by the Board and currently in effect as if they were full-time teachers for each academic year of employment. **IT IS ORDERED** that such placement be made, forthwith.

It is noted that Petitioners have prayed for back pay for their entire periods of employment. It is further noted that in the case of one Petitioner the claim goes back to the year 1965.

N.J.A.C. 6:24-1.2, governing the filing and servicing of petitions of appeal states in pertinent part that "such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested...."

It is noted that the staleness of the monetary claims of Petitioners has not been asserted as an affirmative defense.

It is conclusive, however, that the cause of action accrued when each Petitioner became aware of the salary offered for the second academic year of employment, and that Petitioners responded as free agents to the Board's offers of employment compensation.

The Court said in Betty Eagle et al. v. Board of Education of the Borough of Englewood Cliffs, Bergen County, Docket No. L-15025-7 New Jersey Superior Court, Law Division, February 9, 1971:

> "The fundamental object of all rules of interpretation, whether primary or secondary, is to ascertain and give effect to the intention of the parties...." (at 803)

Further, The Court said:

> "The court must strictly construe any agreement against the draftsman. Bouton v. Litton Industries, Inc. 423 F.2d 643 (3rd Cir. 1970). Couched in other words, 'the language must be interpreted in the sense that the promisor knew, or had reason to know, the promisee understood it***. 'American Lithographic Co. v. Commercial Ins. Co., 81 N.J.L. 271 (Sup. Ct. 1911). ***"

In Russell v. Princeton Laboratories, Inc., 50 N.J. 30,38 (1967) The Court said:

> "A contract should not be read to vest a party or his nominee with the power virtually to make his promise illusory.***"

The initial cause of action in the instant matter accured when each petitioner received a salary notice for the second year of employment. Since the petition was filed on March 12, 1979, basic principles of fundamental fairness dictate that the Board should not be subject to penalties due to the delay and inaction of petitioners. The claims of petitioners for back pay from the accural of the initial cause of action to the filing of this petition, therefore, have no merit. **I SO FIND.**

This finding is not applicable to compensation for the 1979-80 school year, however, since this action was filed in March, 1979 when it is expected that petitioners were notified or aware of 1979-80 salaries.

I CONCLUDE , therefore, that Petitioners are entitled to the difference between salaries received since September 1, 1979 and the salaries they should have received after proper placement on the salary guide consistent with the order previously determined in this initial decision, and that said payments are to be made, forthwith. **IT IS SO ORDERED.**

In summary, the Board is directed to place petitioners on the step of the 1979-80 salary guide as indicated below, forthwith:

Teacher	Salary Guide Step
Beverly Di Geronimo	8
Judith L. Friedman	6
Lee Kronert	2
Diane M. Olsen	7
Catherine Renga	
Alice T. Richmond	
Norma M. Scott	1
Frances M. Sills	9
Mary Ellen Spears	1
Gabrielle Testa	
Janet Werner	6

It is noted that salary step placements above are based on the presumption that the Board has retained Step "O" as the initial step of the salary guide. Steps must be increased by 1 in the event the Board has revised its guide to reflect Step 1 as the initial step.

Continuing with summarization, the Board is further directed to compensate each petitioner, forthwith, for the salary differential between that received for the 1979-80 school year and one half of the salary indicated by the salary guide for full-time teachers after proper placement on that guide. **IT IS SO ORDERED.**

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner of Education does not so act in forty-five (45) days and unless such time limit is otherwise extended,, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1 et seq.

OAL DKT. NO. EDU 1901-79

I HEREBY FILE with the **COMMISSIONER OF EDUCATION FRED G. BURKE,** my Initial Decision in this matter and the record in these proceedings.

21 February 1980
DATE

WARD R. YOUNG, A.L.J.

Receipt acknowledged:

WATCHUNG HILLS REGIONAL EDUCATION ASSOCIATION, on behalf of GABRIELLE TESTA ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by Administrative Law Judge Ward R. Young.

The Commissioner observes that exceptions were filed by both parties pursuant to N.J.A.C. 6:24-1.17(b). Petitioners argue in the main that a teaching staff member does not have to be full-time to be so categorized and that a full year's credit on the salary guide be given to a teacher steadily employed for a year. Respondent argues, inter alia, that a policy does not have to be reduced to writing to be controlling but can be instead "accepted past practice."

The Commissioner agrees with Judge Young that the term "teaching staff member" is all-inclusive and does not distinguish among teachers who work varying hours because of different loads and conditions. Therefore a part-time teacher who is contracted to work a full-year is entitled to a regular increment prorated to the time spent teaching. The Commissioner finds no reason to adhere to the table included on page 8 of Judge Young's initial decision. The decision itself is sufficient. Its application to individual petitioners cannot be based on incomplete evidence. The Board and the teaching staff members should find no difficulty in arriving at a consensus based on the conclusions in the initial decision.

On the other hand, the Commissioner cannot agree with respondent Board that a policy on such an important matter as labor relations does not have to be reduced to writing. With the passage of the Public Employment Relations Act in September 1968 all terms and conditions of employment are regulated by N.J.S.A. 34:13A-1 et seq. wherein 34:13A-5.3 states unequivocally that negotiated agreements must be reduced to writing. Since the Board and the teachers' representatives negotiated a salary agreement for some in the bargaining unit and reduced it to writing they should have done so for all teaching staff members.

With the exception noted above the Commissioner affirms the findings and determination as rendered in the initial decision and adopts them as his own. Accordingly, the Board is ordered to place petitioners on the proper step of the salary guide adopted for the teaching staff members of the district.

However, since N.J.A.C. 6:24-1.2 is applicable and requires that petitions of appeal be filed within 90 days, the monetary claims of petitioners for years previous to 1979-80 are hereby disallowed.

Petitioners responded as free agents to the Board's offers of employment compensation in the past and are not entitled to reopen their claims once they went out of time.

COMMISSIONER OF EDUCATION

April 10, 1980

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

WESLEY A. KOCH, EUGENE H. JOCKEL, QUENTIN HUGHES, LOUIS HAUBER, and JOSEPH T. JOHNSON, Petitioners, v. BERGEN COUNTY VOCATIONAL-TECHNICAL HIGH SCHOOL BOARD OF EDUCATION, Respondent.	INITIAL DECISION OAL DKT. NO. EDU 275-8/77

APPEARANCE:

Goldberg & Simon, Esqs.
Attorneys for Petitioners
By: Theodore M. Simon, Esq.

Greenberg & Covitz, Esqs.
Attorney's for Respondent
By: Norton R. Covitz, Esq.

BEFORE THE HONORABLE JAMES A. OSPENSON, A.L.J.:

Teaching staff members of respondent Board of Education of Bergen County Vocational-Technical High School, petitioners Koch, Jockel, Hughes, Hauber and Johnson, have alleged they are entitled to one year of employment and longevity credits on respondent's salary scales for each year, to a maximum of four years, for each year of their respective military service. Contrary to N.J.S.A. 18A:29-11, they say, respondent has refused them such credits. They seek additional salary to the extent thereof.

The petition of appeal on behalf of the five petitioners was filed in the Division of Controversies and Disputes of the Department of Education on August 19, 1977. Respondent's answer in general denial was filed on November 18, 1977, but it was admitted that beginning employment dates for petitioners were as follows:

Koch	September 1, 1955
Jockel	September 1, 1953
Hughes	December 20, 1952
Hauber	September 1, 1953
Johnson	September 1, 1954

On December 28, 1978, a pre-hearing conference was held in the office of the Assistant Commissioner in charge of Controversies and Disputes and an Order entered that specifically framed, inter alia, the issue whether the 6 year statute of limitations (N.J.S.A. 2A:14-1) barred petitioner's claims. Further discovery was ordered and hearing was set down for March 13, 14, 1979, dates later adjourned sine die at request of the parties for completion of discovery. Effective July 2, 1979, the matter has become the responsibility of the Office of Administrative Law for hearing and determination as a contested case pursuant to N.J.S.A. 52:14B-9, 10. On November 15, 1979, respondent formally moved for summary decision on the pleadings and stipulations, pursuant to N.J.A.C. 19:65-13.1 et seq., upon the grounds of the bar of the 6 year statute of limitations, N.J.S.A. 2A:14-1, and laches.

Although some of the documentation filed herein is fragmentary, enough facts can be found or postulated for addressing the motion. It appears, for example, that the respective periods of military service by petitioners were as follows:

Koch 3 years 0 months 1 day (assumed to be 3 years for purpose of the motion).

Jockel 2 years 11 months 16 days (assumed to be 3 years, as above).

Hughes 1 year 6 months 19 days (assumed to be 2 years, as above).

Hauber 1 year 8 months 26 days (assumed to be 2 years, as above)

Johnson 3 years 4 months 11 days (assumed to be 3 years, as above).

Petitioners' claims, which they say are based on Board records that establish $200 increments for the first 3 years of service and $300 for each year thereafter until maximum on the salary scale, after the eleventh step, has been reached are as follows:

Koch $8,800 (maximum reached 1965-66)

Jockel $8,600 (maximim reached 1963-64)

Hughes $5,840 (maximum reached 1962-63)

Hauber $5,800 (maximum reached 1963-64)

Johnson $8,600 (maximum reached 1964-65)

It thus appears that petitioners' claims for additional salary are for the years from, variously, 1952 to 1955, when their employment began, until 1962 to 1966 when their salaries began to parallel the levels their military service credits would otherwise, had they been granted, have entitled them. Yet their petition, filed in 1977, comes at least 11 years after the last alleged underpayment and at least 22 years after the petitioner youngest in service, Koch, began his employment, the date marking accrual of his cause of action. The other causes of action, of course, are even older.

Squarely at issue, therefore, is whether, as respondent asserts, the claims are barred by N.J.S.A. 2A:14-1:

> "Every action at law...for recovery upon a contractual claim or liability, express or implied, not under seal..., shall be commenced within 6 years next after the cause of action shall have accrued."

Although the Commissioner of Education has previously held that the statute of limitations does not apply in actions involving military service credits (see Lavin v. Board of Education of the Borough of Hackensack, Bergen County, 1979 S.L.D. 94 and Kastner v. Plumstead Board of Education, 1979 S.L.D. -- decided June 11, 1979), the State Board of Education has recently reversed the Commissioner of Education and has held that the six year statute of limitations is applicable to bar a stale claim for military service credit. Basil M. Kastner v. Plumstead Township Board of Education, (State Board of Education decided December 5, 1979). In Kastner, supra, the petitioner sought to obtain additional pay to which military service entitled him between the years 1958 and 1969. Petitioner's claim was not asserted, however, until 1977, eighteen years after the accrual of the initial cause of action. The State Board in Kastner stated at page 5:

> "The Commissioner's decision herein cites authorities to the effect that a governmental body is not exempt from the principles of fair dealing. By the same token, we believe that in fairness a Board of Education should be protected from the assertion of stale monetary claims which an employee has failed to prosecute within the period of limitations deemed reasonable by the legislature."

The State Board of Education cited with approval in its Kastner decision, Miller v. Bd. of Chosen Freeholders, Hudson County, 10 N.J. 398 (1952). In Miller, supra, the Court held that claims by public employees for compensation based on a salary statute were in fact contractual claims and thus subject to the applicable statute of limitations. As stated in Miller at p. 415:

> "...the claim of plaintiffs in the present case rested not in statute but upon the contractual status of their intestates as employees of the county. The substance of their action was one for compensation for services rendered raising the implied contract to pay the reasonable value thereof as established by statute..."

> Additionally, the Court at p. 409 stated:

> "In actions such as these, the substantive right stems from the rendition of services; the statutory rate of pay is the measure by which the true value of the service performed is proved, and this is the more apparent by virtue of the fact that these legislative enactments make no clear legislative recognition of the availability of ordinary legal remedies. The only conclusion to be reached, therefore, is that the six-year statute of limitation, R.S. 2:24-1, supra, clearly applies to such actions and was a valid defense in this case...". (Emphasis in text).

In Greenwald v. Board of Education of the City of Camden, (Docket No. A-1051-77 N.J. Superior Court, Appellate Division, decided October 31, 1978), the Court adopted the reasoning of Miller, supra, and held that plaintiff's claim for additional monies based on defendant's failure to properly credit him for time spent in the military service pursuant to N.J.S.A. 18A:29-11 was barred by the six-year statute of limitations, N.J.S.A. 2A:14-1. In Greenwald, supra, plaintiff brought his claim 30 years after he commenced work. Plaintiff was basing his claim on N.J.S.A. 18A: 29-11, which provides:

> "Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States or of this State, including active service in the women's army corps, the women's reserve of the naval reserve, or any similar organization authorized by the United States to serve with the army or navy, in time of war or an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service, shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other State or territory of the United States, except that the period of such service shall not be credited for more than four employment or adjustment increments..."

The Court in Greenwald, supra, stated at p. 5 of the slip opinion:

> "The statute relied upon by plaintiff merely furnishes the measure of his compensation as one of the terms and conditions of his employment. His right is to compensation founded in contract. Consequently, his cause of action is barred by the statute of limitations."

Based on the foregoing, therefore, and having considered the stipulations, postulates and memoranda of law of the parties, I FIND as follows:

1. From 1942 to 1946, petitioners served actively and honorably in the military for periods, variously, of two to three years.

2. Petitioners began employment as teaching staff members of respondent during the years, variously, from 1952 to 1955 and are presently so employed.

3. At the time of employment, none of the petitioners was given credit on the salary scales for his military service.

4. Nor was any petitioner given such credit in succeeding years from date of employment until the years 1962 to 1966 when petitioners' salary levels, variously, reached maximum.

5. Had such credits been given by respondent during those years, petitioners would have received additional salary in the amounts, variously, hereinabove postulated.

6. Petitioners' claims for such additional salary were first made when, on August 19, 1977, the petition herein was filed, that is, at least 11 years after the last alleged underpayment to one of the petitioners and 22 years after accrual of the most recent of petitioners' causes of action therefor.

Accordingly, and in view of the above, I hereby CONCLUDE that petitioners' claims for additional salary for military service credits not granted by respondent, including any claims for longevity payments, are BARRED by the 6 year statute of limitations in N.J.S.A. 2A:14.1. Respondent's motion for summary decision on its defense of the statute of limitations is GRANTED. The petition of appeal is DISMISSED. Under the circumstances, it becomes unnecessary to address or determine respondent's companion motion for summary decision on its defense of laches.

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

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

February 25, 1980
DATE

JAMES A. OSPENSON, A.L.J.

Receipt Acknowledged:

ad

WESLEY A. KOCH, EUGENE H. JOCKEL, QUENTIN HUGHES, LOUIS HAUBER AND JOSEPH T. JOHNSON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL-TECHNICAL SCHOOL, BERGEN COUNTY.	:	DECISION
RESPONDENT.	:	

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

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

Petitioners except to the determination of Judge James A. Ospenson that dismisses their claims based on N.J.S.A. 2A:14-1, the statute of limitation. Petitioners' reliance on the argument that Castner v. Plumsted, decided by the State Board of Education on December 5, 1979 erroneously relied upon Miller v. Board of Chosen Freeholders, 10 N.J. 398 (1952) is without merit. Castner is presently before the Appellate Division of the New Jersey Superior Court for adjudication and, until decided by that Court, the decision of the State Board of Education stands as that of the court of highest jurisdiction. Accordingly, the Commissioner does not find it necessary to address petitioners' further arguments as to salary matters.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

April 14, 1980
Pending State Board of Education

CARLSTADT TEACHERS' ASSOCIATION AND ROBERT CILENTO,	)	
PETITIONERS,	)	INITIAL DECISION
V.	)	AGENCY DOCKET NO. 205-5/78
BOARD OF EDUCATION OF CARLSTADT, BERGEN COUNTY,	)	
RESPONDENT.	)	

APPEARANCES:

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

For Respondent, Fornabai and Zimmerman
(James V. Zimmermann, Esq., of Counsel)

(Irving C. Evers, Esq. of Counsel and on the Brief)

BEFORE THE HONORABLE BRUCE CAMPBELL, A.L.J.

DOCUMENTARY EVIDENCE:

J-1 Personnel Dress Code 1/2/79

Petitioners seek an Order directing the Carlstadt Board of Education (Board) to alter existing policies governing the dress of teaching staff members, which policies petitioners contend are unreasonably restrictive.

The Board denies any unreasonableness of its policies and prays for an Order dismissing the Petition of Appeal.

This matter was opened before the Commissioner of Education and was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Hearing was held on November 13, 1979, at the Office of Administrative Law, Newark. Following hearing, the parties submitted

Briefs in support of their respective positions. The record was closed and the matter ready for disposition on January 18, 1980.

It is noticed that the policy complained of was superseded on January 2, 1979 by the policy now entered in evidence as J-1. The parties agreed that the matter proceed based on the present policy as their beliefs and pleadings are unaffected by the supersedure.

The issues, as agreed upon at the prehearing conference, are as follows:

1. Can or cannot the Board establish a dress code for teachers.

2. If yes, is the instant dress code reasonable.

The answer in the first consideration must be yes. N.J.S.A. 18A:11-1 provides that

> The board shall -- *** c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title II, Civil Service, of the Revised Statutes ***. (Emphasis supplied.)

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. (Emphasis supplied.)

The language of the statutes is clear and unambiguous. The making of the rules complained of is clearly within the purview of the Board. I SO FIND.

Historically, the criteria of validity for any board of education rule have three:

1. It must be reasonable;

2. It must not be inconsistent with the provisions of Title 18A of the statutes or the rules of

the State Board of Education; and

3. Its effect must be toward the maintenance and support of a thorough and efficient system of public schools.

(Angell v. Bd. of Educ. of Newark, 1959-1960 S.L.D. 141, 143; Quiroli et al. v. Bd. of Educ. of Linwood, et al., 1974 S.L.D. 1035, 1038.)

Black's Law Dictionary, 5th ed., defines reasonable as "Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. ***" at 1138. The connotation clearly is of that which is appropriate or necessary under the circumstances. To say a rule is reasonable is to say it bears a rational and substantial relationship to a valid and lawful purpose.

The intent, content and application of the policy must each pass muster under the three-part test.

I FIND as to intent that the test is met. Paragraph 1 of the policy states, "Recognizing that students look to their teachers to set examples, the Carlstadt Board of Education expects its personnel to be dressed in a manner that lends dignity to the education profession." This statement is a reasonable expression of the will of the community by the community's elected representatives. It is not in contravention of any statute in the education title and it bears a relationship to the furtherance of educational goals in that teachers are undeniably role models to their pupils. East Hartford Educ. Assn. et al. v. Bd. of Educ. of East Hartford, et al., 562 F. 838 (2d Cir. 1977.) (Respondent's Brief at 2-3.)

As to content, the policy lays out intent, ante, explains and states what constitutes acceptable attire, and provides for advisory rulings on forms of attire not specifically mentioned and a process of appeals therefrom. There is no inflexible insistence here on the wearing of neckties as in Quiroli, supra. Opinions of what constitutes acceptable attire in the classroom no doubt range widely. The mere existence of diversity of opinion on the subject does not prompt me to substitute my judgment for that of the Board on the question of what it deems acceptable attire in its community's schools. I FIND, therefore, that the content of the policy represents a reasonable judgment by the Board in an area where it legally may act.

The remaining question of application is not so easily resolved. From the testimony generally adduced at hearing, it seems clear that rulings on attire not specifically mentioned in the policy were made in an inconsistent manner or, more importantly, were not made at all.

Here I specifically reject petitioners' argument that failure to allow male and female personnel to wear the same garb is per se inequitable. Notwithstanding some observable movement within society-at-large toward similar sportswear styles for man and women known as unisex closhing, an argument for automatic approval for one sex to wear the attire approved for the other is simply overreaching.

More central to the question is the effect on the policy and those subject to it when the policy is randomly enforced or not enforced. In my opinion this constitutes selective enforcement and selective enforcement as an equitable matter must be proscribed. I SO FIND.

Based upon the foregoing and careful review of the entire record, I CONCLUDE:

1. Promulgation of the controverted policy was a proper exercise of the Board's powers under law.

2. The intent of the policy is a reasonable expression of the body entrusted with the governance of the Carlstadt Public Schools.

3. The content of the policy is similarly a reasonable expression of the body entrusted with the governance of the Carlstadt Public Schools.

4. The policy has been enforced in a proscribed manner and must be rectified accordingly.

Therefore, the policy is remanded to the Carlstadt Board of Education for revision of its enforcement provisions consistent with the above stated conclusion of law or, in the Board's discretion, for revision of the entire policy. IT IS SO ORDERED.

The Petition of Appeal is otherwise DISMISSED.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

25 FEBRUARY 1980
DATE

Bruce Campbell
BRUCE CAMPBELL, A.L.J.

CARLSTADT TEACHERS' ASSOCIATION AND ROBERT CILIENTO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARLSTADT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision of Administrative Law Judge Bruce Campbell.

The Commissioner notes that exceptions have been filed by both petitioner and respondent. Respondent asks that the initial decision be amended to particularize how the controverted dress code has been enforced, or not enforced, to warrant the appellation "in a proscribed manner." The Commissioner finds no reason to do this. As Judge Campbell points out, "***From testimony generally adduced at hearing, it seems clear that rulings on attire not specifically mentioned in the policy were made in an inconsistent manner or, more importantly, were not made at all.***" Fundamental rights of due process protect individuals from even legal and proper rules and regulations being randomly enforced or unenforced.

Petitioners' exception suggests that Judge Campbell should have made a point by point analysis of the dress code as to how individual items further the goals of the Carlstadt School District. The agreed on issues were simply whether or not a school board can establish a dress code for teachers and, if so, whether or not the instant dress code is reasonable. Judge Campbell ruled affirmatively on both issues. The Commissioner concurs with his conclusions.

Accordingly, the Commissioner accepts the findings and determinations of the initial decision. The Carlstadt Board does have a right to promulgate a reasonable dress code for its teachers. Once adopted, however, the code must be fairly and equitably enforced. The Commissioner so holds.

The policy is remanded to the Carlstadt Board of Education for revision of its enforcement provisions consistent with the conclusions of law detailed by Judge Campbell. To this extent the Commissioner retains jurisdiction in the contested matter.

April 14, 1980 COMMISSIONER OF EDUCATION

CARLSTADT TEACHERS ASSOCIATION AND ROBERT CILIENTO,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF CARLSTADT, BERGEN COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, April 14, 1980

For the Petitioners-Appellants, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent-Appellee, Fornabai & Zimmermann (James V. Zimmermann, Esq., of Counsel)

In his decision below the Commissioner upheld the substance of a dress code policy adopted by the Board of Education for its teaching staff members, but remanded the policy to the Board for revision of its enforcement provisions. The remand rested upon a finding by the Administrative Law Judge that the policy had not been consistently and equitably enforced.

The provisions of the policy which we deem appropriate for review here are the following:

> "1. Recognizing that students look to their teachers to set examples, the Carlstadt Board of Education expects its personnel to be dressed in a manner that adds dignity to the education profession.
>
> "2. Acceptable attire for female personnel shall consist of the following: (A) Dresses. (B) Skirts with blouses and/or sweaters. (C) Pant Suits. (D) Slacks with blouses and/or sweaters.

"3. Acceptable attire for male personnel shall consist of the following: (A) Suits with shirt and tie. (B) Leisure suits with or without ties. (C) Slacks with shirt and tie with or without jacket or sweater. (D) Slacks with turtleneck shirt/ sweater and jacket.

"4. The attire of all employees is expected to be clean and neat.

* * * * *

"7. Whenever any teacher is desirous of wearing a form of attire concerning which the teacher may have concerns as to whether or not such attire is appropriate, a ruling may be sought of the Superintendent who shall issue a ruling within two (2) school days of the date a written request for a ruling is submitted.

"In rendering a ruling, the Superintendent shall be guided as fully as possible by the provisions of this Dress Code.

"Appeals may be taken from a ruling of the Superintendent to the Board of Education. Such appeals shall be taken within five (5) school days of the date of the ruling of the Superintendent and the Board shall render its ruling within fifteen (15) days of the date of the appeal from the decision of the Superintendent."

The law is well established that the Board has the right to adopt a reasonable dress code for its faculty, with the objective of creating an atmosphere of respect for teachers and a dignified environment conducive to discipline and learning. Quiroli v. Linwood Board of Education, 1974 S.L.D. 1035; East Hartford Education Association v. Board of Education of East Hartford, 562 F. 2d 838 (2d Cir. 1977); Cumberland Regional Education Association v. Board of Education of Cumberland Regional High School District, 1980 S.L.D. ____ (State Board decision). What is reasonable is of course the problem. In an effort to guide boards of education in developing their policies, we would adopt the following standards for determining reasonableness in any particular case:

1. The dress code must be substantially clear and concrete; otherwise it will not be enforceable.

2. The code should impose no undue financial burden on any individual teacher.

3. The code should not unduly limit an individual's right of selection and freedom of expression; several options as to styles or modes of dress should be available to both men and women.

4. The code should be reviewed periodically, so it will conform from time to time with changing community attitudes.

5. The code should be consistently interpreted and enforced.

We are of the opinion that the Carlstadt policy conforms to the standards above set forth. In particular, it specifies four different types of dress for female personnel and four different types for males; it is sufficiently clear and concrete, and should impose no financial burden on any teaching staff member. With respect to paragraph 7, which provides for specific rulings by the Superintendent and appeals therefrom to the Board of Education, we see no lack of due process. As for the Commissioner's conclusion that the policy has not been enforced with consistency and fairness, neither the decision nor the brief of the Petitioners furnish any specific instance which can be reviewed by the State Board. Accordingly we find no reason at this point to remand the dress code to the local Board. If any such instance occurs in the future, the aggrieved staff member can file a new petition at that time.

For all the foregoing reasons, the State Board affirms the Commissioner's decision herein insofar as it sustains the dress code in question. Request for oral argument is denied. The petition herein is dismissed.

November 5, 1980
Pending N.J. Superior Court

NANCY MAKOSKI, KATHLEEN SULLIVAN, LINDA PETROCY, AND GAIL AQUILA,	)	
PETITIONERS,	)	INITIAL DECISION OAL DOCKET NO. EDU 4248-79 AGENCY DOCKET NO. 335-8/79A
V.	)	
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE,	)	
RESPONDENT.	)	

APPEARANCES:

For Petitioners, Sauer, Boyle, Dwyer, Conellis & Cambria, Esqs.
(William A. Cambria, Esq., appearing)

For Respondent, Hutt, Berkow, Hollander & Jankowski, Esqs.
(Joseph J. Jankowski, Esq., appearing)

BEFORE THE HONORABLE DANIEL B. MC KEOWN, ALJ

Petitioners individually allege they have acquired a tenure status of employment pursuant to N.J.S.A. 18A:28-5(c) as teaching staff members with the Board of Education of the Township of Woodbridge (Board). Petitioners further allege that the Board violated such alleged individual tenure rights by its refusal to continue their respective employment at the commencement of the 1979-80 academic year. Finally, petitioners complain that because their employment was not continued by the Board at the commencement of the 1979-80 academic year, they were deprived of salary amounts otherwise their due. The Board denies the allegations and asserts its actions with respect to each of petitioner's employment, and each thereof, is in all respects proper and legal.

The matter, filed before the Commissioner of Education, was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. A prehearing conference was conducted during which the parties agreed to submit the matter for summary decision on stipulated facts and Briefs in support of their respective positions. The record was closed and readied for disposition February 7, 1980.

Prior to a recitation of stipulated facts entered herein, it is recognized petitioners' counsel filed a letter application dated January 31, 1980 to have petitioner Gail Aquila's complaint determined moot because of her resignation from the Board's employ. Such application is hereby granted. The complaint of Gail Aquila is determined to be moot and her complaint against the Board is dismissed with prejudice.

It is also recognized that the Board, by letter dated February 4, 1980, waives its third and fourth separate defenses of laches and an asserted violation of N.J.A.C. 6:24-1.2. Such waiver, being freely entered, is accepted.

It is stipulated that each of the three named petitioners is in possession of an appropriate certificate for their respective assignments as teaching staff members in the Board's employ. The employment history of each named petitioner is as follows:

NANCY MAKOSKI

Petitioner Makoski was initially employed by the Board for the 1973-74 academic year and assigned to teach fifth grade. Prior to April 30, 1974 petitioner was notified by the Board pursuant to N.J.S.A. 18A:27-10 it determined not to continue her employment for 1974-75. Notwithstanding such notice, the Board did in fact re-employ petitioner for the whole of the 1974-75 academic year and continued her assignment to teach fifth grade.

Petitioner was re-employed by the Board for the 1975-76 academic year and was assigned to teach fifth grade. Prior to April 30, 1976 the Board notified petitioner, pursuant to N.J.S.A. 18A:27-10 that it determined not to re-employ her for 1976-77 because of budget restraints.

Petitioner was not re-employed by the Board at the commencement of the 1976-77 academic year; she was re-employed by it as a teaching staff member in January, 1977 and assigned to teach fourth grade. Petitioner completed the 1976-77 academic year in the Board's employ.

Petitioner was re-employed by the Board as a teaching staff member for the 1977-78 and 1978-79 academic years and she served in that capacity until January, 1979 when she was granted a maternity leave of absence by the Board until June 30, 1979. Her employment status continued through the leave.

Petitioner, while on leave, was notified by the Board prior to April 30, 1979 it determined not to re-employ her for 1979-80.

Petitioner, and co-petitioners herein filed the instant complaint before the Commissioner of Education on August 22, 1979.

Petitioner's employment was not continued by the Board at the commencement of the 1979-80 academic year. Petitioner's employment was continued, however, at some unspecified time thereafter. She is presently employed by the Board as a teaching staff member.

In chart form petitioner Makoski's employment with the Board in support of her tenure claim is as follows:

YEAR	DATES	MONTHS OF EMPLOYMENT
1973-74	September 1-June 30, 1974	10
1974-75	September 1-June 30, 1975	10
1975-76	September 1-June 30, 1976	10
1976-77	January 1-June 30, 1977	6
1977-78	September 1-June 30, 1978	10
1978-79	September 1-December 31, 1978	4 (Leave)
1979-80	Unspecified	

KATHLEEN SULLIVAN

Petitioner Sullivan began her employment as a teaching staff member with the Board on March 17, 1975 and was assigned to teach sixth grade. Petitioner worked through June 30, 1975.

Petitioner Sullivan was notified by the Board, presumably before April 30, 1975 that her employment would not be continued into the 1975-76 academic year. She was not re-employed by the Board at the commencment of the 1975-76 academic year; she was re-employed by it as a teaching staff member during November, 1975 through the conclusion of that 1975-76 academic year.

Petitioner Sullivan was notified prior to April 30, 1976 she would not be re-employed for 1976-77. She was not re-employed at the commencement of the 1976-1977 academic year; she was re-employed as a teaching staff member by the Board on or about September 15, 1976 and continued through the completion of the 1976-77 academic year.

Petitioner was notified by the Board prior to April 30, 1977 that her employment would not be continued for the 1977-78 academic year. Notwithstanding such notice, the Board did re-employ Sullivan as a teacher for the whole of the 1977-78 academic year.

Petitioner was re-employed as a teacher by the Board for the whole of the 1978-79 academic year. The Board notified her prior to April 30, 1970 her employment would not be continued for 1979-80.

Petitioner Sullivan, and co-petitioner herein, filed the instant complaint on August 22, 1979.

Sullivan's employment was not continued by the Board at the commencement of the 1979-80 academic year. Her employment was continued, however, at some unspecified time thereafter. Sullivan is presently employed by the Board as a teaching staff member.

In chart form petitioner Sullivan's employment with the Board as a teacher in support of her tenure claim is as follows:

YEAR	DATES	MONTHS OF EMPLOYMENT
1974-75	March 17, 1975-June 30, 1975	3 months, 14 days
1975-76	November, 1975-June 30, 1976	8 months
1976-77	September 15, 1976-June 30, 1977	9 months, 15 days
1977-78	September 1-June 30, 1978	10 months
1978-79	September 1-June 30, 1979	10 months
1979-80	Unspecified	

LINDA PETROCY

Petitioner Petrocy was initially employed by the Board as a teaching staff member for the entire 1973-74 academic year. Prior to April 30, 1974 she was notified by the Board she would not be re-employed for the 1974-75 academic year.

Notwithstanding such notice, petitioner was re-employed by the Board as a teaching staff member for the entire 1974-75 academic year.

Petrocy was re-employed by the Board for the entire 1975-76 academic year. The Board notified her prior to April 30, 1976 she was not to be re-employed for the 1976-77 academic year.

Petitioner was not, in fact, re-employed by the Board at the commencement of the 1976-77 academic year; she was re-employed by the Board during January, 1977 and she completed the 1976-77 academic year as a teacher in its employ.

The Board re-employed Petrocy as a teacher for the whole of the 1977-78 and 1978-79 academic years. The Board notified Petrocy prior to April 30, 1979 she would not be re-employed for the 1979-80 academic year.

Petrocy and co-petitioners filed the instant complaint on August 22, 1979.

Though petitioner Petrocy was not re-employed by the Board as a teaching staff member at the commencement of the 1979-80 academic year, she was re-employed by it at an unspecified time thereafter.

In chart form petitioner Petrocy's employment with the Board as a teacher in support of her tenure time is as follows:

YEAR	DATES	MONTHS OF EMPLOYMENT
1973-74	September 1-June 30, 1974	10
1974-75	September 1-June 30, 1975	10
1975-76	September 1-June 30, 1976	10
1976-77	January, 1977-June 30, 1977	6
1977-78	September 1-June 30, 1978	10
1978-79	September 1-June 30, 1979	10
1979-80	Unspecified	

Petitioners stipulate that the notice of nonrenewal they each received from the Board during their employment was based on budget restraints. Moreover, there is nothing before me to suggest that notices of nonrenewal were submitted to any petitioner at any time for reasons other than budget restraints.

Petitioners argue they have satisfied the precise conditions articulated in the statutes for the acquisition of a tenure status and cite Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E. & A. 1941) and Schulz v. State Board of Education, 131 N.J.L. 350 (Sup. Ct. 1944), reversed on other grounds 132 N.J.L. 345 (E. & A. 1945) Petitioners contend that N.J.S.A. 18A:28-5(c) allows for the statutory acquisition of tenure when one serves a board of education in an employment capacity, as each assert they did, for the stated period of time therein.

The Board argues to the contrary that in order for a teaching staff member to acquire a tenure status of employment pursuant to N.J.S.A. 18A:28-5(c) the period of employment must be continuous, without interruption. The Board asserts that each petitioner's continuity of employment was severed when it did not re-employ Makoski at the commencement of the 1976-77 academic year; when it did not re-employ Sullivan at the commencement of the 1976-76 and 1976-77 academic years; and when it did not re-employ Petrocy at the commencement of the 1976-77 academic year.

The Board contends that because it caused, albeit for reasons of budgetary considerations, a break in each of petitioner's employment the benefits of N.J.S.A. 18A:28-5(c) may not now innure to them and cites Ruth D. Trued v. Board of Education of the Borough of Ho-Ho-Kus, Bergen County, 1975 S.L.D. 959; Zielenski v. Board of Education of the Town of Guttenberg, 1970 S.L.D. 202, reversed State Board of Education, 1971 S.L.D. 664; aff'd New Jersey Superior Court, Appellate Division, 1972 S.L.D. 692; Nicoletta Brancardi v. Board of Education of the Borough of Waldwick, 139 N.J. Super. 175 (App. Div. 1976), aff'd 73 N.J. 37; and Elaine Solomon v. Board of Education of the Princeton Regional School District, 1977 S.L.D. 650, aff'd State Board of Education 1977 S.L.D. 657.

Finally, the Board seeks to find support in its argument that petitioners have not acquired a tenure status in a letter its Superintendent of Schools received from the former assistant commissioner of education in charge of controversies and disputes. There, the assistant commissioner, presumably in response to a written question concerning whether petitioners herein acquired a tenure status, states, inter alia:

> " *** If /petitioner's/ respective interruptions were caused either by resignation or failure to be re-employed because of reduction in force, such an interruption would actually constitute a severance of their employment and an ending of the tolling of time for acquiring tenure. Consequently, upon re-employment each would then be starting over in serving time towards acquiring a tenure status *** "

DISCUSSION AND CONCLUSIONS

It is established that time served as a substitute teacher does not count towards the acquisition of tenure. Biancardi, supra; Zielenski, supra; Trued, supra.

Here, it is stipulated that each petitioner was employed by the Board as a teaching staff member. There is no suggestion that any petitioner at any time was employed by the Board as a substitute teacher.

Biancardi, Zielenski, and Trued attempted to include time they each served as substitute teachers in the employ of the respective boards of education to anchor their claims of tenure acquisition. Such is not the case herein.

Thus, I CONCLUDE the above-cited cases by the Board are inapposite to the matter herein.

The Board's reliance on Solomon, supra is also misplaced. Solomon presents the question of the effect of a resignation, freely submitted, upon prior time served for tenure acquisition. Petitioners did not, at any time, tender resignations to the Board. The sole exception is Gail Aquila whose complaint has already been dismissed, with prejudice.

The issue before me is whether petitioners have acquired a tenure status of employment pursuant to N.J.S.A. 18A:28-5(c) by virtue of their stipulated employment histories, in light of the Board's determination not to re-employ them at various intervals for stipulated reasons of economy.

N.J.S.A. 18A:28-5 provides, in pertinent part:

> "The services of all teaching staff members *** serving in any school district or under any board of education *** shall be under tenure *** after employment in such district

or by such board for:

***

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

The New Jersey Supreme Court, in Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962) cert. den. 371 U.S. 856, 83 S. Ct. 508, 9. L. Ed. 2d 502 (1963) held that for a person to acquire the permanent status of teacher under the tenure law, the precise conditions articulated in the statute must be met.

A review of each petitioner's employment history shows inescapably that each has served "the equivalent of more than three academic years within a period of any four consecutive academic years". I CONCLUDE that each petitioner has met the precise conditions set forth in N.J.S.A. 18A:28-5(c) to have acquired a tenure status as teaching staff members in the Board's employ.

The Board's argument that because it ostensibly severed each of petitioner's employment through its notification and effective nonrenewal of employment for divers periods is, in my view, without merit. To hold as the Board argues would be to acknowledge authority for a board of education to frustrate the intent of the Teachers' Tenure Law by notifying all its nontenure teachers every year that for reasons of economy their employment would not be continued. The Board, having their budgetary restraints resolved, could re-employ its nontenure teachers and stagger the reporting time for each nontenure teacher the following academic year so that a break in service would occur. Such is not the intent of the tenure statutes balanced against a board of education's wide grant of authority to select those who shall perform in its schools.

It is not suggested here that the Board acted in bad faith in regard to its stipulated reasons for petitioners' nonrenewals being that of budgetary restraints. I accept the stipulation that the reason of budgetary restraints to be legitimate for notices of nonrenewals and effective nonrenewal in this case. I cannot accept, however, that such effective nonrenewal by the Board negates petitioners' prior employment for purposes of tenure.

N.J.S.A. 18A:28-5(c) is clear and unambiguous on its face; a person acquires tenure by serving the equivalent of more than three academic years within a period of any four consecutive academic years.

The Board's reliance on the former assistant commissioner of education's letter that petitioners' " *** failure to be re-employed because of a reduction in force *** actually constitute(s) a severance of their employment (for purposes of tenure acquisition) *** " is misplaced. Firstly, that stated legal conclusion, albeit in the form of a personal opinion, does not result from a litigated issue; rather, it is solely the opinion of the writer. Secondly, such personal opinion has no foundation in law for the reasons already expressed.

I CONCLUDE each petitioner herein has met the statutory requirements for the acquisition of tenure as teaching staff members in the Board's employ. I FURTHER CONCLUDE that the Board's action of suspending their employment for brief periods of time does not act as a bar to such tenure entitlement.

Finally, it is noticed that each of the three named petitioners are presently in the Board's employ and presumably being properly compensated according to the proper scale and step of the Board's teachers salary policy. Thus, relief of reinstatement is moot for such reinstatement has occurred.

The Board argues with respect to compensation due petitioners should it be established they acquired tenure, which is established herein, that that issue be subject to further proceedings. The Board anchors this request on the assertion that the period of time to which any petitioner would be due compensation is the commencement of the 1979-80 academic year when they were not effectively employed by it. The Board contends that it offered one or more petitioners a job as substitute teacher during that time which, had such offer been accepted, would go to mitigation of the total money now their due.

Under these circumstances, I disagree with the Board. I know of no requirement, nor has any been suggested for which support is advanced, by which petitioners are required to accept positions of employment less than those to which they are entitled for purposes of mitigation.

I CONCLUDE there is no need for further proceedings in the matter to determine mitigation. The Board is directed to compensate Petitioners, Makoski, Sullivan, and Petrocy the amount of money they would have received during the beginning of the 1979-80 academic year had they been employed by the Board, mitigated only by moneys they individually earned at employment they could not have had had they been employed by the Board.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

March 7, 1980 — Daniel B. McKeown

DANIEL B. MC KEOWN, ALJ

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

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

The Commissioner observes that 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 adopts them as his own.

Accordingly, the Board is directed to remunerate petitioners, exclusive of Petitioner Aquila, as though employed by the Board during the 1979-80 academic year mitigated by any outside earnings.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

IN RE:	)	INITIAL DECISION
CONSTANCE ANDERSON	)	**OAL DKT NO. EDU 2625-79**
Petitioner	)	**AGENCY DKT. NO. 219-5/79A**
vs.	)	
BOARD OF EDUCATION OF THE	)	
CITY OF SUMMIT,	)	
UNION COUNTY	)	
Respondent	)	

APPEARANCES:

Gilbert E. Owren, Esq., for the Petitioner, Constance Anderson

Dean J. Paranicas, Esq., for the Respondent, Board of Education of the City of Summit, Union County

BEFORE THE HONORABLE **JACK BERMAN**, A.L.J.:

Constance Anderson (petitioner) seeks to be reinstated to her teaching position with full back pay and all benefits. The petitioner claims she was improperly terminated from teaching by the Summit Board of Education (respondent). Petitioner asserts she is a tenured employee pursuant to the terms of N.J.S.A. 18A:28-5(c) since she has been employed as a teaching staff member by respondent for more than three academic years within the past four consecutive academic years. Respondent asserts petitioner is not tenured.

At a prehearing conference held November 5, 1979, it was agreed that the three years served by petitioner for respondent, namely the teaching period of 1976-1977, 1977-1978 and 1978-1979, counts toward tenure. What remains to be determined is whether the teaching period served by petitioner as a Title I teacher from February 18 to June 16, 1976 counts toward her accrual of tenure.

Should petitioner not prevail on the tenure issue, she does not abandon her other averments as set forth in the Petition of Appeal and reserves her right to a plenary hearing on the remaining issues.

A hearing was held on December 17 and December 18, 1979. At the hearing, the court received into evidence 14 exhibits, nine from petitioner and five from respondent. They are as follows:

Petitioner's Exhibits:

P-1 Summit Public Schools, letter dated February 18, 1976 to Mrs. Constance Anderson

P-2 Certificate of Constance Anderson to teach as an elementary school teacher

P-3 Record - Animal Alphabet - (returned to petitioner at the close of the hearing).

P-4 Three (3) stuffed animals - (returned to petitioner at the close of the hearing).

P-5 Lesson Plans - Title I Program (a) - (m) (Students names appearing thereon are not in evidence).

P-6 Individual Pupil Evaluations (summary report) and the Report of Parent Conferences of Lincoln School - 11 pages. (All references to students names are not in evidence).

P-7 Position Analysis - 11 pages

P-8 Office of Instructional Services, Summit Public School, April 20, 1976 to Title I teachers from Dr. Pomerantz which refers to a form which is attached to R-4 in evidence.

P-9 Correspondence from the Board of Education of Summit dated April 12, 1979 to Constance Anderson signed by the Secretary of the School Business Administration.

Respondent's Exhibits:

R-1 Superintendent's Report to the Board of Education February 19, 1976 - five pages

R-2 Page 4 of Minutes of the Board of Education of February 19, 1976

R-3 Supplementary Instruction hours re Connie Anderson. (All references to names of students are not in evidence). -five pages.

R-4 Office of Instructional Services, June 3, 1976 from Dr. Pomerantz - two pages

R-5 (a) Application for federal assistance - Title I September 1, - 1975 -June 30, 1976
(b) Addendum number 4 - 1
(c) Addendum number 4 - 2(a)
(d) Addendum number 4 - 3
(e) Addendum number 4 - 4
(f) Addendum number 4 - 5
(g) Addendum number 6 - 1

All the exhibits have been carefully studied by the court prior to this decision. The court also heard the testimony of Micheline Schipley, a mother of a student who was in petitioner's class from February 9, 1976 through June 16, 1976, Constance Anderson, the petitioner, David C. Davidson, Principal at Lincoln School during the period February 9 -June 16, 1976, Dr. Richard L. Fiander, Superintendent of Schools, Summit, New Jersey, Joan Conway, employed by the Summit Board of Education as a Learning Disability Teacher Consultant (L.D.T.C.), Dr. Roland L. Wolcott, an Assistant Superintendent of Schools and in charge of the Office of Instructional Services, Board of Education, Summit, New Jersey and carefully scrutinized it and assessed the demeanor and credibility of all witnesses. The court has also studied all of the pleadings, the briefs and the arguments of counsel. The hearing was concluded on the date when the proposed Findings of Facts and Conclusions of Law and reply and post-trial briefs were submitted on January 28, 1980. (See proposed Uniform Administrative Rules of Practice 19:65-16.1.)

Micheline Schipley, a mother of a former student of petitioner, testified. Her son was enrolled in the Title I class petitioner taught from February 1976 to June 16, 1976. Within the past few years her family had lived in Brazil, and her son, Daniel, spoke mostly Portugese. His ability to speak English was not good. She stated that petitioner reported to her as she did to other parents, the progress of the students in her class. Mrs. Schipley had two or three conferences with petitioner and found petitioner to be a very dedicated teacher. Petitioner discussed at these conferences, Mrs. Schipley son's progress in school and reported to her that her child needed more self-confidence. Petitioner would display the children's work to the parents explaining to them what she required of their children. Petitioner also explained to the parents the purpose of the Title I class.

Comparing conferences that Mrs. Schipley had with her son's regular kindergarten teacher and the conferences she had with petitioner, she stated, the conferences with petitioner were very specific regarding the child's needs. She felt that petitioner was responsible for giving her son a feeling of self-confidence.

Mrs. Constance Anderson, the petitioner, testified. She stated she has taught for more than 25 years at many Y.M. and Y.W.C.A.'s. She also, during this period of time, tutored and taught as a substitute teacher. In January 1976 she was hired by respondent to teach a Title I Extended Kindergarten Program class at Lincoln School. This offer was made by and discussed with Dr. Wolcott, Assistant Superintendent of Schools for respondent. Dr. Wolcott, by letter dated February 18, 1976, wrote to petitioner confirming the employment arrrangement.

"Dear Mrs. Anderson:

This letter confirms your employment as a part-time teacher in the Title I Extended Kindergarten Program in the Lincoln School at an hourly rate of $7.00. It is anticipated that this program will be in operation until near the end of the school year, probably until June 4th or June 11th.

Miss Joan Conway is, as you know, the person from whom you will receive direct assistance and supervision in matters relating to the program, materials and instructional activities. Mrs. Smith or Mrs. Rubin and Dr. Pomerantz also have direct responsibilities in this program. The school principal, of course, has the direct responsibility for this program. I urge you to avail yourself of their expertise on a regular basis.

Our program's goals for these pupils are meaningful and realistic. With your commitment, expertise and diligence we can expect very positive experiences and growth for every pupil.

Sincerely,

Roland L. Wolcott
Assistant Superintendent" (P-1)

Petitioner actually taught from February 9 through June 16, 1976, having 11 students in her class. Class began at 11:15 a.m. each day following the regular kindergarten class and would continue until 3:00 p.m. When class was over petitioner would stay until 3:30 p.m. preparing for the next day. She would also talk to the parents of her students, prepare lesson plans, evaluate her students and work on their reports. She used the same classroom each day. She fulfilled her teaching responsibilities until the very last day of class, June 16, 1976. She testified that she never resigned from teaching.

Petitioner holds a certificate issued in September, 1973 by the Department of Education, State Board of Examiners, as an elementary school teacher (P-2).

Dr. Wolcott had explained to her at the outset, the children she would be teaching would be lacking in language skills. Petitioner had the responsibility for planning the Title I curriculum for the Extended Kindergarten Program. She thus developed a curriculum for her students.

Ms. Conway, a Learning Disability Teacher Consultant with the Summit Board of Education, had outlined to her the general objectives of the Title I program. They were:

1. To help each child's language development
2. To help each child get a good self image of themselves
3. To help each child's general coordination

Petitioner never received assistance from any staff employee in developing the curriculum. Nor did she receive anything in writing from anyone, regarding the development of the curriculum. Notwithstanding this, petitioner testified, she implemented the curriculum as follows:

1. By introducing to the children and playing for them an Animal Alphabet record that contained animal songs for each letter. The children would learn the word sound of an animal and identify the animal that went with a letter. The children would also pull out a picture of a stuffed animal from a box that was representive of the animal in the record. The Animal Alphabet record was petitioner's own record she brought from home.

2. By creating a cardboard box covered with cute wallpaper and placing various stuffed animals inside, the children would state the name of the animal as they removed it from the box. The box was known as the "Goody Box".

She would utilize the Animal Alphabet record and the "Goody Box" about three or four times a week. In her lesson plans she referred to both the box and the record.

Other plans she used to implement the curriculum, utilized filmstrips and tapes; such titles as "Sticks and Stones", "Smiles Just Don't Happen", "What Faces Say", and showing the children a picture of a child with tears, would encourage the children to respond. She also showed the children pictures of children smiling, and being sad, thus enabling her students to verbalize their feelings. She would also cut pictures out of magazines and would ask a child "Why is this child smiling, why is he laughing?"

She stated it was her idea to use the "Kindel Series" and stated that she received no assistance from anyone in connection with the idea. She used the Kindel Series at least once a week and she noted it in her lesson plans.

One of her objectives was to help the children listen. In order to do this she created a box with a hole in it. A child would reach into the box and take an item out and describe it to the class mentioning whether the item was smooth or rough. Each day petitioner used the box, she changed its contents. It was called the "Feeling Box". Petitioner stated that this was her own idea and was also noted in her lesson plans.

Petitioner taught three years at the Brayton School, from 1976 to 1979. Comparing her implementation, development and planning of the curriculum, in both her experiences as a Title I teacher in 1976 and as a regular teacher at the Brayton School (1976-1979), she stated, the curriculum implementation in the Title I class was superior.

At required parent conferences petitioner informed the children's parents of the program she had prepared for the children. These conferences would later be summarized in writing by her. The written summaries were submitted to Ms. Conway and later returned to petitioner. Petitioner also held telephone conferences with the parents. These conferences were similar to the required conferences petitioner experienced at the Brayton School for three years. Additionally, petitioner reported the children's progress to the children's regular kindergarten teachers.

The children in the Title I class also had social and emotional problems which petitioner was retained to improve.

All supplies, consumable materials, ditto papers and pencils necessary for the Title I class were ordered by petitioner. Petitioner also had access to the regular kindergarten teachers' materials. Petitioner would obtain other supplies from Mr. Davidson, the principal of Lincoln School. She was required to sign for supplies from the library on a teacher's library card. On many occasions she provided her own supplies and materials. The procedure in obtaining supplies at the Lincoln School was similar to that at the Brayton School.

Petitioner prepared and kept a progress folder on each child, recording each child's needs, his progress and evaluation. In addition to the lesson plans, she prepared a daily instruction sheet about 15 minutes before the children reported to class, and again after they left class.

Petitioner as required, evaluated and reported to Ms. Conway, the progress of the students in her class. This was done before and after a skill was taught. Through various tests she would determine the children who had mastered a skill that was taught.

Petitioner was responsible for the physical safety and conduct of the children. She received no assistance in this regard.

Although she was observed by Mr. Davidson, and by Ms. Conway, she never received any comments or criticisms from them.

Petitioner attended all the required staff meetings concerning the Title I class. She also attended non-required regular staff conferences.

Petitioner performed additional duties that had not been asked of her when she was first hired. Thus, she was required to take the children to lunch each day and also to walk the children through town at the end of each day. In her opinion this was an educational experience for them. They learned to develop proper eating manners and understand what they were eating. They also learned how to participate as a group with one another and how to respond to traffic lights and signs.

The responsibilities petitioner performed as a Title I teacher were not different from the responsibilities she performed as a regular teacher at the Brayton School. Respondent's "Position Analysis" (P-7) in effect from February 1976 through June 20, 1979 sets forth these responsibilities.

At Page 3 of P-7 "Responsibility - Curriculum Development

The responsibility is met when the teacher constructively contributes to and participates in the development, planning, utilization and implementation of the school program.

Key Duties

1. Implements the curriculum through activities and use of materials which supplement and enrich the basic curricular learning.

2. Teaches and tests within the scope of the prevailing course of study and adjusts the stated curriculum to the needs of the students.

3. Originates or participates in the development, revision, evaluation or writing of the curriculum or course of study. This may include teaching new materials in order to try them, teaching experimental units in order to explore new approaches, proposing and trying original materials and methods."

At Page 7 of P-7 "Responsibility and Pupil Evaluation:

The standard of performance for this responsibility is met when the teacher measures the development of the pupils under his tutelage as often as required and reports in a timely manner to the parents on the pupil's achievement.

Key Duties:

1. Administers and scores special and standardized tests of pupil progress.

2. Interprets the meaning of scores obtained from tests.

3. Records test results

4. Prepares meaningful reports for parents, special teachers and administrators.

5. Relates new test results to pupil potential as evidenced by past performance.

6. Analyzes and review with pupil test results in light of pupil's goals and program.

7. Uses specialists for pupil evaluation as required."

At the end of the school year petitioner prepared written reports to the parents of her students concerning their progress.

Petitioner used the following materials in her Title I class, which she obtained from the regular kindergarten teachers: Kindel Series, Kit A Language, Peabody Language Development Kit, and DLM (Development Language Material).

Petitioner was involved in the testing of her students in the Title I class. She had input in rating her student's progress on forms provided to her. Upon completion she would forward her results to Dr. Pomerantz, a psychologist, who had tested the children before they came into the program in order to determine whether they lacked language skills.

At the close of the Title I school year petitioner prepared written reports summarizing each child's development and reviewed them at conferences she held with their parents.

On April 12, 1979 a letter was sent to petitioner (P-9) and reads as follows:

"Dear Mrs. Anderson:

This letter is to advise you that a meeting held April 15, 1979, the Board of Education determined not to offer you a contract for the 1979-80 school year.

Your requests in anticipation of this decision, for the reasons for this action and for a hearing before the Board, have been received and responses will be forthcoming.

Very truly yours,

R.A. Schober
Secretary"

David C. Davidson, in response to a subpeona, testified for petitioner. Mr. Davidson was principal of the Lincoln School when petitioner taught the Title I class (February 9, 1976 through June 16, 1976).

The children who had been placed in the Title I program were identified as children who had special needs for language development. He stated, some of the students who were in the regular kindergarten class were also in the Title I Extended Kindergarten Program. The general area of instruction was language development. The Office of Instructional Services had the main responsibility for the Title I program. Petitioner had eleven students in her class whom she picked up each day at 11:15 a.m. from their regular kindergarten class teachers. She used the same classroom each day and was never absent. In his opinion, petitioner completely fulfilled her teaching obligation to the class.

The development of the curriculum program was done by petitioner. He said he did not provide petitioner with written documentation for her to plan the curriculum.

The lesson plans for the Title I course were prepared by petitioner on forms provided her by the Office of Instructional Services. He pointed out that regular teachers are not provided with such forms but are provided with a plan book. He stated, completing the forms constituted the preparation of the lesson plan.

He was aware petitioner had reported to the parents of her students regarding their progress in the Title I class. He was also aware petitioner ordered supplies and utilized the same procedures in doing so as the regular teachers. He said that petitioner maintained student records and was solely responsible for the classroom instruction, receiving no assistance. He was aware on many occasions that petitioner stayed late in school (after 3:00 p.m.) conferring with teachers.

He held petitioner responsible for evaluating her students in language development as well as for their physical custody, safety and security.

Petitioner escorted the children every day to the center of town for safety reasons. He also stated that petitioner had the responsibility of supervising her students during the lunch period. The children would eat their lunch in the school cafeteria together with petitioner and himself. He considered this a learning experience for the children. He regarded it as being a family setting aiding the childrens language development. The children he stated, conversed with each other describing colors and foods. The regular kindergarten teachers did not have playground or cafeteria duties assigned to them as petitioner had.

Petitioner attended the required staff meetings of the Title I staff. He also was aware that she attended, as a volunteer, the regular school staff conferences.

Referring to the respondent's "Position Analysis" (P-7), Mr. Davidson stated that it was in effect from February of 1976 through June 20, 1979 and that the principle responsibilities and duties applicable to regular teachers were similar to the principle responsibilities and duties performed by petitioner as a Title I teacher. Mr. Davidson said petitioner's lesson plans were more specialized than the regular teachers' lesson plans as she taught a specialized program geared to language development.

Although Mr. Davidson observed petitioner's classroom instruction he did not evaluate her since she was a part-time supplemental teacher.

Regarding supplies, he testified that not all supplies or materials were provided to the school by the Office of Instructional Services, some came from the supply center, some from the library and some were furnished by petitioner. He said that the Office of Instructional Services provided materials for the Kindel, Peabody and DLM series. He said the supply ordering procedures that petitioner followed were the same as the procedures followed by the regular teachers.

At the close of this testimony petitioner rested.

Respondent then moved to dismiss the Petition for failure of the petitioner to prove a prima facie case. Decision was reserved. The motion is denied. Petitioner has established a prima facie case pursuant to the reasons set forth in Dolson v. Anastasia, 55 N.J. 2, 5-6(1969). "The trial court is not concerned with the worth, nature or extent (beyond a scinitilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion."

Dr. Richard L. Fiander, Superintendent of respondent's school, testified. He is familiar with the Title I program petitioner was involved with. It is a federally funded program administered by the state. Three names in addition to petitioner's name were submitted to respondent Board for approval prior to the commencement of the program. Each were designated as part-time supplemental teachers or teacher-aide in the Title I kindergarten project (R-1). Petitioner was hired as a supplemental teacher and not as a teacher-aide. Dr. Fiander did not observe petitioner's classroom performance as she was a part-time supplemental teacher. The purpose of the project was to provide certain designated children with help who were language defecient.

Joan Conway, employed by the Summit Board of Education as a Learning Disability Teacher Consultant (L.D.T.C.) testified for respondent. She holds three Master Degrees, hearing, speech learning disability and therapy. As a Learning Disability Teacher Consultant she is a member of the child study team consisting of the school psychologist and a social worker. The child study team makes decisions on the classification and identification of educationally handicapped children. She worked many

times, in the Spring of 1976, with the language development teachers, Ms. Smith and Ms. Rubin. She was familiar with the Title I program taught by petitioner from February through June of 1976. The program was designed to help children previousiy identified as having immature language development. Ms. Conway's involvement in the Title I program was (1) suggesting fundamentals to teachers, (2) formulating the objectives of the program and (3) monitoring the objectives to see to it that they were fulfilled.

Ms. Conway spoke to petitioner at the first formal meeting of the Title I teachers. The subjects that were discussed were materials, objectives of the program and forms to be used. The primary objective was to develop the recessive language of the children by improving their level of visual and auditory attention. She told petitioner at this meeting the materials to be used were the Peabody Language Development Kit and the Kit A Language Kit.

It was mandatory in the Title I program for the teacher of a Title I class to communicate directly with the parents and enlist their aid. Petitioner was required to submit, each week, a schedule and a written summary of her parent conferences as well as her time sheets.

She met with petitioner four or five times. She visited her class. She observed the children's activities and the conduct of the class but this was not for the purpose of evaluating petitioner. Staff conferences were held once a month with respect to the Title I program. In addition to discussing supplies, they focused on the individual child's needs.

Her definition of a curriculum was the running of an on going course of study. A course of study she defined as "the development of particular areas of content as they relate to one another." She cited physical education as being illustrative of a curriculum. She stated the language development taught under the Title I Extended Kindergarten Program was not a course of study and not a curriculum. She stated that a course of study must occur throughout a year in order for it to be considered a curriculum. The Extended Kindergarten Program did not occur throughout a year.

The Animal Alphabet record was used to develop particular sounds. It was not provided to the petitioner by the Office of Instructional Services but was made available to the students by petitioner. Ms. Conway did not suggest that petitioner use the record

and did not make any comment to petitioner in the lesson plan regarding the use of the record. She stated that petitioner did use her own ideas to bring the development of language to the children.

She stated that it was customary to require petitioner to fill out written reports regarding the children's progress at the conclusion of the required term. These reports covered the children's strengths, weaknesses and contained petitioner's conclusions that would be helpful to the regular kindergarten teachers. These reports were not given to parents. The reports were sent by the Title I teacher to this witness, Dr. Wolcott, Dr. Pomerantz and to the regular kindergarten teachers. Ms. Conway recommended that these reports be given to the parents. In the course of the parent conferences the substance of these reports would be covered.

According to Ms. Conway, petitioner conducted informal testing of her students.

Dr. Roland L. Wolcott, Assistant Superintendent of Schools since 1963 for the Board of Education of Summit, New Jersey and in charge of its Office of Instructional Services since 1971, next testified. He listed as among his duties the operation of the Office of Instructional Services which included special education for handicapped children. Also included within his duties were the operation of the Title I programs as well as the operation of the compensatory education programs of the schools.

He stated that the purpose of the Extended Kindergarten Program was primarly language. He wanted to have certain selected children remain in school for three additional hours to concentrate on their language development. Unlike the regular kindergarten program, the children in the Title I program ate in school.

The Extended Kindergarten Program was formulated over a number of years. He worked on its formulation in the spring and summer of 1975. Petitioner was paid $7.00 an hour. It was not his intention that petitioner be considered a regular kindergarten teacher nor be entitled to receive benefits as a regular classroom teacher. He met with petitioner either in late January or early February of 1976 to discuss the Title I program with her. He recalled that petitioner indicated she was available and interested in the position. He discussed with her the launching of this new program and its main thrust to concentrate work on the children's receptive languages through vehicles available such as

the Peabody Kit, DLM and Kindel Language Series. He stated, petitioner was required to hold parent conferences.

The Title I school year terminated around June 15 or June 16, a few days before the end of the school year for the entire school system. The reason it was shorter was to allow for time to prepare the necessary reports. Ms. Conway offered petitioner assistance and supervision in matters relating to the program. Ms. Smith and Ms. Rubin, language teachers, had various responsibilities. The program required the input of those persons who had expertise in language development.

Petitioner was not supervised from February of 1976 to June of 1976 but was monitored. The policy of the school was not to evaluate supplemental part-time teachers.

Petitioner taught within the scope of language development and also tested within that scope. Petitioner used, new, but not original teaching materials and units that had not been suggested to her. Petitioner contributed to the implementation of the program.

Curriculum has many parameters. It can be an entire school system, or a vertical curriculum ranging from K-12 grades. There can be a curriculum for a particular grade. He stated, "its bigger than what goes on in a classroom but not bigger than what goes on in the school". The curriculum is the frame work a teacher follows. A teacher has to plan and develop the activities incorporating the course of study within it. The teacher is not primarily responsible for developing the frame work. If one isolated the Extended Kindergarten Program to itself, it would be considered a curriculum. As a rule a teacher implements, but does not develop, the curriculum. He stated that he formulated the frame work of the curriculum and petitioner's responsibility was to see to it that it was implemented.

Based upon the testimony and exhibits, the **COURT FINDS:**

1. Petitioner was employed by respondent as a part-time teaching staff member at Lincoln School in the Title I Kindergarten Program from February 9, 1976 through June 16, 1976.

2. Petitioner was employed by respondent as a teaching staff member at Brayton School (2nd grade) from September 1, 1976 through June 30, 1977.

3. Petitioner was employed by respondent as a teaching staff member at Brayton School (2nd grade) from September 1, 1977 through June 30, 1978.

4. Petitioner was employed by respondent as a teaching staff member at Brayton School (4th grade) from September 1, 1978 through June 30, 1979.

5. On April 12, 1979, petitioner received notice from the respondent that she would not be offered a teaching contract for the 1979-80 school year.

6. During the period in which petitioner taught the Title I Extended Kindergarten Program (February 9, 1976 through June 16, 1976), the petitioner performed the following duties:

   a. Prepared comprehensive lesson plans for the 11 students in her class.

   b. Was held accountable for pre-testing and post-testing of her students

   c. Maintained individual progress folders for her students.

   d. Corrected assignments.

   e. Conferred with parents concerning the progress of the students.

   f. Conducted back-to-school sessions.

   g. Attended staff conferences.

   h. Had direct responsibility for the students

   i. Provided her own teaching aides, including language kits, records, etc.

   j. Taught five days a week commencing each day at approximately 11:00 a.m. and continuing to the end of school at approximately 3:00 p.m.

   k. Was paid $7.00 per hour and received no benefits.

   l. Was responsible for, developed, planned and implemented the curriculum plan.

   m. Reported in written and oral form to parents.

n. Ordered supplies.

o. Maintained pupil records.

p. Was assigned duties other than those specifically contracted for.

7. Petitioner holds a certificate from the Department of Education, State Board of Examiners of the State of New Jersey for Elementary School Teacher issued September, 1973.

8. Petitioner never resigned from teaching.

The relevant statute in determining the tenure status of petitioner is N.J.S.A. 18A:28-5, which sets forth those criteria which must be met before tenure attaches. It reads, in pertinent part, as follows:

> "The services of all teaching staff members including all teachers, principals, assistant principals, vice-principals, superintendents, assistant superintendents, and all school nurses *** 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:
>
> ***
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years***."
>
> "It is well established that the right of tenure does not come into being until the precise conditions laid down in the tenure statute have been met."

North Bergen Federation of Teachers v. Board of Education of the Township of North Bergen, Hudson County, 77 S.L.D. 1125 citing Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E & A 1941).

We are only concerned here with whether petitioner's part-time employment as a Title I teacher from February 9, 1976 through June 16, 1976 can be counted towards tenure time together with her full-time employment of September 1, 1976 through June 30, 1977, September 1, 1977 through June 30, 1978 and September 1, 1978 through June 30, 1979.

The cases are legion in noting no distinction between full-time or part-time teaching for the purpose of tenure under N.J.S.A. 18A:28-5. Fox v. New Providence Board of Education. 1939-49, S.L.D. 134, and Josephine Desimone v. Board of Education of the Borough of Fairview, 1966 S.L.D. 43.

Likewise the cases are legion in including Title I employment as counting towards tenure time noting that the source of funds from which a teacher is compensated has no relevancy in this regard. Ruth Nearier et al. v. Board of Education of the City of Passaic, 1975 S.L.D. 604; Henry Butler et al. v. Board of Education of the City of Jersey City, 1974 S.L.D. 890, aff'd State Board of Education, 1975 S.L.D. 1074 aff'd in part rev'd in part 1, Docket No. A-2803-74, N.J. Superior Court, App. Div. July 4, 1976, cert, den. 72 N.J. 468 (197); Noorigian v. Board of Education of Jersey City, 1972 S.L.D. 266.

The nature of the employment however, is significant. For if such employment is that of a substitute teacher such teaching time will not count towards tenure. Schulz v. Board of Education, 132 N.J.L. 345 (E & A 1945) and Nicoletta Biancardi v. Waldwick Board of Education, 1974 S.L.D. 60, aff'd State Board of Education 364, rev'd 139 N.J. Super. 175 (App. Div. 1976) aff'd 73 N.J. 37 (1977).

Of course, if the facts of a particular case show that the designation "substitute" is being used as a mere subterfuge to deny tenure, such teaching time will be counted towards tenure. Downs v. Board of Education of Hoboken, 13 N.J. Misc. 853 (Sup. Ct. 1935); Wall v. Board of Education of Jersey City, 1938 S.L.D. 614 (1936) rev'd and rem. State Board of Education 618 aff'd 119 N.J.L. 308 (Sup. Ct. 1938); Juanita Seilenski v. Board of Education of Guttenberg, 1970 S.L.D. 202 rev'd State Board of Education 1971 S.L.D. 664, aff'd Docket No. A1257-70 New Jersey Superior Court App. Div. February 16, 1972 (72 S.L.D. 692).

Another category is the one with which we are concerned here, the hiring of a teacher as a supplemental teacher for supplemental instructions. Under Kuboski v. Board of Education of South Plainfield, 1978 S.L.D. (decided March 28, 1978) such supplemental time would not count towards tenure. Kuboski tells us that "The limited aspect of supplemental instruction does not include nor are those persons invloved in such duties and responsibilities concerned with curriculum, planning and development, comprehensive lesson planning, reporting in written and oral form to parents, ordering supplies, maintenance of pupil records, assigned duties other than for those specifically contracted, etc." However, the Court finds that all of this was performed by petitioner.

It is asserted by respondent that since petitioner ended her Title I school year with the end of the Title I program on June 16, 1976 while other school programs ended two days later on June 18, 1976, a "break" occurred, which disrupted her tenure accrual. The court disagrees. A break in the chain is applicable where the "break" occurred voluntarily on the part of the teacher. Schulz v. State Board of Education, supra; Solomon v. Board of Education of the Princeton Regional School District - Commissioner of Education decision 77, S.L.D. 650. A voluntary termination on the part of petitioner did not occur here.

Much testimony was received regarding the definition of the word "curriculum". The court finds petitioner met her responsibility in the "development, planning, utilization and implementation of the school program" as stated in respondent's "Position Analysis" (P-7) regarding Curriculum Development.

Therefore, based on a review of the entire record in this matter, **THE COURT CONCLUDES** that the petitioner, Constance Anderson, held a tenured status as a teaching staff member in the school district of the City of Summit, in June, 1979 and that she could not be removed from the position except in the manner prescribed by N.J.S.A. 18A:6-11. The **COURT ORDERS** that petitioner Anderson be reinstated to her teaching position forthwith and be given all salary and other benefits which were rightfully due her from February 26, 1979 to the present time.

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

OAL DKT NO. EDU 2625-79

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

February 28, 1980
DATE

Carl Berman
JACK BERMAN, A.L.J.

Receipt Acknowledged:

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

sm

CONSTANCE ANDERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law, Honorable Jack Berman, A.L.J.

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

Respondent argues that Point Pleasant Beach, supra, contains the controlling legal principles. In that case the Commissioner concluded that Title I teachers who were steadily employed were entitled to tenure and the emoluments therewith. The State Board of Education overturned the Commissioner and was upheld by the New Jersey Superior Court. The Court maintained that the nature and conditions of employment determined how teachers were to be categorized and whether or not they were regular teachers entitled by law to be treated in the same manner as all other teaching staff members.

Respondent argues further that petitioner has, at most, only part-time tenure since the first six months of her employment with respondent were of that nature.

Petitioner disagrees with respondent's interpretation of Point Pleasant Beach, supra, claiming that, on the contrary, Point Pleasant Beach and Kuboski, supra, are both supportive of the philosophy that significant differences exist between supplemental education teachers and professional teaching staff members entrusted with the prime responsibility for classroom instruction, and that they should be treated differently.

Petitioner avers that the facts of the instant case are distinguishable from Point Pleasant Beach, supra, and that petitioner's employment clearly passes the Kuboski test entitling petitioner to be designated as a "teaching staff member" in the fullest sense of the term with all the rights and privileges thereof, including tenure.

The Commissioner agrees with petitioner. Judge Berman discovered that petitioner was indeed steadily and regularly employed; that she performed all the duties of a full-time teacher even though within the framework of a shortened day; and that her assignment involved class instruction, not one-on-one tutoring. The Commissioner agrees with Judge Berman's findings and adopts them as his own. Petitioner's service as a teaching staff member from February 18, 1976 to June 16, 1976 is creditable toward N.J.S.A. 18A:28-5.

Accordingly, the Commissioner determines that petitioner held a tenured status as a teaching staff member in the school district of the City of Summit in June, 1979 and was entitled to the protection prescribed in N.J.S.A. 18A:6-11. The Commissioner further confirms the order of Judge Berman that petitioner be reinstated to her position forthwith and that she be given all salary and other benefits which were rightfully due her from February 26, 1979 to the present time mitigated by petitioner's earnings, if any, during the time of litigation.

COMMISSIONER OF EDUCATION

April 30, 1980

CONSTANCE ANDERSON,	:	
PETITIONER-APPELLEE,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, April 30, 1980

For the Petitioner-Appellee, Drummond & Owren (Gilbert E. Owren, Esq., of Counsel)

For the Respondent-Appellant, McCarter & English (Dean J. Paranicas, Esq., of Counsel)

This case presents again the question whether a teacher employed under Title I of the Elementary and Secondary Education Act, 20 U.S.C.A. § 236 et seq., is a "teaching staff member" for the purpose of accruing tenure during service in such employment. On the facts as reviewed in the initial decision of the Administrative Law Judge, the Commissioner has held in favor of the teacher.

The leading decision which now governs is Point Pleasant Beach Teachers Association v. Callam, 173 N.J. Super. 11 (App. Div. 1980), certif. denied, ___N.J.___ (June 12, 1980). In determining that the Title I teachers in Point Pleasant Beach were not teaching staff members within the meaning of the tenure statutes, the Appellate Division laid down the controlling principle as follows (173 N.J. Super. at page 17):

> "Whether a professional employee of a board of education qualifies as a teaching staff member eligible for tenure depends upon the nature of the employment tendered and accepted. This determination can only be made after an examination of the terms, conditions and duties of the employment and a consideration of the conduct of the parties."

The facts of greatest significance to the court in Point Pleasant Beach were that the petitioners were hired annually without written contract, for a period less than the full school year, as needed, and with pay on an hourly basis; that their continued employment was contingent on Federal funding of the Title I Program; and that accordingly the program required "a flexibility in operation which would be impeded if its instructors were granted tenure". The court quoted with approval that portion of the opinion of the State Board of Education wherein it stated:

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

The instant case is not free from difficulty because, as the Commissioner observed, petitioner's employment has much in common as with that of a regular staff member. She performed many duties similar to those of a full-time teacher even though within the framework of a shortened day, and her assignment involved the instruction of small classes rather than one-on-one tutoring. Nevertheless, we have concluded that those elements in the petitioner's situation did not suffice to take her out of the category of the temporarily employed who do not accrue tenure.

Petitioner herself testified that she contacted the Assistant Superintendent of Schools because she had heard that the Board was thinking of starting a Title I Program in the Lincoln School; that she then met with him to discuss the position and its requirements, whereupon they reached a verbal understanding that the job was hers from February until June; and that in due course the Board of Education employed Petitioner and two other persons "as part-time supplemental teachers in the extended kindergarten program" at the rate of $7.00 per hour. The Assistant Superintendent confirmed the

appointment in a letter to Petitioner wherein he stated:

> "This letter confirms your employment as a part-time teacher in the Title I Program in the Lincoln School at an hourly rate of $7.00. It is anticipated that this program will be in operation until near the end of the school year, probably until June 4th or June 11th".

Petitioner did not receive the benefits accorded to the Board's regular teachers, such as pension, health care and sick leave; she did not sign a teacher's contract; she was paid for 3-1/2 hours employment per day upon submission of monthly time sheets showing her hours worked. The Assistant Superintendent further testified that is was unclear how long the Title funds would be available for this particular program and when it would end. All of these facts plainly establish, in our opinion, that Petitioner's employment as a Title I teacher was clearly understood to be temporary, thus bringing her within the purview of the Point Pleasant Beach decision. Because her continued employment as a supplemental teacher was contingent upon Federal funding of the Title I Program, the Board must be allowed the "flexibility in operation" which the Appellate Division referred to as above noted.

The Commissioner's decision herein is reversed and count one of the Petition is dismissed.

Attorney exceptions are noted.

Katherine Neuberger and Robert Wolfenbarger opposed in the matter.

December 3, 1980

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN RE:	)	INITIAL DECISION
JUDY SCHULTZ V.	)	
BOARD OF EDUCATION OF THE	)	
TOWN OF BLOOMFIELD	)	
	)	**OAL DKT. NO. EDU 3081-79**
	)	AGENCY DKT. NO. 305-7/79A

APPEARANCES:

SHELDON PINCUS, Esq.,
for Petitioner, Judy Schultz

JOHN A. ERRICO, Esq.,
for Respondent, Board of Education of the Town of Bloomfield.

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 transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on November 20, 1979, the following issues were identified:

1. Was the respondent, Board of Education of the Town of Bloomfield, arbitrary, capricious and/or unreasonable in denying petitioner's request to use her accumulated sick days from June 4, 1979 to the end of the school year for maternity leave of absence?

2. Is petitioner barred from any recovery because of her alleged failure to provide proper medical proof to respondent?

3. With respect to respondent's counter-claim, is respondent entitled to repayment from petitioner for eleven days salary for May, 1979?

4. Is petitioner and/or respondent entitled to be awarded interest?

This matter was heard before the Court on January 24, 1980 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. During the hearing, the following exhibits were admitted into evidence:

1. J-1, Letter dated February 21, 1979 from Judith E. Schultz to Mr. R. Morris, Superintendent of Schools.

2. J-2, Letter dated March 1, 1979 from Robert E. Morris to Judith E. Schultz.

3. J-3, Letter dated March 10, 1979 from Judith E. Schultz to Mr. Robert Morris.

4. J-4, Letter dated April 6, 1979 from Robert E. Morris to Judith E. Schultz.

5. J-5, Letter dated April 10, 1979 from Judith E. Schultz to Robert Morris.

6. J-6, Letter dated April 12, 1979 from Judith E. Schultz to Mrs. B. Ferguson.

7. J-7A, Letter dated April 25, 1979 from Judith E. Schultz to Mr. Robert Morris.

8. J-7B, Certificate dated April 24, 1979 from Dr. Eugene Ginsburg, addressed to To Whom It May Concern.

9. J-8, Letter dated May 25, 1979 from Robert E. Morris to Mrs. Judith Schultz.

10. J-9, Letter dated June 5, 1979 from Robert E. Morris to Mrs. Judith Schultz.

11. J-10, Letter dated June 6, 1979 from Robert E. Morris to Mrs. Judith Schultz.

12. J-11, Letter dated June 7, 1979 from Mrs. Judith E. Schultz to Mr. Robert Morris.

13. J-12, Letter dated June 28, 1979 from Robert E. Morris to Mrs. Judith Schultz.

14. P-1, Letter dated June 8, 1979 from Dr. Euguene Ginsburg to Robert E. Morris.

15. R-1, Letter dated March 14, 1979 from Doctor Sylvan J. Hershey to Mr. Robert E. Morris.

16. R-2, Record of Employee's Absence form dated May 7, 1979, signed by Judith E. Schultz.

17. R-3, Agreement between the Bloomfield Board of Education and the Bloomfield Education Association for 1977/78 and 1978/79.

At the hearing, Judith Schultz testified on behalf of petitioner and Robert E. Morris and Robert Pellegrino testified on behalf of respondent. This Court requested the submission of post hearing briefs by March 4, 1980 on which date the hearing was deemed to be concluded. (See Proposed Uniform Administrative Rules of Practice 19:65-16.1).

Additionally, the following stipulations were made at the prehearing conference:

1. Petitioner was a tenured teacher in May, 1979.

2. Petitioner had sufficient accumulated sick leave days to cover her period of absent time in May and June due to her disability.

3. On June 4, 1979 petitioner gave birth to her child.

4. Dr. Eugene Ginsburg's certificate dated June 8, 1979 was submitted to and received by respondent.

5. The letter dated May 25, 1979 from the Superintendent of Schools to petitioner shall be admitted into evidence at the time of hearing without further formal proof. (See J-8).

6. Respondent granted petitioner a maternity leave of absence without pay for the school year 1979/80.

Judith Schultz, a kindergarten teacher for the Bloomfield Board of Education during the 1978/79 school year, became pregnant and expected to give birth on or about May 22, 1979. It was her desire to take advantage of the two year maternity leave of absence set forth in the agreement between the Bloomfield Board of Education and the Bloomfield Education Association for 1977/78 and 1978/79. (R-3). Section 18 E. of the agreement states:

> "Maternity leave will be granted in accordance with applicable New Jersey law. Consistent with the foregoing, leave will be granted for up to one (1) year with an extension, upon request, for up to one (1) additional year with the exact duration of the leave to be contingent upon date of application so that teacher will return from leave at the start of a school year, i.e., September."

After carefully considering how best to accomplish this, Judith Schultz finally determined to use her accumulated sick days both in May, 1979, before the birth of the baby on June 4, 1979, and in June, after the birth of the baby until the end of the school year. Her attempts to utilize such accumulated sick days are detailed in correspondence between herself and Mr. Morris, Superintendent of Schools. Most of the facts set forth in the correspondence are uncontroverted. Respondent views the correspondence as not providing it with sufficient medical proof for the period of time before and after the birth of petitioner's baby to entitle her to use her accumulated sick days.

The relevant correspondence between petitioner and respondent shall be set forth, in pertinent part, as follows:

1. "...February 21, 1979

Dear Mr. Morris:

At this time I would like to request a maternity leave as of May 22, 1979. ...

Sincerely,
s/Judith E. Schultz" (J-1)

2. "...March 1, 1979

Dear Mrs. Schultz:

...Will you please have your physician send me a letter indicating that your health will permit you to continue to work until May 22, 1979. This letter should also indicate the expected date of delivery of your child.

Will you also send me another letter indicating the termination date of the leave you are requesting.

Sincerely yours,

s/ Robert E. Morris." (J-2)

3. "...March 10, 1979

Dear Mr. Morris:

I am writing to indicate the termination date of the maternity leave I recently requested.

I would like to request a leave beginning September, 1979 to June, 1980. ...

Sincerely,

s/Judith E. Schultz..."(J-3)

4. "April 6, 1979...

Dear Mrs. Schultz:

Thank you for submitting your physician's certification indicating that you will be able to continue working until May 22, 1979.

Your letter of March 10, 1979 requests a leave beginning September, 1979 to June, 1980. The maternity leave policy provides for a leave of absence for a period of up to one year with an extension upon request of up to one additional year, with the exact duration to be contingent upon the date of application so that the teacher will return from leave at the start of a school year, i.e., September. This being the case, your initial leave can only be granted for a period of up to one year. It would seem that your initial leave then could be from May 22, 1979 until June 30, 1979, at which time you would then request an extension from September 1, 1979 to June 30, 1980.

Will you please send me another note in order to clarify the matter for our files and for Board action. ...

Sincerely yours,

s/Robert E. Morris" (J-4)

5. "April 10, 1979 ...

Dear Mr. Morris:

I am writing this note in order to clarify my previous note regarding my maternity leave.

I would like to request a maternity leave beginning May 22, 1979 through June 30, 1979. ...

Sincerely,

s/Judith E. Schultz" (J-5)

6. "April 12, 1979 ...

Dear Mrs. Ferguson:

In regard to our telephone conversation today, I would like to request that my second letter about my date of maternity leave be held rather than be sent to the Board for approval. I will call for an appointment with Mr. Morris following our vacation, as you recommended. ...

Sincerely,

s/Judith E. Schultz" (J-6)

7. "April 25, 1979 ...

Dear Mr. Morris:

As I discussed with you at our meeting today, I am trying to find a workable solution to a disturbing situation.

I am expecting my baby on May 22, 1979. When I sent in my request for a maternity leave I assumed that I would be able to receive a total of two years. However, I was told that I may apply for my intitial maternity leave from May 22, 1979 to June 30, 1979. I then could request a one year extension from Sept. 1979, through June, 1980. (A total of 1 year, 1 month).

This was upsetting to me for several reasons. My job is very important to me. I have thoroughly enjoyed my teaching experience in Bloomfield. Also, I would like to be

able to stay home with my baby for at least two years before returning to work.

With these facts in mind, I would like your permission to do the following in order to obtain a full two year maternity leave. My baby is due May 22. Following the birth of my baby, I would like to use my sick days for about four weeks in order to sufficiently recover. (Please see attached note from my doctor). I would like to then complete the remaining days of school. ...

By completing this school year I would like to then request an initial maternity leave for next year (Sept., 1979 -June 1980) and an extension for the following year (Sept. 1980 - June 1981). This would give me a total of two years. ...

Sincerely,

s/Judith E. Schultz" (J-7A)

8. "April 24, 1979

TO WHOM IT MAY CONCERN:

Mrs. Judith Schultz, a prenatal patient here with an expected due date of May 22, 1979, should be able to return to work four weeks after the birth of her child.

s/Eugene Ginsburg, M.D." (J- 7B)

9. "May 25, 1979 ...

Dear Mrs. Schultz:

This is in response to your letter of April 25, 1979 and our subsequent telephone conversation of May 16, 1979. In your letter, you indicate that you wish to use sick days to cover your absence from duty. In order for the Board of Education to consider your request, it will be necessary for your physician to certify to the following:

1. The actual date when the claimed disability or illness started.

2. The nature of the illness or disability.

3. Whether such illness or disability prevented you from performing your duties as a teacher on the claimed dates.

4. The treatment prescribed for the claimed illness or disability.

5. The exact date of the termination of such illness or disability, and when, in his opinion, you will be able to return to your teaching position.

At this time, it is difficult for me to have the Board consider the other request made in your letter. These requests will have to be discussed at a later date in light of the circumstances then existing.

Please, therefore, secure a certificate or letter from your physician answering the above and forward it to me so that I may present it to the Board of Education.

Sincerely yours,

s/Robert E. Morris" (J-8)

10. "June 5, 1979 ...

Dear Mrs. Schultz:

...We are trying to make final staffing plans for September. You originally began corresponding with me concerning a maternity leave of absence back in February, 1979. I have had several letters from you since that time with various proposals.

It will be necessary to hear from you on or about June 12, 1979, concerning a definite request for a maternity leave of absence for next year.

Sincerely yours,

s/Robert E. Morris" (J-9)

11. "June 6, 1979...

Dear Mrs. Schultz:

A review of our absence reports for the month of May indicate that you were absent from duty since May 16, 1979. It will be necessary for me to receive the information from your physician which I requested in my letter to you under date of May 25, 1979, as soon as possible. The Board of Education will be unable to properly assess your situation until they receive the required medical certification.

I wish to advise you that any compensation for the month of June will be delayed until the Board of Education has an opportunity to review your physician's report.

Sincerely yours,

s/Robert E. Morris" (J-10)

12. "June 7, 1979...

Dear Mr. Morris:

I would like to exercise my option to utilize my accumulated sick days during my temporary disability (i.e., birth of my baby on June 4, 1979). This will run through the end of this school year.

I wish to begin my maternity leave September, 1979 through June, 1980.

I have submitted your request for information regarding my temporary disability to my physician. It will be forwarded directly to you. If there is any problem, please let me know. ...

Sincerely,

s/Judith E. Schultz" (J-11)

13. "June 28, 1979...

Dear Mrs. Schultz:

This is to advise you that at a special meeting of the Board of Education, held on June 18, 1979, the Board approved of granting you a maternity leave of absence for the period beginning September 1, 1979 and to continue to June 30, 1980.

Your letter of June 7, 1979 indicated that you had submitted a request to your physician to respond to the information requested by the Board of Education in my letter of May 25, 1979. We received a letter from Dr. Ginsburg; however, he did not respond to the specific information requested by us. Consequently, the Board of Education is unable to give your request for the use of sick days for temporary disability any further consideration. ...

Sincerely yours,

s/Robert E. Morris" (J-12)

14. "June 8, 1979...

Dear Mr. Morris:

Mrs. Judy Schultz who delivered on June 4, 1979 should be able to return to work on July 17th. It is accepted medical practice to discourage the return to full-time duty of new mothers prior to a six-week interval.

s/Eugene Ginsburg, M.D." (P-1)

15. "March 14, 1979...

Dear Mr. Morris:

My patient, Mrs. Judith Schultz, has my permission to continue to work until May 22, 1979 which is her expected date of confinement.

Very truly yours,

s/Sylvan J. Hershey, M.D." (R-1)

Mrs. Schultz testified that in May, 1979 she was absent from school because she was having problems with her leg prior to her birth. She was absent from May 16, 1979 through the remainder of the school year. Petitioner indicated that she was never requested to be examined by another doctor on behalf of the Board. Also, petitioner asserted that she requested her own doctor to comply with whatever requests the Board made with regard to her condition.

Robert E. Morris, the Superintendent of Schools, testified that the Board's policy dealing with sick leave is set forth in the agreement between the Bloomfield Board of Education and the Bloomfield Education Association (R-3) in Section 17, which states:

"A. Sick Leave

1. The Board will grant twelve (12) days of sick leave per year to each full-time employee without deduction in pay, such leave being credited as of the first day of the school year. Unused sick leave in any year shall be allowed to accumulate. ...

2. In case of sick leave claimed, the Board may require a physician's certificate to be filed with the Secretary of the Board of Education.

> 3. Sick leave is hereby defined to mean the absence from his or her post of duty, of the employee because of personal disability due to illness or injury, ..." (1)

Mr. Morris testified that the correspondence which he received from petitioner's doctor dated June 8, 1979 (P-1) was not responsive to either his letter of May 25, 1979 or June 6, 1979. (J-8 and J-10). Mr. Morris, additionally, commented that petitioner was absent 15 days in the month of May and was absent the full month of June. According to petitioner's Record of Employee's Absence (R-2), four of the fifteen days were set forth in the document. Those days were May 3, May 4, May 9, and May 10, 1979. The other eleven days of absences were not accounted for on any Board document. Mr. Morris testified that petitioner was wrongfully paid for the entire month of May, for which the Board was claiming a recoupment or credit for 15 days. Petitioner was not paid for the month of June. Mr. Morris reiterated that the doctor's certificate (P-1) was not satisfactory to the Board for it to make a determination with regard to petitioner's use of accumulated sick days.

Robert Pellegrino testified that he was the Principal of Carteret School where petitioner taught during the 1978/79 school year. He asserted that petitioner was absent from school on May 5, May 6, May 9, May 10, 1979 and from May 16, 1979 thereafter. He indicated that the procedure when a teacher was absent was to fill out an absence form when he returned to work. One absence form was filled out for each month and this form would be submitted to the Superintendant at the end of the month. Mr. Pellegrino did not recall petitioner indicating to him that she was unable to work during the month of May.

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(1) Section 17A 3, of the agreement between the Bloomfield Board of Education and the Bloomfield Education Association, which contains the identical language found in N.J.S.A. 18A-30-1 states:

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

Based upon a careful consideration of the aforegoing, including a careful review and study of the pleadings, the prehearing order, the exhibits, the stipulations, the demeanor and credibility of the witnesses, and the inherent probability of their testimony, this court **FINDS:**

1. Petitioner, Judy Schultz was a tenured teacher in May, 1979.

2. Petitioner had sufficient accumulated sick leave days to cover her absent period of time in May and June, 1979 due to her disability.

3. On June 4, 1979 petitioner gave birth to her child.

4. Respondent granted petitioner a maternity leave of absence without pay for the school year 1979/80.

5. Petitioner wanted to take advantage of the two year maternity leave of absence policy set forth in the agreement between the Bloomfield Board of Education and the Bloomfield Education Association for 1977/78 and 1978/79. (R-3).

6. Initially, petitioner requested a maternity leave as of May 22, 1979. (J-1).

7. Petitioner, subsequently, requested a maternity leave to begin September, 1979 to June, 1980. (J-3).

8. In response to a communication from the Superintendent of Schools, petitioner indicated in a letter of April 10, 1979 that she was requesting a maternity leave of absence beginning May 22, 1979 through June 30, 1979. (J-5).

9. On April 25, 1979, in a letter from petitioner to Mr. Morris, petitioner indicated, among other things, that she would like to use her sick days in order to sufficiently recover from the birth of her baby and then receive two full years of maternity leave commencing September, 1979. (J-7A).

10. Petitioner's doctor, Dr. Eugene Ginsburg, in a certificate dated April 24, 1979 stated the following:

"TO WHOM IT MAY CONCERN:

Mrs. Judith Schultz, a prenatal patient here with an expected due date of May 22, 1979,

should be able to return to work four weeks after the birth of her child." (J-7B).

11. On May 25, 1979 Mr. Robert E. Morris wrote to petitioner requesting the following information in order for the Board of Education to consider whether or not petitioner could use her sick days:

"1. The actual date when the claimed disability or illness started.

2. The nature of the illness or disability.

3. Whether such illness or disability prevented you from performing your duties as a teacher on the claimed dates.

4. The treatment prescribed for the claimed illness or disability.

5. The exact date of the termination of such illness or disability, and when, in his opinion, you will be able to return to your teaching position." (J-8)

12. On June 6, 1979 Robert E. Morris wrote to petitioner indicating that she was absent from duty since May 16, 1979 and that it would be necessary for him to receive the information from petitioner's physician requested on May 25, 1979. (J-10).

13. On June 7, 1979 petitioner indicated to Mr. Morris that she desired to use her accumulated sick days during her temporary disability. She also indicated she wished to begin her maternity leave of absence on September, 1979 which would run through June, 1980. (J-11).

14. A certificate by Dr. Eugene Ginsburg dated June 8, 1979 was submitted to Mr. Morris which said:

"Mrs. Judy Schultz who delivered on June 4, 1979 should be able to return to work on July 17th. It is accepted medical practice to discourage the return to full-time duty of new mothers prior to a six-week interval." (P-1).

15. A certificate submitted by Dr. Sylvan J. Hershey dated March 14, 1979 to Mr. Morris states:

"My patient, Mrs. Judith Schultz, has my permision to continue to work until May 22,

1979, which is her expected date of confinement." (R-1).

16. Petitioner was absent fifteen days during the month of May, 1979, four of which were set forth in petitioner's Record of Employee's Absence, namely on May 3, May 4, May 9, and May 10, 1979.

17. Petitioner was absent from May 16, 1979 until the end of the school year.

18. Petitioner claimed that she was absent during the month of May because of problems with her leg brought about by her pregnancy.

19. There is an absence of medical proof to indicate why petitioner was absent during the month of May, 1979.

The New Jersey Supreme Court's affirmation of the decision in Castellano v. Linden Board of Education, 158 N.J. Super. 350 (App. Div. 1978), aff'd 79 N.J. 407 (1979) made abundantly clear that a teacher is entitled to utilize her accumulated sick leave for her absence on account of childbirth. As stated by the Appellate Division at page 361-2:

"...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 and Sons, Inc. v. Div. Against Discrimination, etc. 31 N.J. 514, 524 (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 salutory purpose would not be furthered by excluding pregnancy-related absences merely because the condition may not be an illness by strict definition. In this regard, it is worthy of comment that the Temporary Disability Benefits Law, N.J.S.A. 43:21-29, as amended by L. 1961

> c. 43, in providing compensation for disability resulting from accident or sickness not compensable under the Workers' Compensation Law, deems pregnancy "to be a sickness during the 4 weeks immediately preceeding the expected birth of child and the 4 weeks immediately following the termination of pregnancy," see N.J. Bell Tel. Co. v. Board of Review, 78 N.J. Super. 144. (App. Div. 1963), aff'd 41 N.J. 64 (1963)."

The Court in Castellano, supra, noted with approval the decision of the Commissioner of Education in Board of Edcuation of the Township of Cinnaminson, in the County of Burlington, v. Laurie Silver, 1976 S.L.D. 739, aff'd State Board of Education (April 5, 1979) wherein the Commissioner held that the definition of sick leave found in N.J.S.A. 18A:30-1 embodied within it the condition of pregnancy. In other words, pregnancy is viewed as a 'disability due to illness or injury' which is part of the statutory language found in N.J.S.A. 18A:30-1 which states:

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

Although the law seems to be clear and settled since Castellano, supra, namely, that a pregnant woman may utilize accumulated sick days for her pregnancy, a Board of Education, may, nevertheless, still require that a physician's certificate be filed before one may obtain sick leave. As stated in 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."

In Cinnaminson, supra, at p. 746 the Commissioner of Education discussed the statutory requirement for submitting a physician's certificate pursuant to N.J.S.A. 18A:30-4 and stated:

> "...(t)he Commissioner determines that they must be if, in conformity with the statutory authority (N.J.S.A. 18A:30-4), there is a physician's certificate which specifically attests to the condition as 'disabling' prior to the beginning of the ninth month of pregnancy or after a period of one month following the birth of a child, but that, for the orderly conduct of the schools and the general welfare of employees, a less specific certificate of birth expectancy may suffice in the two month interim."

Applying the reasoning of Cinnaminson, supra, to the instant case, it must be determined whether or not the medical certificates supplied at the request of Judy Schultz satisfied N.J.S.A. 18A:30-4 and the less specific certificate of birth expectancy required within the two month interim. This court is satisfied from J-7B, the certificate from Doctor Ginsburg, which indicates petitioner should be able to return to work four weeks after the birth of her child and from P-1, the certificate of Doctor Ginsburg dated June 8, 1979 which indicates that it is accepted medical practice to discourage the return to full-time duty of new mothers prior to a six-week interval, that petitioner has supplied the Board with a sufficient physician's certificate pursuant to N.J.S.A. 18:30-4 and pursuant to Cinnaminson, supra. Therefore, it is **CONCLUDED**, that petitioner's absence from school during the month of June, following the birth of her baby on June 4, 1979, was due to a disability or illness under N.J.S.A. 18A:30-1 and that petitioner was entitled to use her accumulated sick days for such an absence. Furthermore, petitioner complied with the applicable statute in supplying the Board of Education with a physician's certificate to entitle her to utilize this sick leave.

However, this Court is faced with a problem with regard to petitioner's absence during the month of May, 1979. Petitioner was absent fifteen days during the month of May, eleven of which were unaccounted for. The other four days were accounted for in her Record of Employee's Absence. (R-2). Although Castellano, supra, suggests that one's pregnancy be deemed to be a sickness during the four weeks immediately preceeding the expected birth of the child and the four weeks immediately following the termination of the pregnancy, and although Cinnaminson, supra, suggests that a less specific certificate of birth expectancy be submitted during this two month period, in the instant case, the certificate of Doctor Sylvan Hershey dated March 14, 1979 (R-1) indicates that petitioner could

continue to work until May 22, 1979, the date of her expected confinement. Doctor Hershey's certificate is in conflict with the testimony of Judy Schultz who indicated that she was unable to work during May because she was having problems with her leg arising from her pregnancy. In other words, not only is there an absence of medical evidence indicating that petitioner should not work during the four weeks prior to birth, but there is medical proof indicating, in fact, that petitioner could work up to the date of her birth. If one were to draw an inference that all pregnant women are disabled in the context of N.J.S.A. 18A:30-1 during the four week period of time prior to birth, this inference, in the instant case, is certainly rebutted by the certificate of Doctor Hershey. Apropos, the Board of Education under the existing circumstances, was justified in not paying petitioner for the eleven days that she was absent from work in May without a medical certificate indicating that petitioner's absence was in fact related to her pregnancy.

Therefore, it is **CONCLUDED, AND ORDERED**, as follows:

1. The Board of Education was arbitrary, capricious, and unreasonable in denying petitioner's use of her accumulated sick days from June 4, 1979 to the end of the school year.

2. The respondent was not arbitrary, capricous or unreasonable in not allowing petitioner to use her accumalated sick days for the eleven days during the month of May, 1979.

3. Petitioner did not submit a proper medical certificate pursuant to N.J.S.A. 18A:30-4 and Cinnaminson, supra, which would entitle her to use her accumulated sick days for her eleven days of absence in May, 1979.

4. Petitioner **IS ORDERED** to submit an amended doctor's certificate, within 30 days from the date hereof, indicating, if so, that her absence during May, 1979, was caused by and related to her pregnancy.

5. Upon receipt of the doctor's certificate, the Superintendent of Schools shall take immediate steps to correct its records to indicate that the May absences were for a disability for which petitioner could use her accumulated sick days. Any salary or benefits withheld from petitioner shall be paid forthwith.

6. Upon petitioner's compliance with this Court's aforementioned conclusions within the time period so indicate, respondent's counter-claim shall be dismissed with prejudice. However, if petitioner fails to comply with the submission of a new doctor's certificate within the time period so indicated, the relief sought in respondent's counter-claim shall be granted and respondent shall be entitled to recover a repayment from petitioner constituting eleven days salary for the eleven days that she was absent in May, 1979.

7. The application by both petitioner and respondent for interest is **HEREBY DENIED.** See Barton Lilenfield, v. Board of Education of the Borough of Watchung, Somerset County, 1977 S.L.D. 315, William J. Convery v. Perth Amboy Board of Education and Anthony v. Ceres, Superintendent of Schools, Middlesex County, 1974 S.L.D. 372.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, Fred G. Burke, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

OAL DKT. NO. EDU 3081-79

I HEREBY FILE with **FRED G. BURKE, COMMISSIONER OF EDUCATION** my Initial Decision in this matter and the record in these proceedings.

March 10, 1980
DATE

Robert P. Glickman
ROBERT P. GLICKMAN, A.L.J.

JUDY SCHULTZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Respondent Board excepts to the ruling of Judge Robert P. Glickman that petitioner submit an amended doctor's certificate to explain her eleven day absence from school in May, 1979. The Commissioner agrees. The record is clear that petitioner did not at that time submit any medical certificate to show that her absence was, in fact, related to her pregnancy or any illness. To now permit petitioner to submit a doctor's certificate that her absence of elven days at a time nearly ten months ago was, if so, due to her pregnancy, deprives the Board of the opportunity to confirm or challenge such a retrospective diagnosis by its own medical inspector. That portion of the initial decision is accordingly set aside. Petitioner's exceptions rebut those of the Board and plead for an award of interest on any monies due her. The Commissioner finds no merit in such pleading, there is simply no enabling statutory provision for such awards.

The order by Judge Glickman to petitioner to submit an amended doctor's certificate for her absence in May 1979 is set aside. The Commissioner notes the inadvertent error by the Board in awarding petitioner pay for elven days of unexcused absence. The Commissioner finds such error regrettable and cautions the Board to avoid such procedural mistakes in the future. In this case the Commissioner directs that petitioner forfeit elven days pay by future salary deduction by the Board as best can be determined between parties. The Board's counterclaim is thus affirmed.

The Board is directed to allow petitioner the use of her accumulated sick days from June 4, 1979 to the end of the school year. Any salary or benefits withheld from petitioner shall be paid forthwith.

With the noted modifications the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

JUDY SCHULTZ,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY,

RESPONDENT-CROSS APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 28, 1980

For the Petitioner-Appellant, Goldberg & Simon (Sheldon H. Pincus, Esq., of Counsel)

For the Respondent-Cross Appellant, John A. Errico, Esq.

Again we are called upon to consider what procedures are appropriate when a teaching staff member requests the use of accumulated sick leave in connection with disability due to pregnancy and childbirth. In the companion case of Hynes v. Bloomfield Board of Education, decided today, we have attempted to clarify the existing law on this subject. The principles enunciated in Hynes will be further illustrated by application to the instant controversy.

Here the pertinent facts for our purposes are as follows: Petitioner in February of 1979 requested the Superintendent for a maternity leave as of May 22, 1979, which was the date up to which her physician certified she could continue working. Subsequently Petitioner clarified her request so as to apply for the use of her sick leave from May 22 (the expected date of her delivery) for the ensuing four weeks, followed by maternity leave for the next two school years. On May 25th the Superintendent requested Petitioner to obtain from her physician a certificate stating among other things the actual

date when her claimed disability began and when it terminated. The only certificate supplied by Petitioner in response to that request was one in which her physician stated: "Mrs. Judy Schultz who delivered on June 4, 1979 should be able to return to work on July 17th. It is accepted medical practice to discourage the return to full-time duty of new mothers prior to a 6-week interval." In the meantime, Petitioner was absent from school without leave from May 16, 1979, through the remainder of the school year. She had failed to give proper notice of her absences with respect to 11 days in the month of May subsequent to the 16th.

The Commissioner concluded that the above quoted physician's certificate sufficed to authorize the use of Petitioner's sick leave for the period from her delivery (June 4th) to the end of the school year (June 30th). On the other hand, the Commissioner upheld the Board in refusing to grant Petitioner's use of her sick leave for her 11-day unexcused absence from school in May of 1979. He noted that Petitioner did not at that time submit any medical certificate to show that her absence was in fact related to her pregnancy or any illness.

In our view the Commissioner rules correctly in ordering payment of the post-natal sick leave, denying the pre-natal claim, denying interest on the amount due Petitioner, and directing recoupment by the Board of the 11 days of salary inadvertently paid for the unexcused May absences. Applying the principles enunciated in our decision in Hynes, supra, Petitioner was entitled to a presumption of disability for one month following her actual date of delivery and a similar presumption for one month prior to expected birth date. By her own actions, however, Petitioner rebutted her presumption of pre-natal disability before May 16 by working until that date, and by submitting a doctor's certificate that she could continue working May 22. If on or before May 16

Petitioner had furnished a new physician's certificate of disability as of that date and had duly notified the administration of the commencement of her sick leave, she would have been entitled to sick pay from that point until delivery occurred. By failing to follow these procedures, Petitioner forfeited her right to be paid for her days of unexcused absence during May 1979. We agree with the Commissioner that to allow Petitioner at this late date to submit a doctor's certificate of pre-natal disability would not merely deprive the Board of the opportunity to challenge such a retrospective diagnosis.

For the foregoing reasons, the decision of the Commissioner herein is affirmed.

December 3, 1980

Date of Mailing 12/5/80

IN THE MATTER OF THE TENURE :
HEARING OF BETTY NACHT, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF ELIZABETH, UNION COUNTY. :
:

For the Complainant Board, O'Brien, Liotta & Mandel
(Raymond D. O'Brien, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld
(Nancy Iris Oxfeld, Attorney at Law, of Counsel)

The Board of Education of the City of Elizabeth, hereinafter "Board," certified four charges to the Commissioner of Education on August 1, 1978, against respondent, a tenured teaching staff member in its employ, pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. By resolution of the Board dated July 13, 1978, respondent was suspended with pay effective September 1, 1978, pending a determination of the charges which the Board avers are sufficient, if true in fact, to warrant dismissal or reduction in salary. Respondent denies all charges against her.

A hearing in this matter was held by a hearing examiner appointed by the Commissioner at the office of the Union County Superintendent of Schools, Westfield, on November 14 and 15, 1978. The report of the hearing examiner is as follows:

The charges against respondent herein are founded in a series of incidents occurring in the 1977-78 school year during which respondent was a teacher of English as a Second Language in School 13. The charges will be considered seriatim.

CHARGE NO. 1

Use of physical force in disciplining students in her classroom.

A fellow teaching staff member, a teacher of bilingual children in School 13 whose class was taught one hour per day by respondent, testified that he had on at least three occasions seen respondent use physical force upon pupils for the purpose of discipline. These incidents included placing pupils in their seats, pulling a pupil across his desk in order to take candy from him and striking a pupil on the head with a paperback book. (Tr. I-10-12) Subsequently, the teacher made this known to the principal in a letter dated May 17, 1978. (P-2) The principal testified to conversations he had had with respondent during the

course of the 1977-78 school year on the subject of physically touching pupils. He testified that she said to him that she really was not sure on all occasions whether she had or had not touched pupils and that she may have touched them in anger, but that the anger was not directed at the pupils. (Tr. II-122)

The Board introduced a letter to the Superintendent of Schools from the mother of a pupil, "J.M.," dated May 18, 1978 in which the parent complained that J.M. had been caused to fall on the classroom floor from his chair by respondent. (P-1) The hearing examiner admitted the letter into the record but notices that neither the parent nor the pupil was called as a witness in this matter and that the contents of the letter deal solely with what the pupil related to his mother about the alleged incident. The Board also introduced a letter dated May 10, 1978 in which three parents complained to the Superintendent of physical abuse of their children while in respondent's class. (P-4) The hearing examiner again notices that neither the parents nor their children were called as witnesses in this matter.

Respondent generally denies having physical contact with pupils but does admit to removing candy from the hand of one pupil by force and to physically placing pupils in seats or in a corner of the room for purposes of discipline. (Tr. II-4-9, 21-27) Respondent could not recall if she had acted in anger. (Tr. II-27)

The Commissioner addressed the issue of excessive use of physical force upon pupils In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, 1969 S.L.D. 159, aff'd State Board of Education 1970 S.L.D. 448, aff'd Docket No. A-539-70 New Jersey Superior Court, Appellate Division, March 14, 1972 (1972 S.L.D. 662) as follows:

> "***Thus, when teachers resort 'to unnecessary and inappropriate physical contact with those in their charge [they] must expect to face dismissal or other severe penalty.' In the Matter of the Tenure Hearing of Frederick L. Ostergren [1966 S.L.D. 185, 187]***" (at 173)

Finding the testimony of respondent's fellow teaching staff member and principal clear and credible, the hearing examiner finds it to be true in fact that respondent inappropriately did use physical force upon pupils in her charge contrary to the provisions of N.J.S.A. 18A:6-1.

CHARGE NO. 2

Conduct unbecoming a teacher in use of improper language in relationship with other staff members.

The evidence offered by the Board in support of this charge consists of the testimony of a fellow teaching staff member as to personally, sexually explicit conversations conducted by respondent primarily with him but also in the presence of other teaching staff members in various teachers' rooms or lounges in School 13. (Tr. I-24-26) In response to the question, "Did any of her language offend you?" posed by the Board's counsel, the witness answered, "I don't think the language per se was offensive." (Tr. I-26)

Respondent testified that she was "not aware" of ever discussing her sex life with the fellow teacher. (Tr. II-4)

The hearing examiner is not convinced that a sufficient weight of evidence has been presented to support the charge and recommends that the Commissioner dismiss Charge No. 2.

CHARGE NO. 3

Conduct unbecoming a teacher in pilfering lunches assigned to pupils in the classroom.

The testimony of a lunchroom aide adduced at the hearing reveals the following facts:

Hot lunches for pupils were delivered to classrooms, including that of respondent, at approximately 11:00 a.m. daily. These lunches, boxed and wrapped in metal foil, were placed in the back of each room in a number equal to the daily attendance. At approximately 11:30 a.m. the aides would return with a container of cold milk for each pupil and commence service of the meal. (Tr. I-67-69) On occasions in the 1978-79 school year, the number of lunches in the room to which respondent was assigned diminished between 11:00 a.m. and 11:30 a.m. and respondent admitted to the aide that she had taken the missing lunches. (Tr. I-72) The aide, through her teacher in charge, made the principal aware of the problem.

The principal testified that he had on more than one occasion spoken to respondent about taking lunches or parts of lunches intended for pupils, that respondent had admitted doing so and that respondent could not explain her actions. (Tr. I-116)

Testimony of respondent in this area is less than clear. In response to a direct question from her counsel whether she had eaten parts of pupils' lunches on a specific day, respondent replied in the negative. When asked if the incident had been discussed by her and the principal, respondent replied affirmatively and when asked what he said to her, her response was as follows:

> "He said to me in view of your past performance is it possible that you could have done it without even realizing it, and I said it was possible. I just didn't really know any more what was going on or not going on."
> (Tr. II-10-11)

In the judgment of the hearing examiner, the clear weight of evidence relevant to Charge No. 3 lies against respondent. The hearing examiner finds the charge to be true in fact.

CHARGE NO. 4

Developing an atmosphere of threat and fear unbecoming classroom procedure.

Extensive testimony was adduced at the hearing from two of respondent's fellow teaching staff members and principal concerning the behavior of pupils before and after their daily one-hour sessions with respondent. Additionally, parole and documentary evidence was admitted attesting to concerns of parents of children in respondent's classes that their children were afraid to go to school because of respondent's treatment of those children while in her charge. (Tr. I-7-8, 14, 19-21, 27, 40-46, 53, 99-105, 109-110; II-47-48, 56, 60; P-4) The teaching staff members advanced their concerns in this regard to the principal in writing on May 17, 1978. (P-2-3) The principal had already communicated to the Superintendent his concerns about respondent's relationship to her pupils in a letter dated April 7, 1978. (P-6)

Respondent denies that she instilled fear in her pupils or created a less than wholesome atmosphere in her classes. (Tr. II-20)

Thus, the hearing examiner is faced with a degree of contradiction that can best be resolved through an assessment of the credibility of the respective witnesses.

In this regard, the hearing examiner gives greater weight to the testimony of respondent's fellow teaching staff members and principal. Their demeanor while under examination was that of professional educators concerned about the welfare of pupils in their charge. Their recounting of incidents wherein pupils in contact with respondent were upset and exhibited apprehension was clear and detailed yet unembellished. Their testimony regarding parental concerns voiced to them is credible and is buttressed by documentary evidence. (P-1, 4)

Accordingly, the hearing examiner finds it to be true, in fact, that respondent created an atmosphere of fear and threat in her classes and that such behavior constitutes conduct unbecoming a teacher.

In summation, the hearing examiner finds it is true in fact that:

1. Respondent inappropriately did use physical force in disciplining pupils in her classroom contrary to the provisions of N.J.S.A. 18A:6-1. (Charge No. 1)

2. Respondent exhibited conduct unbecoming a teacher in pilfering lunches assigned to pupils in the classroom. (Charge No. 3)

3. Respondent did create an atmosphere of threat and fear in her classroom and such behavior constitutes conduct unbecoming a teacher. (Charge No. 4)

The hearing examiner leaves to the Commissioner the determination of an appropriate penalty.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in this matter, including the hearing examiner report and the exceptions thereto filed on behalf of respondent.

Respondent disputes the conclusion reached by the hearing examiner that she used excessive force to discipline pupils. Respondent contends that her version of the incidents in question is more believable than the testimony of her fellow teachers which contradicted it. However, where conflicting evidence is offered on any issue and there is sufficient evidence contained in the record to reasonably support the findings made, the Commissioner will defer to the judgment of the hearing examiner on questions of credibility. Since he had the opportunity to hear and observe the witnesses, he was in a better position to assess credibility. Cf., Close v. Kordulak Bros., 44 N.J. 589, 599 (1965); Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976). The hearing examiner in this case accepted the testimony of Stephen Williams, the bilingual teacher who provided regular instruction to one group of pupils receiving ESL instruction from respondent. The hearing examiner's decision to assign full credibility to Williams' account of several incidents he had directly observed is unassailable. (Tr.I-9-21 to 12-8) So, too, is the hearer's decision to believe Williams' version of events to which he was not a witness. Williams' daily interaction with the elementary school pupils involved enabled him to make an astute assessment of the veracity of pupil reports concerning other incidents that had occurred immediately prior to his entering the classroom. Tr.I-12-10 to 14-20. Williams' testimony was buttressed by the testimony of Diane DiDonato, also a bilingual teacher whose elementary school pupils received one hour of ESL instruction daily from respondent and complained to her regularly. She received 6 or 7 complaints a day (Tr.I-93-24 to 94-2) about physical abuse suffered during that period. (Tr.I-93-3 to 98-7) The principal, Michael Cohn, also testified to receiving repeated reports of physical abuse by respondent. He testified that it was his practice in the course of investigating particular reports, to speak to individual pupils and the teacher involved. He indicated that while he did not automatically accept a pupil's version of the events where it diverged from the teacher's account, when reports concerning respondent became frequent and different pupils complained of similar incidents, the credibility of the teacher was necessarily called into question. (Tr.I-128-10 to 20)

Based upon the cumulative evidence presented in this case, the same credibility judgment was made by the hearing examiner here, and the Commissioner finds no reason to disturb it.

Respondent further excepts to the finding that she pilfered pupil lunches, arguing that, at most, she may be faulted for consuming portions of meals. Even if this infraction represented the sum total of her misconduct on this charge - which it

does not (see testimony of lunchroom aide, Tr.I-72-7 to 8, and principal, Tr.I-115-2 to 18) - the Commissioner can hardly conclude that partially consuming a lunch and then leaving the remainder for an unsuspecting pupil is even remotely within the bounds of acceptable behavior. The Commissioner is repulsed by it and dismisses this exception as well.

Thirdly, respondent disputes the finding that she created an atmosphere of fear and threat in the classroom, insofar as this finding is based upon the testimony of teachers reporting comments and complaints made to them by the children in respondent's ESL classes. While reports of pupils so testified to constitute hearsay, the testimony is nevertheless reliable where corroborated by the teachers' first hand observation of their respective pupils' behavior both preceding and following the one hour session with respondent. Both Williams and DiDonato testified that pupils inquired on a daily basis whether or not respondent would be teaching them. When the answer was no, the students would applaud; if yes, they would be very upset and some would demonstrate displeasure by moaning and sulking. (Tr.I-7-3 to 23, 19-23 to 20-1, 100-14 to 17) When respondent entered the room, pupils became unruly, throwing their books on the floor. (Tr.I-7-25 to 8-3) When the regular teacher returned at the end of the hour, pupils were frequently upset, crying or withdrawn, putting their heads on their desks and refusing to eat lunch. (Tr.I-19-13 to 17, 43-4 to 9, 93-3 to 94-2) DiDonato's pupils begged her to remain in the room with them during respondent's class, complaining that respondent yelled at them and made them nervous. (Tr.I-99-17 to 100-9) The lunchroom aide observed the same reaction. (Tr.I-75-2 to 20)

Even without relying upon the reported complaints of pupils and the teachers' observations of the effect upon pupils respondent had, however, the charge that respondent created an atmosphere of fear and threat in the classroom was established by the testimony of the principal. He testified that when he dropped in on respondent's class he witnessed her screaming at the children (Tr.I-135-6 to 8) and he detected anger in her voice to which the children reacted negatively, in that they were crying and insecure, complaining of stomach aches and other anxiety symptoms. (Tr.I-126-15 to 127-24) He concluded from his personal observation that an atmosphere of fear and threat was present because of the anger. (Tr.I-128-24 to 129-2) He observed that the resulting tension in the room was not present when the regular teachers were teaching these two groups of children. (Tr.I-159-23 to 161-6) In light of the volume of non-hearsay testimony available to establish the charge that respondent created an atmosphere of fear and threat, the Commissioner finds the third exception to be without merit.

All three charges of unbecoming conduct found by the hearing examiner to be true are therefore established and the Commissioner embraces in full the hearing examiner report. However, there remains to be decided the question of appropriate sanction.

Respondent argues that the penalty of removal is too severe. The Commissioner disagrees. Teachers shoulder a heavy responsibility in the discharge of their duties to provide New Jersey's public school children with a constitutionally adequate and rewarding educational experience. The Commissioner reiterates the observation he made In the Matter of the Tenure Hearing of Jacque L. Sammons, Black Horse Pike Regional School District, 1972 S.L.D. 302, 321:

> "***[Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self restraint and controlled behavior rarely requisite to other types of employment***" (Emphasis added.)

The degree of self restraint essential to the satisfactory discharge of a teacher's professional responsibility has simply not been exercised by respondent herein. While a single departure from the standard of conduct expected of her may have been condoned, here the evidence disclosed recurrent incidents of the use of excessive physical force to discipline pupils and persistent exposure of pupils to fear and intimidation in the classroom, all involving elementary school pupils and all occurring over a substantial period of time. Coupled with respondent's exceedingly unattractive behavior with respect to pupil lunches, again on several occasions, respondent's behavior over the course of the 1977-78 school year constitutes gross misconduct and demonstrates respondent's unfitness to hold a teaching position. 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); In the Matter of the Tenure Hearing of Fred J. Gaus III, Chester Township School District, 1979 S.L.D. _____ (decided June 6, 1979), rev'd State Board of Education March 5, 1980; In the Matter of the Tenure Hearing of John I. Gavlick, City of Burlington School District, 1977 S.L.D. 524.

For the foregoing reasons and those articulated by the hearing examiner, the Commissioner orders that respondent be dismissed from her employment with the School District of the City of Elizabeth as of the date of her suspension.

COMMISSIONER OF EDUCATION

May 5, 1980

SALVATORE W. SALERNO, GORDON MAYES AND KENNETH WATERS,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Lordi & Imperial
(George D. Lordi, Esq., of Counsel)

For the Respondent, Cecil J. Banks
(Marvin W. Wyche, Esq., of Counsel)

Petitioners, tenured teachers in the employ of the Board of Education of the City of Newark, hereinafter "Board," allege that each has gained tenure as a principal in the school system pursuant to the N.J.S.A. 18A:28-5 and 28-6. Petitioners allege that as tenured principals they should be compensated on an eleven month schedule and that the Board's action in abolishing their administrative positions with subsequent transfer to teaching positions was illegal and improper.

The Board denies that petitioners acquired a tenure status as principals and avers that its action in abolishing their administrative positions and their subsequent transfer to teaching positions with appropriate salaries was a legal and proper action.

A hearing in this matter was conducted on March 14 and April 14, 1978 at the office of the Union County Superintendent of Schools, Westfield, and August 31 and October 18, 1978 at the office of the Morris County Superintendent of Schools, Morris Plains, before a hearing examiner appointed by the Commissioner of Education. Several exhibits were admitted in evidence and Briefs were filed subsequent to the hearing. The report of the hearing examiner is as follows:

The relevant stipulated facts in this matter are as follows:

Petitioners have tenure in the system as teachers and, additionally, Salvatore W. Salerno has tenure as supervisor of the mathematics department at West Side High School. Mr. Salerno was certified as a secondary school principal and supervisor of mathematics on January 12, 1966. (P-2) Mr. Mayes obtained emergency certification as a principal valid from October 1972

until July 1974 when he received his permanent certificate. (Tr. II-60-61) Mr. Waters obtained emergency certification as a principal in October 1972 which expired in July 1973 and was not thereafter renewed. Because troubled conditions existed at West Side High School, the Board, on March 1, 1972, adopted a new administrative structure at the high school called the West Side Plan, hereinafter "Plan," with a Governing Body, hereinafter "Body," consisting of teachers, faculty members and pupils. (P-7) The Board established extra compensation for the chairman of the Body at $300 per month with the other two associates to receive $200 per month extra compensation. (P-6) The Board appointed Petitioner Mayes as chairman of the Body, with Petitioner Waters and Salerno appointed as associates.

It was determined on June 26, 1972 that the chairmanship be rotated yearly among the chairman and the two associates. (P-8) During the period of existence of the Plan, Theresa David, Assistant Superintendent in charge of secondary education, was named by the Board as the legal principal of West Side High School. (P-7) The Plan existed for about three years and four months and was abolished by the Board on June 24, 1975, as were petitioners' administrative positions. They were subsequently transferred to teaching positions in the system with a decrease in salary by the amount previously given to each petitioner as additional compensation at the initiation of the Plan.

The inosculated testimony of the three petitioners as they allege their salient functions to have been in the Plan may be set down succintly as follows:

1. Petitioners' administrative team established the policy at West Side High School. (Tr. II-63)

2. Every phase of school administration was carried out by the administrative team. (Tr. II-63-64; III-64)

3. Each petitioner was responsible for the performance of all duties of a secondary school principal. (Tr. II-58)

4. Each petitioner was involved in every facet of school administration. (Tr. I-28)

5. The team made all decisions concerning the operation of West Side High School, except for emergency situations, by vote with the majority ruling. (Tr. I-32-33; II-67; III-65-67)

6. The duties of the designated chairman were the same as the duties of the associate members of the team. (Tr. I-32; II-58-59, 68; III-67)

Seymour B. Farber, a vice-principal at Malcolm X Shabazz High School in Newark and a vice-principal at West Side High School at the inception of the Plan testified that the troika of Salerno, Mayes and Waters acted as principal at West Side High School during the operation of the Plan. (Tr. IV-10)

Benjamin Katz, at the time of the Plan chairman of the science department at West Side High School but retired as of June 30, 1978, testified that "***as far as I was concerned, these three gentlemen [petitioners] were acting as the principals and were running the school." (Tr. IV-27)

James Martin, who at the time of the Plan held the position of teacher to assist at West Side High School and is presently vice-principal at East Side High School, testified that the three petitioners acted as the Principal of West Side High during the life of the Plan. (Tr. IV-41)

Joseph P. McElroy, who at the time of the Plan was chairman of the English department at West Side High School and is presently chairman of the English department at Weequahic High School, testified that he felt petitioners comprised a team that made up an equivalent to the principalship. (Tr. IV-52)

The hearing examiner observes that the testimony of all witnesses essentially corroborated the fact that, during the life of the Plan, Theresa David visited West Side High School infrequently, estimates varying from very rarely (Tr. IV-27) to three times a year. (Tr. IV-51-52)

The Board called no witnesses and its Motion to Dismiss at this juncture was denied.

Petitioners argue that each of them exercised all the duties involved in a position as principal of a high school, individually and in concert as an administrative team performing the following duties:

1. The daily operation of West Side High School. (Tr. I-32)

2. The establishment of academic policy at West Side High School. (Tr. II-63)

3. The running of faculty meetings. (Tr. I-28)

4. Setting up and conducting assemblies. (Tr. I-28)

5. The observation and evaluation of teachers. (Tr. II-18)

6. The establishment of school policy in terms of staff, students and administrative goals. (Tr. II-63)

7. The establishment of budgets. (Tr. II-63)

8. The development of new programs for the school. (Tr. II-63)

9. Handling suspensions and transfers. (Tr. II-63)

10. Attendance at principals' meetings, including the county principals' association meetings. (Tr. II-64)

11. Attendance at PTA meetings. (Tr. II-64)

12. Preparation of leadership plans. (Tr. III-76)

(Petitioners' Brief, at p. 9)

Petitioners state that their testimony concerning their duties was not refuted at the hearing. They rely on Arthur L. Page v. Board of Education of the City of Trenton et al., 1975 S.L.D. 644, aff'd State Board of Education 1976 S.L.D. 1158 and Elizabeth Boeshore v. Board of Education of the Township of North Bergen, County, 1974 S.L.D. 805.

Petitioners allege that they have satisfied the precise conditions to acquire tenure. Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962), cert. den. 371 U.S. 956 (1963)

The hearing examiner sets down the governing statutes, N.J.S.A. 18A:28-5 and 28-6, as follows:

N.J.S.A. 18A:28-5 :

> "The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, *** 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;
>
> provided that the time in which such teaching staff member has been employed as such in the district in which he was employed at the end of the academic year immediately preceding July 1, 1962, shall be counted in determining such period or periods of employment in that district or under that board but no such teaching staff member shall obtain tenure prior to July 1, 1964 in any position in any district or under any board of education other than as a teacher, principal, assistant superintendent or superintendent***."

N.J.S.A. 18A:28-6 applies to the acquisition of tenure upon promotion or transfer and reads as follows:

> "Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of three consecutive academic years, for the equivalent of more than two academic years;

> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion."

The Board argues that the Plan was experimental in nature thus limiting petitioners' expectations of tenure in any such impermanent program. The Board contends that it recognized only Theresa David as principal, not petitioners, stating further that the Newark Teachers Union did not recognize petitioners as principals. (Board's Brief, at pp. 2-3) The Board argues further that it never intended to create more than an experimental program which was to be continued or dissolved based upon existing conditions at any given time. (Board's Brief, at p. 5) The Board denies the approbation of Page, supra, and Boeshore, supra, and relies on Herbert J. Buehler v. Board of Education of the Township of Ocean, 1970 S.L.D. 436, aff'd State Board of Education 1971 S.L.D. 660, aff'd New Jersey Superior Court, Appellate Division, 1972 S.L.D. 664 and Lilian Reed et al. v. Board of Education of Trenton, 1938 S.L.D. 437 (1917), rev'd State Board of Education 439. The Board states that as in Reed, (at 440) a common sense view of this matter must be taken which could determine that petitioners' claims are without merit. (Board's Brief, at pp. 14-15)

The hearing examiner finds no merit in the Board's argument that the Plan was experimental in nature thus denying those serving in the Plan the expectation of tenure. The record does not show that the time served by teachers under the Plan did not count toward tenure for each classroom teacher. The hearing examiner notes that if indeed the term "experimental" as applied to a program within the public schools of New Jersey were to set aside the provisions of N.J.S.A. 18A:28-5 such a device could be exercised by a board to deny tenure to any teaching staff member. The Board argues that the Newark Teachers Union did not recognize petitioners as principals. The hearing examiner finds no merit in such argument finding that the avowed and expressed beliefs of a teachers' union are not law and are not binding on any board of education per se.

There can be no argument that the Board declared Theresa David the legal principal of West Side High School at the inception of the Plan, nor can there be any argument to dispute that very troubled conditions existed at the school. The Board denies that petitioners were, in effect, acting as principal of the school, pointing to Miss David as the named principal. The hearing examiner observes that unrefuted testimony established Miss David's visits to West Side High School during the existence of the Plan, at most, as three times a year. (Tr. IV-51-52) The hearing examiner finds it impossible to conceive that such infrequency of visits by Miss David could be considered to fill the daily administrative needs and duties of the principalship of the distressed high school. Although Miss David was named the legal principal of West Side High School by the Board, she did not act as such and took little, if any, part in the monumental problems of pupils, programs, and personnel existing on a daily and recurring basis in the troubled school. The hearing examiner finds that petitioners met these needs, dictated by such trying conditions, as the functional principal of West Side High School, albeit as a troika, while the Plan existed. Page, supra

Because of this tripartite role the hearing examiner must now turn his attention to each individual petitioner. The hearing examiner finds that Salvatore W. Salerno was fully certified as a high school principal prior to his appointment in the Plan and, having served the requisite time under N.J.S.A. 18A:28-6 as a functional principal of West Side High School, has gained tenure and seniority rights as a high school principal.

The hearing examiner finds that Gordon Mayes obtained an emergency certificate as a high school principal in October 1972, and in July 1974 received his permanent certificate as high school principal. The hearing examiner determines that Mr. Mayes served the requisite time under N.J.S.A. 18A:28-6 as a functional principal of West Side High School and has gained tenure and seniority rights as a high school principal. Joann K'Burg v. Board of Education of the Township of Lower Alloways Creek, 1973 S.L.D. 636

The hearing examiner finds that Kenneth Waters held an emergency certificate from October 1972 to July 1973 which was not thereafter renewed for reasons not stated in the record. The hearing examiner determines that Petitioner Waters' employment by the Board as a member of the Plan embraced a total period of time more than sufficient to have earned him entitlement to a tenured status as a high school principal if all other requirements of the statutes have been met. N.J.S.A. 18A:28-5 and 28-6. However, the statutory mandate in this regard also requires that petitioners must possess an "appropriate" certificate which the Commissioner has defined as either a "provisional" or a "standard" certificate issued by the State Board of Examiners. Robert Anson et al. v. Board of Education of the City of Bridgeton, 1972 S.L.D. 638 The hearing examiner determines that Kenneth Waters did not hold an appropriate certificate to acquire

tenure and seniority rights as a high school principal. Even assuming, arguendo, that Mr. Waters had held an emergency certificate for the entire period of employment by the Board as a member of the Plan, he could not have acquired either tenure or seniority rights. Anson supra; N.J.A.C. 6:3-1.10(d) The hearing examiner recommends that the Commissioner dismiss Mr. Waters' Petition.

The hearing examiner recommends that the Commissioner determine that Petitioners Salerno and Mayes have acquired tenure as principals with the Board and have seniority rights within the system. He further recommends that the Commissioner determine that they may not be removed from their positions except in the manner outlined in the statute, N.J.S.A. 18A:28-1 et seq., and rules of the State Board of Education, N.J.A.C. 6, and that the Commissioner direct the Board to compensate them commensurate with such findings on a retroactive basis to June 24, 1975.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in this matter, including the hearing examiner report, to which neither party has filed exceptions. The hearing examiner concluded that those petitioners holding standard principal certificates as of June 1975 became tenured as principals by virtue of their service as members of the team assigned in March 1972 by respondent Newark Board of Education to administer the district's troubled West Side High School. The Commissioner agrees.

Although the positions held by petitioners did not correspond precisely either in title or structure to the traditional principal model, it is not the external formalities of a position but the duties actually performed that determine the category of employment. N.J.A.C. 6:3-1.10(f) provides:

> "Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with duties performed and not by title. Whenever the title of any employment shall not be found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed."

Guided by this provision when the question of appropriate certification needed for the administrative positions held by petitioners was considered, the County Superintendent of Schools for Essex County determined that, as all petitioners were performing the duties required under principal certification, each should hold a standard principal certificate. (See Exhibit J attached to Petition of Appeal.) And, as the exhibits (most notably P-7, P-9 and P-10 in evidence) and the testimony (summarized at pp. 5-6 of the hearing examiner report) disclose, petitioners were both collectively and individually responsible for all the duties traditionally assigned to the position of principal. Hence, pursuant to N.J.A.C. 6:3-1.10(f), the position held by petitioners was properly classified as that of principal, a category of employment expressly covered by the tenure laws. N.J.S.A. 18A:28-5 et seq.

In view of this, the decision in Page v. Trenton Board of Education, 1975 S.L.D. 644, aff'd 1976 S.L.D. 1158 dictates that where petitioners performed the duties of principal for the statutory period required for tenure under the operative provision, here N.J.S.A. 18A:28-6, and where they hold standard certification as principals, their service is properly characterized as that of principals, affording them the full protection of the tenure laws.

As Petitioners Salerno and Mayes fulfilled all the condition prerequisite to tenure, they are entitled to that status and hence to the relief prayed for herein. As Petitioner Waters did not hold standard certification at the time the administrative position in which he claims tenure was discontinued, the hearing examiner correctly determined that he is not eligible for tenure under the teaching of Joann K'Burg v. Lower Alloways Creek Board of Education, 1973 S.L.D. 636. Accordingly, the Commissioner embraces the conclusions reached by the hearing examiner and adopts as his own the hearing examiner report in its entirety.

COMMISSIONER OF EDUCATION

May 5, 1980

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 WASHINGTON ST.
NEWARK, NEW JERSEY 07102
(201) 648-6186

IN THE MATTER OF THE TENURE HEARING OF DAVID BRODY, SCHOOL DISTRICT OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY

INITIAL DECISION

OAL DKT. NO. E.D.U. 3503-79
AGENCY DKT. NO. 300-7/79A

APPEARANCES:

Stanley Turitz, Esq., Attorney for Petitioner, the School District of Elmwood Park, Bergen County

Theodore M. Simon, Esq., Attorney for the Respondent, David Brody

BEFORE THE HONORABLE JACK BERMAN, A.L.J.:

On June 5, 1979, written charges were filed with the Board's secretary against Mr. David Brody (respondent), a teacher in the Elmwood Park School System, by Joseph T. Heffernan, Acting Superintendent concerning actions on the part of the respondent on May 23, 1979 in not properly performing his duties. Mr. Heffernan considered the respondent's actions as being insubordinate and his conduct unbecoming a professional teacher. On July 18, 1979, the Board of Education of Elmwood Park (petitioner) found that probable cause existed to evidence the charges brought against respondent and that same warranted a dismissal or reduction of salary.

On August 17, 1979, an Answer was submitted by Theodore M. Simon, Esq., attorney for respondent.

This matter was then transmitted to the Office of Administrative Law for a hearing pursuant to the provisions of N.J.S.A. 52:14F-1 et seq.

On November 27, 1979 a pre-hearing order was issued wherein the following were determined to be the issues to be resolved at the hearing:

a. Did respondent's conduct on May 23, 1979, constitute conduct unbecoming a teacher;

(1) If so, what would be the appropriate punishment?

b. Did the Board of Education follow proper procedures in certifying tenure charges against the respondent?

Pursuant to the pre-hearing order, the burden of proof on both issues were placed upon the petitioner.

A hearing was held on January 29, 1980 pursuant to the provisions of N.J.S.A. 52:14F-1 et seq at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey, 07102. At the hearing, the following exhibits were received in evidence.

JOINT EXHIBITS

J-3 Closed Minutes of the Board of Education of Tuesday, June 5, 1979.

J-5 Letter dated June 8, 1979 to Mr. David Brody from Charles A. Bartlett, Board Secretary. Attached to the letter is an Affidavit of Joseph T. Heffernan sworn to June 4, 1979, attached to it is a memorandum on the stationary of Gilbert Avenue School dated May 23, 1979 to Mr. J. Heffernan, Acting Superintendent, from Mr. A. Maccia, Principal and a letter on the stationary of the Office of the Acting Superintendent of Schools, dated June 6, 1979, to Mr. Charles A. Bartlett, Board Secretary from Joseph T. Heffernan, Acting Superintendent.

J-6 Correspondence from the law firm of Goldberg & Simon to Charles A. Bartlett, Board Secretary, consisting of two pages dated June 18, 1979.

J-7 Letter on the stationary of Bartlett and Turitz, dated June 20, 1979 to Theodore M. Simon, Esq.,

J-8 Letter on the stationary of Bartlett and Turitz dated June 29, 1979 to Theodore M. Simon, Esq., signed Charles A. Bartlett.

J-9 Letter on the stationary of Goldberg & Simon dated July 3, 1979 to Charles A. Bartlett, Esq., signed Theodore M. Simon.

J-10 Special meeting of the Elmwood Park Board of Education of the Borough of Elmwood Park, New Jersey, dated July 18, 1979.

J-11 Closed Minutes of the Board of Education of July 18, 1979 consisting of two pages.

J-12 Correspondence dated July 20, 1979 to Mr. David Brody from Charles A. Bartlett, Board Secretary. Attached thereto is an Affidavit of Joseph T. Heffernan sworn to June 4, 1979 and attached to the affidavit is a Memorandum on the stationary of Gilbert Avenue School dated May 23, 1979 to Mr. J. Heffernan, Acting Superintendent from Mr. A. Maccia, Principal and a Memorandum on the stationary of the Office of the Acting Superintendent of Schools dated June 6, 1979 to Mr. Charles A. Bartlett, Board Secretary, from Joseph T. Heffernan, Acting Superintendent and a Two page Resolution dated July 18, 1979 signed by Charles A. Bartlett, Board Secretary.

J-13 Letter dated July 20, 1979 to Mr. Fred G. Burke Commissioner of Education. Attached thereto is Affadavit of Joseph Heffernan, and Exhibit 1-A, which is a Memorandum to J. Heffernan from A. Maccia, consisting of two pages and a Memorandum from the Office of the Acting Superintendent of Schools dated June 6, 1979 and a Two page Resolution dated July 18, 1979, signed Charles A. Bartlett, Board Secretary.

J-14 Contract between the Elmwood Park Board of Education with the Elmwood Park Education Association consisting of 26 pages.

PETITIONER'S EXHIBIT

P-1 Memorandum on the stationary of Gilbert Avenue School dated May 23, 1979 to Mr. J. Heffernan, Acting Superintendent from Mr. A. Maccia, principal, re incident with Mr. D. Brody, on Wednesday, May 23, 1979, consisting of two pages.

RESPONDENT'S EXHIBITS

R-1 Memorandum on the stationary of the Office of the Superintendent of Schools dated May 29, 1979 to Board members from Joseph T. Heffernan, Acting Superintendent.

R-2 Note from Vincent J. Giardino, M.D. dated May 24, 1979

The following witnesses testified:

For Petitioner: Alexander R. Maccia
Elementary School Principal
Gilbert Avenue School

Mr. Joseph Heffernan
Acting Superintendent of Schools

Mr. Charles A. Bartlett
Board Secretary
School District of the Borough of
Elmwood Park, Bergen County

For Respondent: David Brody, Respondent

Mr. Alexander R. Maccia, the principal of the Gilbert Avenue Elementary School testified for petitioner. He reported that on May 23, 1979, around 8:55 a.m. he had directed respondent to assist in supervising the children who had arrived in the gymnasium of the Gilbert School. Respondent was on the telephone at the time, approximately 60 to 70 feet from him down the corridor when he asked respondent in a loud voice to assist him with the children in the gymnasium. Respondent replied that "he had completed his assignment and was not going to do anything extra". Again this witness asked respondent for his assistance in the gym. The respondent again refused and walked to the boiler room near where he maintained his office. This witness followed him. The respondent told him "there's going to be fire around here", which Mr. Maccia did not construe to be a physical fire.

Mr. Maccia was not aware of any grievance that respondent filed pertaining to the May 23rd incident. After the incident in the boiler room he tried to reach Mr. Heffernan, who was then the acting superintendent of schools. Mr. Heffernan was not in. He left a message for Mr. Heffernan to call him. Subsequently, he made a written report to Mr. Heffernan (P-1). Around 9:15 a.m. the respondent came to Mr. Maccia's office and was asked by him to wait for the arrival of Mr. Heffernan. The respondent refused and went downstairs. When Mr. Heffernan arrived he and Mr. Maccia went to the gymnasium to meet with respondent. Mr. Heffernan asked respondent what had occurred. Respondent admitted to Mr. Heffernan that Mr. Maccia had wanted him to supervise the children in the gymnasium. Mr. Heffernan explained to respondent that Mr. Maccia had the right to order him to help supervise the children in the gymnasium and if he disagreed with that order, he could take appropriate grievance steps.

From 8:45 to 9:00 a.m. each day all teachers are subject to assignment and emergency calls. Assignments are posted listing all teachers' responsibilities each day during this period of time for the entire year.

This witness was not aware of anything bothering the respondent that day that accounted for the alleged insubordination. Later in the day, Mr. Maccia was informed by respondent that respondent had been notified the previous day that he was not going to receive an increment and was quite disturbed in that regard. Respondent's counsel at this point, requested that the court take judicial notice of an Initial Decision dated November 28, 1979 by the Honorable Ward R. Young, Administrative Law Judge, regarding the same parties pertaining to a withholding of an increment from respondent. According to respondent's attorney, that decision reversed the School Board's determination to withhold an increment from respondent.

It was this witness' opinion that an appropriate punishment in this matter would be suspension without pay for an appropriate period of time.

Joseph Heffernan, Acting Superintendent of Schools on May 23, 1979, the date on which the alleged incident occurred, testified next. He investigated the incident on May 23, 1979 and spoke to respondent. Respondent told him that Mr. Maccia had been picking on him and had been harrassing him. He suggested to the respondent that he go home, have a cup of coffee, talk to his wife and try to relax and to calm down. As a result of his investigation, he recommended to the Board of Education that respondent be charged with insubordination.

Charles A. Bartlett, the Board's secretary, for the School District of the Borough of Elmwood Park, was the final witness to testify for petitioner. Through him, various documents that had been submitted into evidence were explained concerning the Board's procedure that had been followed in the bringing of the tenure charges against respondent.

At the conclusion of this testimony, the Petitioner rested.

A motion was made by respondent to dismiss on the grounds that the petitioner failed to prove a prima facie case. The motion was denied.

David Brody, the respondent, testified on his own behalf. He is a physical education teacher and has taught for the Elmwood Park Schools for 10 years. On May 23, 1979, while at the Gilbert Avenue School, at approximately 8:57 a.m. he was telephoning his doctor, Dr. Giardino. Respondent explained to the court that he had had an accident on or about May 17, 1979 having been hit in the ribs with a baseball bat. He was calling Dr. Giardino to let him know that he was in pain and wanted the doctor's advice. He never reached the doctor because as the phone was ringing, he heard Mr. Maccia screaming at him from the other end of the hall, asking him where he was supposed to be. He replied that he had just finished supervising the cafeteria and he was not supposed to be anywhere. Mr. Maccia told him to supervise the gym. Respondent replied he had already done his assignment and thus disregarded Mr. Maccia's directive. The reason he replied in the manner he did, was that he was experiencing severe pain and was anxious to contact his doctor. He also stated that on May 22, 1979 he had received a letter from the Board of Education informing him that the Board of Education voted to take away his increment on a recommendation made by Mr. Maccia. Consequently he hadn't slept that night. If not for these disturbances, he would have complied with Mr. Maccia's directive.

He met with Mr. Heffernan around 9:35 a.m. of May 23, 1979 and told him he was upset. Mr. Heffernan suggested that he have a cup of coffee and go home, even have a drink, relax and speak to his wife. Respondent went home and returned to school approximately 1:00 p.m. and apologized to Mr. Maccia.

On May 24, 1979, he went to Dr. Giardino and obtained a note from him (R-2), which states in relevant part, "this is to certify that David Brody is under my care for the following: May 24, 1979, 1:00 office, severely bruised right rib, return to work June 4, 1979".

At the conclusion of this testimony, respondent rested.

A review of the exhibits reveals that petitioner followed the proper procedures in certifying the tenure charges against respondent.

Therefore, based on a review of the entire record in this matter, the COURT FINDS:

1. Respondent, by failing to comply with the directive of principal Alexander R. Maccia, on May 23, 1979, committed an insubordinate act.

2. Respondent is a tenured employee.

3. Petitioner, the Board of Education, followed proper procedures in certifying tenure charges against respondent.

Respondent admitted that he failed to follow the directive given to him by principal Alexander R. Maccia on May 23, 1979. He explains that the reason he failed to do so was based on physical discomfort that he experienced on that day and his disturbance with not receiving an increment from petitioner. He further asserts that Mr. Maccia had been harrassing him. The court does not feel that respondent's actions of May 23, 1979 were properly excusable.

A teacher has a responsibility at all times to exercise mature, sound professional judgment requiring "a degree of self-restraint and controlled behavior rarely requisite to other types of employment". In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, Camden County, 1972 SLD 302. This responsibility is never abated. It is constant. Personal problems, no matter how vexatious, does not lessen this responsibility. Fortunately no harm resulted to any person as a result of petitioner's failure but the potential for serious harm to occur was present at the time.

Petitioner is to be reprimanded for his immature, unprofessional and disobedient response to his superior.

It is therefore CONCLUDED that petitioner on May 23, 1979 committed an act of insubordination constituting conduct unbecoming a teacher. It is HEREBY ORDERED that this decision be filed in petitioner's personnel file as a warning that any further act of insubordination and/or conduct unbecoming a teacher committed by him, may result in his dismissal or in his receiving a reduction of salary in accordance with N.J.S.A. 18A:6-10.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

March 9, 1980
DATE

Jack Berman
JACK BERMAN, A.L.J.

IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID BRODY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF ELMWOOD PARK,	:	
BERGEN COUNTY.	:	
	:	

The Commissioner has reviewed the salient facts and testimony adduced in the matter controverted herein including the initial determination of Judge Jack Berman, A.L.J.

The Commissioner also notes that no exceptions were filed by either party pursuant to N.J.A.C. 6:24-1.17(b).

The conclusion of Judge Berman that respondent committed an act of insubordination after receiving a lawful order from a superior is, in the view of the Commissioner, obviously correct. The Commissioner adopts it as his own.

The penalty imposed on respondent is warranted and fair. It fits the level of offense in that it is a warning of more serious repercussions should such an unprofessional act recur. Accordingly, the Commissioner orders that a copy of this decision be placed permanently in respondent's personnel file so long as he is employed in Elmwood Park as a teaching staff member.

By so doing the Commissioner hopes that this action will serve as a reminder to respondent and others that unlawful acts, no matter when or where they occur, which rise to the level of unbecoming conduct, will not go unpunished.

COMMISSIONER OF EDUCATION

May 6, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN RE:	INITIAL DECISION
FREDERICK REIMER, JR., DANIEL BORSTAND, AND HARALD HARVEY, Petitioners, V. BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL IN THE COUNTY OF SUSSEX, A. PAUL VERCHOT, INDIVIDUALLY AND AS BOARD PRESIDENT, JOSEPH DOUGHERTY, INDIVIDUALLY AND AS BOARD VICE PRESIDENT, GLADYS VANDERBECK, A MEMBER OF THE BOARD, JEAN REDMOND, A MEMBER OF THE BOARD, AND ROSEMARY MANN, de facto MEMBER OF THE BOARD, Respondents	OAL DKT.NO. EDU 856-80 AGENCY DKT.NO. 9-1/80A

APPEARANCES:

Harald Harvey, Pro Se, Petitioner

Frederick Reimer, Pro Se, Petitioner

Dr. George Wilson, Superintendent, Amicus Curie

Emanuel A. Honig, Esq., Amicus Curie

BEFORE THE HONORABLE ROBERT P. GLICKMAN, A.L.J.:

This matter comes before the Court by way of petition filed on January 11, 1980 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. An answer was filed with the Commissioner of Education on February 14, 1980. This matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On or about February 21, 1980 petitioners filed, among other things, a motion for Summary Judgment or Summary Decision pursuant to N.J.A.C. 6:24-1.16, Proposed Uniform Administrative Rules of Practice 19:65-13.1 et seq. and the guidelines embodied in New Jersey Court Rule 4:46-1 et seq. This Court has carefully reviewed and considered the petition and answer, the affidavit of Frederick Reimer, Jr., his brief and the minutes of the Board of Education of the Vocational School in the County of Sussex, attached to petitioner's moving papers. Additionally, this Court has considered the letter submitted by Rosemary Mann, dated March 18, 1980 and admitted into evidence as C-1. Because there seems to be no facts in dispute, this Court feels that this matter is ripe for Summary Decision.

The issue facing this Court is whether or not the appointment of Rosemary Mann to a Board vacancy pursuant to N.J.S.A. 18A:12-15 was illegal and therefore null and void because of a lack of a legal quorum at the time of the appointment?

The uncontroverted facts, which this Court adopts as its Findings of Fact are as follows:

1. On December 20, 1979 at the Board of Education meeting of the Sussex County Vocational School the following Board members were present as revealed by the roll call vote:

   Mr. Dougherty, Mr. Harvey, Mrs. Redmond, Mr. Reimer, Mrs. Vanderbeck and Mr. Verchot.

2. Upon being advised that a vacant board seat would be filled, Mr. Harvey and Mr. Reimer absented themselves from the meeting.

3. Emanuel Honig, Esq., Board Attorney, advised the president of the board that the absence of Mr. Harvey and Mr. Reimer would result in the lack of a quorum. Mr. Verchot, disregarding the advice of counsel, called for a roll call vote on the appointment of Mrs. Rosemary Mann, whose appointment was nominated by Mrs. Redmond and seconded by Mrs. Vanderbeck.

4. The nomination of Mrs. Mann received the following votes:

   Mrs. Dougherty - yes
   Mr. Harvey - did not respond
   Mrs. Redmond - yes
   Mr. Reimer - did not respond
   Mr. Vanderbeck - yes
   Mr. Verchot - yes

5. President Verchot declared that the motion to appoint Mrs. Rosemary Mann passed and congratulated Mrs. Rosemary Mann on being elected to the Board of Education.

6. When board members Reimer and Harvey absented themselves from the December 20, 1979 meeting, only four members of the nine member board were present at the time of the vote.

7. On December 21, 1979 a letter signed by Frank L. McChesney, board secretary, addressed to Dr. Dale Reinhardt, Sussex County Superintendent and all board members stated the following:

"On Tuesday, December 20, 1979, the Board of Education of the Vocational School in the County of Sussex voted with four members present to appoint a new board member.

I have been advied by Mr. Paul Verchot, Board President, that he has declared said item null and void due to a statutory conflict. Therefore, although the action shall be recorded in our minutes, said action shall not take effect."

8. On December 28, 1979 Paul Verchot, board president, sent a memorandum to all board members with regard to the letter dated December 21,1979. The memorandum states the following:

"Please be advised that the County Superintendent has been instructed to disregard the letter of December 21, 1979 declaring null and void the appointment of a new board member. Because the board counsellor has advised that the chairman is presumptively correct and because the chairman of the board is the sole judge of the quorum and because the chairman did declare that there was a quorum and because the decision was not challenged by any board member, the action taken by the board was proper and Mrs. Rosemary Mann will take her place on the board as soon as possible.

I have directed Mr. McChesney to give the required oath for school board members to Mrs. Rosemary Mann and said oath was given on December 28, 1979 at 11:20 a.m. in the presence of Mr. Verchot, Dr. Wilson and Mrs. Lambrecht, ..."

9. Mrs. Mann has sat on the board since being sworn in and has participated in board business during its regular meetings, including January 8, 1980 and January 15, 1980. (See board minutes of January 8, 1980 and January 15, 1980).

10. On March 18, a letter of resignation was submitted by Rosemary Mann to Paul Verchot, which resignation has not yet been accepted by the Board. Additionally, the resignation does not make moot the issues raised in the Petition.

The Commissioner of Education on other occasions has had the opportunity to set forth in detail the applicable law dealing with the issue of what constitutes a quorum for the legal transaction of board business. A comprehensive decision dealing with this issue was written in the case of Eric H. Beckhusen, Joseph L. Keefe, Harry W. McDowell and John J. Sprowls, M.D. v. Board of Education of the City of Rahway and Lewis R. Rizzo, Union County, 1973 S.L.D. 167. In Beckhusen, supra, the Commissioner specifically dealt with the narrow issue of whether the presence of four members of a normally nine-member Board of Education constituted a quorum for the legal transaction of the board business. Quoting from the case of State ex. Rel. Cadmus v. Farr, 18 Vroom 208 (47 N.J.L. 208 (Sup. Ct. 1885), that Court pointed out at page 216 that, in regard to the transaction of business by municipal corporations:

> "...the legislative intent was to require a specified majority in certain cases. In other cases, in respect to which no rule was prescribed, it is clear the intent was to leave them to the general rule governing the action of corporate bodies.
>
> "The general rule, in the absence of specific provision is well settled, and is that when the body empowered to act consists of a definite number of individuals, a majority of that number will constitute a quorum for the transaction of business, and when duly met a majority of the quorum may act. The rule was thus stated in McDermott v. Miller, 16 Vroom 251, and in State v. Paterson, 6 Vroom 190 and rests on a long line of authority from which I find no dissent...."

The common law rule regarding a quorum is set forth in Ross v. Miller, 115 N.J.L. 61 (Sup. Ct. 1935) as follows at p. 63:

> "...At common law, a majority of all the members of a municipal governing body constituted a quorum; and in the event of a vacancy a quorum consisted of a majority of the remaining members...
>
> And it was likewise the rule at common law that a majority of a quorum was empowered to fill a vacancy or take any other action within its proper sphere..."

As stated further in Beckhusen, supra, at p. 176:

> "In the instant matter, the board is constituted to have the definite number of nine members; therefore a quorum to transact business must be composed of no less than five members, and the Commissioner so holds.
>
> Because the statutory provision, N.J.S.A. 18A:12-15, insures that each local Board of Education shall consist of a quorum of the full membership under all circumstances, the common law rule that a quorum shall consist of a majority of the occupied seats, as stated in Ross v. Miller, supra, does not apply..."

As stated additionally, in Sandra Robinson v. Board of Education of the Township of Quinton, Salem County 1973 S.L.D. 257,259:

> "In the instant matter, the board is constituted to have the definite number of nine members; therefore a quorum to transact business must be composed of no less than five members..."

Applying the clear law set forth by the Commissioner in Beckhusen, supra, and Robinson, supra, it is without question that the Board of Education of the Vocational School in the County of Sussex, which is a nine member board, required a quorum of five members in order to appoint Rosemary Mann to the vacant position. As stated in Beckhusen, supra, at p. 176, which case is almost exactly on point with the instant matter:

> "...The commissioner does not agree that Reinsmith, supra, controls in the instant matter. In this instance, both petitioners, Sprowls and McDowell actually departed not only from the table, but from the meeting room and did not return thereafter. Their expressed intention to act thusly is clearly stated in the record before the commissioner. At this point in time when these two petitioners physically departed from the board meeting, the number of members present was reduced from six to four, thus resulting in the lack of a quorum, and the commissioner so holds."

Thus, in the instant case, the departure of Mr. Reimer and Mr. Harvey from the meeting as in Beckhusen, supra, reduced the number of members present from six to four, and thus resulted in the lack of a quorum.

It is thus CONCLUDED, that the appointment of Rosemary Mann to fill a board vacancy was illegal because of the lack of a quorum. It is further CONCLUDED that her appointment be and is hereby deemed to be null and void. Since the appointment of Rosemary Mann was illegal, it is further CONCLUDED that the seat heretofore held by her on the board be and is hereby deemed to be vacant.

Additionally, it is CONCLUDED that Rosemary Mann was a de facto member of the Board of Education of the Vocational School in the County of Sussex since her appointment and up to today. "A de facto school officer is one who has entered into the possession of a school office and assumed to exercise the functions thereof by virtue of an apparent election or appointment which is illegal or irregular." 78 Corpus Juris Secundum, Section 133, p.876. It is well settled that the facts of a board of education are valid and binding during the period of time a member unlawfully sat. Or, putting it another way, it is well established that the acts of a de facto officer are valid and may not be challenged and set aside on the grounds that he did not hold title de jure. See Clare M. Eagan and Basil H. Blair v. Joseph G. Brady, Robert W. Braid, Donald H. Denight, Edward T. Hamilton and Albert Mann 1970 S.L.D. 153.

For the foregoing reasons, it is ORDERED that the appointment of Rosemary Mann to fill the vacancy on the Board of Education of the Vocational School in the County of Sussex be and is hereby set aside and declared null and void. It is further ORDERED that said seat heretofore held by Rosemary Mann be and is hereby declared vacant.

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

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

March 20, 1980
DATE

Robert P. Glickman
ROBERT P. GLICKMAN, A.L.J.

Receipt Acknowledged:

FREDERICK REIMER, JR., DANIEL BORSTAD AND HARALD HARVEY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SUSSEX COUNTY VOCATIONAL SCHOOL ET AL., SUSSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law and observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

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

The appointment of Rosemary Mann to fill a board vacancy was and is illegal and, accordingly, that seat held by her is declared vacant to be filled pursuant to N.J.S.A. 18A:12-15(a).

It is so directed.

COMMISSIONER OF EDUCATION

May 8, 1980

PISCATAWAY TOWNSHIP EDUCATION ASSOCIATION AND ROSETTA DONELICK,	:	
PETITIONERS-CROSS APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 26, 1980

For the Petitioners-Cross Appellants, Mandel, Wysoker, Sherman, Glassner & Weingartner, (Jack Wysoker, Esq., of Counsel)

For the Respondent-Appellant, Rubin, Lerner & Rubin (David B. Rubin, Esq., of Counsel)

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

October 1, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

RALPH DEL PIANO,	)	
	)	
PETITIONER,	)	INITIAL DECISION
	)	AGENCY DOCKET NO. 316-9/78
V.	)	
	)	
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	)	
	)	
RESPONDENT.	)	

APPEARANCES:

For Petitioner, Philip Feintuch, Esq., of Counsel and on the Brief

For Respondent, William A. Massa, Esq.
(Louis Serterides, Esq., of Counsel and on the Brief)

BEFORE THE HONORABLE DANIEL B. MC KEOWN, ALJ

DOCUMENTS IN EVIDENCE

J-1	Memorandum dated December 28, 1977
P-1	Evaluation of petitioner, February 15, 1977
P-2	Evaluation of petitioner, March 15, 1977
P-2A	Evaluation Summary of petitioner, July 16, 1977
P-3	Evaluation of petitioner, December 22, 1977
P-4	Evaluation of petitioner, March 21, 1978
P-5	Letter dated April 28, 1978
P-6	Memorandum dated April 27, 1978

Petitioner, who has acquired tenure as a teacher and as an assistant principal in the employ of the Board of Education of the City of Jersey City, (Board) challenges as contrary to law the action of the Board by which he was not reemployed as school principal for the 1978-79 year.

The matter, filed before the Commissioner of Education, was brought forward to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. A hearing was conducted in the matter on October 9

and 17, 1979 at the Office of Administrative Law, Newark. The matter was readied for disposition on March 3, 1980 when final Briefs were filed.

The essential historical facts of the matter are these:

Petitioner was initially employed by the Board as a teacher for the 1968-69 academic year. Petitioner continued in that employment with the Board through the completion of the 1972-73 academic year. The Board then appointed petitioner to the position of assistant principal for the 1973-74 academic year in which position he remained through the 1975-76 academic year. The Board then appointed petitioner to the position of principal of its School Number 29 for the 1976-77 academic year. The Board continued petitioner's employment as principal for the 1977-78 academic year.

On or about April 28, 1978 petitioner was notified his employment as principal would not be continued for the 1978-79 academic year. Thereafter, petitioner retained counsel of record who, on petitioner's behalf, requested a statement of reasons why his employment as principal was not to be continued.

The Superintendent of Schools advised counsel, and thus petitioner, by letter dated May 30, 1978 that the reasons for petitioner's nonreemployment as school principal were: (C-1)

> "Based on the evaluations by his immediate supervisor, /then an assistant superintendent who has since been appointed to the position of deputy superintendent/ Mr. Del Piano did not score as well as other non-tenure principals with the exception of /one/. An analysis of Mr. Del Piano's scores indicates fewer excellent scores and generally less growth than would be expected of candidates who (are to be offered tenure).
>
> "In several areas, there were decreases in the evaluation marks during the second year evaluations in the areas of "supervision and evaluates personnel, anticipates pressure situations, assures continuance of curriculum implementation." Decreases were in other areas of the evaluation where inconsistent improvement patterns were noted *** ."

Petitioner requested and was granted by the Board an informal opportunity to be heard so that he may convince it it erred in its determination not to reemploy him as principal. The informal hearing was held June 21, 1978 which was attended by less than a quorum of the Board. Petitioner failed to convince those Board members present that an error was made in his nonreemployment for the Petition of Appeal was filed September 5, 1978.

At a conference held January 11, 1979 counsel to the parties agreed with the then Commissioner's representative that an effective quorum of the Board must provide petitioner an informal opportunity to be heard. An effective quorum of the Board did provide petitioner the opportunity on May 16, 1979 to convince it it erred in its determination not to reemploy him as principal.

Petitioner did not convince the Board it erred for he is not employed by it in the position of principal.

When the matter was brought forward to the Office of Administrative Law as a contested case, a prehearing conference was conducted on August 22, 1979 at which it was stipulated petitioner is employed by the Board as an assistant principal.

Petitioner grounds his allegation that the Board acted contrary to law in its determination not to reemploy him as principal for the 1978-79 academic year for the following reasons:

1. The evaluations of his performance as principal belie the stated reasons given him by the Superintendent for his nonreemployment (C-1, ante);

2. His performance was not evaluated the requisite number of times as required at N.J.S.A. 18A:27-3.1 and at N.J.A.C. 6:3-1.19; and

3. The Board relied solely on the recommendation of the Superintendent and it thereby failed to make its own independent judgment whether to continue his employment.

Each of petitioner's complaints shall be discussed in the order presented.

I

Petitioner's performance as principal was evaluated in writing, on two occasions during 1976-77 (P-1) (P-2) and on two occasions during 1977-78. (P-3 (P-4) Each written evaluation was prepared by Franklin Williams, now the deputy superintendent of schools but who was the assistant superintendent at times material herein.

Williams testified that as an assistant superintendent his responsibility was to supervise fifteen schools and evaluate the principals of each school and that he alone evaluated his assigned principals. Petitioner was assigned one of the fifteen schools and, accordingly, was subject to Williams' evaluation of his performance.

It is noticed here that the evaluation instrument applied to an administrator's and/or supervisor's performance, which includes petitioner, sets forth five major areas: administrative and supervisory skills, planning and implementation of goals, management skills, communication skills, and personal qualities. Each of the first two major areas is followed by nine specifications each of which is to be noted E (for excellent), or G (for good), or F (for fair), or U (for unsatisfactory), or N/A (for not applicable). The three remaining major areas are followed by eight specifications, each of which is to be rated in the manner described.

Following petitioner's first year as principal, Williams also prepared a summary of his evaluations of petitioner's performance that year in which the

same rating scale was applied but only to the five major areas in what appears to be a conclusionary manner. (P-2A)

A modified version of the evaluation instrument, together with a compilation of Williams' ratings of petitioner's performance set forth in each of four evaluations (P-1) (P-2) (P-3) (P-4) in addition to the first year summary (P-2A) is as follows:

		P-1 2/15/77 RATING	P-2 3/15/77 RATING	P-2A 9/16/77 SUMMARY	P-3 12/22/77 RATING	P-4 3/21/78 RATING
I.	Admn/Superv. Skills					
	1. Decision Making	G	E		E	G
	2. Knowledge of Position	G	E		E	E
	3. Supervision/Evaluation	G	G		F	G
	4. Office Management	G	E		E	E
	5. Priorities	G	G		E	G
	6. Anticipates Problems	G	E		F	E
	7. Curriculum	G	E		F	G
	8. Community Participation	G	E		E	G
	9. Seeks Alternatives	G	E		G	E
II.	Planning Supplementation			E		
	1. Coordination of Staff	G	E		G	G
	2. Leadership	G	E		G	G
	3. Manages	G	E		E	G
	4. Facilities	G	G		G	E
	5. Utilizes Staff	F	G		G	E
	6. Initiative	G	E		E	G
	7. Planning	G	E		E	G
	8. Staff Evaluation	G	E		E	E
	9. Pupil Evaluation	G	G		E	G
III.	Management Skills			G		
	1. Exercises Authority	G	G		E	G
	2. Technical Assistance	G	E		G	E
	3. Staff Support	G	G		E	G
	4. Structure	G	G		G	E
	5. Staff Assistance	G	E		E	G
	6. Staff Utilization	G	E		E	G
	7. Organization	G	G		G	G
	8. Supply Use	G	E		E	E
IV.	Communication Skills			G		
	1. With Staff and Superiors	E	E		E	G
	2. To Staff and Pupils	G	E		E	E
	3. Clear Articulation	G	E		E	E
	4. Relates to Community	G	E		G	G
	5. To Parents	F	E-G		E	G

		P-1 2/15/77 RATING	P-2 3/15/77 RATING	P-2A 9/16/77 SUMMARY	P-3 12/22/77 RATING	P-4 3/21/78 RATING
IV.	Communication Skills (cont'd.)					
	6. Change in policy	G			G	E
	7. Availability	G	E		E	G
	8. Interchange	F	E		E	G
V.	Personal Qualities			E		
	1. Punctual	G	E		E	G
	2. Character	E	E		E	G
	3. Conscientious	E			E	G
	4. Discretion	E	E		E	G
	5. Sensitive	G	E		E	G
	6. Patience	G	E		E	G
	7. Personal Relationships	E	E		E	G
	8. Grooming	E	E		E	E

Williams testified he believed, based on his evaluations and his own perceived authority, of petitioner's performance as set forth above, it was his decision not the Superintendent's whether to recommend petitioner for reemployment as principal. (Tr. II-12) Inexplicably he advised the Superintendent in this regard, by memorandum dated April 27, 1978, of the following recommendation: (P-6)

> "Enclosed are the evaluations of Mr. Ralph Del Piano /and two other nontenure principals, neither of whom is a party to this action/ all of whom shall receive tenure after June 30, 1978. I must, with all honesty and candor, say that the initial year of their tenure was not as smooth as it could have been, but they were successful. The task that they undertook in three of our largest schools, each with its peculiar problems, was no easy assignment.
>
> "I am happy to say on this day of Thursday, April 27, 1978, that the formerly named /petitioner/ have grown to a high professional level. Their performance has justified my adulation.
>
> "Dr. Ross, /superintendent/ I present to you /petitioner/ to be recommended for tenure as Grammar Principals with an enthusiastic endorsement."

It is fair to conclude that Williams' memorandum dated April 27, 1978 (P-6) to the Superintendent was either crossed in the mails or by telephone message between the Superintendent and Williams for on the very next day, April 28, 1978, Williams submitted a formal letter to the Superintendent which begins

> "This letter is in response to your request of April 27th to notify /petitioner/ of their failure for the school year and to inform them that they will not receive tenure *** " (P-5)

Williams, in the same memorandum, (P-6) reminds the Superintendent that he, Williams, is petitioner's immediate supervisor, that he enthusiastically recommended petitioner for continued employment as principal, that he spent countless hours with petitioner observing and evaluating him, and that petitioner, in his view, displayed immense potential. Williams completes the memorandum by requesting the Superintendent to " *** give this matter /the question of petitioner's continued employment as principal/ profound consideration before making any decision." (P-6)

Williams testified he had no prior knowledge that the Superintendent had specific concerns with petitioner's performance nor did he have knowledge, he asserts, that petitioner's continued employment as principal was ever in doubt, so long as he recommended continued employment.

Firstly, it must be noticed here that the Superintendent of Schools is the chief executive officer of the Board. It is the person who occupies that position to whom the legislature vested the responsibility to provide " *** general supervision over the schools of the district *** " and that that person " *** shall have a seat on the board *** and the right to speak on all educational matters at meetings of the board *** but shall have no vote." N.J.S.A. 18A:17-20

The position of assistant superintendent of schools is subordinate to the position of superintendent. N.J.S.A. 18A:17-22 states in full:

> Each assistant superintendent of schools shall perform such duties as shall be prescribed by the superintendent of schools with the approval of the board *** employing such superintendent.

Williams' view that as an assistant superintendent it is his determination whether a professional staff member on a probationary basis shall be continued in employment, or even recommended to the Board for continued employment, is groundless. The Board has the authority and responsibility to determine whether to employ teaching staff members. N.J.S.A. 18A:27-1 Recommendations made to the Board with respect to continuing employment of its nontenure teaching staff are made by the Superintendent as the Board's chief executive officer. N.J.S.A. 18A:17-20 Because Williams concluded based on his evaluations of petitioner's performance that he, petitioner, should have been continued in his employment as principal is not binding on the Superintendent. The Superintendent is responsible for the general supervision of the schools in the district. If, as in the case herein, the Superintendent differs in view from that of a subordinate, an assistant superintendent, the Superintendent is not required to adopt the view with which he differs.

Of course, the Superintendent may not ground such differences on an illegal or otherwise improper reason. Here, the Superintendent testified he relied on the evaluation prepared upon petitioner by Williams. The Superintendent explained he was concerned with petitioner's ability to handle community problems, with his ability to evaluate staff, with his ability in the areas of curriculum, and with his ability to anticipate problems. (Tr. II-55) These concerns, the Superintendent testified, were discussed with Williams during December, 1977. The Superintendent requested Williams to submit an interim evaluation of nontenure principals and to assign such persons within the categories of most efficient, efficient, least efficient. Williams submitted his ratings on December 28, 1977 and placed petitioner in the least efficient category. Williams also stated with respect to petitioner that though " *** /petitioner/ has done well considering his experience with minorities ***

> "He must find a better way to enlist fuller support of his staff.
>
> "He must work harder to resolve problems before crises stage.
>
> "He must seek alternate means to involve community in constructive participation *** " (J-1)

Williams identified these areas of concerns in regard to petitioner's performance to the Superintendent on December 28, 1977, four months before he, Williams, submitted his "enthusiastic endorsement" to the Superintendent that petitioner be continued as principal for 1978-79. (P-6, supra)

It should be further noted that these expressed concerns followed by six days Williams' formal evaluation of petitioner's performance dated December 22, 1977 wherein Williams assigned petitioner a rating fair (F) in the categories of supervision/evaluation, anticipates problems, and curriculum. (P-3) Though in the main, there are twenty-nine ratings of excellent (E) that number is less than the thirty-two ratings of excellent assigned petitioner in the prior evaluation. (P-2)

Finally, on Williams' last written evaluation dated March 21, 1978 of petitioner only fourteen categories were assigned a rating of excellent. (P-4) That number, of course, is down from the twenty-nine ratings of excellent received on December 22, 1977. (P-3)

A fair review of Williams' testimony and the testimony of the Superintendent, together with a review of the evaluations, and the interim evaluation submitted by Williams, leads to the inescapable conclusion that Williams himself had concerns with respect to petitioner's performance and such concerns were transmitted and discussed with the Superintendent. Williams' asserted enthusiastic endorsement of petitioner's continued employment as principal, in light of his own evaluations and interim evaluation on December 28, 1977, are simply not compatible.

I FIND the statement of reasons given for petitioner's nonreemployment by the Superintendent fully supported by the evaluations. That the Superintendent

may have compared ratings received by petitioner with other nontenure principals does not negate the fact that the statement of reasons for petitioner's nonreemployment, supported in the record, was afforded him. Evaluation of one's performance has been recognized as being highly subjective in nature. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, 1968 S.L.D. The selection of those from among several persons being considered for reemployment must, in the final analysis, address the question of who if not all on a comparative basis shall be so recommended. So long as the final determination is made for reasons not proscribed by law I FIND nothing inherently evil in such comparison.

II

N.J.S.A. 18A:27-3.1 requires nontenure teaching staff members to be observed and evaluated in the performance of their duties at least three times a year, and not less than once each semester. This requirement is for the expressed statutory pupose

> " *** to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence."

The definition of teaching staff member at N.J.S.A. 18A:1-1 includes principal.

The State Board rules to implement the provisions of N.J.S.A. 18A:27-3.1 are set forth N.J.A.C. 6:3-1.19.

Here, it is agreed that petitioner during his first year as principal, 1976-77, was formally evaluated twice; February 15, 1977 (P-1) and on March 15, 1977. (P-2) During the second year as principal, 1977-78, petitioner was evaluated twice; December 22, 1977 (P-3) and on March 21, 1978. (P-4)

Williams, whose testimony establishes that he alone was responsible for the evaluation of petitioner, testified the Superintendent told him to evaluate petitioner more frequently. (Tr. II-20) Williams explained he felt the law required only two evaluations and he presumably concluded he complied with the law. (Tr. II-21)

The facts herein establish that petitioner was not formally evaluated on three occasions either during 1976-77 or 1977-78. Thus, it must be concluded that a violation of N.J.S.A. 18A:27-31 and N.J.A.C. 6:3-1.19 exists.

But, equally as important, the question of how the violation occurred and what harm, if any, was caused petitioner must be considered. Williams' testimony that he was solely responsible as assistant superintendent for the evaluations of petitioner in addition to his testimony he was told by the Superintendent to evaluate petitioner more frequently, together with his improper perception of the numbers of evaluations required by law, establishes in my view that he caused the violation to occur.

It is recognized that petitioner testified he was never told by anyone of perceived weaknesses in his performance. (Tr. II-47) It is also recog-

nized that petitioner testified he was never told by anyone of perceived weaknesses in his performance. (Tr. II-47) It is also recognized that petitioner, who is caucasian, testified he was assigned a school with a one hundred percent Black pupil population which, in turn, created community problems. (Tr. II-49) Petitioner admits Williams did speak with him in regard to such problems.

Surely petitioner reviewed the evaluations Williams did prepare. (P-1, P-2, P-3, P-4) Assuming that to be true, it may be inferred that petitioner was aware of perceived weaknesses. There is nothing before me to establish that petitioner at any time prior to April 30, 1978 complained to Williams that he, Williams, did not perform the required number of evaluations. Petitioner, I CONCLUDE, was content to rely on the assumption that Williams' recommendation for reemployment would be automatic reemployment.

The Superintendent, to the contrary, reviewed petitioner's evaluations and the interim evaluation by which Williams rated petitioner as among the least efficient. The Superintendent determined for the reasons already stated (C-1, ante) not to recommend petitioner for reemployment.

I have reviewed Louis A. Foleno v. Board of Education of the Township of Bedminster, 1978 S.L.D. - (decided February 22, 1978) and Winona D. Bendon v. Board of Education of the Borough of Keansburg, Monmouth County, 1978 S.L.D. 181 with respect to relief to be afforded a complaining party for violation of N.J.S.A. 18A:27-3.1.

Foleno was granted sixty days pay, without reinstatement to the Board's employ, for its violation of the statute. Bendon was granted reinstatement with full pay for that Board's total disregard for the statute.

Here, however, I FIND no parallel. The Superintendent did not violate the statute of reference nor did the Board. Williams was told to evaluate petitioner more frequently but for whatever reason elected not to do so. Petitioner lodged no complaint that he was not receiving the requisite number of evaluations and he knew, or should have known, through a review of the evaluations performed, that areas of his performance could have been improved. Probationary professional staff members have no automatic claim to continuing employment with a board of education. Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962)

Relief in Foleno was granted on equitable principles. In Bendon relief was granted because of the extraordinary violation of N.J.S.A. 18A:27-3.1 but still grounded upon equity. Relief for violation of the statute must be grounded in equity because there is no provision, expressed or fairly implied in N.J.S.A. 18A:27-3.1 which provides a basis for penalizing a board for failure to comply with its terms. (See Margaret Pelose v. Board of Education of the Township of South Brunswick, Superior Court of New Jersey, Appellate Division, Docket A-271-77, decided May 2, 1978.)

Here, I FIND no basis within the context of these facts to grant relief to petitioner. Petitioner is employed by the Board, albeit as an assistant principal. To direct his reinstatement as principal would in my view usurp the authority of the Board to select those who shall administer its schools. Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974) Moreover, petitioner would, if reinstated as principal, acquire a tenure status in that position not by virtue of performance but because of the assistant superintendent's failure

to comply with the law.

III

Petitioner asserts that the Board must set forth its reasons why it determined not to continue his employment as principal. Petitioner reasons that because the Board relied solely on the recommendations of the Superintendent, who did not formally evaluate him, it acted in an arbitrary and unjust fashion. Petitioner anchors this position by citing four New Jersey criminal cases and one disorderly complaint appealed to the New Jersey Supreme Court from the ruling below.

The matter herein is not criminal nor disorderly in nature. The nature of the action herein is administrative and it addresses the propriety of an action taken by the Board.

It has already been found that the stated reasons why the Superintendent determined not to recommend petitioner for continued employment are supported by the evaluations of his performance. I FIND nothing improper with respect to the Board adopting as its reason for petitioner's nonreemployment the recommendation of the Superintendent.

Having considered the entire record, and notwithstanding the violation of N.J.S.A. 18A:27-3.1, I FIND no basis upon which to conclude the Board's determination not to reemploy petitioner as principal for 1978-79 is contrary to law or otherwise improper to the extent relief, in any form, should or must be granted.

The Petition of Appeal IS DISMISSED.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

DATE

DANIEL B. MC KEOWN, ALJ

RALPH DEL PIANO,	:	
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).

Petitioner excepts to the "cavalier" manner by which he alleges Judge Daniel B. McKeown, A.L.J., failed to properly weight the admitted violations of N.J.S.A. 18A:27-3.1 and N.J.A.C. 6:3-1.19. The Commissioner does not condone such violations but cannot agree in the circumstances of this case with the exaggerated significance that petitioner attaches to them. Petitioner's claim that the evaluation of the Superintendent of Schools is completely arbitrary is not supported by the record.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

May 27, 1980

RALPH DEL PIANO,	:	
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	STATE BOARD OF EDUCATION
RESPONDENT-APPELLEE.	:	DECISION

Decided by the Commissioner of Education, May 27, 1980

For the Petitioner-Appellant, Philip Feintuch, Esq.

For the Respondent-Appellee, William A. Massa, Esq.

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein. Request for oral argument is denied.

November 5, 1980

STEPHEN DORE AND CHRISTINE SENA,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioners, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

For the Respondent, Blumberg, Rosenberg, Mullen & Blumberg (William B. Rosenberg, Esq., of Counsel)

Petitioners, formerly employed as teaching staff members by the Board of Education of the Township of Bedminster, hereinafter "Board," allege that the Board's determination not to reemploy them for the 1976-77 academic year was in violation of N.J.S.A. 18A:27-3.1 which provides that:

> "Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of her or his duties at least three times during each school year but not less than once during each semester.*** Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence."

Petitioners charge that noncompliance with this statute by the Board and its administrative staff renders their non-reemployment arbitrary, capricious, unreasonable and in bad faith and pray that it be set aside. The Board maintains that its determination not to reemploy petitioners was a legal exercise of its discretionary authority.

A hearing was conducted in the matter on January 12 and February 7, 1977 at the offices of the Somerset and Hunterdon County Superintendents of Schools, respectively, by a hearing

examiner appointed by the Commissioner of Education. Thereafter, the parties filed Briefs in support of their respective positions. The report of the hearing examiner is as follows:

Petitioner Dore was employed by the Board as a sixth grade teacher for the 1974-75 and 1975-76 academic years. Petitioner Sena was employed by the Board as a fifth grade teacher for the 1973-74, 1974-75, and 1975-76 academic years.

The Board, at a private meeting held on March 16, 1978, discussed the performance of petitioners and at a public meeting conducted on March 18, 1976, determined not to offer employment to either petitioner for the 1976-77 academic year. (C-3, at p. 6)

The Board, subsequent to its receipt of petitioners' requests for reasons for their nonreemployment, advised Petitioner Dore, by letter dated April 22, 1976 from the Board President, that his employment would not be continued

> "***due to insufficient positive evidence of teaching effectiveness; particularly poor teaching methods as evidenced by poor grading procedures, lack of structured classroom and not providing student materials (textbooks, homework assignments), lack of continual assessment of student progress." (J-8)

Petitioner Sena was also advised by letter from the Board President dated April 22, 1976 that her employment would not be continued

> "***due to insufficient positive evidence of teaching effectiveness; particularly the lack of self-control demonstrated by emotional outbursts and use of improper language."(J-9)

Petitioner Dore testified that during 1975-76 he received two written evaluations (J-5,6) from the Board's administrative principal. The principal testified that he was solely responsible for the supervision and evaluation of teaching staff members in the employ of the Board. Petitioner Dore explained that while he received only two written evaluations during 1975-76, the principal did visit his classroom almost on a daily basis. (Tr. I-59)

The principal submitted a written evaluation to Petitioner Dore dated January 27, 1976 which was laudatory, in a general fashion, of Petitioner Dore's "***significant contribution to Bedminster School staff***." (J-6)

The principal testified that he submitted a second written evaluation (J-5) dated March 18, 1976 to Petitioner Dore in which he commended Petitioner Dore's demonstration of "***an

excellent insight into individual student needs and [his] commitment to seek out and utilize educational alternatives that will provide for student learning.***" (J-5) The principal also stated that based on Petitioner Dore's "***fine service to date I recommend him for a teaching contract for the 1976-77 school year." (J-5)

The principal explained that the two written evaluations of Petitioner Dore's performance were based on daily two to five minute observations. The principal testified that neither written evaluation of Petitioner Dore are the products of any particular classroom observations.

The principal testified that he had no knowledge of the basis for reasons (J-8) given Petitioner Dore by the Board for his nonreemployment and that the Board did not consult with him in regard to the formulation of such reasons. (Tr. I-12-14)

The principal submitted two written evaluations to Petitioner Sena during 1975-76 with respect to her performance. (J-1, 2) Petitioner Sena was advised, inter alia, by the principal on January 27, 1976 that she

> "***has matured significantly *** has continued to progress in her skill to assess individual student needs.***" (J-2)

The principal also advised Petitioner Sena to broaden her awareness of instructional materials, organizational strategies and record keeping techniques. The principal suggested to Petitioner Sena that to accomplish these objectives, she visit other classrooms, attend courses or workshops and seek assistance from her colleagues. (J-2)

Petitioner Sena received the second and last written evaluation for 1975-76 from the principal dated March 22, 1976 (J-1) in which the principal stated that she continued "***to show progress as a teacher *** has demonstrated a willingness to investigate and gain skill in areas *** [to] strengthen her ability as a teacher.***" (J-1)

The principal then proffered that he recommended her employment for the 1976-77 year be continued. (J-1)

Petitioners complain that the Board violated the provisions of N.J.S.A. 18A:27-3.1 and the rules of the State Board of Education at N.J.A.C. 6:3-1.19 with respect to their nonreemployment.

The State Board of Education promulgated N.J.A.C. 6:3-1.19, effective January 16, 1976, as the rule to implement the requirements of N.J.S.A. 18A:27-3.1 as originally enacted. The rule provides, in pertinent part, that the three required

observations of an elementary teacher's performance be conducted for a minimum duration of one complete subject lesson (N.J.A.C. 6:3-1.19(a)(1)); that each such observation be followed by a written evaluation of the teacher's performance (N.J.A.C. 6:3-1.19(b)); and that each board of education adopt a policy for the supervision of instruction and distribute such policy to each teaching staff member at the beginning of his/her employment. N.J.A.C. 6:3-1.19(c)

The principal testified that the two written evaluations he prepared upon Petitioner Dore (J-5, 6) and the two he prepared upon Petitioner Sena (J-1, 2) during 1975-76 were based on his daily two to five minute observations. (Tr. I-24, 27) The principal testified that no one of the evaluations he prepared upon Petitioner Dore or Sena was based upon any particular classroom observation he had made; rather, the evaluations were the product of his own perceptions of petitioners' abilities gathered from his daily observations.

The principal testified that he was aware that three evaluations of Petitioner Dore were required during the 1975-76 academic year. (Tr. I-17) The principal, according to the unrefuted testimony of a Board member, was reminded by the Board from time to time to insure that evaluations were conducted of the staff. (Tr. II-88-89)

The hearing examiner observes that the principal himself was not reemployed by the Board for the 1977-78 year and he has challenged that action in a Petition of Appeal which is pending before the Commissioner.

The collective testimony of the Board President (Tr. II-27, 49), three Board members (Tr. II-50-104) and the Board Secretary (Tr. II-6-26) establishes that the Board met in private session, with the principal, on January 29, 1976 to discuss personnel evaluations. (Tr. II-7) The Board Secretary testified that the Board did review the personnel files brought to the meeting by the principal. The Board determined at that time that Petitioner Dore's performance was excellent, while Petitioner Sena's performance was considered in need of improvement. (Tr. II-10)

The Board met again on March 16, 1976 in private session with the principal to discuss personnel evaluations. This meeting was two days before the date when the Board publicly determined not to offer reemployment to petitioners. The Board Secretary testified that the Board informally determined at that time not to offer Petitioner Sena reemployment for 1976-77 and arrived at no determination in regard to Petitioner Dore. (Tr. II-11)

It is observed that between the first meeting in January conducted by the Board and the second meeting conducted in March, an annual school election was held and new members were elected to the Board. Consequently, two members who attended the March 16, 1976 private session had not attended the January session.

The Board, at its private meeting on March 16, 1976, decided not to offer reemployment to Petitioner Sena because one Board member recalled that the principal had reported her use of intemperate language in the classroom, which Petitioner Sena admits (Tr. I-52), and that the principal had also reported that she displayed temper in her classroom. (Tr. II-29, 54, 78, 94) One Board member testified that she had personally heard Petitioner Sena's display of temper and of inappropriate language. (Tr. II-81) Finally, it is noted that the Board President testified that based on Petitioner Sena's January written evaluation (J-1) he had not seen nor had been shown evidence that Petitioner Sena had improved as a teacher.

The Board, in regard to Petitioner Dore, determined not to offer him reemployment because his attitude was abrasive to the Board during its public meetings he attended (Tr. II-59, 90), because some children of Board members who were pupils in Petitioner Dore's class claimed he did not use a regular textbook, that the Board thought that Petitioner Dore had administered only one test in the 1975-76 year to his pupils (Tr. II-57) and that Petitioner Dore, according to the children of Board members who were assigned to his class, did not assign homework. (Tr. II-96)

The hearing examiner observes with respect to Petitioner Sena that the testimony herein supports the concerns of the Board with respect to her use of inappropriate language, as well as her display of temper. The principal himself reported those concerns to the Board and one Board member did testify that she personally heard Petitioner Sena engage in the use of inappropriate language. There is nothing in the record to establish that the Board brought these concerns to Petitioner Sena's attention directly.

The hearing examiner observes with respect to Petitioner Dore that the major reason why his employment was not continued for the 1976-77 year was the perceived abrasive attitude he displayed before the Board at meetings he attended. There is no basis in the record to establish that Petitioner Dore's teaching methods were poor, that his classroom lacked structure, that he failed to provide proper materials or that he failed to assess pupil progress, as stated by the Board as reasons for his nonreemployment.

Thus, the hearing examiner finds that the reasons (J-9) given Petitioner Sena by the Board for her non-reemployment are proper. The reasons (J-8) given Petitioner Dore by the Board for his non-reemployment are not based on fact, but upon hearsay.

Further, the real reason why his employment was not continued was because of his conduct at public Board meetings.

Notwithstanding the findings with respect to both petitioners and the stated reasons given them by the Board, the principal did fail to properly observe and evaluate petitioners during 1975-76 consistent with N.J.S.A. 18A:27-3.1 and N.J.A.C. 6:3-1.19. This failure on the principal's part becomes more perplexing in view of the fact that he was directed by the Board to insure that evaluations of staff were being performed.

The Board asserts in this regard that it may not be held liable for the inaction of its principal to whom it delegated the responsibility to cause evaluations of its teaching staff. The Board argues that its determination not to reemploy petitioners was not arbitrary or capricious. Rather, the Board contends that the determination not to reemploy petitioners was based on the information available to it at the time.

Finally, the Board asserts that notwithstanding the failure of its principal to cause three written evaluations to be prepared upon petitioners, the Commissioner may not set aside its determination not to reemploy petitioners unless it is established that the action was illegal or improper. The Board cites Sallie Gorny v. Board of Education of the City of Northfield et al., 1975 S.L.D. 669; Moses Cobb v. Board of Education of the City of East Orange, 1975 S.L.D. 1047, aff'd State Board of Education 1976 S.L.D. 1135; and Sandra Robinson v. Board of Education of the Township of Quinton, 1973 S.L.D. 257. The Board argues that petitioners have failed to establish that its action in regard to their nonreemployment is illegal or improper.

Petitioners assert that the failure of the Board to cause three written evaluations to be performed upon their performance by its principal renders its nonreemployment action defective. Petitioners assert that the reasons afforded them by the Board for their nonrenewal are not related at all to the two evaluations they did receive. Petitioners contend that as a result the Board did in fact fail to provide them the real reasons for their nonreemployment and demand reinstatement to their former positions of employment.

The hearing examiner, having considered the evidence adduced in the matter and the Briefs of the parties herein, finds the following:

1. Petitioners did not receive three written evaluations during 1975-76 as required by N.J.S.A. 18A:27-3.1.

2. The Board had directed its principal to comply with the referenced statute.

3. The principal failed to comply with the directive of the Board.

4. The reasons afforded Petitioner Sena by the Board in regard to her nonreemployment were based upon her reported use of intemperate language and emotional outbursts.

5. The reasons afforded Petitioner Dore are not at all related to evaluations of his performance in the classroom. The reason, in the judgment of the hearing examiner, for his nonreemployment is his perceived abrasiveness to the Board at public meetings.

Thus, the Board's action with respect to Petitioner Sena is found to be proper. The Board's action with respect to Petitioner Dore is found to be improper.

The hearing examiner recommends that the Petition of Appeal be dismissed in regard to Petitioner Sena. The hearing examiner recommends that the Commissioner grant Petitioner Dore's request for reinstatement to his former position of employment with the Board. Should Petitioner Dore elect to refuse such employment, no further relief is recommended.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in this matter, including the report of the hearing examiner and the exceptions thereto filed on behalf of both parties.

At the outset the Commissioner rejects the premise, apparently generated by the hearing examiner's analysis and assumed by both parties in their exceptions, that boards of education are bound to predicate renewal decisions affecting nontenured teaching staff members on evaluations conducted pursuant to N.J.S.A. 18A:27-3.1 and implementing regulations. While these evaluations are critical to the employment process, they cannot usurp the board's broad discretion to discharge nontenured teachers for other valid reasons, so long as those reasons are communicated to the teacher upon termination in accordance with the dictates and purposes articulated in Donaldson v. North Wildwood Board of Education, 65 N.J. 236, 245 (1974); N.J.S.A. 18A:27-3.2.

The thrust of Petitioner Sena's argument is that the Board failed to ensure that mandatory evaluations were conducted in accordance with N.J.S.A. 18A:27-3.1 and N.J.A.C. 6:3-1.19, and that this improper action alone dictates reinstatement. While Bendon v. Keansburg Board of Education, 1978 S.L.D. 720 appears to support this position, the result reached in that case does not control here as the operative facts are distinguishable. There, the failure to comply with the dictates of N.J.S.A.

18A:27-3.1 was aggravated by the board's arbitrary action in predicating its nonrenewal decision upon reasons beyond the reason communicated to Bendon in the notice of nonrenewal--abolition of position--which reason was itself suspect. In the instant case, the Board had and communicated to Petitioner Sena independent valid reasons for nonrenewal of her teaching contract.

Although reinstatement would defeat the Board's legitimate exercise of discretion in deciding not to reemploy Petitioner Sena, however, the Commissioner is not prepared to condone the Board's improper conduct with respect to its obligation to evaluate petitioner. Some relief is warranted. Based upon the same equitable principles that dictated monetary relief in Foleno v. Bedminster Board of Education, 1978 S.L.D. 106, Petitioner Sena should be paid 60 days' salary at the rate she was compensated during the 1975-76 academic year.

In the case of Petitioner Dore, while the deficiency in evaluation procedure already noted entitles him to the same relief afforded Petitioner Sena, the further remedy of reinstatement is compelled by the fact that the reasons for nonrenewal furnished him were not justified by the positive evaluations he did in fact receive and no other reason was given him to explain the Board's decision not to offer him reemployment. Under these circumstances, the Board abused its discretion by acting arbitrarily and the hearing examiner correctly determined that the Board's action should be set aside. The Commissioner notes further that insofar as the Board relied upon a reason not communicated to Petitioner Dore--that is, the attitude he allegedly displayed toward the Board--its decision against renewal may also be vulnerable as having been made for constitutionally proscribed reasons. Based upon the conclusion reached in Bendon v. Keansburg Board of Education, supra, the Commissioner directs that Petitioner Dore be reinstated at the same step of the salary schedule as he held during the 1975-76 school year, and accorded full salary from September 1976, mitigated by any earnings he may have received from alternate employment during the intervening period.

COMMISSIONER OF EDUCATION

May 30, 1980

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

MARY SIEBOLD V. BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND	)	INITIAL DECISION AGENCY DOCKET NO. 397-11/78
AND		
KATHLEEN DAVIS V. BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND	)	OAL DOCKET NO. EDU 4939-79 AGENCY DOCKET NO. 385-10/79A
AND		
PATRICIA KENNY V. BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND	)	OAL DOCKET NO. EDU 4940-79 AGENCY DOCKET NO. 403-10-79A
AND		
CATHERINE DYKSTRA V. BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND	)	OAL DOCKET NO. EDU 5683-79 AGENCY DOCKET NO. 429-11/79A

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 BRUCE CAMPBELL, A.L.J.

DOCUMENTS IN EVIDENCE:

Petitioners' Exhibit	A	Professional Personnel Compensation Guides and Contracts 9-1-72, revised 10-78, Oakland Board of Education
Petitioners' Exhibit	B-1	Letter of Risser to Siebold 6-1-78
Petitioners' Exhibit	B-2	Letter of Risser to Dykstra 3-2-79

Respondent's Exhibit	A	4 pp. list of staff members who advanced their training levels 9-74 to 10-79, with cover memorandum signed by superintendent 10-30-79

These matters were opened before the Commissioner of Education and transmitted to the Office of Administrative Law as contested cases pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. On February 7, 1980, the matters were consolidated by an order of this Court since all involve common issues of fact and law and a common respondent.

In each case, the central allegation of the petitioner is the same: a certain number of graduate credits was earned before the receipt of a master's degree and these credits were not applied toward the credit requirements for the master's degree. Subsequent to award of the master's degree, the petitioner applied to the Board of Education of the Borough of Oakland (Board) for placement on a salary guide higher than that for holders of a master's degree, e.g., master's degree plus 15 graduate credits guide. These applications were based on the accrual of some number of graduate credits and the holding of a master's degree. It is uncontested that at least some of these graduate credits had been earned prior to receipt of the master's degree. In each instance the application for placement on a higher salary guide was refused. The reason for the refusal was stated to be the order in which the graduate credits and the master's degree were earned; that is, to be applicable to a salary guide for a master's degree plus 15 graduate credits, the 15 graduate credits would have to be earned after the completion of requirements for the master's degree.

For the sake of clarity, certain data concerning petitioners may be summarized as follows:

NAME	CREDITS EARNED BEFORE MASTER'S DEGREE	DATE MASTER'S DEGREE EARNED
Siebold*	6	1975
Davis	15	1978
Kenny	32	1970
Dykstra	12	1978

NAME	CREDITS EARNED AFTER MASTER'S DEGREE	SALARY GUIDE PLACEMENT CLAIMED	DATE NEW PLACEMENT CLAIMED
Siebold	9	M + 15	9/78
Davis	0	M + 15	9/78
Kenny	0	M + 30	9/70
Dykstra	3	M + 15	2/79

*On January 18, 1980, Petitioner Siebold amended her petition averring that she possessed 12 graduate credits before being awarded a master's degree and that these credits were not applied toward the requirements for that degree. She also averred that, as of January 18, 1980, she had completed an additional 18 graduate credits and therefore was eligible for placement on the M+30 guide as of February 1980. These considerations will be addressed further, below.

Petitioners contend that the Board's policy with respect to procurement and use for salary guide purposes of graduate credits was, until October 1978, unconditional as to the order of taking credits. They contend further that in or about October 1978 the Board adopted a new policy (Petitioner's Exhibit A) with respect to procurement and use for salary guide purposes of graduate credits.

The Board avers that it had a policy (Petitioner's Exhibit A) which provided that teaching staff members were individually responsible for officially informing the school administration of and providing "evidence of increments due them for completion of approved training toward advance degrees." (Respondent's Brief at p.1.)

The Board states further that "The practice in the District had been to give credit towards advancement on the guide only for courses taken following the prior degree." (Id.) and "In 1978, the interpretation which had uniformly been placed on the policy was reduced to writing and that interpretation clearly stated that credit for courses taken for advancement on the Guide would only be allowed for courses taken after the appropriate degree." (Id. at p.2.)

The Board also suggests "that plain logic dictates that where a salary schedule calls for a payment of a fixed amount for a given degree and thereafter provision is made for additional payments because of additional credits earned that can only mean that the credits must be earned after the degree." (Id. at p. 3.)

The policy on which this matter obviously rests is here reproduced in its entirety.

PROFESSIONAL PERSONNEL
COMPENSATION GUIDES AND CONTRACTS

Personnel shall be individually responsible for officially informing the school administration, and providing the required supporting evidence, of increments due them for completion of approved training towards advanced degrees.

Adjustments due to new training status shall be considered twice annually, in September and February. The changes shall become effective at the time specified in the official Board approval.

Prior regulation revised 1972

> In order for graduate courses to be applied to the Bachelor's plus 15 or the Master's plus 15, 30 or 45, training levels on the teachers' salary guide, said courses must be taken after the Bachelor's or Master's degree, respectively, has been completed.
>
> Adopted October, 1978.

Oakland, N.J., Public Schools 9/1/72

The question that must be answered is whether or not, in light of the above policy and of applicable law, petitioners are entitled to the salary guide placements they claim.

Through the education statutes, boards of education are given broad grants of rule making authority. See, e.g., N.J.S.A. 18A:11-1 and 27-4. Among these grants, boards are given statutory authority to make policy governing salaries " *** for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board ***." at N.J.S.A. 18A:29-4.1.

As was expressed in Harry A. Romeo, Jr. v. Board of Education of the Township of Madison, Middlesex County, 1973 S.L.D. 102, 106:

> ***In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. Lane v. Holderman, 23 N.J. 304 (1957) Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. Duke Power Company, Inc. v. Edward J. Patten, Secretary of State et al., 20 N.J. 42, 49 (1955); Zietko v. New Jersey Manufacturers Casualty Ins. Co., 132 N.J.L. 206, 211 (E.& A. 1944); Bass v. Allen Home Development Co., 8 N.J. 219, 226 (1951); Sperry & Hutchinson Co. v. Margetts, 15 N.J. 203, 209, (1954); 2 Sutherland, Statutes and Statutory Construction (3rd ed 1943), section 4502***.

In the instant matter, the policy was silent as to the order in which the graduate credits and the master's degree had to be earned until revised in October 1978. Identical circumstances are found in McAllen v. Board of Education of the Borough of North Arlington, Bergen County, 1975 S.L.D. 90.

In McAllen it was stated at 91:

> The Board adopted policies which provide for additional compensation for those teaching staff members having a master's degree plus ten, twenty, or thirty credits. Nowhere in the Board's adopted policies is there found a requirement that graduate credits can only be considered for salary placement on the master's degree plus ten, twenty or thirty credits levels after the acquisition of the master's degree.
>
> The Superintendent's directives requiring his prior approval for graduate study beyond the master's degree only after the award of a master's degree is not Board policy. There is no statutory authority for a superintendent to establish such salary policy; therefore, those directives are hereby set aside.
>
> Nothing expressed herein prevents the Board from adopting a policy such as that expressed in the Superintendent's directives; however, those directives cannot be considered as existing Board policy. (Emphasis in text.)

The North Arlington Board of Education was directed to place Petitioner McAllen on the master's degree plus 30 credits salary guide at the step corresponding to his number of years' experience and, further, to compensate him retroactively to the point at which his petition arose. The State Board of Education affirmed the decision of the Commissioner of Education in the matter. 1975 S.L.D. 92.

I can find nothing in the present case to distinguish it from McAllen up to the point at which the Board revised and refined the controling policy; i.e., October 1978.

Therefore, I FIND AND CONCLUDE that Petitioners Siebold and Davis are entitled to placement on the master's degree plus 15 credits salary guide as of September 1978 and Petitioner Kenny is entitled to placement on the master's degree plus 30 credits salary guide as of September 1970. Petitioner Dykstra's claim must fail, as must Petitioner Siebold's amended claim, above, by reason of arising after the promulgation of and being controled by the Board's duly adopted Compensation Guides Policy of October 1978.

The Board of Education of the Borough of Oakland shall place Petitioners Siebold and Davis on the master's degree plus 15 credits salary guide at the steps corresponding to their respective numbers of years' experience and shall compensate them accordingly retroactive to September 1, 1978. The Board shall place Petitioner Kenny on the master's degree plus 30 credits salary guide at the step corresponding to her number of years' experience and shall compensate her accordingly retroactive to September 1, 1970. IT IS SO ORDERED.

In all other respects, the consolidated Petition IS DISMISSED.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

31 MARCH 1980
DATE

Bruce Campbell
BRUCE CAMPBELL, A.L.J.

MARY SIEBOLD ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner Siebold alleges that Judge Bruce Campbell erred in his determination of credits earned by her prior to her award of a master's degree. The Commissioner cannot agree, the record does not support such a determination. Petitioner Dykstra's exception refers to her rights presently under consideration before PERC and the contested validity of the Board policy of October 1978. The Commissioner upholds the denial of her claim under N.J.S.A. 18A:1.1 without reference to her rights, if any, presently under consideration before PERC.

The Commissioner finds no merit in the Board's exception that Judge Campbell erred in his determination in this case.

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

Petitioner Dykstra's claim and the amended claim of Petitioner Siebold are herewith denied. The Board of Education of the Borough of Oakland shall place Petitioners Siebold and Davis on the master's degree plus 15 credits salary guide, each at her proper experience level step retroactive to September 1, 1978. Petitioner Kenny shall be placed on the master's degree plus 30 credits salary guide at her proper experience level as of September 1, 1970.

It is so directed.

June 2, 1980

COMMISSIONER OF EDUCATION

MARY SIEBOLD, ET AL.,

PETITIONER-CROSS APPELLANT, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY, :

RESPONDENT-APPELLANT. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 2, 1980

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

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

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

October 1, 1980

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN RE: **GEORGE MORELL** v. PARSIPPANY-TROY HILLS BOARD OF EDUCATION	)))))))	INITIAL DECISION **OAL DKT. NO. EDU 4062-79** AGENCY DKT. NO. 342-8/79A

APPEARANCES:

For the Petitioner:

ROBERT M. SCHWARTZ, Esq.

THEODORE BLAND, Witness

GEORGE MORELL, Petitioner

For the Respondent:

JOHN W. ADAMS, Esq.

JOHN E. SHEEHY, Superintendent

EVIDENTIARY DOCUMENTS:

P-1: Organizational chart 11/75

P-2: Organizational chart revised 10/19/76; revised 11/14/77

P-3: Organizational chart 9/80

J-1: A.P.S.A./BOARD agreement re: salaries

J-2: Job description - Elementary principal

J-3: Job description - Assistant Junior H.S. principal

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

Petitioner, a tenured school administrator alleges that the Board acted in violation of N.J.S.A. 18A:6-10 et seq. when it transferred him from his position as elementary principal to that as acting assistant principal of a junior high school.

The Board admits the involuntary transfer, denies it was a demotion, and avers that it acted properly and within its discretionary authority granted by statute.

The petition of Appeal was filed with the Commissioner of Education on August 27, 1979, and was transferred to the Office of Administrative Law on September 20, 1979 pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on December 4, 1979 and a plenary hearing was held on February 4, 1980. The parties submitted timely briefs. The record was closed on April 16, 1980 with the expiration of time established for the petitioner to submit a rebuttal, which he chose not to do.

The facts in this controversy are rather simple and the adjudication rests on conclusions of law. The petitioner served as a teacher and an assistant principal in the junior high school prior to his assignment as an elementary principal, a position he held for 13 years through the 1978-79 school year.

On July 1, 1979, the Board transferred the petitioner to the position of acting assistant principal in the junior high school, admittedly against petitioner's will.

Petitioner challenges the Board's authority to transfer him involuntarily to a position he considers a demotion and to one with lesser salary expectancy.

It is indisputed that the position of assistant junior high school principal is a tenured-eligible position and that petitioner is properly certified. The demotional and lesser salary aspects of the transfer are in dispute as well as the contention of petitioner that his assent is essential to effect the transfer.

The petitioner testified that his salary in 1978-79 as an elementary principal was $31,900 and in 1979-80, after transfer, his salary had increased to $32,600 (Tr 39). He further testified that the increase in salary was not automatic, but the result of a merit increase (Tr 40).

The Superintendent, who recommended the transfer, testified that the petitioner was deemed to be "better suited for the [junior high school] position that he is now holding than he was as a principal of the elementary school." (Tr. 44). Relative to salary,

the Superintendent further testified that "his category is still in the elementary principalship, because that was the point of our [Board] making it an acting role; we did not want to penalize him in anyway..." (Tr. 45)

In Jeanette A. Williams. v. Board of Education of the City of Plainfield, 79 S.L.D. - (decided June 1, 1979), aff'd in part, rev'd in part, State Board of Education, (decided June 9, 1980), petitioner was a tenured high school principal who was transferred to the position of administrative assistant in the central office, and several months later was transferred to the position of elementary principal. She performed in these positions at the same salary she received as a high school principal.

In Williams, the State Board clearly establishes that a "board of education has plenary authority, by a majority vote of the whole board, to transfer its professional personnel in good faith for the best interests of the school system", but for two limitations. The limitations require the staff member's consent if the transfer is to a non-tenurable position, and further, the employing board is prevented from reducing the compensation of the staff member except by proceedings under N.J.S.A. 18A:6-10 et seq.

A careful and thorough review of the entire record in the instant matter reveals the following:

1) Petitioner was transferred, albeit without his consent, to a tenured position within his certification.

2) Petitioner's salary was not reduced, but was increased, negating the alleged violation of N.J.S.A. 18A:6-10 or 28-5,6.

3) The Board and its agent acted in good faith and within the Boards' statutory discretionary authority.

4) The transfer was not a demotion.

The contentions of petitioner in this matter have no merit. **I SO FIND.**

I CONCLUDE therefore, that the Petition of Appeal **IS DISMISSED.**

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

I HEREBY FILE with **FRED G. BURKE, COMMISSIONER OF EDUCATION,** my Initial Decision in this matter and the record in these proceedings.

17 April 1980
DATE

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

GEORGE MORELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that no exceptions were filed by the parties in a timely fashion 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 adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

June 5, 1980

GEORGE MORELL,	:	
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLEE.	:	
	:	

Decided by the Commissioner of Education, June 5, 1980

For the Petitioner-Appellant, Robert M. Schwartz, Esq.

For the Respondent-Appellee, Dillon, Bitar, & Luther (John W. Adams, Esq., of Counsel)

For New Jersey Principals and Supervisors Association, Amicus Curiae -- John F. Malone, Esq.

For New Jersey School Boards Association, Amicus Curiae -- David W. Carroll, Esq.

For New Jersey Education Association, Amicus Curiae -- Ruhlman & Butrym, Esq.

The State Board is again being called upon to determine the validity of a transfer of a tenured school administrator, in this case from the position of Elementary Principal to that of Acting Assistant Junior High Principal. Since Petitioner's salary was not reduced, the only question is whether this involuntary transfer constituted a demotion or reduction in rank. The Commissioner has sustained the Board's action, holding that the transfer was not a demotion.

On this appeal the Legal Committee initially issued a report recommending that the Commissioner's decision be affirmed. Subsequent to that report the Legal Committee received comments from both parties as well as amicus briefs from New Jersey Principals and Supervisors Association, New Jersey School

Boards Association and New Jersey Education Association. All of these have been most helpful to the State Board in arriving at our final decision, which is to reverse the Commissioner and to hold the transfer in question invalid.

In Williams v. Plainfield Board of Education, decided, State Board, June 9, 1980, aff'd New Jersey Superior Court November 5, 1980, we reviewed at some length the nature of the tenure granted by N.J.S.A. 18A:28-5, 18A:28-6 and related statutes. The opinion observed that tenure consists basically of two parts: job security, which means that a tenured administrator may not be dismissed or demoted during good behavior; and financial security, which requires that the compensation not be reduced except as provided by law. We held in Williams that a transfer from high school principal to elementary school principal did not constitute a demotion or reduction in rank, even though there were numerous differences in the duties of the two positions. We noted that the certification required for both positions was the same; that tenure could be acquired in both; and that the duties of the elementary school principal were of no less importance from an educational standpoint than those of the high school principal. The opinion thus indicated that rank is generally determined by three elements: certification required for the position, its duties and responsibilities, and its tenure status. For the purposes of determining whether a transfer is to a position of comparable rank or causes a reduction in compensation, we established "a balancing test, weighing the interest of the teaching staff member in job and financial security on the one hand and the best interests of the school program on the other."

Applying the principles laid down in the Williams decision, we have concluded that the Board could not transfer the elementary principal without his/her consent to the position of acting assistant junior high school principal, for two reasons: (1) the duties and responsibilities of the latter position

were not comparable to those of the former; and (2) since the assignment to the second position was designated as "acting", such employment was evidently temporary in nature, and under N.J.S.A. 18A:16-1.1 no person could acquire tenure in that type of employment

To amplify the first reason above given, we note that under the organizational chart of the district the principals were shown to be in charge of their respective buildings, the assistant principals did not appear on the chart and their duties were largely determined by the principal, who would delegate tasks depending upon the needs of the school as he/she saw them. Thus each principal obviously had the greater responsibility and the more comprehensive duties.

We further observe that from time immemorial the Legislature and the State Department of Education have recognized the principal as the head of the school to which he/she is assigned. As was said in Viemeister v. Prospect Park Board of Education, 5 N.J. Super. 215, 217 (App. Div. 1949): "The position of principal is recognized throughout the school laws and the regulations of the State Board of Education." Indeed, it was not until 1962 that vice principals or assistant principals could obtain tenure as such, whereas tenure for principals in that category went back to the laws of 1909. See Greenway v. Board of Education of Camden, 129 N.J.L. 461 (E. & A. 1942). We find this legislative recognition of the difference between principal and vice principal or assistant principal to be persuasive as to their difference in rank.

For the foregoing reasons, we reverse the decision of the Commissioner and direct that the Petitioner be restored to his position as elementary principal.

Attorney exceptions are noted.

December 3, 1980
Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN RE:	)	INITIAL DECISION
Patricia Banzer	)	**O.A.L. DKT. NO. EDU 3080-79**
vs.	)	AGENCY DKT. NO. 291-7/79A
Board of Education of the Borough of Madison, Morris County	)	

APPEARANCES FOR THE PETITIONER:

Saul R. Alexander, Esq.,
Patricia Banzer, Petitioner
Robert A. Newhouse, Principal

APPEARANCES FOR THE RESPONDENT:

David B. Rand, Esq.

EVIDENTIARY DOCUMENTS:

C-1: Board policy on reduction in force
J-1: Performance appraisals of petitioner under dates of 2/28/77, 2/28/78, and 2/28/79
J-2: Observation reports of petitioner 1976-79 (10 pages)
P-1: 11/9/77 letter to petitioner from Superintendent
P-2: 4/17/79 Board minutes (in pertinent part)
P-3: 4/17/79 riffing letter to petitioner from Superintendent
P-4: Non-renewal reasons request letter of 4/21/79 from petitioner to Board secretary
P-5: Reasons letter of 4/25/79 to petitioner from Superintendent
P-6: 5/24/79 round table minutes in pertinent part
P-7: 5/25/79 letter to petitioner from Board president

P-8: 7/30/79 letter to petitioner from principal May
P-9: 11/9/77 "Board Bits"
P-10: Rif criteria memo of 4/23/79 from principals to Superintendent
P-11: Undated reduction in force procedures proposal

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

Petitioner alleges that the Board's termination of her services as a teaching staff member through non-renewal was improper, illegal, and an abuse of its discretionary authority.

The Board avers that it accorded petitioner full and complete procedural due process and acted reasonably and properly pursuant to N.J.S.A. 18A and N.J.A.C. 6.

The Petition of Appeal was filed with the Commissioner of Education on July 18, 1979, and the matter was transferred to the Office of Administrative Law on August 15, 1979 pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on November 16, 1979 and a plenary hearing was held on March 12, 1980. At the close of the hearing counsel for the parties waived the Briefs which were not required by the Judge. The parties were reserved the right to file a memorandum of law, and the Judge required that same be mailed by either or both parties exercising the option on April 4, 1980.

The record was closed in this matter on April 9, 1980 when the Judge was satisfied that letter memoranda was not forthcoming from either party.

The uncontroverted facts in this matter indicate the Board's intention and action to reduce its force by one teacher for valid reasons pursuant to N.J.S.A. 18A:28-9. The controversy centers on the Board's decision to non-renew petitioner instead of any one of three other non-tenured teachers.

There is no contention by the Board or its agents that the petitioner was not a good teacher. The Board's decision to non-renew petitioner was based on its value judgment and reliance on the value judgments of its administrators related to the relative strengths and weaknesses of four good non-tenured teachers. The determination of the Board

resulted from a conclusion that the three retained non-tenured teachers had more strengths and/or fewer weaknesses than the petitioner. **I SO FIND.**

The Commissioner stated in Nettles v. Board of Education of the City of Bridgeton, 1976 S.L.D. 555 that "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." (at 560)

The Commissioner also stated in Nettles that:

> Absent a showing of abuse of the 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. (at 560)

It was further stated in Nettles 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)." (at 560)

A careful and thorough review of the entire record in the instant matter reveals clearly that the petitioner has not met her burden of proof that the Board's action must be set aside due to impropriety, illegality, or abuse of its discretionary authority, or any other reason. I SO FIND.

I CONCLUDE, therefore, that the Petition of Appeal **IS DISMISSED.**

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

OAL DKT. NO. EDU 3080-79

I HEREBY FILE with **FRED G. BURKE, COMMISSIONER OF EDUCATION,** my Initial Decision in this matter and the record in these proceedings.

17 April 1980
DATE

WARD R. YOUNG, A.L.J.

PATRICIA BANZER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MADISON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed in a timely fashion 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 adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

NINO A. GELSOMINO, PETITIONER, V. BOARD OF EDUCATION OF THE TOWN OF BELLEVILLE, ESSEX COUNTY, RESPONDENT.	)	INITIAL DECISION AGENCY DOCKET NO. 305-8/78

APPEARANCES:

For Petitioner, Rothbard, Harris & Oxfeld
(Sanford R. Oxfeld, Esq., of Counsel)

For Respondent, Jacob Green, Esq. (Allen P. Dzwilewski, Esq., of Counsel)

BEFORE THE HONORABLE BRUCE CAMPBELL, A.L.J.

DOCUMENTS IN EVIDENCE:

J-1	Extract of Board Minutes dated 12/23/74
J-2	Extract of Board Minutes dated 6/23/75
J-3	Extract of Board Minutes dated 3/28/77
J-4	Letter dated 4/27/77; Certified Mail Receipt dated 4/28/77; Extract of Board Minutes dated 4/25/77
J-5	Supervisor Certificate dated 6/77; Receipt dated 6/10/77
J-6A	Job Description for Area Coordinator dated 6/23/75
J-6B	Job Description for Departed Chairman, undated
J-7	Extract of Board Minutes dated 8/29/77
J-8	Extract of Board Minutes dated 10/23/78
J-9	Extract of Board Minutes dated 6/23/75 containing Motion Adopting Job Description for Area Coordinator

Petitioner contends he has achieved tenure status in a supervisory capacity in the Belleville Public Schools. He states he was improperly removed from service in a supervisory capacity and requests reinstatement with appropriate compensation retroactive to the date of the allegedly improper removal.

Conversely, the Board of Education of the Town of Belleville (Board) avers the petitioner was properly removed, has achieved no tenure status other than as a teacher and the petition should therefore be dismissed.

The matter was opened before the Commissioner of Education and transferred to the Office of Administrative Law pursuant to the provisions of N.J.S.A. 52:14F-1 et seq.

The parties have cross-moved for summary judgment. The matter is submitted on the pleadings, briefs, exhibits and the transcript of a brief hearing conducted on January 23, 1979 in East Orange at which the instant motions were put forward.

The following facts are not in dispute. Petitioner was employed as a foreign language teacher on September 1, 1960. Petitioner was appointed Acting Foreign Language Department Head effective January 2, 1975 (J-1) and so served until June 30, 1975. On June 23, 1975, he was appointed Foreign Language Area Coordinator for the 1975-76 school year (J-2). He so served until June 30, 1977. By a communication dated April 27, 1977 (J-4) the Board notified petitioner he would not be offered the foreign language area coordinator position for the 1977-78 school year. Petitioner possesses a Supervisor Certificate issued by the State Board of Examiners in June 1977 and recorded in the Office of the Essex County Superintendent of Schools on June 10, 1977 (J-5).

Petitioner argues that a job description adopted by a Board of Education which requires observation and evaluation of teachers leads to the conclusions that a person serving in that capacity is acting in a supervisory capacity and that such service is tenurable, apparently regardless of the title affixed. He cites McCormick v. Board of Education of Hunterdon Central Regional High School District, 1978 S.L.D. ____ (decided February 18, 1978) and states it centers on the fact that the board in question required that department Chairmen be certified by the State Board of Examiners as supervisors and that they alone were required to observe and evaluate teachers. In the instant matter, he argues, the job descriptions (J-6A, J-6B and J-9) and the Board minutes of August 29, 1977 (J-7) show that the Board never required him to hold a supervisory certificate.

Petitioner cites Glover v. Board of Education of the City of Newark, 1974 S.L.D. 723, for the proposition that one may add periods of time of service during which appropriate certification is not held to periods of time in which it is, provided, as in the instant case, the appropriate certification is received before one is removed from supervisory capacity. Petitioner also cites North Bergen Federation of Teachers v. Board of Education of Township of North Bergen, 1977 S.L.D. 1125, in support of this contention that so long as an individual has acquired the necessary certification by the end of the statutory period necessary to tenure acquisition, then the individual is capable of acquiring tenure status.

Petitioner also argues that he would have acquired supervisory certification sooner had he been told at the beginning of his service as a supervisor it was necessary for him to do so.

In behalf of its own motion the Board also states that petitioner never was required by the Board to hold supervisory certification. The Board asserts that the job descriptions (J-6A, J-6B) in no way state or imply that the observations and evaluations performed thereunder were the only observations and evaluations of those teachers in the department or area.

The Board argues that even if the Department Head and Area Coordinator titles be equated, petitioner still fails to meet the requirements for tenure specified by N.J.S.A. 18A:28-6 since his service January 2 through June 30, 1975 was in an acting capacity. It is the Board's contention that the term "acting" removes the period of service hereunder from consideration in calculating time for tenure accrual purposes. If this theory were adopted, petitioner would have two years' service, but no more, in a supervisory capacity.

Alternatively, the Board argues failure to hold proper certification for the position in which tenure is claimed totally extinguishes the claim and cites Sydnor v. Board of Education of Englewood, 1976 S.L.D. 113 as support. In Sydnor, however, it is noticed that the petitioner at no time in question held a valid teaching certificate. At 117 the Commissioner states

> Petitioner's argument that the Superintendent was derelict in not compelling her to apply for certification is not a weighty one as a reason to grant the relief she seeks. The procuring of certification is the primary responsibility of a teacher. It is also the responsibility of the Superintendent to insure that all teaching staff members are either certified or apply in timely fashion for appropriate certificates ... (Emphasis supplied.)

It is apparent that both parties in the instant matter have overlooked a fundamental consideration. In carrying out the will of the legislature that all public school teachers regularly be evaluated, the State Board of Education has promulgated N.J.A.C. 6:3-1.19 and 1.21. These regulations set forth the requirements of and procedures for teacher observation and evaluation.

It is noticed that N.J.A.C. 6:3-1.19 became effective January 16, 1976, well within the span of petitioner's service as Foreign Language Area Coordinator under the specifications of J-6A. That regulation states at subsection (a)

> For the purpose of this Section, the term "observation" shall be construed to mean a visitation to a classroom by a member of the administrative and supervisory staff of the local school district, who holds an appropriate certificate for the supervision of instruction, for the purpose of observing a nontenured teaching staff member's performance of the instructional process:...

and at subsection (b)

> The term "evaluation" shall be construed to mean a written evaluation prepared by the administrative/supervisory staff member who visits the classroom... (Emphasis supplied.)

It is further noticed that there is no "grandfather clause" in N.J.A.C. 6.3-1.19. It is clear that the intendment of the State Board of Education was that the regulation be in full force and effect as of January 16, 1976.

Based on the foregoing, I FIND:

1. Petitioner served as Acting Foreign Language Department Head from January 2, 1975 to June 30, 1975.

2. Petitioner served as Foreign Language Area Coordinator from September 1, 1975 to June 30, 1977.

3. The job descriptions for Foreign Language Department Head (J-6B) and Foreign Language Area Coordinator (J-6A) are substantially the same and both require the observation and evaluation of teachers of foreign languages.

4. There is nothing of record to indicate that petitioner did not perform all of the duties specified in the job descriptions, above.

5. Effective January 16, 1976, only persons holding appropriate certification for the supervision of instruction could properly and lawfully observe and evaluate nontenured teachers in the public schools of this State pursuant to N.J.A.C. 6:3-1.19.

6. Petitioner received certification as a supervisor in June 1977.

Upon review of the entire record and the findings above, I CONCLUDE

1. The assignment by the Board of petitioner to the observation and evaluation of nontenured teachers in the period January 16, 1976 to the date upon which petitioner applied to the State Board of Examiners for supervisory certification was ultra vires.

2. Acts which are in excess of lawful powers can be of no effect.

3. The time in which petitioner was assigned outside the scope of his certification cannot be counted toward the accrual of tenure in a supervisory position even if all other requisites of such accrual were satisfied.

4. Petitioner's services does not meet the requirements established in N.J.S.A. 18A:28-6, tenure upon transfer or promotion.

Therefore, no justiciable issue exists and, accordingly, the PETITION IS DISMISSED.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

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

21 APRIL 1980
DATE

Bruce Campbell
BRUCE CAMPBELL, A.A.J.

NINO A. GELSOMINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner's exceptions rely largely on McCormick, supra, wherein the Commissioner found that McCormick had acquired a tenured status as a supervisor of instruction. The Commissioner cannot agree, finding McCormick inapposite to the present matter. In that decision petitioner had been certified by the New Jersey State Board of Examiners since September 1971 as a supervisor and throughout his tenure with the Board as a teacher of English (at p.5). In the present matter petitioner did not possess a Supervisor Certificate until June 1977 although the State Board of Education promulgated N.J.A.C. 6:3-1.19, the requirement that supervisory staff hold an appropriate certificate, effective January 16, 1976. In the present matter petitioner's assignment by the Board to the duties of observation and evaluation of nontenured teachers to the date in June wherein he acquired proper supervisory certification was ultra vires.

The Board's exceptions affirm the initial decision.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

June 5, 1980

PETER DIGLIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

For the Respondent, Stein, Joseph & Rosen (Marc Joseph, Esq., of Counsel)

Petitioner, formerly employed as a teaching staff member by the Board of Education of the River Dell Regional School District, hereinafter "Board," alleges that the Board illegally established his salary for the 1975-76 academic year, the last year of his employment. The Board denies the allegation and asserts that petitioner's salary for 1975-76 was established according to the amount set forth in the employment contract.

Hearings were conducted in the matter on April 21 and June 9, 1977 at the office of the Bergen County Superintendent of Schools by a hearing examiner appointed by the Commissioner of Education. Thereafter the parties of interest filed Briefs in support of their respective positions. The report of the hearing examiner is as follows:

Subsequent to the joining of the pleadings herein the Board filed a Motion to Dismiss the Petition, with supporting Brief, on the grounds that petitioner accepted part time employment and was compensated accordingly; that petitioner failed to file a grievance in regard to his complaint and is thereby barred from seeking relief before the Commissioner; that petitioner is barred from seeking relief through the application of the equitable doctrine of laches; and that the Association, of which petitioner is a member, accepted and approved salaries for 1975-76 for its members. Petitioner opposed the Board's Motion to Dismiss, with supporting Brief, and demanded the matter move to plenary hearing.

The parties were advised that the Motion to Dismiss was to be held in abeyance and moved to plenary hearing.

The facts necessary to be considered in the matter are these:

Petitioner, certified as a health education specialist, was first employed full time by the Board in December 1973 and was assigned to teach health at the junior and senior high schools. Petitioner was also assigned the task of developing a health curriculum for grades seven through twelve. Petitioner was provided periods of time during his full time schedule to work on the curriculum task between December 1973 and June 30, 1974.

Petitioner's employment was renewed by the Board for 1974-75. Preceding the commencement of the 1974-75 academic year, petitioner was employed by the Board for two weeks during the 1974 summer to work on the curriculum task.

Petitioner testified that during the whole of the 1974-75 academic year, his assignment included the teaching of from twenty to twenty-two classes of pupils per week, depending upon the marking period. Petitioner explained that he was also assigned one outside duty period per day, plus two periods per day to work on the curriculum. (Tr. I-98)

The principal testified that petitioner, during 1974-75, was assigned nineteen to twenty-one classes per week, depending upon the marking period. The principal testified in this regard that a schedule (R-7) which reflects petitioner's assignment for 1974-75, including three to four classes per day, plus two to three periods for his curriculum work, plus one conference period, and no outside duty, is accurate. (Tr. II-106)

Petitioner was offered reemployment by the Board for 1975-76 on an eighty percent of full time basis at a salary of eighty percent of the amount he would have received had he been employed full time. Petitioner testified that when he was offered the eighty percent of full time employment contract (R-3) he was told that his schedule of classes would be limited to three classes of ninth grade pupils per day, plus one preparation and one conference period per day. Petitioner also testified that he expected to be assigned four to six classes of eighth grade pupils for 1975-76. Petitioner explained that upon that understanding of his schedule he did sign and execute the eighty percent of full time contract for eighty percent of a full time salary. (R-3; Tr. I-110) In the meantime, petitioner was again engaged by the Board for one week in the 1975 summer to work on curriculum.

Petitioner testified that when the 1975-76 academic year began, his schedule was revised to include an assignment to teach one class of special education pupils one day a week plus an additional assignment of continuing work on the curriculum. (Tr. I-111) It is noticed that petitioner was, in fact, also assigned one period per day of outside duty. (R-7)

Firstly, the hearing examiner observes that petitioner was not assigned to teach a class of special education pupils at any time. Rather, petitioner did have contact with teachers of special education during his curriculum work and he simply began working with some pupils in need of special education strictly on his own initiative. (Tr. I-134-135; II-118, 209) While such initiative is admirable, it may not be used as a legal basis upon which to lay claim to full time employment.

The hearing examiner finds with respect to petitioner's claim that he was required to continue his curriculum work during 1975-76 that the total evidence speaks otherwise.

The combined testimony of the Superintendent, the principal and petitioner's department chairman establishes that the curriculum work which petitioner began in December 1973 was clearly to have been completed by working during the 1975 summer months when the Board engaged petitioner, ante. Petitioner testified that the department chairman had asked him to revise the proposed curriculum in September 1975 while the principal and the department chairman testified that petitioner was repeatedly requested to finish the curriculum task for which he had already been paid. In either case, petitioner testified that when the topic of additional work on the curriculum was discussed in September 1975 he understood that he would receive no compensation for such work.

Petitioner's claim to full time employment is not supported by his assertion that he performed curriculum work during 1975-76 or by his allegation that he taught a class of pupils in need of special education. His claim to full time employment and, accordingly, to full time compensation is supported by other evidence and testimony.

The Superintendent testified that the Board considers a teacher to be employed full time if assigned twenty-five or more teaching periods per week, in addition to five non-teaching periods. The Superintendent testified that this is consistent with Board policy which, the hearing examiner notices, is silent with respect to the number of teaching periods to be assigned full time teachers. (P-4; Tr. II-27, 70)

The hearing examiner observes in this regard that during 1974-75, petitioner was assigned, according to the schedule the principal testified is accurate (R-7, ante), from nineteen to twenty-one teaching periods per week. Yet, petitioner was employed and compensated on a full time basis.

The Superintendent also testified that petitioner's schedule of teaching periods was reduced by twenty percent for 1975-76. (Tr. II-35) The hearing examiner finds that this is simply not so. The schedule (R-7), which the principal asserts

is accurate, shows that petitioner was assigned nineteen classes during the entire 1975-76 academic year. The fact that an adjustment to an assigned outside duty was made by deletion subsequent to petitioner's protest, does not alter that fact. If, as the Superintendent asserts, petitioner's 1975-76 teaching periods were reduced by twenty percent from 1974-75, petitioner would have been assigned between 3.8 to 4.2 classes less, depending upon the marking period.

The hearing examiner has thoroughly reviewed the record herein and finds no basis to conclude that the Board fairly arrived at a determination as to how petitioner's duties should be reduced by twenty percent to establish his salary at a level of eighty percent of full time employment. Rather, it is clear that petitioner's efforts in regard to the curriculum were not considered adequate and the solution was to require him to work full time for 1975-76 but at a purported eighty percent assignment. Thus, petitioner theoretically would have the time to repair the deficiencies in his curriculum efforts.

The hearing examiner finds that petitioner was assigned a full time teaching position for 1975-76 and should have been compensated accordingly. There is, in the judgment of the hearing examiner, ample evidence to support petitioner's allegation that the schedule (R-5) of assigned duties for which he signed an eighty percent employment contract (R-3) for 1975-76 was sufficiently altered so that his actual schedule (R-7) for 1975-76 was full time.

The question whether petitioner was employed full time for 1975-76 is an issue of fact, and the hearing examiner concludes that the record supports a finding that petitioner was employed full time. Consequently, there is no need to discuss the Board's Brief in support of its position that petitioner was not employed on a full time basis.

The hearing examiner recommends the Commissioner issue an Order directing the Board to forward forthwith to petitioner an amount equal to the difference between what he was paid compared to what he should have been paid for 1975-76 as a full time teaching staff member in its employ.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in this matter, including the report of the hearing examiner, to which neither party has filed exceptions. The Commissioner adopts the findings and recommendations contained in that report, although he feels compelled to explore independently the reasons for his decision.

It is in the approach used in determining whether petitioner was in fact a full time employee during the 1975-76 academic year that the Commissioner feels further discussion is warranted. Viewed solely as a comparison of the periods of teaching duty assigned, the Commissioner would find untenable the hearing examiner's conclusion that petitioner's schedule for the 1975-76 school year was revised subsequent to the execution of his employment contract. The record discloses that petitioner's expectation at the time he accepted an 80% contract was that his teaching load would remain virtually the same as the preceding year. (Tr. I-109-3 to 11) Hence the only obligation of which he expected to be relieved was curriculum development, to which he had been assigned an average of two periods per day during the 1974-75 school year. This commitment, exacted of him as part of his overall professional responsibilities as a teaching staff member, could not be disregarded in establishing the number of teaching duty periods assigned in 1974-75. And, as the hearing examiner properly declined to recognize as an additional assignment the time petitioner was obliged to spend curing the deficiencies in the curriculum project, a simple comparison would compel the conclusion that petitioner's schedule was, in fact, reduced by 10 periods.

However, it is the total number of duty periods that determines the extent to which a teaching staff member is committed. And when examined from this broader perspective the evidence presented in this case indicates that the number of periods assigned for conferences and outside duty did not remain constant from one year to the next. It is this data that persuades the Commissioner to conclude that petitioner's schedule was in fact modified in such a manner as to eliminate the reduction in duty for which petitioner had accepted a reduced salary. When the periods of curriculum work (10 per week) are added to the periods of classroom teaching, which ranged from 19 to 21 depending upon the marking period and averaged 20 per week, and 5 conference periods per week, petitioner's duty periods for the 1974-75 school year totaled 35 per week. The total periods of assigned duty in 1975-76 were 34. This represents an average per week of 20 teaching periods, 10 conference periods, compared to 5 the preceding year, and 4 outside duty periods, from which petitioner had been excused entirely during 1974-75. (R-7) (While outside duty periods were assigned initially, the number was reduced for the last two marking periods to correspond to the reduction in petitioner's teaching duties, making the average for the year roughly 4 periods per week).

From this summary it clearly appears that the elimination of periods assigned to curriculum development did not in fact reduce the number of periods during which petitioner was assigned duties. Of the 10 periods that had been devoted to curriculum work, 9 were devoted instead to conferences and outside duty. In view of the foregoing, the Commissioner concludes that petitioner was, in fact, called upon to perform the services of a full time teaching staff member during the 1975-76 academic year and he should have been compensated accordingly. The Board is directed to forward to petitioner an amount equal to the difference between the part time salary he was paid and the full time salary he should have been paid for the 1975-76 school year.

COMMISSIONER OF EDUCATION

June 5, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF THE CENTRAL REGIONAL HIGH SCHOOL DISTRICT OF OCEAN COUNTY, PETITIONER, V. BOARD OF EDUCATION OF LACEY TOWNSHIP AND THE CENTRAL REGIONAL EDUCATION ASSOCIATION AND RONALD VILLANO, individually, OCEAN COUNTY, RESPONDENT.	INITIAL DECISION OAL DKT. NO. EDU 902-79 AGENCY DKT. NO. 23-2/79A

APPEARANCES:

For the Petitioner, Russo & Courtney, (James P. Courtney, Esq., of Counsel)

For the Respondent Lacey Board of Education, Martin & Corbett, (Wilbert J. Martin, Esq., of Counsel)

For the Respondent Central Regional Education Association and Ronald Villano, Starkey, Kelly, Cunningham, Blaney & Ward (James M. Blaney, Esq., of Counsel)

BEFORE THE HONORABLE LILLARD E. LAW, ALJ

Respondent Lacey Township Board of Education, hereinafter "Lacey Board," joins with petitioner Board of Education of the Central Regional High School District, hereinafter "Central Regional Board," seeking a declaratory judgment with respect to the provisions of N.J.S.A. 18A:28-9 et seq., and N.J.S.A. 18A: 13-64 et seq and any other provisions of Title 18A Education or New Jersey Administrative Code, Title 6, Education as they affect the rights of all parties hereto and, in particular, the rights and responsibilities of the Lacey Regional Board effective July 1, 1978. The parties seek a determination and declaration to the following, as set

forth in Central Regional Board's Petition for Declaratory Judgment:

> "*** 1. Does the teaching staff member or employee that will be released from the Central Regional High School District have the right to be placed in the same position in the withdrawing district, namely Lacey Township School District.
>
> 2. If the Board of Education of the Regional High School District determines that certain administrative staff positions be abolished under the circumstances of the reduction of the number of students, does this person in such administrative position return to his last tenured position within the Central Regional High School District or does he or she have the right to be put in the same position within the withdrawing district.
>
> 3. Are there any guidelines which the Board of Education of the Central Regional High School District should utilize in determining seniority in the reduction of staff members or the abolishment of positions. ***"

The Central Regional Education Association and Ronald Villano, hereinafter "Association," as party respondents did not file an Answer to Central Regional Board's position nor did it advance any objections but, rather, subsequently joined the Central Regional Board and Lacey Board seeking a declaratory judgment in the instant matter.

The matter comes before the Court as a matter of educational law in the form of the pleadings, exhibits, and Briefs of counsel. The factual context surrounding the matter sub judice is as follows:

STATEMENT OF FACTS

1. Subsequent to the passage and approval on March 3, 1976, of "An act concerning education, authorizing and providing a procedure for withdrawal from a limited purpose regional school district and supplementing Title 18A: of the New Jersey Statutes (N.J.S.A. 18A:13-15 et seq.) the Lacey Township Board of Education on October 14, 1976 adopted a resolution authorizing an application to the Ocean County Superintendent of Schools to make an investigation as to the advisability of withdrawal of Lacey Township from Central Regional High School District of Ocean County.

2. On November 25, 1976, the Ocean County Superintendent of Schools filed his report on the withdrawal from the limited purpose Regional School District, setting forth the required statements and information in compliance with N.J.S.A. 18A:13-52.

3. Thereafter Lacey Township School District petitioned the Commissioner of Education for permission to submit to the legal voters of the withdrawing district and the remaining districts within the regional district the question whether or not it should so withdraw.

4. The Commissioner of Education submitted the petition and answers to same to the Board of Review pursuant to N.J.S.A. 18A:13-56 with the result that the said Board of Review, on May 20, 1977, granted approval to submit the deregionalization proposal question to the voters of Lacey Township and the remaining Regional District.

5. Some further proceedings ensued including amendments to the withdrawal statute, none pertinent here, resulting ultimately in a determination by the Commissioner of Education dated November 1, 1977, "that in the event of the approval by the electorate of the withdrawal of Lacey Township from the Central Regional District such withdrawal shall be legally effective July 1, 1978, but that thereafter there shall be a sending-receiving relationship between Lacey Township and the Central Regional District which shall receive authorization for and construct a new high school facility". In the Matter of the Petition of the Boroughs of Seaside Heights and Seaside Park and the Township of Lacey for Withdrawal from the Central Regional High School District, Ocean County, 1977 S.L.D. 632, 648.

6. At an election held for that purpose on December 14, 1977 the voters approved of the withdrawal of Lacey Township from the Regional High School District.

7. There were no school buildings of the Central Regional School District in Lacey Township, with all of the buildings and facilities of the Central Regional High School located in Berkeley Township, one of the constituent districts within the Central Regional High School District.

8. Pursuant to the Order of the Commissioner of Education the withdrawal became effective on July 1, 1978, and a sending-receiving relationship was created by the Order of the Commissioner, to be terminated upon the approval and construction of a high school.

9. Voter approval of the acquisition by the Lacey Board of two sites and the construction thereon of two school buildings, on one a Middle School to house grades 5 through 8 and on the other a High School to house grades 9 through 12, was obtained at an election held on June 27, 1978. Subsequently, on October 17, 1978 at a special election for that purpose two other plots of land were substituted for the acquisitions approval on June 27, 1978.

10. The Middle School is expected to be ready for students and staff by September 1, 1980. Prior to that date, Lacey Township Board of Education, pursuant to N.J.S.A. 18A:11-1, shall be required to hire a teaching staff to teach 7th and 8th grades.

11. The High School is expected to be ready for students and staff by September 1, 1981. Prior to that date, Lacey Township Board of Education shall be required to hire a high school certificated teaching staff for grades 9 through 12 in subject matter areas presently being determined as the curriculum as adopted by the Lacey Township Board of Education.

12. Central Regional Board of Education has stated its intentions to reduce its staff by approximately 26 teachers in the school year 80-81 and to further reduce its staff in the school year 81-82 when the Lacey Township Board of Education opens its high school.

13. A tentative list of teachers to be affected by the reduction in force at Central Regional High School District, dated December 20, 1979, was submitted to the parties in late December 1979, and a revision, dated January 28, 1980, was supplied on February 4, 1980, at a conference presided over by the undersigned Administrative Law Judge.

14. The above-mentioned lists appear to be based on seniority over the two-year period and not to be based on 7th and 8th grade levels in the 1980-81 reduction in force and the subsequent reduction in force of high school teachers, grades 9 through 12 in the 1981-82 reduction in force.

THE PARTIES HERETO HAVE STIPULATED THE FOLLOWING:

1. Effective date of the withdrawal July 1, 1978

2. Sending-receiving agreement between Central Regional High School District and Lacey Township by Order of the Commissioner of Education. In the Matter of the Petition of the Boroughs of Seaside Heights and Seaside Park and the

Township of Lacey for Withdrawal from the Central Regional High School District, Ocean County, 1977 S.L.D. 632, 648.

3. The election held on December 14, 1977 approved the withdrawal of Lacey Township from the Central Regional School District.

4. Lacey Township will operate its schools to include grades seven and eight for the 1980-81 school year and such pupils will not attend Central Regional School District.

5. The Lacey Township projected pupil population for 1980-81 will be approximately:

Grade seven (7)	207 pupils
Grade eight (8)	195 pupils

6. Commencing the 1981-82 school year, Lacey Township will provide an educational program for grades K through 12.

The statutes, N.J.S.A. 18A:28-9 et seq., set forth the provisions by which a board of education may reduce the number of tenured teaching staff members in its employ and the protected rights of those tenured teaching staff members so reduced in employment. Notice is taken that N.J.S.A. 18A:28-9 et seq. speaks only of tenured teaching staff members whereas the statute N.J.S.A. 18A:13-64, the subject of these pleadings, speaks of "all employees" as follows:

N.J.S.A. 18A:13-64 states:

"***All employees of the regional district shall continue in their respective positions in the withdrawing district and all of their rights of tenure, seniority, pension, leave of absence and other similar benefits shall be recognized and preserved and any periods of prior employment in the regional district shall count toward the acquisition of tenure to the same extent as if all such employment had been under the withdrawing district. Any tenured employee in a school located in the withdrawing district who desires to remain in the employ of the regional district, and whose seniority under existing tenure laws so permits, may apply for and shall be granted a transfer to a position with the regional district for which he is certified

> which is vacant, held by a tenured employee with less seniority or by an employee without tenure; applications for such transfers shall be made within 45 days of the date of the special school election at which the withdrawal was approved."

The specific issues which were agreed to by the parties and are to be resolved in the instant matter are stated as follows:

1. In an action to withdraw from a limited purpose regional high school district, do those school employees released from the regional school district have the right to be placed in the same position in the withdrawing school district? N.J.S.A. 18A:13-49, N.J.S.A. 18A:13-64.

2. If so, what employees is the Lacey Board required to take? N.J.S.A. 18A:13-64.

3. If Issue Number One above is answered in the affirmative what benefits that are provided by the Central Regional Board follow the employees to the Lacey Board?

Briefs were filed by the Lacey Board and the Association. Central Regional Board did not file a brief, representing that it would rely upon the undisputed facts and points of law set forth by the other parties. It is noted that the parties offered extensive arguments with respect to the interpretation of statutes under consideration in the instant matter. Such arguments have been carefully considered and are a matter of the herein record. The arguments of the parties are set forth, seriatum, as follows:

ISSUE NUMBER ONE

The Association avers that the statute to permit the withdrawal from a regional school district was originally introduced in the Legislature on January 24, 1974 and in its original form contained no provision for the protection of the employees of regional school districts because of reductions of force caused by a withdrawal of a board of education from a regional school district. It contends that the act was amended to include N.J.S.A. 18A:13-64 to cure inequities that could have occurred to employees of a regional school district as the result of an approved withdrawal. It asserts that inasmuch as N.J.S.A. 18A:13-64 was not a part of the original bill it could be concluded that the Legislature adopted the statute to protect employees and their benefits.

The Association contends that the language of N.J.S.A. 18A:13-64 has been found to be so clear and concise that the Commissioner of Education has commented on the same in two recent decisions. The Commissioner stated:

> "The costs for the conduct of the election are clearly prescribed by statute as are the division of assets and liabilities and the seniority entitlement for teaching staff members of the withdrawing and remaining districts. (emphasis added). In the Matter of the Petition of the Township of Egg Harbor Regional High School District, Commissioner of Education #63-78 p. 19 (March 17, 1978); See also, In the Matter of the Petition of Mt. Olive for Withdrawal from the West Morris Regional School District, Commissioner of Education #233-77 p. 18 (Nov. 1, 1977)."

It noted that the Appellate Division of the Superior Court in a recent case has put its imprimatur indirectly on the above interpretation of this statute. The case of In the Matter of the closing of Jamesburg High School, School District of the Borough of Jamesburg, Middlesex County, A-3471-78 and A-3642-78 (App. Div. decided July 2, 1979) dealt with a completely different situation than we have here but would have obviously been decided in favor of the teachers as the Commissioner and State Board had done if there was a "***provision in the law***" which compelled the same. "The desirability of such a provision is clearly for the Legislature and not for the courts to determine." (Jamesburg at p. 4 of slip opinion.) Also citing, Burling-County Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579, 598 (1970). It asserts that the Court is indicating that they would have affirmed the power of the Commissioner of Education to transfer teachers if there were a statute, and the Court even suggests that the Legislature pass such legislation.

The Association avers that, in the case at bar, the Legislature has passed such a law upon which one can rely for the power to order the protection of all employees of a regional school district and a withdrawing district. It asserts that this statute mandates the public policy as intimated by the Court in Jamesburg which is to protect employees in situations of this very nature.

It contends that Jamesburg indicates that where there is statutory direction, the Commissioner should do all that is necessary to protect employees caught in a difficult transition. It prays such should be done in this case.

The Lacey Board asserts that as the withdrawing district it did not have any "positions" within the district where "employees of the regional district" could "continue in their respective positions" hence 18A:13-64 does not apply to the Lacey Township School District. It asserts that the language of the statute is clear.

The Lacey Board argues that the Legislature intended that only if a school building of the regional district were physically located in the Township of Lacey, title to which would be transferred from the Central Regional High School District to the Lacey Township Board of Education, pursuant to N.J.S.A. 18A:13-61, would the employees whose positions were in the withdrawing district have the right to continue in their positions. The statute provides further that a tenured employee in a school located in the withdrawing district would have the right to elect to remain an employee of the regional district and "bump" a less senior employee and be transferred to a position in the regional district for which he is certified. It contends that the effect of the withdrawal from Central Regional High School District was to create, pursuant to the Order of the Commissioner of Education, a sending-receiving relationship between the two, separate, school districts. No positions pre-existed or were created as of that time, July 1, 1978, and the sending-receiving relationship will continue until September, 1980, for 7th and 8th grades and until September, 1981 for 9th through 12th grades. Seaside Heights, Seaside Park, Township of Lacey for Withdrawal from Central Regional, supra.

The Lacey Board argues that the intent of the Legislature, when construction be necessary, is gathered from the whole act and from a similar legislation on the same subject. It asserts that the construction of N.J.S.A. 18A:13-64 is one of first impression in this matter and that resort must be made to prior legislation in the same subject area of Title 18A: Education and more particularly to N.J.S.A. 18A:28-6.1, N.J.S.A. 18A:13-49 and N.J.S.A. 18A:28-15 to 17.

N.J.S.A. 18A:13-1 through 50, it observes, provides for the creation of regional school districts and did not, until after March 3, 1976, provide for the withdrawal of any constituent districts. It contends that in amending the regional school district law, the Legislature must be presumed to have been aware of N.J.S.A. 18A:13-1 to 18A:13-50, and particularly N.J.S.A. 18A:13-49, which provided as follows:

N.J.S.A. 18A:13-49. PRINCIPALS, TEACHERS AND EMPLOYEES TRANSFERRED.

All principals, teachers and employees in the employ of any dissolving local district shall be transferred to and continue in their respective employments in the employ of the regional school district and their rights to tenure, pension and accumulated leave of absence accorded under the laws of the state shall not be affected by their transfer to the employ of the regional school district.

The Lacey Board noted that both N.J.S.A. 18A:13-53 and N.J.S.A. 18A:13-61 deal with the fact that there may be school buildings in the withdrawing district and make special provision for the determination of value and the fixing of the financial responsibility of the withdrawing district as well as the fact that the withdrawing district shall take title under certain terms and conditions as to time of taking title. Similarly, it argues, that the Legislature provided for the employees assigned to such buildings by the employer regional board of education on those occasions where the withdrawing district contained a school building.

The Lacey Board contends that the statutory language of N.J.S.A. 18A:13-64 does not justify a limitation on right of employer board of education to freely select its own employees. It argues that it is long-standing law that both the employing board of education and the prospective employee are free agents with the right to negotiate the initial contract between them. N.J.S.A. 18:29-9

N.J.S.A. 18A:11-1 states, in mandatory language:

"The board shall ***

c. make, amend and repeal rules, not inconsistent with this title or with the rules of the state board *** for the employment, *** of its employees ***

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

The Lacey Board states that it should be noted that the "Public School Education Act of 1975" sometimes referred to as "Thorough and Efficient" was a statute long considered before its adoption and carrying with its adoption extensive legislative findings and declarations. It asserts that after finding and declaring that New Jersy should encourage citizen involvement in educational matters and should provide for free public schools in a manner which guarantees and encourages local participation (see N.J.S.A. 18A:7A-2 (5)).

The Lacey Board asserts that the legislatively expressed mandate that there shall be "qualified instructional and other personnel" furnished by the local school district dictates that the local board, here the withdrawing district, have complete freedom in the selection of its employees.

ISSUE NUMBER TWO

The Association asserts that N.J.S.A. 18A:13-64 speaks of a school district being required to take all employees. It contends that no cut off dates are spelled out, therefore, the clear language of the statute requires that all employees up to the actual dismissal of employees from the regional district must be accepted by the withdrawing district.

To hold otherwise, it suggests, would punish the students enrolled in the Central Regional District up until the transfer. For example, if a cut off date for acceptance of employees by Lacey Township were set, then any teacher hired after that date would be hired and expect to be fired as soon as the withdrawal began. It contends that such a situation would lend itself to an unjust and harsh demise for those employees and it would also create a situation where no top-notch employee would want to find himself, therefore, the quality employees would avoid the situation and the students would in the long run be the ones who would suffer. It asserts that if all the employees up to the actual withdrawal were accepted, then an employee would not be as fearful to enter such a situation and the students who are partially Lacey Township students would benefit.

The Association avers that the Legislature, by omitting any cut off date, has clearly indicated its intention that none should exist. If no cut off date for transfer of employees exists, then all employees should be included in this interpretation of the statute.

The Lacey Board argues that only those employees holding positions in the regional district at the time of the election should be accorded whatever protection is afforded by N.J.S.A. 18A:13-64.

The Lacey Board argues that only those eligible employees who have taught for a substantial part of their careers in the categories and subject matter areas of the positions created in the withdrawing district should be entitled to fill those positions. It asserts that upon the effective date of the withdrawal, the withdrawing district must look to the special needs of the community and meet those needs and the mandates of the "Public School Education Act of 1975" in the development of a curriculum which in turn dictates the employment of qualified instructional and other personnel. N.J.S.A. 18A:7A-5g. It argues that to compel the withdrawing district to employ all the employees of the regional district who are dismissed as a result of a reduction in force without regard to the needs of the withdrawing district would, in effect, legislate the violation of N.J.S.A. 18A:11-1 and N.J.S.A. 18A:7A-1 et seq.

ISSUE NUMBER THREE

The Association avers that N.J.S.A. 18A:13-64 provides for the vesting of *** rights of tenure, seniority, pension and leaves of absence ***" It raises the question as to what does the phrase "other similar benefits" mean?

It argues that since the intent of this statute was not to destroy the continuity of employment and service by the employees it should likewise be clear that this continuity of employment includes all of those fringe benefits not specifically mentioned in the statute. See, Pearce v. Brick Township Board of Education, 85 N.J.L. 510 (1914) The Association observes that it should be noted that support for this argument can be garnished from N.J.S.A. 18A:6-10 which disallows any reduction of a tenured employee's compensation without a formal charge being brought against that teacher. It asserts that in this situation if a withdrawing board were allowed to reduce salary or lower fringe benefits, it would be circumventing the intent of N.J.S.A. 18A:6-10 as well as the attempt at promoting the continuity of employment and service.

The Association submits that the Lacey Township Board of Education must accept those employees who are to be released by Central Regional School District because of the withdrawal of Lacey Township. It asserts that this acceptance of employees should apply to all employees employed by Central at the time of the actual withdrawal of the students, and those employees leaving Central for Lacey should take with them all benefits they were receiving at Central.

The Lacey Board argues, conversly, that only those benefits specifically set forth in the statute can follow the employee into a position in the withdrawing district. It argues further, that if the withdrawing district is required by the construction of N.J.S.A. 18A:13-64 to provide positions for the employees who are dismissed from the regional school, the withdrawing district would be required to recognize the tenure status of such employee his seniority with resepct to other employees, his pension rights, his rights if on a leave of absence and other similar benefits such as placement on the appropriate experience level on the salary guide of the withdrawing district.

Respondent Lacey Township Board of Education, asserts that for the reason that it had no positions in the district at the time of the withdrawal, it is not required to accept teachers from Central Regional High School, but, if in the alternative it is required to take teachers, such teachers will be limited to those holding similar positions in the Regional District at the time of the withdrawal election and not thereafter.

It further concludes that if it is required to take teachers from the Regional District, Lacey will recognize the tenure status of such employee, his seniority with respect to other employees, his pension rights, his rights if on a leave of absence and other similar benefits such as placement on the appropriate experience level on the salary guide of the withdrawing district.

Having carefully reviewed the entire record in the instant matter, I FIND that those Stipulations, numbers one (1) through six (6) inclusive, are hereby adopted as findings of fact in the instant matter. I HEREBY FIND the Statement of Facts, Numbers One (1) through Fourteen (14), as set forth at length herein, are also adopted by reference and that no further recital thereto is necessary.

The first issue to be determined is whether those employees to be released from Central Regional Board's employ due to a reduction of force have the right to be placed in the same position of the Lacey Board's school district as the result of the Lacey Board's withdrawal from the Central Regional School District. The central issue involving statutory interpretation is one of first impression. The statute, N.J.S.A. 18A:13-64, provides that "All employees *** shall continue in their respective positions *** and all of their rights of tenure, seniority, pension, leave of

absence and other similar benefits shall be recognized and preserved ***." The antecedent, the recognition and preservation of the rights of all employees in a withdrawing action, pursuant to N.J.S.A. 18A:13-51 et seq., shows that the Legislative intent of N.J.S.A. 18A:13-64 was to protect the employment rights of those employees who have provided good and faithful service to the school district. The statutes are replete with employment protection, particularly with regard to those who have acquired a tenure status. Such tenure protections are afforded when there is a change in the method of government of a school district, N.J.S.A. 18A:28-15; when a state agency assumes operation of a school district, N.J.S.A. 18A:28-16; when a local board of education assumes operation of a school district previously under the operation of a state agency, N.J.S.A. 18A:28-17; when smaller school districts are consolidated or dissolved to form regional school districts, N.J.S.A. 18A:13-42 and N.J.S.A. 18A:13-49; upon the discontinuance of a school in one district with the establishment of a sending-receiving relationship by agreement with another board of education, N.J.S.A. 18A:28-6.1. Additionally, tenured teachers may not be summarily dismissed or reduced in compensation, N.J.S.A. 18A:6-10 et seq. Similarly, nontenured employees are clothed with certain employment protections, albeit, limited. N.J.S.A. 18A:27-10 et seq; N.J.S.A. 18A:27-3.1 et seq; N.J.A.C. 6:3-1.19, 1.20. It is undisputed that a local board of education has the discretionary authority to decline to reemploy nontenured employees, however, such authority is not absolute. When a board's action to terminate is found to be arbitrary, unreasonable, capricious or otherwise improper, such action can be set aside. See Cullum v. North Bergen Board of Education, 15 N.J. 285 (1954); Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County, 1968 S.L.D. 7, dismissed State Board of Education, 1968 S.L.D. 11, affirmed Superior Court of New Jersey, Appellate Division, 1969 S.L.D. 202, reversed in Donaldson v. Board of Education of North Wildwood, 65 N.J. 236, 247-248 (1974); Lewis Moroze v. Board of Education of the Essex County Vocational School District, Essex County, 1973 S.L.D. 385, remand State Board of Education, 1974 S.L.D. 897, reversed State Board of Education 1975 S.L.D. 1103; Hazel Richardson and Deborah L. Anderson v. Board of Education of the Township of Galloway, Atlantic County, 1979 S.L.D. _____ (December 3, 1979)

Notwithstanding such employment protection, the statute N.J.S.A. 18A:13-64 provides equal, if not greater, protection to employees in the withdrawing district wherein it provides that:

> "All employees of the regional district shall continue in their respective positions

> in the withdrawing district and all their rights of tenure, seniority, pension, leave of absence and other similar benefits shall be recognized and preserved and any periods of prior employment in the regional district shall count toward the acquisition of tenure to the same extent as if all such employment had been under the withdrawing district.***"

and;

> "*** Any tenured employee in a school located in withdrawing district who desires to remain in the employ of the regional district, and whose seniority under existing tenure laws so permits, may apply for and shall be granted a transfer to a position with the regional district for which he is certified which is vacant, held by a tenured employee with less seniority or by an employee without tenure; applications for such transfers shall be made within 45 days of the date of the special school election at which the withdrawal was approved."
> (Emphasis supplied)

The facts in the instant matter reveal that, prior to the deregionalization, the Lacey Board operated two elementary schools instructing its pupils in kindergarten through grade six. Its pupils, subsequent to the completition of sixth grade, attended Central Regional High School for grades seven through twelve inclusive as constituent resident pupils under the direction and control of the Central Regional Board. As a constituent member of the Central Regional School District, Lacey Township was duly represented on the Central Regional Board with all of the concomitant rights and responsibilities inherent with such membership. Lacey Township was an integral part of, and not separate or apart from, the Central Regional School District for secondary school purposes. The Lacey Board's argument that there was no school of the regional district within the geographic confines of its Township and, therefore, that it has no responsibility for or to the employees of the regional district is without merit.

The lack of a school within the geographic boundaries of Lacey does not modify or alter the intent of the statute that the rights of "all employees shall be recognized and preserved." The mere absence of a school house, in an action of a board of education to withdraw its pupils from a limited purpose regional school district, cannot be used to vitiate the statutorily protected rights of those employees effected by such withdrawal. Nor can the interim designation by the Commissioner, of the Lacey Board as a sending district pending the completion of its own secondary school buldings, relieve the Lacey Board of its statutory responsibilities to the employees of the regional district. In the Matter of the Petition of the Township of Egg Harbor for Withdrawal from the Greater Egg Harbor Regional High School District, Atlantic County, 1978 S.L.D. _____ (March 17, 1978) It is observed that in order for the Lacey Board to achieve its constitutional and statutory mandate to provide a thorough and efficient system of public education it must provide a class of experienced personnel in its schools to balance the inexperienced. Thus, the release of a cadre of experienced employees by the Central Regional Board and their employment by the Lacey Board will avoid such an imbalance of inexperienced personnel in the new Lacey Board secondary schools.

I CONCLUDE, therefore, that the rights of those employees employed at the time of the Lacey Board's withdrawal from the Central Regional High School District are protected by statute and shall be employed by the withdrawing Lacey Board "for which he/she is certified" and that "all of their rights of tenure, seniority, pension, leave of absences" and other such rights specifically set forth in statute "shall be recognized and preserved."

I CONCLUDE FURTHER, that those benefits provided by the Lacey Board to its employees pursuant to N.J.S.A. 34:13A-1 et seq., shall be held in full force and effect to those employees transferred to its employ from the Central Regional District.

I CONCLUDE that the method by which the statutory intent of N.J.S.A. 18A:13-64 is to be administered will be pursuant to N.J.S.A. 18A:28-9 et seq., and read in pari materia wherein N.J.S.A. 18A:28-9 provides in pertinent part that:

> "Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of

teaching staff members,***."

and; N.J.S.A. 18A:28-11 provides, inter alia, that:

"In the case of any such reduction the board of education shall determine the seniority of the persons affected ***"

It is observed that N.J.S.A. 18A:29-9 speaks only to those persons who have acquired a tenure status. In order to carry out the mandate of N.J.S.A. 18A:13-64, IT IS ORDERED that, for the purposes of the matter sub judice, the Central Regional Board shall establish a seniority status for tenured and nontenured persons in its employ. IT IS FURTHER ORDERED that the Commissioner, pursuant to N.J.S.A. 18A:4-29, direct the Ocean County Superintendent of Schools to meet with the parties of the herein matter to determine the seniority status of the individuals and to effectuate a fair and equitable transition in this matter.

Finally, it is recognized that the statutory obligation of boards of education to evaluate personnel to assure that a thorough and efficient program of education is afforded to their pupils. Those nontenure individuals who have been evaluated by the Central Regional Board been adjudged unsatisfactory in their performance shall be notified pursuant to N.J.S.A. 18A:27-10 et seq. IT IS CONCLUDED that such individuals have no legitimate claim to positions in the employ of the Lacey Board.

Accordingly, it is declared that those employees of the Central Regional School District, who were employed prior to July 1, 1978 and who will be the subject of a reduction of force as the result of the withdrawal of the Lacey Board from the Central Regional District, shall be granted a transfer to the Lacey Board's Middle School for the 1980-81 school year and to the Lacey Board's Senior High School for the 1981-82 school year. It is further declared that those benefits afforded the Lacey Board's employees shall be conferred upon those employees transferred to the Lacey Board's employ from the Central Regional School District. Egg Harbor Withdrawal, supra. Having granted the parties prayer for relief in the form of the foregoing declaratory judgment, I FIND it unnecessary to conduct a plenary hearing or to retain further jurisdiction in the instant matter.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1 et seq.

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

11 April 1980
DATE

Lillard E. Law
LILLARD E. LAW. ALJ

Receipt Acknowledged

DATE

AGENCY HEAD

Mailed to Parties

April 16, 1980
DATE

Ronald L. Parker /bt
OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF THE CENTRAL REGIONAL HIGH SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LACEY TOWNSHIP AND THE CENTRAL REGIONAL EDUCATION ASSOCIATION AND RONALD VILLANO, individually, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the Central Regional Education Association pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

The respondent Association takes exception to that aspect of the initial decision which limits transfer rights of employees of the Central Regional School District to those individuals who were employed by the Regional District prior to July 1, 1978. The Association argues that since N.J.S.A. 18A:13-64 does not provide a cutoff date with respect to the transfer of the affected employees of the regional district, there should be none. Additionally, the Association asserts that if the establishment of a cutoff date is appropriate, the Central Regional Board was required to notify each teacher hired subsequent to that date that he would be subject to the termination without the express transfer rights created by N.J.S.A. 18A:13-64. The Commissioner is not persuaded by these arguments. The intent of N.J.S.A. 18A:13-64 was to protect the employment rights of personnel affected by the withdrawal of a constituent district from a special services regional school district and to effectuate an orderly transition. Under such circumstances, the Commissioner finds that the establishment of the July 1, 1978 cutoff date was entirely reasonable and consistent with legislative intent since it protected all individuals who were employees of the regional district as of the time the withdrawal became legally effective. Since the impending withdrawal was a matter of public record and since employees hired by the Central Regional Board after July 1, 1978, had full knowledge of said withdrawal and its impact on enrollment, there can be no charge of bad faith on the part of the Central Regional Board. The Commissioner concludes that the argument of the Association is without merit.

The Association also takes exception to the conclusion below: "***that those benefits provided by the Lacey Board to its employees pursuant to N.J.S.A. 34:13A-1 et seq. shall be held in full force and effect to those employees transferred to its employ from the Central Regional District." The Association asserts that N.J.S.A. 18A:13-64 speaks to those rights of tenure, seniority, pension, leave of absence and other said benefits accrued while at Central Regional and not to the adoption of the rights of the Lacey contract. Further, the Association maintains that since the Lacey Township salary scale is lower than that of Central Regional, teachers transferred to Lacey Township will experience a reduction in compensation contrary to the provisions of N.J.S.A. 18A:6-10 which states:

> "No person shall be dismissed or reduced in compensation,
>
> > (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state
> >
> > * * *
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the Commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.***"

The Commissioner agrees that those rights of tenure, seniority, pension, leave of absence, and other such benefits addressed in 18A:13-64 are in fact transferrable, however, the Commissioner does not conclude that the intent of 18A:13-64 was to require the withdrawing district to establish, in effect, two levels of compensation and benefits for comparable levels of training and experience, one for its long time employees and one for its newly acquired employees.

The Commissioner therefore directs the Lacey Township Board of Education to place those employees transferred from the Central Regional School District at the step and level of the Lacey Township salary schedule appropriate for their years of service in the regional district and to fully recognize and preserve "all of their rights of tenure, seniority, pension,

leave of absence and other similar benefits" and to provide them with all other benefits which are accorded employees of the Lacey Township School District.

Having noted the exceptions and addressed them, the Commissioner affirms the findings of Judge Law with the following exception hereinafter set forth.

The Commissioner rejects Judge Law's order that the Ocean County Superintendent of Schools be directed "***to meet with the parties***to determine the seniority status of the individuals and to effectuate a fair and equitable transition in this matter." The Commissioner observes that the responsibility for determining seniority and for effectuating the transfers within the parameters of the instant decision properly belongs with the boards of education of the respective districts.

Finally, as a matter of clarification the Commissioner accepts the recommendations of Judge Law in reference to the employment entitlements of all employees (emphasis added) with the understanding that the seniority lists created for purposes of effectuating the transfer shall not remain in force beyond the point at which the transfer of personnel between the two districts has been accomplished. Teaching staff members transferred from Central Regional School District to the employ of the Lacey Township School District shall be placed upon the seniority list of the district to which they have been transferred and retain no further claim to seniority in the district from which they came. Seniority lists developed for non-professional employees shall be utilized solely for the purpose of carrying out the transfer between the two districts and will expire immediately upon completion of such transfer conferring no further seniority entitlement in either district.

COMMISSIONER OF EDUCATION

June 6, 1980

SHIRLEY K. LICHTMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Thomas C.C. Humick, Esq.

For the Respondent, Stephen G. Weiss, Esq.

Petitioner, a tenured teaching staff member who was employed as a part-time school librarian by the Board of Education of the Village of Ridgewood, hereinafter "Board," until her position was abolished by the Board at the conclusion of the 1975-76 academic year, alleges that the action of the Board in terminating her employment was violative of her seniority rights as a tenured teaching staff member. Petitioner alleges that she was entitled to be appointed to a vacant position of full-time school librarian or to another teaching position within the scope of her certification as of the 1976-77 academic year. Petitioner asserts that the Board's action in terminating her employment at the conclusion of the 1975-76 academic year violates the provisions of N.J.S.A. 18A:28-12, 18A:29-9 and N.J.A.C. 6:3-1.10. Petitioner prays for an order by the Commissioner of Education directing the Board to reinstate her to a teaching position in accordance with her seniority and certification. More specifically, petitioner requests that the Board be directed to employ her in the position of full-time school librarian which became vacant as of the 1976-77 academic year. The Board admits that petitioner was a tenured teaching staff member but denies that she had seniority rights to any position other than that of part-time school librarian, the last of which positions was abolished at the conclusion of the 1975-76 academic year.

A Motion for Summary Judgment was advanced by petitioner and accompanied the filing of the instant Petition of Appeal. Such Motion was denied by the hearing examiner upon request by respondent to amplify the record in support of its position through testimony from the Board's Director of Personnel.

A hearing in this matter was conducted April 14, 1977 in the office of the Bergen County Superintendent of Schools, before a hearing examiner appointed by the Commissioner. Several documents were submitted into evidence. The hearing examiner's

report is based upon those documents, the factual admissions in the pleadings, the testimony of the Director of Personnel, and the Briefs of counsel filed subsequent thereto. Many of the pertinent facts of this matter are not in dispute and are set forth as follows:

Petitioner possessed a valid certificate issued by the New Jersey State Board of Examiners at the time of her initial employment by the Board at the commencement of the 1965-66 academic year. This certificate was issued to petitioner in May 1965 and indicates that she was certified as a "Secondary school teacher of English and French" and "Teacher Librarian." (J-1) Petitioner's employment contracts issued by the Board establish her employment service record to be as follows:

Year	Employment Status	Days Per Week
1965-66	Librarian	3
1966-67	Librarian, part-time	3
1967-68	Sch. Librarian, part-time	3
1968-69*	Sch. Librarian, part-time (Sept.-Jan. 1)	
	Librarian, full-time (Jan. 2-June 30	*
1969-70	Librarian, 3/5 time	3
1970-71	Lib. Instruct. Media Spec., 3/5 time	3
1971-72	Instruct. Media Spec., 3/5 time	3
1972-73	Instruct. Media Spec., 3/5 time	3
1973-74	Instruct. Media Spec., 3/5 time	3
1974-75	Instruct. Media Spec., 3/5 time	3
1975-76	Sch. Librarian, 3/5 time	3

(P-1-12)

*The Director of Personnel testified that petitioner was issued a contract to serve as a full-time school librarian for the second half of the 1968-69 academic year because the full time school librarian at the school to which she was assigned was granted a leave of absence by the Board. (Tr. 46) It has further been established that petitioner was assigned to serve at the Somerville Elementary School from September 1965 through June 1975. Petitioner served as part-time school librarian at the George Washington Junior High School for the entire 1975-76 academic year, after which her employment was terminated by the Board. (P-18)

The hearing examiner observes from the employment contracts (P-1 through P-12) that the title of her position of employment has been described as either "librarian," "school

librarian," or "instructional media specialist." It is found and determined that petitioner was qualified to serve in such capacities during her periods of employment by virtue of her certification as "Teacher Librarian" as it appears on the certificate issued by the State Board of Examiners. (J-1)

On April 14, 1976, petitioner received a letter from the Superintendent. The body of the letter reads as follows:

> "In compliance with the Fair Dismissal section of the existing agreement between the Board of Education and the Ridgewood Education Association and in compliance with N.J.S.A. 18A:27-10, I am writing to inform you that continued employment in the Ridgewood Public Schools beyond June 30, 1976, cannot be offered to you. Your position as a part time librarian has been eliminated in the 1976-77 budget. Your position is the last of our part time library positions in the Ridgewood Schools.
>
> "We appreciate the contributions you have made as a member of the Ridgewood staff for the past 11 years and wish you well in the future." (P-13)

Thereafter, petitioner replied in writing on April 15, 1976 as follows:

> "I received your notification for non-reemployment for the year of 1976-1977 under Article [N.J.S.A.] 18A:27-10 which pertains to non-tenured teaching staff members. Since I am a tenured professional employee in the school district the notification that you have sent me has absolutely no meaning whatsoever. I would also like to inform you that as a tenured staff member I have seniority and 'bumping' rights in the area of my certification. I would suggest that you consult with your [Board] solicitor to reassess my position in the Ridgewood Public Schools.***" (P-14)

The Superintendent advised petitioner by way of a letter dated April 28, 1976 of the following:

> "Thank you for your certified letter of April 15. There is no question that you are a tenured employee of the Ridgewood Schools at this time. However, according to N.J.S.A. 18A your tenure applies only to a 3/5 time [3 days per week] position since that is how you earned your tenure.

> "I trust that you will understand, therefore, in absence of any 3/5 time position for which you are qualified, we are unable to re-employ you for the 1976-77 school year." (P-15)

Petitioner, as a professional staff member, was apprised by the director of personnel of certain teaching vacancies which would be available for the 1976-77 academic year by way of the following memorandum dated May 4, 1976:

> "Since we must provide opportunities for a number of tenured professional staff members returning from official leave, relocate staff due to budget cutbacks or enrollment adjustments and attempt to accommodate transfer requests, we are at this time notifying all permanent staff of those known professional opportunities available for the 1976-77 school year.
>
> "Those staff members interested in transferring to one of the advertised openings should direct a letter of application to the principal of the school where the anticipated vacancy exists with a copy forwarded to me. The deadline for accepting applications for the openings listed is May 14, 1976.
>
> ELEMENTARY
>
> ***
> RIDGE
> Librarian
>
> SECONDARY
>
> BENJAMIN FRANKLIN JR. HIGH SCHOOL
> ***
> French" (P-17)

Petitioner in compliance with this directive sent a letter dated May 5, 1976 to the principal of the Ridge Elementary School. The letter reads in pertinent part as follows:

> "Today I received notice of an opening for a school librarian position at Ridge School for the year of 1976-77. I wish to apply for the position. ***
>
> "I have for 11 years been a Librarian or Media Specialist in the Ridgewood School [S]ystem, 10 years at Somerville School and this year at the George Washington Jr. High [S]chool.***" (P-18)

Petitioner also informed the Board in writing on May 11, 1976 (P-19) that she had applied for the position of school librarian full time as indicated in the memorandum she received from the director of personnel dated May 4, 1976. (P-17, ante) Petitioner requested that the Board review her employment status and seniority rights in light of her demand that she be employed in such position. The Superintendent and the Board were again notified in writing on May 20, 1976 (P-16) of petitioner's request to be employed in a teaching position in accordance with her certification and seniority.

The hearing examiner observes that the Superintendent corresponded with petitioner's attorney on June 9, 1976 in reply to a letter which was directed to him dated June 7. The Superintendent's letter states in pertinent part:

> "In reference to your letter of June 7, 1976***I will reiterate what I wrote directly to Mrs. Lichtman regarding her employment rights in Ridgewood.
>
> "Mrs. Lichtman is eligible for employment whenever the next part-time librarian position is created. Thus, Mrs. Lichtman herself comprises the seniority list since she is the only one eligible in that category as a part-time librarian.***" (R-1)

The director of personnel testified that petitioner had been assigned to the Somerville Elementary School Annex commencing with the 1965-66 academic year. She served in the capacity of part-time librarian three days per week. He further testified that her duties were the same as the full-time librarian at the Somerville Elementary School and that her employment was continued with one exception in this capacity each academic year thereafter through the 1974-75 academic year. The only exception was when the Board employed her as a full-time librarian at the Somerville Elementary School during the second half of the 1968-69 academic year to take the place of the librarian who was on a Board approved leave of absence. The director testified that petitioner was interviewed for the position of a full-time librarian for the 1976-77 academic year by the principal of Ridge Elementary School and the full-time librarian at the school who retired at the end of the 1975-76 academic year. His testimony further established that another applicant, Mrs. Catherine Gaeton, was also interviewed by the principal, the retiring librarian and himself. The Board minutes of July 19, 1976 (J-5) established that the Board employed Mrs. Gaeton for the position of full-time librarian at the Ridge Elementary School for the 1976-77 academic year. Thus, petitioner was no longer employed by the Board.

Mrs. Gaeton's employment record reflects that she was never employed in New Jersey public schools prior to the 1976-77 academic year (J-3) and further that the Bergen County

Superintendent of Schools was notified by the New Jersey State Board of Examiners on December 9, 1976, that she was being issued a school librarian's certificate which would be extended to include certification as an educational media specialist. (J-4)

In the hearing examiner's opinion a single issue emerges with respect to the matter herein controverted; i.e., what certification privileges and seniority rights, if any, does petitioner have in seeking a position of full-time employment by the Board, after it had abolished her tenured position of part-time school librarian.

Petitioner argues that the Board, when it abolished her position as part-time school librarian at the conclusion of the 1975-76 academic year, refused her request to consider her seniority rights to a vacancy for full-time school librarian which would be available at the commencement of the 1976-77 academic year. Petitioner asserts that, notwithstanding her requests of the Board and the fact that she applied and was interviewed for the full-time position, the Board proceeded to hire an applicant new to the school district who had no previous employment experience in New Jersey public schools. It is contended by petitioner that such action by the Board violates the provisions of N.J.S.A. 18A:28-9 et seq. and in particular 18A:28-12.

In making this argument with respect to her seniority rights regarding employment in the position of full-time school librarian which was filled by a nontenured teaching staff member, petitioner maintains that it in no way constitutes a waiver of any seniority rights which she may have to any other position of employment in accordance with her certification. (Petitioner's Brief, at p. 3) In this regard, petitioner relies on the statutory provisions of N.J.S.A. 18A:28-12 which read as follows:

> "If any teaching staff member shall be dismissed as a result of such reduction [in force, N.J.S.A. 18A:28-9], such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service***." (Emphasis added)
> (Petitioner's Brief, at p. 6)

Additionally, petitioner argues that the provisions of N.J.A.C. 6:3-1.10(b) pertaining to the seniority of teaching staff members provide in part that:

> "Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in specific categories as hereinafter provided in the school district.***" (Emphasis added) (Petitioner's Brief, at p. 10)

Petitioner relies on Josephine DeSimone v. Board of Education of the Borough of Fairview, 1966 S.L.D. 43 which established that tenure accrues to teaching staff members employed in part-time positions and also upholds a board's discretionary right to assign such employees to full-time positions within the scope of their certification. However, petitioner argues that the same principle enunciated by the Commissioner in DeSimone applies equally to her right to demand a full-time position of employment by virtue of her seniority and certification. (Petitioner's Brief, at pp. 8-9)

The Board avers that petitioner's employment never effectively exceeded three-fifths time or three days per week during her eleven years of employment service by the Board. The Board, however, admits that petitioner was employed as a full-time librarian during the second half of the 1968-69 academic year, but contends that such full-time employment constituted substitute employment for the full-time librarian at the Somerville Elementary School who was granted a sabbatical leave of absence for that period of time.

The Board also relies on DeSimone, supra, as well as the Commissioner's rulings in 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 and Ellen Sue Oxfeld v. Board of Education of the South Orange-Maplewood School District, 1975 S.L.D. 574, aff'd State Board 1976 S.L.D. 1157, aff'd Docket No. A-1936-75 New Jersey Superior Court, Appellate Division, November 15, 1976 (1976 S.L.D. 1158) to support its contention that a local board of education may exercise its managerial prerogative to transfer tenured part-time teaching staff members within the scope of their certifications. However, the Board avers that a tenured teaching staff member may not demand that he or she be transferred to a part-time or full-time position of employment. (Board's Brief, at pp. 2-5)

In conclusion, the Board argues that neither the statutory nor regulatory provisions of Title 18A, Education, nor the State Board rules provide sufficient guidance between tenure and seniority in full-time teaching positions as opposed to part-time positions. Thus, the Board maintains that petitioner has no basis to demand that her seniority accrued in her former position as a part-time school librarian be extended to include a seniority entitlement to a full-time position of employment.

The hearing examiner has reviewed the facts of this matter and the arguments of counsel with respect to the rights of a tenured teaching staff member to demand a transfer to either a part-time or full-time position of employment. In the hearing examiner's opinion, the cases hereinbefore cited by counsel establish that the Board retains the right pursuant to its managerial prerogative to transfer teaching staff members within the scope of their particular certification. Such authority, however, may not be exercised in an arbitrary, capricious and unlawful manner. It is equally clear that tenured teaching staff members have no vested right of preference in demanding a transfer to or from a part-time or full-time position of employment. DeSimone, supra; Oxfeld, supra The matter controverted herein, however, is distinguishable from the case law cited herein by virtue of the fact that the transfers of tenured teaching staff members are not at issue but, rather, it is a question of whether seniority rights of tenured teaching staff members extend to part-time or full-time positions of employment by virtue of a reduction in force. N.J.S.A. 18A:28-9 et seq. While it is true that teaching staff members may acquire tenure while serving in part-time or full-time positions of employment in accordance with their certifications, local boards of education must comply with the provisions of law regarding tenured teaching staff members when effecting a reduction in force. When such a reduction in force occurs, the seniority rights and privileges of tenured teaching staff members must be considered by the employing board in accordance with a teaching staff member's certification by category.

No tenured teaching staff member may be dismissed from employment unless or until the employing board of education has complied with the provisions of N.J.S.A. 18A:28-9 et seq. and N.J.A.C. 6:3-1.10 et seq. Moreover, the courts have held that when a local board of education is faced with a reduction in force which could result in the dismissal of certain teaching staff members, those nontenured teaching staff members who have not acquired seniority privileges and who are similarly employed within the affected categories must be dismissed from employment before tenured teaching staff members. Downs v. Board of Education of Hoboken, 12 N.J. Misc. 345 (Sup. Ct. 1934), aff'd sub nomine Fletchner v. Board of Education of Hoboken, 113 N.J.L. 401 (E. & A. 1934); Seidel v. Board of Education of Ventnor City, 110 N.J.L. 31 (Sup. Ct. 1933), aff'd 111 N.J.L. 240 (E. & A. 1933)

The hearing examiner, in relying on the above-cited cases as well as Greenway v. Board of Education of the City of Camden, 129 N.J.L. 46 (E. & A. 1942), aff'd 129 N.J.L. 461 (1943), concludes that seniority of teaching staff members which is triggered upon acquisition of a tenure status is a legislative, not a contractual status. Consequently, those tenured teaching staff members who may be affected by a reduction in force must have their seniority determined in those categories of

certification in which they are employed or have previously been employed by a board of education, before a determination is made regarding their continued employment or dismissal.

The provisions of N.J.A.C. 6:3-1.10 et seq. provide local boards of education with direction when a reduction in force affecting tenured teaching staff members is under consideration. In this regard N.J.A.C. 6:3-1.10(b) provides in pertinent part:

> "Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided.***"

Thereafter, the regulations as set forth in N.J.A.C. 6:3-1.10(k) contain 28 categories in which seniority is to be considered by virtue of a teaching staff member's tenure of employment service and certification. Other specific categories not included in this section of the regulations are included by reference in N.J.A.C. 6:11-1.1 et seq.

In the hearing examiner's judgment the rules governing seniority of employment in certification categories must be construed by using "academic years" or "calendar years" as a common denominator when the total accumulated seniority of tenured teaching staff members' employment service is being determined within particular certification categories. This is so whether an employee's service in any category of certification is either full-time or less than full-time. Thus, when a local board of education abolishes a position within a particular certification category, all teaching staff members employed within that category must have their accumulated seniority determined in terms of academic or calendar years of employment service, including any fraction thereof. Those tenured teaching staff members would then be ranked according to their seniority within any affected certification category requiring a reduction in force.

In the instant matter, petitioner served eleven academic years as a part-time school librarian and/or instructional media specialist as designated by title by the Board.

The testimony of the director of personnel established, however, that her duties for each of those academic years were essentially no different from those of a full-time school librarian and further that the Board had never adopted a job description which would discern the duties of either position. The hearing examiner finds and determines that the Board erred when it abolished the last of the positions of part-time librarian in which petitioner was employed without complying with

the rules and regulations set forth in N.J.A.C. 6:3-1.10 et seq. Such position, although entitled school librarian and/or instructional media specialist, fell within the certification categories of school librarian and teacher librarian. These certification categories appear as separate categories as set forth in N.J.A.C. 6:11-12.5 and 12.6, respectively.

Consequently, in accordance with the provisions of N.J.S.A. 18A:28-9 et seq. and N.J.A.C. 6:3-1.10 et seq., all full-time and part-time tenured teaching staff members employed as school librarians and certified either as a school librarian or teacher librarian should have been ranked according to their seniority in determining who had the least seniority in those categories and who would be eligible to fill the vacancy for the position of full-time school librarian which occurred at the commencement of the 1976-77 academic year. Although the seniority of the other tenured teaching staff members serving in the capacity of full-time school librarians was not determined by the Board, the record herein establishes that petitioner had accumulated six and three-fifths academic years of full-time seniority at the end of the 1975-76 academic year and was, in fact, entitled to the vacant full-time librarian's position given to a nontenured teacher at the commencement of the 1976-77 academic year.

Finally, the record establishes that although petitioner was certified to teach Secondary English and French (J-1), she has no seniority under this certification by virtue of the fact that she had never been employed in the "Secondary" category pursuant to the provisions of N.J.A.C. 6:3-1.10(k)(27).

The hearing examiner so finds and recommends to the Commissioner that petitioner be immediately reemployed as a full-time school librarian in the Ridgewood School System. It is further recommended that petitioner be granted all back salary, fringe benefits and other emoluments due her, mitigated only by the salary received in substitute employment during such periods of time.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in this matter, including the report of the hearing examiner and the exceptions thereto filed on behalf of respondent, Ridgewood Board of Education. No exceptions were filed on behalf of petitioner, Ms. Lichtman.

Respondent argues that the recommended decision of the hearing examiner should be rejected as contrary to school law precedent established in Fox v. New Providence Board of Education, 1939-1949 S.L.D. 134 (decided January 17, 1938). Petitioner in that case had been dismissed from her part-time position following the board's determination to abolish that position. The Commissioner determined that she had acquired tenure in the part-time position and, as the board had in fact continued the part-time position it had purported to abolish, petitioner's services were illegally terminated and the board was directed to reinstate her. In the course of his opinion, the Commissioner noted that while petitioner could not, having attained tenure in a part-time position, demand assignment to a full-time position, she was entitled, by virtue of her tenure status, to remain in her old position so long as it continued. 1939-1949 S.L.D. at 135. It is this language which respondent urges is dispositive here. The Commissioner disagrees. The principle is articulated as dictum in Fox in the context of a discussion of the breadth of the tenure rights of petitioner in that case. It pertains to the question of transfer to another type of position within the district, which has been addressed more recently in DeSimone v. Fairview Board of Education, 1966 S.L.D. 43 and Oxfeld v. South Orange-Maplewood Board of Education, 1975 S.L.D. 574, aff'd State Board of Education 1976 S.L.D. 1157, aff'd Superior Court, Appellate Division, Docket No. A-1936-75, reported at 1976 S.L.D. 1158. In these cases the Commissioner again confirmed that transfer cannot be declined nor demanded as a right by a tenured teacher, but is rather a matter committed to the discretion of the board of education.

Neither the dispositions in DeSimone and Oxfeld nor the dictum in Fox is controlling here. The issue projected by the instant controversy is whether a teacher, tenured in a part-time position who has been dismissed pursuant to N.J.S.A. 18A:28-9 et seq., enjoys reemployment rights where vacancy in a full-time position occurs, pursuant to N.J.S.A. 18A:28-12. The scope of such right in any given case depends entirely upon a determination of the discharged teacher's seniority, which in turn is established on the basis of the category of certification for the position in which she was employed and the years of service in that category. N.J.S.A. 18A:28-12, N.J.A.C. 6:3-1.10, N.J.A.C. 6:11-12.5, 12.6. Utilizing these criteria, the hearing examiner correctly found that in her eleven years of service to the district, petitioner had accumulated six and three-fifths

academic years of full-time seniority at the time her services were terminated, and hence was entitled to a position on the preferred eligibility list for reemployment as a full-time librarian when a vacancy in that position occurred for the 1976-77 academic year. Assuming she was the only candidate so eligible for reemployment, inasmuch as the Board filled the vacancy by hiring a nontenured teacher, petitioner was entitled to reemployment in that position.

In view of this disposition, the Commissioner directs that petitioner be reinstated as of the date of this decision and compensated henceforth at the salary to which she would currently be entitled had she been reemployed as a full-time librarian at the beginning of the 1976-77 school year, together with all benefits attendant thereto, and recognizing the years of previous service. N.J.S.A. 18A:28-10 It is further ordered that petitioner be granted all back salary, fringe benefits and other emoluments due her, mitigated only by salary received in substitute employment during such periods of time.

COMMISSIONER OF EDUCATION

June 10, 1980

SHIRLEY K. LICHTMAN,	:	
PETITIONER-APPELLEE,	:	
V.	:	
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, June 10, 1980

For the Petitioner-Appellee, Riker, Danzig, Scherer & Hyland (Peter N. Perretti, Esq., of Counsel)

For the Respondent-Appellant, Greenwood & Weiss (Stephen G. Weiss, Esq., of Counsel)

The State Board of Education denies request for oral argument and reverses the Commissioner's decision in light of the State Board decisions in Aslanian v. Fort Lee, decided July 2, 1980 and Zubkoff v. Madison, decided July 2, 1980.

Sonia Ruby opposed in the matter.

October 1, 1980

Pending N.J. Superior Court

JAMES P. ZUCARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY.	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Chamlin, Schottland, Rosen, Cavanagh & Kelley (Thomas W. Cavanagh, Jr., Esq., of Counsel)

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

Petitioner, a tenured teaching staff member employed by the Board of Education of the Red Bank Regional High School District, hereinafter "Board," alleges that the Board's action in denying him his salary and adjustment increments for the 1978-79 school year was arbitrary, capricious, improper and without substantiation or justification pursuant to pertinent statutory prescription. The Board denies petitioner's allegations and avers that its actions with respect to the withholding of his salary and adjustment increments for the 1978-79 school year were in all ways proper and legally correct.

A conference of counsel was held by a hearing examiner assigned to conduct further proceedings into the instant matter by the Commissioner of Education.

The issue agreed upon by the parties at the time of the conference is set forth as follows:

> "Was the action of the Board with respect to withholding petitioner's employment increments for the 1978-79 academic year arbitrary, capricious or unjustified pursuant to the applicable provisions of N.J.S.A. 18A:29-14?"

Moreover, as a result of said conference of counsel, the parties agreed to the submission of amended pleadings to further clarify certain of the allegations controverted therein. The Board also agreed to submit all of those documents in petitioner's personnel folder upon which it relied to withhold his salary and adjustment increments.

Subsequent thereto petitioner filed his Amended Petition of Appeal with the Commissioner on November 17, 1978. The Board filed its Answer in reply to the Amended Petition on December 11, 1978.

On March 5, 1979 a second conference of counsel was convened between the parties at which time thirty documents were marked as joint exhibits in evidence. (J-1 through J-30) As a condition set forth in the conference agreement, the Board indicated that it would file a Motion for Summary Judgment in its favor on or before April 17, 1979. Petitioner, however, on March 14, 1979 filed a Notice of Motion to compel Discovery pursuant to the provisions of N.J.A.C. 6:24-1.9(1)(2).

Thereafter the Board filed its Motion for Summary Judgment with supporting Brief on April 19, 1979. Petitioner then filed a Cross-Motion for partial Summary Judgment with supporting Brief which also set forth separate arguments in opposition to the Board's Motion and further supported his prior Notice of Motion to Compel Discovery. Petitioner's moving papers included his own affidavit in support of his contentions.

On June 19, 1979 oral argument by the parties on their respective Motions was heard by the hearing examiner at the Department of Education.

The entire record of this matter is now before the Commissioner for his determination.

Initially, the Commissioner observes that the statutory authority which authorizes local boards of education to withhold salary or adjustment increments from teaching staff members is set forth in N.J.S.A. 18A:29-14, as amended, and 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 action to the Commissioner under rules prescribed by him. The Commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid.***"

It is further observed by the Commissioner from certain of the exhibits in evidence that the following events occurred giving rise to the Board's action to withhold petitioner's salary and adjustment increments:

(1) Petitioner received a letter from the Superintendent dated April 10, 1978 which reads:

> "I have reviewed evaluation reports from the building principal recommending that an increment be withheld. I wish to provide you with an opportunity to speak with me in connection with that matter prior to the special Board meeting to be held on Wednesday, April 12, 1978 at 8:00 p.m., at which time action will be taken by the Board of Education. I will be available each day between the hours of 9:00 and 4:00.
>
> "Also be advised that the discussion and consideration of the Board of Education in connection with the possible withholding will be in private unless you, as the individual whose rights could be adversely affected, request in writing that such matter be discussed at a public meeting. In any event the formal action of the Board if it determines to withhold increment will be in public as it must be.
>
> "The major purpose of executive sessions is to protect individual privacy; however, if you desire to forego this personal privacy and have public discussion regarding the recommendation for withholding increment please advise me at your earliest convenience."
>
> (J-3)

(2) A second letter dated April 12, 1978 from the Superintendent to petitioner reads:

> "As per our telephone conversation at approximately 5:00 p.m. on April 11, 1978, I wish to point out to you that at this time you have no right to participate before the Board of Education. The only purpose of the letter was to provide you with an opportunity to speak with the Superintendent of Schools and to provide you with the conditions under which the discussions of the Board would be in public as opposed to in private.

> "According to the Red Bank Regional Education Association contract, Article IX A-1 and NJS 18A:29-14 your rights are duly protected." (J-2)

(3) Thereafter, on April 12, 1978 petitioner caused the following mailgram to be sent to Board counsel:

> "I have been advised by superintendent of schools Dr. Donald Warner that the Board of Education will at its meeting of April 12 act upon a recommendation that a salary increment be denied to me for the 1978-79 school year.
>
> "Before the Red Bank Board of Education acts upon that recommendation I respectfully request that I have the opportunity to appear before the Board of Education in executive session to place before you reasons why I believe the recommendation is improper." (J-1)

The Board did, however, convene a meeting on April 12, 1978 and took the following action as indicated in its letter of April 14, 1978 from the Board Secretary to petitioner which states:

> "This is to advise you that the Board of Education, by roll call majority, voted to withhold your salary increments at a Special (Public) Board Meeting held on April 12, 1978. This action was taken by Resolution of the Board and a copy is attached for your information.
>
> "The reasons for withholding of the increments are enumerated in the documents listed on enclosure Number 1.
>
> "It is to be noted that most of the Items listed on Enclosure #1 were previously given to you and should be in your possession, but if you desire copies, please contact me and I will provide them.
>
> "In addition, if you find you do not have one or more of the documents listed, please contact me and I will supply you with copies of same." (J-30)

The Commissioner observes that the itemized list of documents referred to by the Board above in "***enclosure Number 1***" is in fact a table of contents (R-2, "Z") which merely enumerates most of the exhibits marked in evidence as J-1 through J-30 contained in the record of this matter. Moreover, a

second table of contents (R-1, "B") which was filed by the Board pertaining to the same exhibits (J-1 through J-30) while similar in content, reveals that the dates identifying certain exhibits are not the same.

In the Commissioner's judgment the narrow issue to be adjudicated herein is whether the table of contents (R-2-Z) which refers to the majority of exhibits marked in evidence as J-1 through J-30) satisfies the requirements of N.J.S.A. 18A:29-14 with respect to the Board's reasons for withholding petitioner's salary and adjustment increments for the 1978-79 school year.

Petitioner argues that the Board has not complied with the minimal requirements of statutory prescription by virtue of the fact that the table of contents he received (R-2-Z) enumerating the exhibits in evidence are not the Board's reasons for the withholding his salary and adjustment increments which the Board was required to give him by law. Petitioner argues further that the exhibits in evidence (J-1 through J-30) which, the Board contends, were its reasons for taking action against him, merely refer to a list of exhibits which were part of his personnel file and that they fail to comport with the intent of N.J.S.A. 18A:29-14. Petitioner maintains that he is unable to determine from these exhibits the reasons the Board intended to convey to him for withholding his salary and adjustment increments. Petitioner also contends that the table of contents (R-2-Z) he received is further defective by virtue of the fact that without further discovery which the Board refuses to afford him, he is unable to ascertain which of the exhibits referred to therein the Board relied upon in support of whatever reasons it had for the action taken against him. In this regard petitioner contends that Board's reliance on the exhibits (J-1 through J-30) as its reasons to withhold his salary and adjustment increments by their very content must be rejected in whole or in part because of their relevancy and sufficiency if, in fact, they may be considered reasons at all pursuant to statutory prescription or applicable case law. The Commissioner observes that petitioner in his Brief and in the transcript of oral argument by the parties relies on a number of prior school law decisions and court decisions, incorporated by reference herein in support of his position with respect to the matter.

The Board on the other hand maintains the matter before the Commissioner is ripe for Summary Judgment based on the record developed thus far. The Board argues that petitioner's Motion to Compel Discovery with respect to the matter herein controverted is without merit and must, by the very circumstances already presented in the record, be denied without the necessity for a plenary hearing.

The Board further contends that the scope of authority and review by the Commissioner is limited in light of the record now before him. The Board maintains that the record sufficiently sets forth the basis for its actions with respect to its denial

of petitioner's salary and adjustment increments. The Board's position in this regard in that the reasons it gave petitioner for its action comply with statutory provision and that the exhibits in evidence adequately convey such reasons to petitioner. The Board also relies on prior decisions of the Commissioner and the courts in such matters in its Brief and the transcript of oral argument in support of its action against petitioner.

Finally, the Board argues that it is well established in case law that the Commissioner may not substitute his own judgment for the discretion of the Board absent clear and compelling evidence that the Board's action was patently arbitrary capricious or without a rational basis or induced by improper motives.

The Commissioner has reviewed the entire record of the matter including the arguments of the parties in support of their positions taken with respect to the Motions advanced herein.

In the Commissioner's judgment, the position taken by the Board that the exhibits (J-1 through J-30) (R-1-B) (R-2-Z) satisfy the statutory provisions of N.J.S.A. 18A:29-14 with respect to the procedural steps it took and the reasons it advanced to petitioner for the denial of his salary and adjustment increments for the school year in question, requires further comment.

It is observed that the majority of the exhibits marked as J-1 through J-30 pertain to written observations, evaluations and/or conferences which were part of petitioner's personnel file. Many of these exhibits reveal that there was a two way communication between petitioner and the school administrators. Other exhibits related to a grievance filed by petitioner, a newspaper article authored by petitioner's wife and correspondence between school administrators concerning incidents in which petitioner appeared to have been involved. It is not clear to the Commissioner, however, from the letter to petitioner from the Board Secretary dated April 14, 1978 (J-30) whether petitioner had knowledge of all of the exhibits reviewed by the Board or whether they, indeed, were part of his personnel file. Moreover, the Commissioner observes from the Superintendent's letter to petitioner dated April 10, 1978 (J-3) that the Superintendent was recommending to the Board that petitioner's salary increments be withheld on the basis of the evaluation reports of his building principal. It is clear, however, from the exhibits in evidence that the Board decided to expand the scope of its review to petitioner's performance with respect to other incidents contained in these exhibits.

The Board's authority to undertake such a review regarding petitioner's performance is not questioned by the Commissioner herein. What is of concern to the Commissioner, however, is that the scope of the review of such exhibits by the

Board lacks definition with respect to communicating the content of these exhibits to petitioner as its basis for the denial of his salary and adjustment increments.

The Commissioner observes that while he has previously held that it is unnecessary for either the Board or its administrators to set forth in minute detail their reasons with respect to the withholding of salary and/or adjustment increments of teaching staff members, nevertheless he finds and determines herein that the Board failed to convey to petitioner its reasons for withholding his salary and adjustment increments resulting from its review of those exhibits contained in his personnel file or otherwise.

The Commissioner so holds.

In arriving at this finding and determination the Commissioner relies on two prior school law decisions in which it was stated is pertinent part:

> "***Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play. Conceding further that a salary increment may be denied for reasons other than unsatisfactory teaching performance, the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice that such a recommendation is to be made to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. This is not to say that deprivation of a salary increase requires service of written charges, entitlement to a full scale plenary hearing or the kind of formal procedures necessary to dismissal of tenured employees. But certainly any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgment is erroneous.***"
>
> (1969 S.L.D. at 7)

See: J. Michael Fitzpatrick v. Board of Education of the Borough of Montvale, 1969 S.L.D. 4; Elizabeth Aikins v. Board of Education of the Borough of East Paterson, 1973 S.L.D. 80.

Accordingly, for the reasons set forth in the Commissioner's decision herein Summary Judgment is entered on petitioner's behalf. The Board is hereby directed to pay petitioner the salary and adjustment increments for the 1978-79 school year.

The Commissioner, in denying the Board's Motion for Summary Judgment, does so without prejudice with respect to future action regarding petitioner's entitlement to salary and/or adjustment increments pursuant to the prescribed provisions of N.J.S.A. 18A:29-14.

COMMISSIONER OF EDUCATION

June 11, 1980

JAMES P. ZUCARO,	:	
PETITIONER-CROSS-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	STATE BOARD OF EDUCATION
RESPONDENT-APPELLANT.	:	DECISION
	:	

Decided by the Commissioner of Education, June 11, 1980

For the Petitioner-Cross-Appellant, Chamlin, Schottland, Rosen & Cavanagh (Thomas W. Cavanagh, Jr., Esq., of Counsel)

For the Respondent-Appellant, Crowell & Otten (Robert H. Otten, Esq., of Counsel)

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

November 5, 1980

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN RE:	)	INITIAL DECISION
PAUL FITZPATRCK, ET AL.	)	**OAL DKT. NO. EDU 411-76**

APPEARANCES:

For the Petitioners:

THEODORE M. SIMON, Esq.

For the Respondent:

LE ROY D. SAFRO, Esq.

EXHIBITS:

R-1: Superintendent's request of Commissioner for an advisory opinion under date of March 19, 1976; Memo to Commissioner from Advisory Panel dated April 26, 1976; Letter to Superintendent from Assistant Commissioner Zach under date of April 28, 1976.

C-1: 1976-77 teacher schedules

C-2: 1975-76 and 1976-77 teacher data (date employed, certification and assignments)

C-3: February 28, 1980 letter from Sueoka to Administrative Law Judge

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

Petitioners, all tenured teaching staff members, allege that the Weehawken Board of Education, hereinafter "Board", terminated their services at the conclusion of the 1975-76 school year in contravention of their seniority rights pursuant to N.J.S.A. 18A:28-10 and N.J.A.C. 6:3-1.10.

The respondent Board avers that all petitioners were included in a reduction in force necessitated by economics and re-organization of curriculum; that seniority rights

were respected throughout; and further that the Board acted properly within the authority granted to them pusuant to N.J.S.A. 18A:27-4.

The Petitions of Appeal were filed with the Commissioner of Education on December 29, 1976. A conference of counsel was held on April 19, 1977 to consider the controverted matters of Paul Fitzpatrick (Dkt. 411-76), James Furno (Dkt. 412-76), Thomas La Fronz (Dkt. 420-76) and Harry Untereiner (Dkt. 422-76). Notice of a motion to consolidate the petitions was indicated, which received an affirmative response by letter of the Attorney General dated May 26, 1977. The matter was held in abeyance pending Superior Court determinations in a corollary matter.

A second conference of counsel was held on July 11, 1978 at which time it was agreed that two hearing dates would be "mutually agreed upon and supplied by counsel." Nothing materialized and the matter was set aside with the retirement of the assigned hearing examiner.

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

A hearing was held on October 9, 1979. Stipulations of fact were placed on the record and the parties agreed to submit the matter for summary decision (Tr. 17, 18).

The record was initially closed on February 8, 1980 with the receipt of petitioner's reply brief, but reopened by the Administrative Law Judge for additional personnel documents.

The recitation of relevant facts now follows with the matter of petitioners Fitzpatrick, Furno and Untereiner addressed collectively due to the single academic discipline within which the controversy focuses. The matter of petitioner La Fronz will be addressed separately.

Petitioner Fitzpatrick was initially employed in September 1968. His services were terminated by a reduction in force as of June 1976 and he was placed on a preferred eligibility list. He had accumulated eight years of seniority as a teacher of Social Studies

in grades 7-12 and was properly certified. (Tr. 2, C-1, C-2). He was reinstated as of April 1, 1978 and is claiming salary for his period of unemployment from September 1, 1976 until his reinstatement.

Petitioner Furno was initially employed in September 1967 and his services were terminated by a reduction in force as of June 1976, and he was placed on a preferred eligibility list. He had accumulated nine years of seniority as a teacher of social studies in grades 7-12, and was properly certified at the time of initial employment. (Tr. 3, C-1, C-2). He was offered reemployment as of September 1978 but declined.

Petitioner Untereiner was initially employed in September 1971 and his services were terminated by a reduction in force as of June 1976, at which time he was placed on a preferred eligibility list. (Tr. 3, C-1, C-2). He had accumulated five years of seniority as a teacher of social studies, having been properly certified at the time of initial employment. (Tr. 3-4, C-1, C-2). He was reemployed in September 1978.

Seniority issues require a relative assessment of the data of petitioners with those of third parties. The data of non-petitioners who were assigned to teach social studies in grades seven and eight during the 1976-77 school year after petitioners were placed on a preferred eligibility list follows:

Teaching staff member Badrig (nee Turnanian) was first employed in September 1951, and was issued the elementary certificate in October 1954. Her assignment in 1975-76 was in high school guidance, and in 1976-77 she was assigned one section of grade seven social studies. She holds certifications in several other categories which are not relevant to the instant matter and need not be reported. Badrig's seniority to teach social studies in grades seven or eight under the elementary certificate as of September 1976 must be determined by the time accrued in assignments under that certificate. The Board was directed to provide information of scheduled assignments under certificates issued after initial employment, and if no such assignments were made prior to September 1976 to state "NONE." Since the Board did not provide either, it is presumed here that no such assignments were made. It must therefore be determined that Badrig's seniority to teach social studies under the elementary certificate as of September 1976 was zero.

Teaching staff member Buda was initially employed in September 1965. Her certificate to teach secondary English and Spanish, with an endorsement for elementary grades three to eight, was issued in March 1957. It is determined that her seniority to teach social studies in grades seven and eight as of September 1976 is 11 years.

Teaching staff member Ruymen was initially employed in February 1968 and was issued the elementary certificate in January 1968. Her seniority to teach social studies in grades seven and eight as of Semptember 1976 is determined to be eight and one half years.

Teaching staff member Kelly was initially employed in September 1970 and was issued the elementary certificate in June 1966. Her seniority to teach social studies in grades seven and eight as of September 1976 is six years.

Teaching staff member Conigliaro was initially employed in September 1970. He holds three certificates in business categories and was also issued a social studies certificate in February 1976. His first assignment under the social studies certificate was in September 1976 and his seniority to teach social studies in grades seven and eight as of that date was zero.

A summary of pertinent date and seniority determinations for the teaching of social studies in grades seven and eight as of September 1976 is as follows:

TEACHER	DATE HIRED	RELEVANT CERTIFICATION	9/76 SENIORITY	1976-77 RELEVANT ASSIGNMENTS
Buda	9/65	Elementary (3/57)	11	Soc. Studies (grade 8) (6 sections)
Furno	9/67	Soc. Studies (6/65)	9	RIF'd
Ruymen	2/68	Elementary (1/68)	8 1/2	Soc. Studies (grade 7) (3 sections)
Fitzpatriek	9/68	Soc. Studies (12/68)	8	RIF'd
Kelly	9/70	Elementary (6/66)	6	Soc. Studies (grade 7) (3 sections)
Untereiner (2/71)	9/71	Soc. Studies	5	RIF'd
Badrig	9/51	Elementary (10/54)	0	Soc. Studies (grade 7) (1 section)
Conigliaro	9/70	Soc. Studies (2/76)	0	Soc. Studies (grade 7) (1 section)

Prior to any analysis and discussion of applicable laws, it is deemed to be necessary to first address a reliance of the respondent Board.

A request for an Advisory Opinion on seniority rights was submitted to the Commissioner of Education by letter of the Superintendent of Schools on behalf of the Board under date of March 19, 1976. (R-1). Said letter indicated the intent of the Board to reorganize its school system, which in effect would eliminate the junior high school concept and create a middle school. Based on the contents of R-1 and the personnel date supplied, the advisory panel determined that petitioners Fitzpatrick, Furno and Untereiner would be affected. The opinion indicated that elementary certification was required and secondary social studies certification was inapplicable for the teaching of social studies in grades seven and eight in the Board's reorganization. It is noted that an Advisory Opinion is not binding. N.J.S.A.18A:28-11.

A review of the 1976-77 teacher schedules reveals a nine period schedule. Preparation periods were scheduled as well as subject classes for the same period daily. Regardless of the umbrella under which any reorganization may exist, substance must prevail. It is clear that departmentalization of social studies continued in 1976-77 in grades seven and eight. **I SO FIND.**

The significance of this finding now requires a review of N.J.A.C. 6:3-1.10 which states in pertinent parts:

> "(b) Seniority pursuant to N.J.S.A. 18A:29-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof as the case may be, in the school district in specific categories as hereinafter provided. Seniority status shall not be affected by occasional absences and leaves of absence.
>
> * * *
>
> (h) Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shallbe placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him.
>
> * * *
>
> (k) The following shall be deemed to be specific categories but not necessarily numbered in order of precedence:
>
> * * *
>
> 27. Secondary. The word "secondary" shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction. Any person holding a secondary certificate shall have seniority in all subjects or fields covered by his certificate, except those subjects or fields for which a special certificate has or shall be required by the State Board of Education. However, if a person has held employment in the school district in any special subject or field endorsed on his secondary certificate, such special subject or field shall, for the purposes of these regulations, be regarded as any other subject or field endorsed upon his certificate;
>
> 28. Elementary. The word "elementary" shall include Kindergarten, grades 1-6 and grades 7-8 with or without departmental instruction, including grades 7-8 in junior high schools;

* * *

> 30. Additional categories of specific certificates issued by the State Board of Examiners and listed in the State Board rules dealing with Teacher Certification."

It is clearly established that elementary certification is applicable for the teaching of social studies in grades seven and eight regardless of organization, and further that secondary social studies certification is also applicable when de facto departmentalization exists.

The discretionary authority of the Board to transfer teaching staff members within their areas of certification is undisputed, but may not be made in violation of N.J.S.A. 18A:28-10, which states:

> Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board.

The authority of the Board to reduce the number of teaching staff members pursuant to N.J.S.A. 18A:28-9 is also undisputed.

The petitioners contend they were illegally dismissed because the Board continued to assign teachers for the 1976-77 school year in grades seven and eight to teach social studies who had less seniority.

Further review of individual teacher schedules infers a general scheduling policy of six periods of instruction, two preparation periods, and one period for lunch. That review also reveals that 14 sections of social studies were assigned in grades seven and eight for the 1976-77 school year, and eight sections were assigned to teachers Ruymen, Kelly, Badrig and Conigliaro, each of whom had less seniority than petitioner Furno. **I SO FIND.**

I ALSO FIND that the assignments of nine sections to teachers Buda and Ruymen, together with the transfer of five assigned sections from teachers Kelly, Badrig and Conigliaro to petitioner Furno, results in the assignments of 14 sections to teachers with greater seniority than petitioners Fitzpatrick and Untereiner.

It is therefore determined that petitioner Furno was improperly denied his entitlement to retain his teaching position for the 1976-77 school year, and further that the Board properly terminated petitioners Fitzpatrick and Untereiner and placed them on the preferred eligibility list. **I SO CONCLUDE.**

It is now appropriate to review the assignments for the 1977-78 school year.

After completion of the Initial Decision relative to the 1976-77 claims of petitioners certified to teach social studies, the adjudication of remaining issues was held in abeyance for the completion of additional discovery.

Six weeks have passed since requesting said discovery of respondent in my letter of March 10 which stated the following:

> There were but five teaching schedules submitted for the 1977-78 school year for the Woodrow Wilson School. They represented the schedules of teachers Badrig, Buda, Conigliaro, Kelly and Ruymen.
>
> Kindly submit the 77-78 schedules for the remaining staff members assigned to the Wilson School. I have no record of the teachers assigned to social studies that year at Wilson other than for the above.

The court has experienced difficulty in securing data from the respondent. It was necessary for the court to go directly to the State Department of Education for certification data of four teaching staff members. A request was made in my letter of February 15, and again on February 28. I indicated in the latter that "In the absence of clarity, I wish to advise you that favorable inference will be given to petitioners." Counsel for respondent excepted to same in a letter of March 5, and again on March 21.

On March 27 I indicated to respondent that "I am still awaiting response to mine of March 10, 1980 relative to individual teacher schedules for 1977-78. Who taught social studies and how many periods of same were assigned at Wilson?"

On April 1, 1980 a letter from petitioners was acknowledged with a copy to respondent. In that letter I stated, in pertinent part that "I am awaiting a response to mine of March 10 to respondent relative to 1977-78 teacher schedules. ...Upon receipt of the schedules requested in my March 10 letter, the full decision will be completed."

As of this date, no communication has been received from respondent with any reference to mine of March 10, March 27, or April 1.

The court is proceeding with the completion of this decision, sua sponte. Before doing so, however, the favorable inference concept must be addressed.

The history of the courts in New Jersey clearly permit an inference against a party who deliberately fails to produce documentary data during discovery. The courts may assume that if the documents were produced they would be unfavorable to the withholding party. Certainly such reasoning is equitable since the obstinate party's noncompliance causes prejudice to the petitioner's case. The effect of prejudice on the petitioner, if it goes to the heart of his case, will permit a court to find a default judgment against the respondent.

Supporting this proposition, the New Jersey Supreme Court held in State v. The Council, Div. of Resource Dev., 60 N.J. 199 (1972), that the behavior of a litigant with respect to relevant evidence may permit an inference that his behavior was prompted by a conscious appreciation that the evidence would or might be hurtful to his position, and said:

> A conscious awareness of the existence of a dispute with another and a conscious awareness that an act done will destroy evidence or access to evidence are prerequisite to reliance upon that doctrine. If the doctrine is invoked, it permits an inference, but does not require one to be drawn, depending upon the common sense of a situation. It does not shift the burden of proof and usually will not relieve the party holding the burden from the obligation of producing some evidence to support his claim. Id. 202.

Similarly, the high court held in Douglas v. Harris, 35 N.J. 2070 (1961) that where the defendant failed to answer interrogatories concerning an auto accident with the plaintiff pedestrian, defendant "seriously hampered plaintiff in the preparation and trial of her case." Furthermore, it declared that "The court should have indulged the inference that the information sought by the plaintiff which was in defendant's sole possession and which related to the identity and conduct of the driver of the motor vehicle and the manner of operation thereof would be beneficial to the plaintiff." Id. 283.

In Interchemical Corp. v. Uncas Printing and Finance Co., Inc., 39 N.J. Super. 318 (App. Div. 1956), the defendant appealed from a Law Division judgment involving a claim for unpaid royalties due plaintiff under a licensing agreement with the defendant. During pretrial discovery the plaintiff moved for an order directing the defendant to produce certain books and records. The court entered an order directing the defendant to produce the request materials.

The defendant, however, failed to disclose the records, which were uniquely in its control and did not answer interrogatories. Consequently, the court ordered the plaintiff to proceed to default judgment on proof of its damages. It asserted that "the discovery proceedings went to the very foundation of plaintiff's cause of action, and defendant's refusal to comply was deliberate and contemptuous". ID. 326. Due to defendant's failure to comply with discovery procedures, the plaintiff was left to prove the amount of its damages with such facts as it had to go on.

Concluding, the court stated that, "Under all the circumstances, the court was well entitled to indulge the inference that any evidence or information in defendant's possession relating to the products used and therefore relevant to the calculation of damages, would be beneficial to the plaintiff..." Id. 328.

The court supported its decision by citing to, 2 Wigmore on Evidence (3d. ed. 1940), § 285, p. 162 which pronounced that "the propriety of inferring that the failure of a party to produce evidence when an opponent contends that its production would elucidate certain facts, is an indication that the facts so exposed would be unfavorable." Furthermore, the court found the rule not only had the force of logic behind it, but is butressed by the fact that "no one who withholds evidence can be in any sense a fit object of clemency or protection." Id. § 291, p. 186.

In Lang v. Morgan's Home Equipment Corp., 6 N.J. 333 (1951), the court reasoned that the rules of discovery were patterned after the provisions of the Federal Rules of Civil Procedure and as such were "designed to insure that the outcome of litigation in this State shall depend on its merits in light of all the available facts, rather than on the craftiness of the parties or the guide of their counsel." Id. 338.

In Merck & Co., Inc. v. Biorganic Laboratories, Inc., 82 N.J. Super. 86 (App. Div. 1964), defendants appealed from an interlocutory order of the trial court striking the answer of all the defendants and entering a default as to all the defendants. The record disclosed a deliberate course of conduct by defendants and their counsel, the effect of which was to frustrate plaintiff's discovery. The plaintiff had served and filed a notice of motion to compel production of certain papers. The trial judge, after hearing argument, orally directed defendants to produce the documents designated in plaintiff's motion. The defendants claimed that they had no "personal documents encompassed by" the court's production order. Thereafter, the defendants' answer was stricken by the trial court and a default was entered as to all the defendants. The Suerior Court found that the production of the documents was central to the foundation of the plaintiff's cause of action. The defendants acknowledged that they at one time possessed the documents but that they had been destroyed prior to receiving notice or knowledge of the court's oral determination.

The judgment of the court held that the defendants knew, through their counsel, of the trial court's verbal order prior to the destruction of the corporate records and that prejudice to the plaintiff was clear since the documents destroyed were fundamental to the plaintiff's case.

Earlier court cases have followed the same line of reasoning. In Jacoby v. Jacoby, 6 N.J. Misc. 86 (Ch. 1928), the plaintiff failed to produce a marriage certificate to show his year of marriage. The court ruled that "if a person can produce something which will testify in their favor or be proof in their favor - when they fail to do it that the presumption is that it would be against their testimony." Ibid.

The Court of Errors and Appeals found in Eckel v. Eckel, 49 N.J. Eq. 587 (E. & A. 1892) (a mortgage foreclosure situation), that the defendant did not produce papers showing whether payment on interest was made as claimed by plaintiff. Thus "failure to produce these papers convinces (the judge) that they contained certain evidence which would have established the fact that the interest had been satisfied." Id. 589.

In the instant matter, only three of the 1977-78 teacher schedules indicates the teaching of social studies. Teacher Buda taught three sections of grade 8, as did teacher Ruymen. The grade 8 schedules submitted indicate section assignments, such as, 8-3, 8-6, 8-8 and leads one to believe there were 8 grade 8 sections.

Teacher Kelly's schedule appears to be a grade 7 self-contained structure in room 35. Her schedule includes, inter alia, what appears to be 50 minutes of social studies on Mondays, 55 minutes on Tuesdays, 55 minutes on Wednesdays, 55 minutes on Thursdays, and 10 minutes of current events on Fridays.

I FIND that the record does not indicate any teacher scheduling of 2 grade 8 social studies sections, and for grade 7 other than the 1 section for Kelly.
The relative seniority of teaching staff members listed on page 5 of this decision does not change as of September 1977, even though one year may be added to each.

Petitioner Fitzpatrick was rehired as of April 1, 1977. Although his 1977-78 schedule was not submitted, his area of certification was in social studies only. It is inconceivable, however, that teacher needs for social studies for 1977-78 could have exceeded the need for teachers other than Buda, Furno, Ruymen, Fitzpatrick and Kelly. The claim of Untereiner,therefore, has no merit. **I SO FIND**.

I DO FIND that the reinstatement of Fitzpatrick prior to Furno violated the order of the preferred eligibilility list, and **I CONCLUDE**, therefore, that petitioner Furno was denied his entitlement to his position in 1977-78.

Counsel for petitioners has argued eloquently in support of his contention that the tenure rights of teachers must be protected, and if necessary, the Board must employ a "bumping" concept. For simplification, names will be omitted.

Teachers "A" and "B" are certified in secondary social studies, their only area of assignment since initial employment. "A" has the least seniority of social studies and all are tenured. Teacher "B" is also certified in English, and was so on the date of initial employment. Teacher "C" is a non-tenured teacher of English. The Board reduces its force by one social studies teacher.

Counsel for petitioners contends that the Board has the obligation to assign teacher "B" to English and non-review the non-tenured English teacher in order to preserve the tenure rights of teacher "A".

The discretionary authority of the Board to act as suggested by counsel will not be addressed, as his argument centers on the Board's obligation to so act.

The reduction in force was in social studies, not English. In order to preserve "A's" tenure and seniority rights in this hypothesis, it would appear to be essential that "A" be certified in English at the time of initial employment, and deemed to be competant to claim the position held by "C". Seidel v. Board of Education of Ventnor City, 110 N.J.L. 31, 164 A. 901 (1933), affirmed 111 N.J.L. 240, 168 A. 297.

To uphold counsel's contention would create a juxtapositioning concept I do not believe was envisioned or intended by the legislature. I am reluctant and do not feel compelled to speculate the myriad of spin-off litagation that would result from the merry-go-round of petitioners' "bumping" concept. **I FIND** his argument to require such Board action to be without merit.

The final claim in this consolidated matter is the petitoin of Thomas LaFronz.

It was stipulated by the parties that LaFronz was initially employed in September 1962 and terminated in June 1976. He had served the district for 14 years. He had been assigned as a teacher of Psychology for 13 years and as a teacher of Business for one year (1968-69).

Petitioner was issued a Limited certificate in General Business in January 1965 and the Regular certificate in October 1970. He was also issued the Regular certificate in Psychology in May 1977.

It was jointly stipulated that there were no certifications for teachers of Psychology at the time of petitioner's initial employment. Petitioner LaFronz was reinstated in September 1978. His claim is for the period from September 1976-June 1978.

A summary of pertinent personnel data relevant to this claim and non-categorical seniority determinations as of September 1976 is as follows:

TEACHER	DATE HIRED	RELEVANT CERTIFICATION	9/76 SENIORITY	1976-77 RELEVANT ASSIGNMENTS
Nelson	9/56	English & Social Studies (3/62)	20	1 psychology section
Yasson	9/61	Stu. Personnel Dir., Stud. Pers. Principal	15	1 psychology section
LaFronz	9/62	Gen. Business Psychology (5/77)	14	RIF'd.
Hannon	9/62	Guid. Couns. Soc. Stud.; Dir., Stu. Personnel	14	1 psychology section
Celidonio	9/70	Indus. Arts CIE Coord.	6	Introduction to Vocations
Conigliaro	9/70	Gen. Business Typewriting	6	Typewriting
Aronsky	9/76	Bus. Edu.	0	Typewriting

Petitioner claims he was denied his entitlement to teach 3 sections of psychology which were assigned to teachers Nelson, Yasson and Hannon during the 1976-77 school year.

It is recognized that psychology certification was not required until August 31, 1977. It is also recognized that the State Department issued said certificate to petitioner in May 1977. In non-categorical seniority as teaching staff members, the petitioner was exceeded by Nelson and Yasson, and equal with Hannon. It is further recognized that petitioner had taught psychology in the district for 13 of his total years (14), while there is no indication in the record that Nelson, Yasson or Hannon had any prior experience in teaching the subject.

In the absence of required certification in psychology it appears equitable to determine that petitioner had a greater entitlement to teach said subject based on his experience of teaching same in the district and his qualifications as represented by the certificate issued to him prior to the requirement for same. **I SO FIND.**

Petitioner also claims an entitlement to teach the Introduction to Vocations courses assigned to teacher Celidonio during 1976-77. Celidonio was certified in Industrial Arts and as C.I.E. coordinator.

Introduction to Vocations is clearly a subject associated with Industrial Arts and was properly assigned to one so certified. **I FIND** that petitioner's claim here has no merit.

The final claim of petitioner relates to the teaching of typewriting. He alleges he was denied his entitlement to teach said subject when teachers Aronsky and Conigliaro were assigned part-time and 4 sections respectively in 1976-77 and 4 sections to the latter in 1977-78.

Petitioner is certified in General Business, a comprehensive certificate which provides a right to teach typewriting equal to that of a teacher with a typewriting certificate. He was issued his first General Business certificate in January 1965, which was 3 1/2 years after his initial employment. He was not assigned, however, under that certificate until 1968-69. His seniority in general business began to toll at that point. His seniority of 7 years in relation to 6 years for Conigliaro and none for Aronsky is supportive of his entitlement claim which **I FIND** to be just and proper.

I FIND, therefore, that petitioner LaFronz was improperly denied his entitlement to retain his teaching position for the 1976-77 and 1977-78 school years.

In summary, **I FIND** that:

1) the Board improperly denied petitioner Furno his entitlement to retain his teaching position for the 1976-77 and 1977-78 school years;

2) the Board properly terminated petitioners Fitzpatrick and Untereiner and Placed them on the preferred eligibility list;

3) the Board improperly denied petitoner LaFronz his entitlement to retain his teaching position for the 1976-77 and 1977-78 school years.

I CONCLUDE, therefore that:

1) the Petition of Paul Fitzpatrick is hereby **DISMISSED**;

2) the Petition of Harry Untereiner is hereby **DISMISSED:**

3) the Board **IS ORDERED** to compensate petitioner James Furno the amount of salary he would have received for the 1976-77 and 1977-78 school years had he not been terminated, which is to be mitigated by other earnings during those school years;

4) the Board **IS ORDERED** to compensate petitioner Thomas LaFronz the amount of salary he would have received for the 1976-77 and 1977-78 school years had he not been terminated, which is to be mitigated by other earnings during those school yeas.

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

OAL DKT. NO. EDU 411-76

I HEREBY FILE with **FRED G. BURKE, COMMISIONER OF EDUCATION,** my Initial Decision in this matter and the record in these proceedings.

29 April 1980
DATE

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

Reciept Acknowledged:

30 April 1980
DATE

Paul De Marco
AGENCY HEAD

Mailed To Parties:

May 6, 1980
DATE

Ronald L. Parker/BA
FOR OFFICE OF ADMINISTRATIVE LAW

It is hereby noted that the initial decision above was completed and submitted to word processing on April 22. On April 24 the schedule for the Wilson school were received from respondent. A careful review of the documents reveals that teacher Buda was assigned 3 of 8 sections of grade 8 social studies. Buda is the only teacher with greater seniority than petitioner Furno. (Teachers Ruymen and Woltmann were assigned the remaining 5 sections).

The determination in the initial decision is unchanged.

PAUL FITZPATRICK ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioners' except to the finding by Judge Ward R. Young that teacher Buda had greater seniority then Petitioners Furno, Fitzpatrick and Untereiner in the subject field of social studies. The Commissioner agrees. He finds petitioners' arguments persuasive wherein is stated:

> "Since Buda did not serve under her elementary certificate until the 1975-76 school year, her seniority in Social Studies under that certificate must be limited to one (1) year as of September, 1976 (the effective date of the alleged reduction in force). This is true since N.J.A.C. 6:3-1.10(G) allows an individual to count years of employment as years of seniority in all previously held job categories, but it does not permit one to count years of previous employment toward seniority in a subsequent new job category. Thus Buda could count her year in elementary education (1975-76) as an additional year of seniority in her prior job category (secondary Spanish), but could not count her prior ten (10) years in that latter category toward seniority in the subsequently obtained elementary position." (Emphasis in text.) (at pp. 3-4)

Accordingly, the Commissioner determines that the Board improperly denied Petitioner Furno his entitlement to retain his teaching position for the 1976-77 and 1977-78 school years, holding as he did top seniority of nine years in teaching social studies as of September 1976.

Petitioners except further to Judge Young's determination that the Board did not have an affirmative duty to structure any reduction in force so as to maximize the protection of all tenured employees. Petitioners contend that if the reduction in staff is to occur in a subject field it is not sufficient to remove the least senior employee in that field. N.J.S.A. 18A:28-9 and 28-10 Petitioners contend that the Board must review its entire staff to determine whether any staff members could, by any pattern of transfers to other positions of requisite complexity of each or all tenured teaching staff members minimize job loss of any tenured teacher. The Commissioner cannot agree.

The right of a board of education to determine the school to which a teacher is assigned and the grade level or subject area taught by that teacher has been firmly established by the Supreme Court of New Jersey in Ridgefield Park Education Association v. Ridgefield Park Board of Education 78 N.J. 144 (1978) wherein it was said in pertinent part:

> "***The selection of the school in which a teacher works or the grade and subjects which he teaches undoubtedly have an appreciable effect on his welfare. However, even assuming that this effect could be considered direct and intimate, we find that this aspect of the transfer decision is insignificant in comparison to its relationship to the Board's managerial duty to deploy personnel in the manner which it considers most likely to promote the overall goal of providing all students with a thorough and efficient education. Thus, we find that the issue of teacher transfers is one on which negotiated agreement would significantly interfere with a public employer's discharge of inherent managerial responsibilities. Accordingly, it is not a matter as to which collective negotiation is mandatory.***" (at 156)

The Commissioner reemphasizes the overwhelming importance of the Board's right and duty to "deploy personnel in the manner which it considers most likely to promote the overall goal of providing all students with a thorough and efficient education."

The Commissioner notes that it was also stated in Ridgefield Park, supra, by the Court:

> "***The interests of teachers do not always coincide with the interests of the students on many important matters of educational policy. Teachers' associations, like any

> employee organizations, have as their primary responsibility the advancement of the interests of their members***."
>
> (at 165)

Similarly in Clinton F. Smith et al. v. Board of Education of the Borough of Paramus et al., 1968 S.L.D. 62, 67 the Commissioner said:

> "***The principle enunciated by the Court in Bates v. Board of Education, 72 P.907 (Calif. Sup. Ct. 1903), and quoted with approval in McGrath v. Burkhard, 280 P.2d 864 (Calif. App. 1955), bears repeating here:
>
> 'The public schools were not created, nor are they supported, for the benefit of the teachers therein,*** but for the benefit of the pupils and the resulting benefit to their parents and the Community at large.'***"

The discretionary authority of the Board to transfer teaching staff members to grade levels and subject matter areas for which they hold certification cannot be contested but must be done in accordance with N.J.S.A. 18A:28-10. The complex plan offered by petitioners to support their contention must fail. Nothing in the record before the Commissioner shows him that the suitability of such transfer was considered nor was there any evaluation made of the consequent disruption of program continuity by such transfers. The Commissioner affirms the responsibility of the Board to duly consider tenure and seniority rights in any reduction in staff but reaffirm the right and duty of the Board to assign teachers to positions which best accord pupils a thorough and efficient education.

The Board excepts to Judge Young's determination that Petitioner LaFronz was entitled to teach three sections of psychology that had been assigned to other teachers during 1976-77. The Commissioner agrees. Absent a certification requirement for psychology which did not exist until August 31, 1977 it was within the discretionary authority of the Board to assign the teaching of psychology to professional staff members who it determined would best meet the needs of the school district.

The Board excepts further to Judge Young's finding that Petitioner LaFronz had seniority to teach typewriting wherein it was said:

> "Petitioner is certified in General Business, a comprehensive certificate which provides a right to teach typewriting equal to that of a teacher with a typewriting certificate."
>
> (Initial decision, ante)

Petitioner LaFronz held a general business certificate. N.J.A.C. 6:11-6.3(a)1(vi) In Regulations and Standards for Certification, Department of Education, Division of Field Services, Bureau of Teacher Education and Academic Credentials 22nd Edition, 1976 it states:

> "This endorsement authorizes the holder to teach general business studies in all public schools. General business studies normally include: business law, economic geography, economic, social business studies, consumer education, sales, retailing, advertising."
> (at p. 63)

The Commissioner finds that LaFronz was certified in general business studies which does not include typewriting. He therefore has no claim to teach that subject which was properly assigned to teachers duly certified.

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

In summation the Commissioner states:

1. Petitioner Furno, being entitled to retain his teaching position for the 1976-77 and 1977-78 school years, should not have been terminated and the Board is directed to accord him the amount of salary he would have earned for those two (2) years mitigated by any other earnings.

2. Petitioners Fitzpatrick and Untereiner were properly terminated by the Board and placed on seniority eligibility lists. Their Petitions of Appeal are dismissed.

3. Petitioner LaFronz was properly terminated and accordingly his Petition is dismissed.

It is so directed.

COMMISSIONER OF EDUCATION

June 13, 1980
Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN RE:	)	INITIAL DECISION
MARY FORD AND **BARBARA PARKER,**	)	**O.A.L. DKT. NO. EDU 2416-79**
Petitioners	)	AGENCY DKT. NO. 188-5/79A
vs.	)	
BOARD OF EDUCATION OF THE	)	
TOWNSHIP OF SOUTH HACKENSACK,	)	
Respondent		

APPEARANCES:

Gregory T. Syrek, Esq., of Goldberg & Simon, Attorneys for Petitioners

Ralph J. Padovano, Esq., Attorney for Respondent

BEFORE THE HONORABLE **JACK BERMAN,** A.L.J.:

On May 14, 1979, a Verified Petition was filed with the Commissioner of Education pursuant to N.J.S.A. 18A:6-9. Petitioners seek an order directing respondent to compensate them for longevity in accordance with the longevity provision of the salary guide.

This matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A pre-hearing conference was held on November 27, 1979 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey, at which time the issues in the case were identified as follows:

A. Was petitioner Ford, entitled to a longevity increment of $700.00 as of the 1976-77 school year and thereafter based upon respondent's salary guide?

B. Was petitioner Parker, entitled to a longevity increment of $500.00 as of 1978-79 school year and thereafter, based upon respondent's salary guides?

C. Does petitioner Parker's part-time employment affect her entitlement to longevity pay to any extent?

D. To what extent does petitioner Ford's part-time employment from April 1, 1955 through June, 1970 affect her claim to full increment?

The following were stipulated to at the pre-hearing conference:

A. Petitioner, Mary Ford, was employed by the Board as a school nurse from April 1, 1955 to June, 1970 on a part-time basis; as of September 1, 1970 until the present on a full-time basis.

B. Petitioner, Barbara Parker, has been employed two days a week as a teacher on a part-time basis since September 1963.

C. The Board of Education acknowledges that petitioner Parker is entitled to 2/5ths of her increment or $200.00.

The burden of proof assigned to the parties by virtue of the pre-hearing order of November 28, 1979 is as follows:

A. Petitioners shall have the burden of proof of issues A & B.

B. Respondent shall have the burden of proof of issues C & D.

A hearing was held on March 25, 1980 at the Office of Administrative Law. At the hearing three exhibits were received in evidence, (see appendix attached), two from petitioners and one from respondent.

It was stipulated at the hearing with respect to petitioner Ford, that credit was given for her three years prior military service.

The following persons testified:

For Petitioners:

Mary Ford, a petitioner

For Respondent:

Ruth C. Brierty, respondent's Board Secretary

Mary Ford began her employment with respondent on April 1, 1955 working three mornings a week as a nurse. In 1970 having received her certification she became employed on a full-time basis.

In the 1973-74 school year she was for the first time, placed on the salary guide, specifically Step 4.

In the 1978-79 school year she went from Step 8 to Step 12 of the salary guide, having received credit from her three year prior military service. Presently she is on Step 13 of the salary guide.

In 1978 she wrote a letter to the respondent requesting longevity pay. As a result, during the 1978-79 school term, she received payment of $280. This determination was made by the respondent's Board secretary, Mrs. Brierty. Subsequently that year, the respondent Board made a determination that she was not entitled to longevity pay and no further payments were made to her.

Petitioner Ford joined the teacher's pension and annuity fund shortly prior to her gaining full-time employment with respondent.

Petitioner Barbara Parker, a teacher, was first employed by respondent on September 1, 1963, working two days a week (Tuesday and Thursday), as she presently does, as a speech therapist.

In the school year 1978-79, a determination was made by respondent Board to pay petitioner Parker longevity based on her part-time employment of two days a week. Thus she received 2/5ths of $500 or $200.

Respondent's position with respect to longevity pay of each of the petitioners, is articulated in letters sent to them under date February 27, 1979 (P-1 and P-2). As to Ford, the Board's secretary wrote in part ". . . longevity is for teaching services and since

the certificate recognized by the State was issued in 1970, you, therefore have only nine years, plus three years Military Service, for twelve years of teaching service to our community. Therefore longevity is being denied." (P- 1).

The Board's secretary's letter to petitioner Parker states ". . . the Board feels that all part-time teachers are entitled to 2/5ths of longevity pay which amounts to $200.00." (P-2)

Based on the foregoing, the COURT FINDS:

A. As to petitioner Ford:

1. She began her employment with respondent on April 1, 1955 working three mornings a week as a nurse, until June, 1970.

2. In 1970 she received her certification and became employed on a full-time basis and continues to be employed until the present.

3. She is currently on Step 13 of respondent's salary guide having received three years prior military service credit, in the 1978-79 school year.

4. In 1978 she requested from respondent longevity pay and during the 1978-79 school year received a longevity payment from respondent of $280.

5. Subsequently that year, respondent Board determined that she was not entitled to longevity pay since "... longevity is for teaching services and since the certificate recognized by the State was issued in 1970..."

6. Respondent recognized only twelve years of her "teaching service to our community" when she had worked a total of 25 years, of that 15 years part-time.

7. Pursuant to "Teacher Negotiations 1978-1980" (R-1) specifically "Longevity" for teaching 21-25 years in respondent's school system a teacher is entitled to longevity pay of $700.00.

8. For purposes of "Longevity" she is a "teacher" and is entitled to longevity pay of $700.00.

B. As to petitioner Parker:

1. She is a teacher, who was first employed by respondent, on September 1, 1963, working two days a week (Tuesday and Thursday) as she presently does, as a speech therapist.

2. Respondent Board acknowledges that she is entitled to 2/5ths of her increment or $200.00

3. She has worked as a teacher in respondent's school system 16 years.

4. Pursuant to "Teacher Negotiations 1978-80" (R-1), specifically, "Longevity" for teaching 16-20 years in respondent's school system a teacher is entitled to longevity pay of $500.00.

Since there is no statute regarding eligibility for longevity pay, the practice and/or legal commitment of the school board regarding it is to be considered. In this regard R-1 "Teacher Negotiations 1978-1980," is controlling. "Such policy and schedules shall be binding upon the adopting Board. . ." N.J.S.A 18A:29-4.1. An examination of this agreement reveals the following with respect to longevity.

"Longevity: For years of teaching in the South Hackensack School System:

16 - 20 years	$500.00
21 - 25 years	700.00
26- 30 years	900.00
Over 30 years	1100.00"

Nothing else with respect to "Longevity" appears. Thus, nothing is said regarding employment part-time, employment time as a nurse, or employment prior to certification.

With respect to petitioner Ford, although respondent in its denial of longevity pay to her specified that "longevity is for teaching service" they have not raised this matter as an issue. Nonetheless, N.J.S.A. 18A:29-4.2 answers this in petitioner Ford's favor by stating "Any teaching staff member employed as a school nurse and holding a

standard nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the full use of the same experience steps and training levels that apply to teachers." (Emphasis Added).

The agreement when elsewhere perused for indicia of intent regarding the omission in the agreement of part-time employment towards accreditation for longevity, reveals that Article XIII dealing with sick pay distinguishes specifically between "Full-time Teacher" and "Part-Time Teachers." Likewise, Article X "Benefit" for "course reimbursement" distinguishes specifically between "Full-time Teacher" and "Part-Time Teachers." Both Articles place certain specified limitations on part-time teachers. Part-time Teachers are also distinguished from full-time teacher in Articles VI and IX.

The Court will not presume a limitation unless one is specified in the agreement. In Neptune Education Association v. Board of Education of the Township of Neptune, 1969 S.L.D.1, the parties had negotiated a salary agreement providing for longevity payments after 20 and 25 years of service. The Board of Education alleged that this longevity provision was limited to years of service in that particular district. This limitation was in keeping with a long-standing Board policy. However, this limitation was not contained within the negotiated agreement. Consequently, the salary policy and guides adopted by way of the agreement were silent as to any such restrictions. The Commissioner rejected the Board's claim, holding that:

"Pursuant to N.J.S.A. 18A:29-4.1, respondent Board of Education, adopted a binding salary schedule which provides for all teachers at Step 20 an increment of $300.00 and at Step 25, an increment of $200.00, without regard to whether the years of employment needed to reach those steps were served in the Neptune Township school district or elsewhere." In Casriel v. King, 2 N.J. 45, 50 (1949) the Supreme Court stated regarding contractual interpretation, "the polestar of construction is the intention of the parties to the contract as disclosed by the language used, taken as an entirety;. . ."

In this matter, there is no mention in the longevity provision of the salary guide of part-time or full-time teachers being eligible for longevity pay. The eligibility is "for years of teaching" in respondent's school system. Also, there is no requirement for longevity that one must be certified to be eligible. Absent these limitations, petitioners are eligible for longevity pay.

It is therefore CONCLUDED:

1. Petitioner Ford is entitled to a longevity increment of $700.00 as of the 1976-1977 school year and thereafter, based upon respondent's salary guides.

2. Petitioner Parker is entitled to a longevity increment of $500.00 as of the 1978-1979 school year and thereafter, based upon respondent's salary guides.

3. Petitioner Parker's part-time employment does not affect her entitlement to longevity pay to any extent.

4. Petitioner Ford's part-time employment from April 1, 1955 through June 1970 does not affect her claim to full increment.

It is therefore **ORDERED** that respondent pay petitioner Ford $700.00 less $280.00 paid to her by respondent, for a total of $420.00 as and for her longevity increment for the year 1976-1977; and it is **FURTHER ORDERED** that respondent pay to petitioner Ford $700.00 for each year thereafter; and it is **FURTHER ORDERED** that respondent pay to petitioner Parker the sum of $500.00 as and for her longevity increment for the school year 1978-1979 and thereafter.

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

O.A.L. DKT. NO. EDU 2416-79

I HEREBY FILE with the **COMMISSIONER OF EDUCATION, FRED G. BURKE,** my Initial Decision in this matter and the record in these proceedings.

June 25, 1980
DATE

Jack Berman
JACK BERMAN, A.L.J.

MARY FORD AND BARBARA PARKER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by respondent in a timely fashion pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Subsequently, reply exceptions were filed by petitioner in an untimely manner which were not considered.

The Board's exceptions address the alleged lack of significance attributed by Judge Jack Berman to Petitioner Ford's lack of certification from her date of employment in 1955 as a part-time nurse until 1970 when she became certified and was employed full time. The Commissioner does not agree. The Commissioner does not condone employment by a board of education of a professional employee without certification. N.J.S.A. 18A:27-2 In this case, however, the Commissioner finds nothing in the record to show bad faith or collusion on the part of either the Board or petitioner to circumvent the law. The Commissioner determines that as a matter of equity those years of service must be recognized in determining longevity.

The Commissioner observes that nothing in the negotiated agreement refers to the eligibility of part-time or full-time teachers for longevity payments. Absent such provision or definition, the Commissioner determines that all employees must be treated on the same basis. This does not preclude the parties from future negotiation on this question.

The Commissioner is constrained to point to the decision in Wall Township Education Association et al. v. Board of Education of the Township of Wall, 149 N.J. Super. 126 (App. Div. 1977) wherein the question of longevity pay and military service credit was addressed in pertinent part thusly:

> "***Our construction of the contractual provision is confirmed by the final sentence which deals with an additional increment for teachers 'entering their 21st year of teaching in Wall Township.' By contrast with the remainder of the increments for the 15th and 18th years, this provision limits the 21st year increment to service for the entire period in Wall Township. As already noted, veterans are granted equivalency with non-veterans; they are therefore equally subject to the provisions of the negotiating agreement which are not in conflict with the legislative policy. And since the 21-year increment is based upon such total service in the Wall community, credit for military service cannot be utilized in determining eligibility for this additional increment. The statutory credit applies as if the veteran had been employed for the period of his military service in 'some publicly owned and operated college, school or institution of learning.' (Emphasis added.) Since the military service is not equated in the statute with employment in the same school system, the credit cannot be applied for eligibility for the extraordinary longevity increment due because of service in Wall Township.***" (at 131-132)

The Commissioner notes that in the negotiated agreement the only reference to "Longevity" appears in this manner.

> "Longevity: For years of service in the South Hackensack School system."

The Commissioner finds that as in Wall, supra, in the instant case military service credit cannot be applied toward the longevity increment due a teacher because of service in South Hackensack. The Commissioner notes that this does not change the monetary award presently due Petitioner Ford as she must be credited with twenty-one (21) years longevity but will slow her eligibility for future longevity payment increases.

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

The Board is directed to pay Petitioner Ford the sum of $700 as her longevity increment as determined by agreement starting with the school year 1976-77 and each year thereafter

mitigated by $280 previously paid her. Petitioner Parker is to be paid the sum of $500 as her longevity increment starting with the school year 1978-79 and thereafter as per agreement.

COMMISSIONER OF EDUCATION

June 18, 1980

ROBERT P. TUCKER	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Carl J. Kerbowski, Esq.

For the Respondent, Theodore Z. Davis, Esq.

Petitioner, who was employed September 1975 through June 30, 1977 as administrative principal by the Lawnside Board of Education, hereinafter "Board," asserts that the Board failed to legally determine that he would not be reemployed thereafter. Specifically, petitioner alleges that the Board in violation of N.J.S.A. 18A:27-3.1-3 and N.J.A.C. 6:3-1.20(i) not only failed to evaluate his performance, but also failed to provide timely and valid reasons for his nonreemployment, a timely appearance before the Board and timely notification of its final decision.

The Board, conversely, maintains that its decision not to reemploy petitioner was a legal exercise of its discretionary authority.

In an interlocutory order dated February 24, 1978, incorporated herein by reference, petitioner's Motion for Interim Relief seeking reinstatement, pendente lite, was denied by the Commissioner of Education on grounds that petitioner had failed to show irreparable harm beyond the remedial authority of the Commissioner.

A plenary hearing was conducted at the State Department of Education, Trenton, on May 8 and 9 and July 25, 1978. Post-hearing briefing was completed on January 29, 1979. The report of the hearing examiner follows setting forth first those relevant facts which are not controverted.

Petitioner was advised by a letter of the Board Secretary dated April 27, 1977 that the Board on April 26 had voted not to offer him a contract for the 1977-78 school year. (R-1) Thereupon, by letters dated May 2 and May 25 petitioner requested reasons for the Board's action. (P-1-2) The Board, after convening on June 13, notified petitioner by letter dated June 16 of twelve reasons which state that petitioner had failed to provide the Board with his evaluations of teachers, disregarded the Board's written policies, recommended uncertificated

and uncertifiable persons for employment, expended unauthorized Board funds, failed to submit to the Board and the State Department of Education timely and appropriate reports and plans of action, failed to implement a funded compensatory education program, and exhibited both inability to set priorities and lack of respect for the Board. (R-2)

On June 22 and again on July 21 petitioner requested an informal appearance before the Board. (P-3-4) The Board on July 25 notified petitioner that, because it had scheduled such an appearance for July 14 and had inadvertantly failed to notify petitioner, it was rescheduling such appearance for August 4. Following that appearance, petitioner was notified by letter of August 18 that the Board had affirmed its earlier decision (R-4-5; P-5-6) Thereafter, on November 9, 1977 the within Petition of Appeal was filed with the Commissioner.

At the hearing petitioner, testifying on his own behalf, averred that, after being so informed by the County Superintendent of Schools, he had notified the Board in February 1977 that it was legally obligated to evaluate him as its administrative principal. He testified, however, that at no time did he receive an oral or written evaluation from the Board or a conference to discuss an evaluation of his performance. (Tr. I-15-18) Petitioner, in his testimony denied the validity of each and every one of the twelve reasons enunciated by the Board (R-2) as the basis for his nonreemployment, ante, and introduced numerous exhibits into evidence in support of his contentions. (Tr. II-4-169; III-6-81; IV-140-171)

A Board member who had been newly elected to the Board in March 1977 testified that at the Board's closed meeting on April 26, 1977, called for the purpose of discussing personnel matters, petitioner had requested that the Board promptly determine his employment status. He testified that the Board did at that meeting discuss his employment status and voted not to reemploy him. (Tr. III-85-96)

The Board Secretary testified that petitioner's written evaluations of his teachers were received by her for distribution to the Board less than a week prior to the Board's April 26 meeting. She testified that she tabulated these by frequency for each teacher (R-13) and delivered them to the Board at the meeting. (Tr. III-131)

The Board's principal witness and present Board President testified that, when the Board voiced concerns over curriculum matters, T&E requirements, teacher evaluations, compensatory education and affirmative action programs, petitioner was dilatory in carrying out his responsibilities and reporting progress to the Board. (Tr. III-108-127) He testified further that, while no written evaluation of petitioner was ever made and no meeting was ever called for the express purpose of conferring

with petitioner on his evaluations, the Board did not consider such to be required. He testified that on four occasions during 1975-76 and on at least eight occasions during 1976-77 the Board discussed with petitioner his performance, his goals and priorities, or lack thereof. (Tr. IV-4, 64-71, 88) He testified that he had no knowledge of petitioner ever having made recommendations or seeking help from the Board concerning curriculum revisions for kindergarten and elementary programs in reading, music and art. (Tr. III-29-31, 39-40, 68)

He also testified that the delays in notifying petitioner of the controverted reasons and the Board's final decision following the informal appearance were occasioned by problems in getting a quorum of the full Board to take appropriate action. (Tr. III-5, 8) He testified additionally that on one occasion petitioner had failed to act until he, as a Board member, directed that he comply with the Board's policy on drugs by placing in the hands of the local police suspected drugs which had been found on the school premises. (Tr. IV-14-16)

The hearing examiner, having carefully reviewed the documentary evidence and the testimony of witnesses, sets forth the following additional findings of relevant fact which should be considered in reaching a determination:

A. Alleged Delays Attributed to the Board

1. The Board made known to petitioner by its vote on April 26, 1977 that it was not offering him a successor contract and notified him in writing of its decision by letter dated April 27. Although petitioner did not receive that letter until after April 30, the Board's action was in substantial compliance with N.J.S.A. 18A:27-10 which requires notice of employment status by April 30. In any event petitioner made no timely claim to continued employment pursuant to N.J.S.A. 18A:27-11.

2. Petitioner on May 2, 1977 made timely request for a statement of reasons for his nonreemployment pursuant to N.J.S.A. 18A:27-3.2 which requires that such statement be provided in writing "***within 30 days after receipt of such request."

3. Despite petitioner's second request on May 25 for reasons, the Board responded with reasons on June 16, six weeks beyond the statutory limit for providing those reasons. (P-2)

4. When timely request was made by petitioner for an informal appearance, the Board, through inadvertant misunderstanding, failed to provide petitioner with notice that an appearance was scheduled for July 14. The rescheduled appearance on August 4 was somewhat more than one week beyond the thirty days within which such appearance is required by N.J.A.C. 6:3-1.20. The hearing examiner finds the Board to have been in substantial compliance with that rule.

5. There is within the record, however, no evidence of extenuating circumstances to justify the Board's delay of eighteen days beyond the three day period provided by N.J.A.C. 6:3-1.20(i) in notifying petitioner of its final decision. (R-5)

B. Allegation That the Board Illegally Failed to Evaluate Petitioner

The hearing examiner finds that although petitioner was on occasion advised by individual Board members of matters of concern to them he was at no time evaluated by the Board pursuant to the requirement of N.J.S.A. 18A:27-3.1. By legislative definition petitioner was a teaching staff member. N.J.S.A. 18A:1.1 Accordingly, he was entitled to be evaluated by his superior. Since he was the chief school officer, only the Board, acting as a body, was his superior.

The hearing examiner grounds his finding on the testimony of a member of the Board, as well as the testimony of petitioner, in concluding that at no time was a meeting called by the Board to evaluate petitioner or to confer with him concerning an evaluation. These elements are mandated by the Legislature:

> "Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated ***not less than once during each semester.*** Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence." (N.J.S.A. 18A:27-3.1)

C. Allegations That the Board's Reasons Were Without Basis in Fact

Reason No. 1: Petitioner violated N.J.A.C. 6:3-1.19 which required in 1976 that a nontenured teacher be evaluated three times each school year and at least once each semester.

The Board's own document in evidence (R-13) constitutes proof that petitioner had evaluated nontenured teachers on his staff at least once prior to April 26, 1977. This proof is corroborated by petitioner's uncontroverted testimony that by April 26, 1977 he "**had evaluated every [teacher] employee in the district.**" (Tr. II-104) The record is devoid of proof that the Board, prior to that date, had required that petitioner provide it with additional evaluations. No documentary or parol evidence was entered by the Board in support of its contention that petitioner had failed to evaluate his teachers prior to April 1977 in compliance with existing law.

Reason No. 2: Total and willful disregard of the Board's stated policies.

Petitioner denied that he ever willfully disregarded the Board's stated policies. The Board failed at the hearing to enter credible evidence on which to base a conclusion that petitioner ever willfully disregarded the Board's stated policies.

Reason No. 3: Petitioner recommended uncertificated or uncertifiable persons for employment.

Petitioner's testimony that he had at no time recommended such persons is uncontroverted in the record.

Reason No. 4: Petitioner incurred expenses without the Board's approval.

Petitioner denied that he had ever incurred unauthorized expenditures. The hearing examiner finds no evidence within the record that forms a basis for giving petitioner this reason for his nonreemployment. (Tr. II-46)

Reason No. 5: Petitioner totally and willfully disregarded the State requirement that a T&E report be submitted by December 1, 1976.

Petitioner's testimony that he submitted a T&E report by December 1, 1976 is confirmed by the Commissioner's own records from the office of the Camden County Superintendent of Schools that such a report was received in that office on December 1, 1976. (Tr. II-6; C-1(8)) In regard to petitioner's extensive efforts to implement T&E, see Tr. III-7, 17-21, 23-30, 67 and IV-154.

Reason No. 6: Petitioner failed to submit timely and substantive monthly reports to the Board.

The hearing examiner finds those reports submitted to the Board and entered into evidence by the Board to be substantive in that they discuss and make recommendations to the Board on critical educational matters including, inter alia, staffing, State programs involving school districts, curriculum, pupil activities, testing and guidance. (P-7-25)

Reason No. 7: Petitioner failed to implement a compensatory education program although such program had been funded.

The hearing examiner finds, after careful review of testimony concerning this reason, that any delay in implementing the funded compensatory education progam was primarily the result of delay by the Board in authorizing that program. Petitioner prepared extensive informative documentation for the Board in September 1976 and recommended its adoption on December 1976. Thereafter, in March 1977 the Board authorized its implementation (Tr. II-16-26, 147-152; P-7, 22, 24; C-1)

Reason No. 8: Petitioner failed to inform the Board of district-wide testing results until "virtually begged" to do so.

The hearing examiner finds nothing within the record on which to base a conclusion that Reason No. 8 is true in fact or that the Board as a body ever requested such results other than those presented routinely to the Board by petitioner. (Tr. II-55-57)

Reason No. 9: Petitioner, as affirmative action officer for the Board, failed to file with the Board a plan of affirmative action.

The hearing examiner finds that as early as April 1976 petitioner presented to the Board an affirmative action policy statement and plan for implementation. (P-21) Delay in implementing an appropriate plan was attributable to inability of the Board to agree on such a plan. In making this finding the hearing examiner relies on the forthright, consistent testimony of petitioner concerning his efforts to effectuate for the district an appropriate affirmative action program. (Tr. II-37-43, 69-71; III-39-44, 51-53, 71-73)

Reason No. 10: Petitioner failed to make a timely report of existence of drugs within the school.

It is uncontroverted that one Board member directed petitioner to submit and that he did thereafter promptly submit to the police an unknown substance found in a school building. There is, however, no proof that the unknown substance, the presence of which petitioner had reported to the Board, was a controlled dangerous substance. Nor is there evidence that the substance which was found in an area utilized by the general public was at any time in the possession of a pupil or employee of the school. The only remaining concern over drugs was an incident occurring after the Board's action of April 26, 1977 which resulted in the Board's ordering petitioner to reinstate pupils whom he had suspended for possession of a controlled dangerous substance. There is no credible evidence on which to base a conclusion that petitioner, who in each instance called these matters to the attention of the Board, did not act in accord with the Board's policy on drugs. (Tr. II-10-13)

Reason No. 11: Petitioner exhibited lack of respect for the Board.

Petitioner denies that he ever exhibited such lack of respect. The hearing examiner finds the record devoid of any documentary or parol evidence on which to base a conclusion that petitioner displayed a lack of respect for the Board.

Reason No. 12: Petitioner "***exhibited a complete inability to set priorities with respect to many of his tasks." (R-2)

The hearing examiner finds convincing petitioner's forthright testimony which is buttressed by documents in evidence showing that petitioner's priorities were established early in his employment in areas of pupil safety, preservation of property and curriculum development with a strong emphasis on developing reading skills. It is further proven that petitioner in his monthly reports to the Board regularly reported on his efforts in such important matters as curriculum development. (Tr. II-47-58, 92-96, 118-127; P-12, 15-19, 20-25)

The hearing examiner concludes that not one of the twelve reasons given by the Board for nonreemployment has withstood the scrutiny of testimony and documentary evidence entered at the hearing. Testimony of the Board's principal witness also makes it clear that they were formulated by the Board with little consideration of available relevant documents. (Tr. IV-127)

Accordingly, it is recommended that the Commissioner determine that the reasons given were neither in compliance with the legislative intent expressed in N.J.S.A. 18A:27-3.2, with the rules of the State Board of Education set forth in N.J.A.C. 6:3-1.20 nor with the directive of the Supreme Court in Donaldson v. Board of Education of the City of North Wildwood, 65 N.J. 236 (1974) wherein it was stated that a teaching member not being reemployed, in elemental fairness, has the right to know why. (at 244) The Court in Donaldson also stated that "***the requirement that reasons be stated would *** serve as a significant discipline on the board itself against arbitrary or abusive exercise of its broad discretionary powers.***" (at 245)

The following serve to summarize the foregoing findings of fact:

A. The Board was in substantial noncompliance with the due process time deadlines set forth in N.J.S.A. 18A:27-3.2 and N.J.A.C. 6:3-1.20.

B. The Board, after being advised by petitioner of its responsibility to evaluate him, failed to do so in violation of N.J.S.A. 18A:27-3.1 and the admonition of the Commissioner in Frederick J. Procopio, Jr. v. Board of Education of the City of Wildwood, 1975 S.L.D. 807, 819, aff'd State Board of Education 1975 S.L.D. 1161.

C. The reasons given by the Board, all of which are denied by petitioner, are not shown by evidence entered into the record to be valid or based on fact.

While the Board in such a case brought by a teaching staff member who is not tenured does not bear the initial burden of proving the reasons it has given, it was under obligation to come forth with credible evidence to rebut such evidence as was entered by petitioner who developed a prima facie case against the Board. As was stated in Preston K. Mears et al. v. Board of Education of the Town of Boonton, 1968 S.L.D. 108, 111:

> "***[T]he Commissioner recognizes the practical problems confronting boards of education in creating a record of all its discussions and formulating a statement of its reasons for all of its decisions, as if to anticipate a need to defend itself in litigation such as that herein. The evidence of reasonable action is not always so formally generated. But in the absence of such evidence, the Commissioner cannot discharge his duty to examine the exercise of a board's discretion where, as here, it is challenged, unless at the hearing or in some other proper manner the board is willing to come forward with appropriate evidence that it acted with reason and not in an arbitrary, capricious, unreasonable, or discriminatory manner. Thus, while the burden of proof initially and in the ultimate sense rests with the petitioner in an action such as the instant matter, the Commissioner must be able to determine that some reasonable basis exists for the board's actions. Therefore, unless such basis appears to the Commissioner, the board's actions cannot be sustained.***"

In conclusion, the hearing examiner recommends that the Commissioner determine that the Board has abused its discretionary authority by acting contrary to the statutes and rules of the State Board of Education and in arbitrary and capricious fashion. It is further recommended that the Commissioner order the Board to reinstate petitioner to his former position as administrative principal with appropriate directive to the Board to evaluate him during his third year of employment in that position as required for all teaching staff members by existing education law.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in this matter, including the report of the hearing examiner and the exceptions thereto filed on behalf of both parties.

The Commissioner has considered carefully the Board's arguments to the contrary but is not persuaded either that the Board conducted the evaluations mandated by N.J.S.A. 18A:27-3.1 in the manner prescribed by N.J.A.C. 6:3-1.19 or that the reasons supplied petitioner for nonrenewal of his employment contract were supported by the record. Accordingly, the Commissioner accepts as correct the conclusions reached by the hearing examiner and embraces them as his own.

While a board of education is not expected to undertake the burden of proving in the first instance that its reasons for denying reemployment to a nontenured teaching staff member are valid, the board must be prepared to defend those reasons when their validity is persuasively questioned, as was the case here. In such circumstances the Board's failure to offer credible evidence establishing a basis in fact for the reasons furnished can only lead the hearer to conclude that the Board's action predicated on those reasons was arbitrary, constituting an abuse of discretion. Preston K. Mears et al. v. Boonton Board of Education, 1968 S.L.D. 108, 111. To conclude otherwise invites erosion of one of the principal objectives to be served by a statement of reasons: to discipline the board of education against the arbitrary or abusive exercise of its broad discretion in making employment decisions. Donaldson v. North Wildwood Board of Education, 65 N.J. 236, 245 (1974).

In view of the Board's failure to substantiate its reasons for nonrenewal, coupled with its failure to evaluate petitioner in accordance with N.J.S.A. 18A:27-3.1 and regulations promulgated pursuant thereto, the Commissioner concludes that reinstatement is warranted. He therefore directs that petitioner be restored to his former position as administrative principal at the salary he would have commanded had he not been dismissed. The Commissioner further directs the Board to award petitioner lost salary for the period September 1977 to the date of reinstatement, mitigated by any earnings he may have received from alternate employment during that period. Dore and Sena v. Bedminster Board of Education, 1980 S.L.D. _____ (decided May 30, 1980); Bendon v. Keansburg Board of Education, 1978 S.L.D. _____ (decided August 30, 1978).

COMMISSIONER OF EDUCATION

June 18, 1980

Pending State Board of Education

ANGELA RIEMANN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

For the Respondent, R. Joseph Ferenczi, Esq.

Petitioner alleges that the Board's action in assigning her to a four-fifths teaching position, on a seniority basis, failed to take into account that she had accrued seniority during a prior period of employment by the Board as a tenured teaching staff member. Petitioner asserts that the Board's action in this regard violates the provisions of N.J.S.A. 18A:28-5 through 13, as well as N.J.A.C. 6:3-1.10, and has deprived her of a full-time teaching position of business education together with full salary. Petitioner prays for an order of the Commissioner of Education granting her full seniority credit for all the years of service in the Board's employ and, further, that the Board be directed to restore her to any available full-time position by virtue of the total amount of seniority service credit which is due her. The Board, on the other hand, admits that it assigned petitioner to a four-fifths position as a teacher of business education at the Edison High School with a corresponding reduction in salary. The Board maintains, however, that such assignment of petitioner was made only after she rejected a full-time teaching position at another of its high schools and accepted, in lieu thereof, a four-fifths position at the Edison High School, commencing with the 1976-77 academic year. In all other respects the Board denies petitioner's allegations and asserts that its actions were proper and legally correct.

A hearing was conducted in this matter on July 13, 1978 at the Middlesex County Administration Building. The report of the hearing examiner is based on the testimony and stipulations of the parties adduced at the hearing, as well as a Joint Stipulation of Facts, documents, a Petitioner's Memorandum in lieu of Brief with attached affidavit, and the Board's reply Brief. The report of the hearing examiner follows:

On October 18, 1977, a Stipulation of Facts was filed by the parties and is reproduced in toto as follows:

"1. Petitioner, Angela Riemann, is a teaching staff member employed by Respondent, Edison Township Board of Education. Petitioner is fully certified to teach all secondary grade Business subjects, and is presently under tenure.

"2. Petitioner has taught Business Education subjects while employed by Respondent Board for the following periods of time: (a) September, 1959 through October 31, 1964, Business Education courses at Edison High School; (b) on April 24, 1973, Petitioner resumed teaching Business Education courses at Edison High School, is presently so employed, and received tenure for a second time on April 25, 1976.

"3. Effective November 1, 1964, Petitioner commenced a leave of absence for maternity reasons and subsequently Petitioner resigned her teaching position in the Edison School District on or about March 16, 1965 in order to raise her family.

"4. For the 1976-77 school year, Petitioner was offered, by Respondent Board, full time employment in Business subjects at J.P. Stevens High School or Herbert Hoover Junior High School [Edison Township School District]. Notwithstanding this offer, Petitioner refused same and accepted a 4/5 position at the Edison High School teaching Business subjects. By virtue of her alleged seniority, she claimed entitlement to a full time position at Edison High School. The full time teaching position at Edison High School was given to a teacher with less total time of service in the Edison School District than Petitioner if Petitioner's seniority is construed to include her prior service in the District.

"5. Respondent Board's assignment of Petitioner that resulted in her 4/5 teaching position was based upon seniority status which only included that period of time from April 23, 1973, and not for the period of employment in the Edison School District from September, 1959 through October 31, 1964.

"6. Article XIII, Paragraph (c) of the 1975-78 agreement between the Respondent Board and the Edison Township Education Association provides as follows:

> 'Determination of transfers, both voluntary and involuntary, will only be made after the best interests of the teacher and the school system are taken into consideration.'

The parties herein are in dispute regarding the past practice in the District as to what consideration is given to seniority status in determining the involuntary transfer of teaching staff members." (C-1)

Counsel stipulated on the transcript of the record at the time of the hearing, in pertinent part, that:

> "***[I]f the petitioner had received credit for the earlier five years of employment, September, 1959, through October 31, 1964, *** at Edison High School, *** she would have been more senior, or had more seniority than at least five other teaching staff members in the Business Education Department at the Edison High School***. ***[S]he [petitioner] was required by the administration and Board to make the choice of whether to stay at the Edison High School on a four-fifth position or accept a full-time transfer in business education subjects at J.P. Stevens High School or another junior high school on the basis of the Board's contention that she had lower seniority and was the least senior staff person by virtue of the Board's contention that she was not entitled to credit toward seniority for those five prior years [of teaching service].***" (Tr. 3-4)

And it was further stipulated that:

> "***[T]he Board did not enact any resolution abolishing her [petitioner's] full-time position *** nor did it enact any resolution creating the new four-fifth position in business education in Edison High School.***"
> (Tr. 4-5)

The first issue to be addressed herein is whether or not petitioner is entitled to attach her prior and present periods of employment as a regular classroom teacher for the purpose of determining her seniority status in the instant matter. It is clear that petitioner had acquired a tenure status and seniority protection during her initial period of regular employment by the Board. That employment period commenced in September 1959 and extended until on or about March 16, 1965, when her voluntary resignation from the Board's employ became effective. Petitioner acquired tenure and seniority protection anew on April 26, 1976 after being reemployed by the Board commencing April 24, 1973.

Petitioner relies on the provisions of N.J.S.A. 18A:28-13 and N.J.A.C. 6:3-1.10 in arguing that nothing is contained within the provisions of this statute which requires that her periods of employment service by the Board must be continuous and uninterrupted. This position is buttressed by petitioner in her affidavit wherein she attests that when she was reemployed by the Board on April 24, 1973, she was placed on the step of the salary guide that gave her credit for her years of employment service from September 1959 through October 31, 1964. (C-2, at p. 1)

Petitioner asserts that had the Board taken her total teaching experience into consideration, she would have had eight years, four and one-half months seniority. Such seniority service credit she maintains, if recognized, would have given her more seniority than at least five other teachers of business education at Edison High School, thereby doing away with the necessity of having to choose between a transfer to J.P. Stevens High School or Herbert Hoover Junior High School as a full-time teacher, or to accept a four-fifths position at Edison High School. (C-2, at p. 2)

The effect of a voluntary resignation from a tenured teaching position was raised in Elaine Solomon v. Board of Education of the Princeton Regional School District, 1977 S.L.D. 650, aff'd State Board of Education 657. Petitioner therein claimed that such resignation had no effect on the provisions of N.J.S.A. 18A:28-5 et seq. inasmuch as she was reemployed by the board within the time prescribed pursuant to N.J.S.A. 18A:28-5(c) and therefore such time tolled toward acquiring a new tenure status. The Commissioner ruled that the effect of petitioner's voluntary

resignation from the board's employ was not an "artificial splitting" of the periods of employment by the board, but rather that petitioner relinquished her tenure protection and any rights attendant thereto by virtue of such resignation. Consequently, the Commissioner held that petitioner's prior periods of employment served could not be counted toward a new tenure entitlement.

The hearing examiner observes that the instant matter is distinguishable, in part, from Solomon, supra, in that petitioner's prior period of continuous full-time employment by the Board occurred approximately eight years prior to the commencement of her new period of employment by the Board on April 24, 1973. The hearing examiner finds and determines that petitioner, in resigning from her prior teaching position with the Board, effectively terminated her tenure and seniority status for that employment period. In the hearing examiner's view, such lapse of time between regular full-time employment periods, as stipulated herein, required that petitioner's employment service begin anew on April 24, 1973, toward the acquisition of a tenure status and seniority protection. Such intervening periods between regular full-time employment periods cannot be construed by definition, as argued by petitioner, to amount to occasional absences and leaves of absence pursuant to the provisions of N.J.A.C. 6:3-1.10(b). (Petitioner's Memorandum, at p.4) The hearing examiner concludes that the provisions of N.J.A.C. 6:3-1.10 et seq. provide seniority protection to teaching staff members when the precise terms and conditions of the tenure statutes have been met and, further, that such employment service rendered by a teaching staff member must be continuous except for occasional absences or leaves of absence. It is further concluded that such was not the case herein, and therefore petitioner is not entitled to be credited with seniority for those periods of employment service from September 1959 through March 16, 1965 by virtue of the fact that her resignation from the Board's employ effectively terminated her tenure and seniority protection that she had accrued as of that time.

Accordingly, it is found and determined that petitioner, by virtue of her new tenure status, had approximately three years, two months seniority credit at the time of the Board's action.

The second issue raised is whether petitioner, by virtue of her seniority rights, is entitled to demand a full-time teaching position at Edison High School as opposed to the four-fifths position in which she is presently serving at that high school.

As has been previously found and determined herein, petitioner had approximately three years, two months seniority credit taken into account by the Board when it determined that one full-time position in business education was not needed at Edison High School.

Petitioner does not dispute the fact that the Board, due to declining enrollment, did not require as many teachers of business education for the 1976-77 academic year. Consequently, petitioner was offered a choice by virtue of her having the lesser seniority of the full-time teachers at Edison High School: to be transferred to another full-time position at J.P. Stevens High School or the Herbert Hoover Junior High School, or to remain in a four-fifths teaching position at Edison High School. (Petitioner's Memorandum, at p. 1)

Petitioner maintains that she accepted the four-fifths position at Edison High School instead of the other full-time teaching positions under protest, because it was her belief that she had more total seniority teaching experience than at least four other teachers of business education at Edison High School and, therefore, should not have been transferred out of her full-time teaching position.

The Board has stipulated that it did not take formal action to abolish petitioner's full-time teaching position, nor did it take formal action to create petitioner's four-fifths teaching position at Edison High School. (Tr. 4-5)

The hearing examiner observes, however, upon review of those documents submitted by the Board subsequent to the hearing in this matter, that the 1976-77 School Budget (C-3) and the accompanying Budget Clarification (C-4) establishes that the Board had reduced its line item budget request under Teachers' Salaries (J-213 account) by $516,899 for that year. The effect of such reduced budget request was translated into the reduction of twenty-two teaching positions. (C-4, at p. 2) Additionally, the staffing report for the senior high schools (Edison and J.P. Stevens) (C-5), which indicates that it had been revised on May 15, 1976, establishes that the number of teaching positions in business education would be reduced from 11.6 in the 1975-76 academic year, to 10.8 as of the 1976-77 academic year. Consequently, there was an eight-tenths, or four-fifths, teaching position projected in business education at Edison High School for the 1976-77 academic year. Finally, a copy of the pertinent Board minutes dated July 12, 1976 and approved by the Board on August 10, 1976 (C-6) establishes that petitioner was employed in a four-fifths teaching position at the salary of $11,830, for the 1976-77 academic year. (C-6, at p. 4785)

The hearing examiner finds that the Board did, in fact, err when it failed to formally abolish that full-time teaching position in which petitioner was employed prior to its determination to employ her in a four-fifths teaching position. The Commissioner, however, relied on the ruling of the New Jersey Supreme Court in Board of Education of the Borough of Union Beach v. New Jersey Education Association et al., 53 N.J. 29 (1968) when

he held that the failure of the Madison Township Board to formally abolish the positions of two teaching staff members was not fatal therein. The Commissioner held that the substance of a situation and not its shape must control in certain instances. See Board of Education of the Township of Madison v. Madison Township Education Association et al., 1974 S.L.D. 488, 496.

The Board argues it has the discretionary authority to transfer teaching staff members within the scope of their certification and relies in part upon the Commissioner's ruling in Thelma Bradley v. Board of Education of the Borough of Freehold, 1976 S.L.D. 590, 600, wherein the Commissioner stated:

> "***A board of education may transfer teaching staff members pursuant to N.J.S.A. 18A:25-1. Such a transfer may be based upon the Board's determination that the teaching staff member, or the individual school, or the entire community or a combination thereof may individually or collectively benefit by such a transfer.***"

The Board relies on the decision rendered by the New Jersey Supreme Court in Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978) wherein it was held that the issue of teacher transfers was a managerial prerogative and responsibility, not subject to collective negotiations.

The hearing examiner finds and determines that while petitioner's full-time teaching position had, in effect, been reduced to a four-fifths position at Edison High School because of declining pupil enrollment, the Board had, in fact, requested that she accept a transfer to any one of two other schools within the district as a full-time teacher of business education. Such a transfer was clearly within the Board's discretionary authority pursuant to N.J.S.A. 18A:25-1 and the justification for such action has been clearly established by the facts. However, instead of pursuing such action, the Board, through its administration, allowed petitioner to decline that alternative and remain in a four-fifths teaching position at Edison High School.

In the hearing examiner's judgment the Board was under no obligation to offer petitioner the latter alternative in lieu of such transfer. The Assistant Superintendent testified at the hearing that the Board's past practice regarding teacher transfers was to consider them on a seniority basis with a few exceptions. (Tr. 8-9) In certain instances teacher transfers were made when the educational program needed to be upgraded within the school district because of their competence and ability within their area of expertise. The Assistant Superin-

tendent stated that teachers who had less seniority were requested and encouraged to accept such transfers between schools on a voluntary basis as the need arose.

In other instances, however, certain teachers with less seniority were involuntarily transferred from one school to another, for the purpose of facilitating the educational program. (Tr. 8-13)

Petitioner now requests in her Petition of Appeal that the Commissioner restore her to any available full-time position based on her seniority status. It can only be concluded that if such relief were to be granted by the Commissioner, petitioner would accept any full-time teaching position available within the school district in business education. In this regard, the hearing examiner recommends that petitioner be given an opportunity to be transferred to any full-time position to which her seniority would entitle her if and when such position should become available in the school district.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in this matter, including the report of the hearing examiner and the exceptions thereto filed on behalf of petitioner.

Petitioner disputes the hearing examiner's conclusion that in surrendering tenure upon her resignation in 1965 she also surrendered whatever seniority rights she had earned during the period 1959-1965. Petitioner argues that teaching service need not be continuous to be considered in determining seniority status, and that the provisions governing the determination of seniority status do not compel the contrary result reached herein. N.J.S.A. 18A:28-12, 13 and N.J.A.C. 6:3-1.10(b) The Commissioner cannot agree.

While the statutory provisions in question are admittedly silent on this issue, both common sense and the regulations promulgated to implement those provisions suggest that continuity of employment was clearly contemplated. To conclude otherwise is to render unnecessary that portion of N.J.A.C. 6:3-1.10(b) providing that seniority status be unaffected by "occasional absences and leaves of absence." Abbotts Dairies, Inc. v. Armstrong, 14 N.J. 319, 328 (1954); 2A Sands, Sutherland Statutory Construction §46.06 (3rd ed. Rev. 1973) The only inference readily drawn from this language is that any significant breach in teaching duties, even if it occurs within the context of an ongoing employment relationship and certainly where it occurs as the result of severing that relationship, will preclude the consideration of service preceding the interruption in any determination of seniority status.

Furthermore, petitioner's argument that seniority status is independent of tenure status ignores the dependence of reemployment on the basis of seniority upon underlying tenure. The reemployment rights created by N.J.S.A. 18A:28-12 are only available to teaching staff members who, while under tenure, have been discharged on account of a reduction in force. As was settled by the Commissioner's decision in Solomon v. Princeton Regional Board of Education, 1977 S.L.D. 650, aff'd 657 (State Board of Education), petitioner surrendered her tenure status when she resigned her teaching position in 1965. In so doing, she surrendered as well whatever seniority status that attended her tenure.

Finally, the Commissioner does not find persuasive petitioner's argument that she is entitled to seniority credit for past teaching service in the district just as she was accorded credit for that service when her salary was established in 1973. An individual teacher's salary must recognize not only years of teaching experience acquired in a district in which such teacher had been previously employed but also years of employment in any other district. N.J.S.A. 18A:29-7 and 10. Year of employment for salary purposes is defined by N.J.S.A. 18A:29-6 to mean:

> "employment***in any publicly owned and operated college, school or other institution of learning for one academic year in this or any other state or territory of the United States***."

Hence, the fact that petitioner's salary upon reemployment in 1973 took into account the prior years of employment in the district is in no respect probative of petitioner's claim that the seniority status she previously enjoyed should be considered in determining the seniority to which she became entitled following her reemployment. For the foregoing reasons, the Commissioner adopts the conclusions of the hearing examiner. The relief demanded in the Petition of Appeal filed in this matter is denied.

COMMISSIONER OF EDUCATION

June 19, 1980

JOHN PFAU,	:	INITIAL DECISION
	:	
PETITIONER,	:	OAL DKT. NO. EDU 4938-79
	:	AGENCY DKT. NO. 379-9/79A
V.	:	
	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY.	:	

APPEARANCES:

For the Petitioner, Joseph H. Enos, Esq.

For the Respondent, Holston, Holston & Mac Donald
(Arthur J. MacDonald, Jr., Esq., of Counsel)

BEFORE THE HONORABLE LILLARD E. LAW, ALJ

DOCUMENTS IN EVIDENCE:

J-1 Stipulation of Facts. Re: Incident of September 22, 1979

J-2 Diagram of West Deptford Township High School Football Field

P-1 Letter to John Pfau from Charles McNally, Superintendent of Schools, dated September 26, 1979

P-2 Letter to John Pfau from Paul Brunner, Secretary to the Board, dated December 20, 1979

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Township of West Deptford, hereinafter "Board," alleges that the Board's action to suspend him from his football coaching duties for a period of two weeks, with a commensurate reduction in stipend, and its action to cancel his appointment as assistant track coach

was arbitrary, capricious, without merit and prays that it be set aside. The Board denies petitioner's allegations and asserts that its actions were correct in accordance with statutory and case law.

The Stipulation of Facts, as agreed to by and between the parties, are as follows:

"RE: Incident of September 22, 1979

1. On September 22, 1979, at approximately 10:15 a.m. while leaving the field with the West Deptford Football Team, Head Coach, Donald Ehrman said words such as the following to a Township resident, Mr. Joseph Valentini: 'I am glad to see that you are feeling better, Mr. Valentini but ...'

2. During the fall of 1978, Mr. Valentini had been involved in an ongoing argument against the High School coaching staff. This argument involved the coaching staffs alleged failure to pursue a scholarship at a large football institution for Mr. Valentini's son. Due to a heart attack in November/December 1978, Mr. Valentini did not appear at the Board of Education meeting in 1979 at which the criticisms raised by Mr. Valentini were refuted.

3. Mr. Valentini claims that he was not certain of the meaning of Mr. Ehrman's greeting on September 22, 1979, but that he accepted that greeting at face value and responded with words of appreciation such as 'thank you, etc'.

4. Mr. John Pfau addressed Mr. Valentini immediately after Mr. Ehrman's statement with words such as the following: 'I am sorry that you did not attend the Board hearing because it was proven what a liar you are'.

5. Mr. Valentini, who was standing behind the spectator fence became enraged at being publicly called a liar by Mr. Pfau. He loudly began shouting words - reported by most as obscentities and profanities - and hurried along the fence to an opening through which the coaches had to cross to depart from the stadium field.

6. As the coaches passed through the opening, Mr. Valentini grabbed Mr. Pfau by his jacket and, according to various reports shouted words such as - 'lets settle this now'. I am going to break your head', etc. (The

high school principal also reported that Mr. Valentini raised one hand as if to strike Mr. Pfau.)

7. Mr. Valentini was physically separated from Mr. Pfau and Pfau exhibited excellent self-control during the actual time of the confrontation." (J-1)

Additional uncontroverted facts in the instant matter are these:

1. On or about September 26, 1979, the Superintendent suspended petitioner "*** for a period of two weeks from all duties and responsibilities as Assistant Varsity Football Coach with appropriate reduction in stipend.***"

2. Thereafter, petitioner with representation by legal counsel appealed his suspension before the Board. The Board affirmed the Superintendent's determination to suspend petitioner with loss of stipend.

3. In December 1979, the Board affirmed the Superintendents recommendation that petitioner's Spring track coaching responsibilities be cancelled.

The procedural history of the matter, sub judice, is as follows:

Subsequent to petitioner's two week suspension from his assistant football coaching duties, through his legal counsel, a Motion for Interim Relief was filed before the Commissioner of Education. Oral argument on the Motion was held before a representative of the Commissioner on October 3, 1979, wherein petitioner's motion was denied. Subsequently, the matter was transferred to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. On January 3, 1980, a prehearing conference was conducted at the Office of Administrative Law, Trenton, at which petitioner was granted leave to file an Amended Petition of Appeal. Thereafter, a hearing in the matter was conducted on February 13, 1980 at Gloucester County Freeholder's Room, Woodbury. The parties subsequently filed Briefs and Memorandum of Law and the case was closed on April 21, 1980.

At the hearing, petitioner testified and freely admitted to paragrpah Number 4 of the Stipulation of Facts, ante. (TR. 97, 118) He testified that his remarks were spontaneous,

not premeditated, and was the result of the Board vindicating him and his coaching colleagues with regard to certain false allegations made to the Board by Mr. Valentini. (TR. 98-100, 121-123) Petitioner testified that subsequent to his remarks to Mr. Valentini, Mr. Valentini pursued him, grabbed the hood of his parka and made threatening remarks to him. (TR. 103) The head football coach testified that when he observed Mr. Valentini grab petitioner he had to use force to separate petitioner from Mr. Valentini (TR. 65-66)

Petitioner testified that following the completion of the football game on September 22, 1979, he and the head football coach were called to a meeting with the high school principal to discuss the incident which involved Mr. Valentini. Subsequently, on September 25, 1980, petitioner, with a representative from the West Deptford Education Association, was called to a conference with the principal and Superintendent at which certain penalties were to be levied against petitioner. (TR. 107-108) Petitioner testified that on September 26, 1979, he received a letter from the Superintendent which set forth, inter alia, such penalties as follows:

"Re: Confrontation with
Mr. Joseph Valentini
Saturday, September 22, 1979

"Dear Mr. Pfau:

Please be advised that this office has reviewed your involvement in the above referenced matter and has concluded that your performance was not in accordance with acceptable standards.

It is the position of this office that the comments made by you to Mr. Joseph Valentini, 471 Pakland Road, Woodbury, N.J., at last Saturday's Varsity Football game, September 22, 1979, were unnecessary, unacceptable and precipitated a serious crowd control problem. Said actions, therefore, are regarded as a breech of the contract between yourself and the West Deptford Board of Education to serve during the 1979 Season as an Assistant Varsity Football Coach.

Please be advised as of today, you are suspended for a period of two weeks from all duties and responsibilities as Assistant Varsity Football Coach with appropriate reduction in stipend. Furthermore, at the close of this athletic

season, your qualifications to continue in any capacity as a coach at West Deptford High School will be reviewed and re-evaluated.

As noted in our conference of September 25, 1979, the restraint you exhibited after having precipitated the problem with Mr. Valentini has been duly noted and is appreciated. This is mentioned even though it remains my wish that you had not been required to exhibit this response by having prudently avoided the initiation of the confrontation.

Should you find my position in this matter to be unacceptable, please be advised that you may appeal to the Board of Education relative thereto.***" (P-1)

Petitioner asserts that the two week suspension was an abuse of the Superintendent's discretion and the Board's subsequent affirmance was arbitrary, unreasonable and capricious.

Petitioner testified that subsequent to his receipt of P-1 he was called to a meeting by the principal who informed him that his services as an assistant track coach had been terminated. He stated that during the three years he had been assigned as assistant track coach he had received positive comments from the Board's Athletic Director and that there had been no adverse criticism of his performance. He testified that on or about December 20, 1979, he received a letter from the Secretary of the Board advising him that the Board terminated his appointment as follows:

"***Please be advised that the West Deptford Township Board of Education passed a motion during the meeting of December 17, 1979, to cancel your appointment as Spring Assistant Track Coach. (P-2)

Petitioner asserts that the Board failed to give him reasons for its action to terminate him as the assistant track coach. (TR. 112-115) He contends that the Board's failure to supply him with its reasons to terminate his appointment as the assistant track coach is in violation of the Courts decision in Mary Donaldson v. Board of Education of the City of North Wildwood, Cape May County, 65 N.J. 236 (1974).

The Board argues that as a matter of law, there is a strong presumption that it acted within its proper administrative authority with regard to petitioner's coaching assignment.

Thomas v. Board of Education of Morris Township, N.J. Super 237, 232 (App Div. 1965) aff'd. 46 N.J. 581 (1966) The Board contends that the incident between petitioner and Mr. Valentini was a very serious matter and one which could have resulted in a problem with "crowd control." It asserts that the testimony revealed that there were approximately fifteen or more people within fifteen feet of the incident, with approximately thirty (30) or more people adjacent to the incident and about one hundred (100) to one hundred fifty (150) or more people in the general area of the incident. (TR. 19, 24-25, 33) It is observed that the potential for crowd control was expressed at the hearing by Mr. Valentini when he testified as follows:

"Q. "What was your reaction?"

A. "I said, 'Mr. DiAntonio, let me handle this. If it happens my kid and the rest of his friends will go crazy and somebody will get killed.'"(TR. 164)

***Q. "Then what happened?"

A. "And then Mr. Bronsky and Mr. Douglas and Mr. Vespe, let me think, some of the other parents, Joe McKenna from the Midget Football League was there. They all said, 'Hey, we'll take care of him.' Right after the game they said they were going to get him." (TR. 164)

Mr. Valentini testified that after much discussion he was able to restrain his son and his friends from creating a disturbance with petitioner. (TR. 165-168)

The Board contends that the seriousness with which it viewed this matter is very much a part of the discretion vested in it and that its penalty of the two-week suspension of petitioners from his football coaching duties and the appropriate reduction of stipend should stand. Thomas, supra.

With regard to the Board's action to terminate petitioner from his assistant track coaching responsibilities, it asserts that petitioners reliance upon Donaldson, supra, is without merit. In the alternative, the Board cites the matter of Joseph J. Dignan v. Board of Education of the Rumson-Fair Haven Regional High School District, Monmouth County, Superior Court of New Jersey, Appellate Division, decided October 10, 1975, 1975 S.L.D. 1083, wherein the Court dealt with the case of a tenured school teacher who was relieved of his extra-curricular assignment together with loss of stipend and therein dealt with the procedural requirements of Donaldson, as follows:

"We have carefully considered each of the issues raised by appellant and have concluded

> that they are without merit. Donaldson v. Board of Education of North Wildwood (citations omitted) which held that a non-tenured teacher was entitled to a statement of reasons for non-retention is not apposite. While appellant has tenure in his teaching position, he had no such status with regard to his extra-curricular assignment nor was there any potentiality of tenured status in such an assignment. (Citation omitted .) It is presumed that the respondent Board acted within its proper administrative authority in dealing with the assignment in question; appellant has not demonstrated affirmatively that the Board's action was arbitrary, capricious or unreasonable. (Citations omitted.) Since we have concluded that appellant was not entitled to a statement of reasons for his non-reassignment, it is not necessary for us to consider whether he was entitled to have a representative of the New Jersey Education Association present at administrative hearings. We do note however that he was represented by counsel at various stages of the proceedings."
>
> (1975 S.L.D. at 1983-1084)

The Board contends that, in the instant matter, it exceeded the minimal requirements set forth by the Court. It argues that in view of the seriousness of the incident between petitioner and Mr. Valentini, the Commissioner should confirm its well reasoned and deliberate decision as to how and who will coach the pupils in the West Deptford School system.

Having carefully reviewed and considered the entire record in the matter, sub judice, I FIND that the Stipulation of Facts, Number One (1) through Seven (7) are hereby adopted as findings of fact as well as those additional uncontroverted facts Number One (1) through Three (3) and that no further recital thereto is necessary.

After careful consideration of the facts and arguments of the parties I CONCUR with the Board's position that the matter in Dignan, supra, controls in the instant matter. I CONCLUDE, therefore, that the Board acted within its statutory authority when it suspended petitioner for a two-week period from his extra-curricular football coaching duties and when it terminated his assignment as the assistant track coach.

I DETERMINE, therefore, that petitioner's claim is without merit and that his Petition of Appeal is hereby DISMISSED.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1 et seq.

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

7 May 1980
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

JOHN PFAU,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

June 26, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

MABEL B. PERRY, Petitioner, v. BOARD OF EDUCATION OF THE BOROUGH OF GLEN ROCK, BERGEN COUNTY, Respondent.	)	INITIAL DECISION OAL DKT. NO. EDU 4798-79 AGENCY DKT. NO. 221-5/79A

APPEARANCES:

Norris, McLaughlin & Marcus, Esqs.
Attorneys for Petitioner,
By M. Karen Thompson, Esq.

Parisi, Evers & Greenfield, Esqs.
Attorneys for Respondent,
By Irving C. Evers, Esq.

EXHIBITS MARKED IN EVIDENCE:

J-1 Petitioner's degree MA, Newark State College, June 9, 1966.

J-2 Petitioner's New Jersey Department of Education principal's certificate, May, 1972.

J-3 Petitioner's New Jersey Department of Education certificate, director of student personnel services, September, 1972.

J-4 Petitioner's New Jersey Department of Education certificate as supervisor, December, 1972.

J-5 Petitioner's New Jersey Department of Education certificate in student personnel services, January, 1969.

J-6 Petitioner's New Jersey Department of Education certificate as secondary school teacher of social sciences, July, 1967.

J- 7 Petitioner's New Jersey Department of Education certificate as elementary school teacher, July, 1967.

J- 8 Petitioner's New Jersey Department of Education limited secondary teacher's certificate K-8.

J- 9 Thomas P. Tunny's New Hampshire Board of Education credential as licensed educational specialist, endorsed as guidance director, guidance counsellor, and director of pupil personnel services, October 8, 1976.

J-10 Thomas Tunny's New Jersey Department of Education certificate as director of student personnel services, March, 1979.

J-11 Verified complaint by petitioner against respondent, New Jersey Division on Civil Rights, docket no. EB22RE-15295-C, filed April 23, 1979, alleging, inter alia, unlawful racial discrimination in respondent's hiring Thomas Tunny as supervisor of guidance, in October, 1978, who was less qualified than petitioner, she said, because at the time of hiring he had "no credentials from New Jersey." Also alleged were respondent's discriminatory elimination of the posts of director of guidance (in September, 1976) and chairperson of guidance (in February, 1977).

J-12 Amendment to verified complaint by petitioner against respondent, New Jersey Division on Civil Rights, docket no. EB22RE-15295-C, filed September 27, 1979, alleging unlawful racial discrimination in respondent's refusal to hire her as vice principal in June, 1979 and alleging continual and systematic denial of supervisory positions in the Glen Rock school system while caucasians have been promoted or hired into the positions.

J-13 Finding of No Probable Cause, New Jersey Division of Civil Rights, docket no. EB22RB-15295-C, entered April 1, 1980, pursuant to N.J.S.A. 10:5-4 and N.J.A.C. 13:4-6.1(d), by the Director.

J-14 Charges of discrimination by petitioner against respondent, Equal Employment Opportunity Commission, docket no. 021-79-2925, filed June 29, 1979, alleging the same or similar unlawful acts of discrimination against respondent as in her complaint before the New Jersey Division on Civil Rights, docket no EB 22RB-15295-C (see J-13 above).

J-15 Notice of deferral of charges by Equal Employment Opportunity to the New Jersey Division of Civil Rights, docket no. 021-79-2925, dated October 11, 1979.

J-16 Affirmative Action Resolution, Glen Rock Board of Education, adopted July 25, 1975.

P-1 Report of affirmative action grievance by superintendent of schools to respondent, re petitioner's grievances, dated April 25, 1979.

P-2 Letter from superintendent of schools to petitioner, dated July 3, 1979, explaining respondent's reasons for hiring Joseph Dubanovich as summer school vice principal instead of petitioner.

R-1 List of colleges and universities from which respondent sought to recruit administrators and teachers.

BEFORE THE HONORABLE JAMES A. OSPENSON, A.L.J.:

Mabel B. Perry, a tenured guidance counsellor employed since 1971 by the Board of Education of the Borough of Glen Rock charged she had been denied equal access to supervisory employment by the Board by reason of her race. She is black. Her petition of appeal to the Commissioner of Education pursuant to N.J.S.A. 18A:6-9, invokes the Law against Discrimination, N.J.S.A. 10:5-1, et seq., and N.J.A.C. 6:4-1.1, 1.6(a), (b); the Equal Employment Opportunity Act of 1972, 42 U.S.C.A. 2000e-4, et seq.; and Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. 2000e-2, et seq. See Hinfey v. Matawan Reg. Board of Education, 77 N.J. 514, 523 (1978)("Public schools under the supervision of the Commissioner of Education are places of public accommodation under the law against discrimination. N.J.S.A. 10:5-5(e)"). Though least senior guidance counsellor, petitioner also alleged the Board improperly reduced her from full time to half time in a reduction in force for 1979-80, such reduction being discriminatory, there

having been a history of racial unrest in the district and petitioner having been first hired in 1971 as a result thereof. The Board denied the allegations.

Pro se, petitioner filed her petition in the Division of Controversies and Disputes of the Department of Education on June 1, 1979. An answer by the Board was filed on October 10, 1979. On October 25, 1979, the matter was transmitted to the Office of Adminstrative Law for hearing and determination as a contested case pursuant to N.J.S.A. 52:14B-9, 10. A prehearing conference was scheduled and conducted in the Office of Administrative Law on January 28, 1980 and an order entered. Hearing was scheduled for March 10, and 11, 1980, but was adjourned at the Board's request to April 7, 1980, when it was begun and concluded on April 8, 1980. Closure of the record was 30 days thereafter, deadline for filing of briefs. Petitioner's attorneys of record filed their appearance on March 13, 1980.

PRELIMINARY PROCEDURAL HISTORY

Cast first in general terms, petitioner's charges of discrimination were more precisely formulated at prehearing conference. In the prehearing order entered January 28, 1980, she charged as follows:

A. In September 1976, petitioner applied for the position of director of guidance. The position was eliminated. Her application was denied, allegedly because of her race.

B. In February 1977, petitioner applied for the position of chairperson of guidance. The position was posted then but was eliminated. Petitioner was rejected, allegedly because of her race.

C. In May 1978, petitioner applied for the position of high school principal. She was not a finalist after being heard by a screening committee, rejected allegedly because of her race.

D. In October 1978, petitioner applied for the position of part-time supervisor of guidance at $10,000 per year. She was then a full-time guidance counsellor at $25,000 per year. Her application was denied, allegedly because of race, she said, and an uncertificated person hired.

E. In June 1979, petitioner applied for the position of acting vice-principal of the high school for the summer program. Though she was denied the position for the reason to grant it would have improperly preferred her over another applicant who with petitioner had applied for the regular position of vice-principal in 1979-80, she alleged pretextual discrimination.

F. In June 1979, petitioner applied for the vice-principalship for 1979-80. Her application was denied, allegedly because of her race, which the Board denied. Petitioner survived the selection committee and was one of four recommended to the Board, which chose a white woman candidate after its first choice, a black man, refused the position.

G. On April 18, 1979, the Board reduced petitioner's position of guidance counsellor full-time to half-time, beginning September for 1979-80. Petitioner was least senior guidance counsellor for grades 6-12 in the district. She alleged she was hired in 1971 as the only black guidance counsellor because of racial unrest. She contended the reduction in force was unlawful, therefore, even though she was least senior. The Board denied discrimination, denied the 1971 situation prompted petitioner's hiring, and denied any special status that exempted or excepted petitioner from operation of seniority laws.

Under Office of Administrative Law practice, these formulations at prehearing are amendatory of the pleadings as filed and bind the parties accordingly. N.J.A.C. 19:65-10.1 (d).

When it developed, at prehearing, that petitioner had filed charges of employment discrimination on some of the same or similar grounds before the New Jersey Division on Civil Rights on April 23, 1979 (J-11,12) and before the Equal Employment Opportunity Commission on June 29, 1979 (J-14), it was ordered that copies of the prehearing order be served on the Attorney General of New Jersey, the Director of the Division on Civil Rights, and on the Commissioner of the Department of Education. (Principles of comity and deference to sibling agencies are a fundamental responsibility of administrative tribunals. It became incumbent upon this tribunal, therefore, to give notice of pendency of proceedings before the Commissioner of Education that were presumptively of then present jurisdictional concern to the Attorney General and the Director of the Division on Civil Rights, at least to offer reasonable opportunity for intervention and consolidation of duplicitous claims for trial.

See Hinfey v. Matawan, supra, 77 N.J. at pp. 530-533; and cf. Hackensack v. Winner, --N.J.-- (1980); and see, generally, Uniform Administrative Practice Rules, N.J.A.C. 19:65-12.1 (intervention) and N.J.A.C. 19:65-14.1 (consolidation). Salutary ends of these procedural measures are avoiding multiplicity of actions, forum shopping, inconsistent determinations and "internecine struggles for jurisdictional hegemony," and fostering dispute resolution by the forum best positioned by statutory status, administrative competence and regulatory expertise to adjudicate the matter. See Hinfey, supra, pp. 531-532 of 77 N.J.).

A fair reading of charges lodged before those other agencies shows charges A, B, and D above were before the EEOC and charges A, B, D, E and F were before the New Jersey Division on Civil Rights. After prehearing the Office of Administrative Law was informed the Director, after investigation of allegations (i.e., the equivalent of charges A, B, D, E and F herein), had determined on April 1, 1980, pursuant to N.J.S.A. 10:5-14 and N.J.A.C. 13:4-6.1(d), there was no probable cause to credit them and the Division file was closed. (The finding was marked into evidence (J-13), but admission was qualified by a ruling (Transcript, April 7, 1980, pp. 33-35) that the finding, not being an adjudication on the merits, was of no substantive evidential value, was not res judicata and did not collaterally estop petitioner from prosecuting them further here). Thus, the charges before the Division never became contested, never became ripe for transmission to the Office of Administrative Law and never, therefore, reached a stage appropriate for other agency intervention or consolidation. See N.J.S.A. 52:14B-10; and N.J.S.A. 52:14F-5; but cf. Hackensack v. Winner, 162 N.J. Sup. 1, 24-32 (App. Div. 1978), modified --N.J.--(1980)(slip opinion, p. 47-48); and see Sprague v. Glassboro State College, 161 N.J. Sup. 218, 225 (App. Div. 1978).

LIMITATIONS ON CHARGES A, B, C, D

Addressed at the outset of hearing was the question whether the charges in A, B, C and D at times, respectively, from September 1976, February 1977, May 1978 to October 1978, were timely under the 180 day limiting periods of N.J.S.A. 10:5-18 and 42 U.S.C.A. 2000e-5(e). Facially, these charges detailed single, discrete and episodic instances of alleged discriminatory failure to hire petitioner in supervisory posts. Unlike the complaint in Decker v. Board of Education of

Elizabeth, 153 N.J. Sup. 470 (App. Div. 1977), which charged a female employee was being paid a lower salary than a male employee performing the same function, the several instances do not purport to be continuing into, and thus capable of suspending the running of, the limiting period of 180 days before petitioner filed her petition on June 1, 1979 before the Commissioner of Education. See United Airlines, Inc. v. Evans, 431 U. S. 553 (1977). Petitioner makes no attack upon the neutrality of a separate salary guide or a seniority system with payments thereunder continuing to within the limiting period. Her case is a disparate treatment case.

After argument at hearing, nevertheless, petitioner STIPULATED charges A, B, C and D were not timely filed and that no relief thereunder was sought: i.e., that the 180 day limiting periods of N.J.S.A. 5:10-18 and 42 U.S.C.A., section 2000-5(e) barred her from relief. See Transcript, April 7, 1980, pp. 40-41. Petitioner was permitted to adduce general background testimony, however, covering those instances. Correspondingly, petitioner's claims for relief were limited to charges E, F and G.

LIMITATIONS ON RELIEF IN STATE COURTS UNDER TITLE VII FOR CHARGES E, F AND G FOR FAILURE TO FILE EQUIVALENT CHARGES BEFORE EEOC

Petitioner's charges before the EEOC on June 29, 1979 (J-14) are the same or similar to charges A, B and D herein. No charges similar to E, F and G were filed there. As to the latter in State courts or State administrative agencies, therefore, no jurisdiction lies in such courts or agencies to give relief under Title VII, 42 U.S.C.A., section 2000e-5(e). Cf. Peper v. Princeton University Board of Trustees, 77 N.J. 55, 74-76 (1978).

Thus, petitioner herein raises before the Commissioner of Education only those alleged acts of employment discrimination remediable under N.J.S.A. 5:10-1, et seq., as are specified in charges E, F and G of the prehearing order.

EVIDENCE AT HEARING

CHARGE E, SUMMER SCHOOL VICE PRINCIPALSHIP, JUNE 1979

Petitioner testified she applied for the position of vice principal in the secondary summer school in June 1979. She holds a principal's certificate (J-2). At the time she was also

a candidate for the job in 1979-80. She was told by the superintendent the Board chose another person for the summer position who had 5 years experience as vice principal (petitioner had none) and was not a candidate for the full position for 1979-1980. The superintendent said the Board felt that to choose petitioner for the summer position would have preferred her over other candidates for the full position. (See P-2). Petitioner said the summer vacancy was posted but no notice was given that candidates for the full position would not be considered. The superintendent said the Board wished to avoid preferences in order not to create questions of tenure acquisition.

CHARGE F,
VICE PRINCIPALSHIP FOR 1979-1980,
JUNE - AUGUST, 1979

Petitioner said she applied for the position of vice principal for 1979-1980 in June 1979. She became one of six semi-finalists and was one of four recommended by the screening committee. The superintendent submitted hers and three other names to the Board in August 1979. She was interviewed by the Board on August 30, 1979 at 10:00 p.m. Petitioner found the conduct of some of the Board members offensive: some were eating and drinking coffee, talking and passing notes. They seemed not to pay attention to her, she said. In addition, petitioner's husband who went with her to the interview, said he overheard unidentified persons outside the building chanting "nigger-lover, nigger-lover" just as they arrived. Petitioner's supervising principal testified there were 29 candidates for the job. The screening committee interviewed 26, reducing the list to 6 including petitioner. These names went to the superintendent. There was no racial discrimination in the procedures, he said, because there were devices employed to prevent any unfair measures. The committee met beforehand to decide questions to ask. All interviewees were treated alike.

The superintendent testified she received 6 names from the screening committee. She sent 4 of these to the Board, including petitioner's name. She indicated no preference. The Board met August 31, 1979 to interview the selectees. Because the meeting started early and ran long, coffee and sandwiches were supplied and the Board worked through. Petitioner was last interviewed at 10:00 p.m. She was treated no differently from the rest. The superintendent said she heard no racist chanting outside the building.

The superintendent said, and a Board member confirmed, the Board's first choice was a black man, whose experience included assistant superintendent for personnel in another district. He was offered the maximum salary permitted by the administrator's

salary guide in effect in Glen Rock. Since this was less than he was earning and since he would have to relocate, he declined the position and it was offered to a white woman candidate, who accepted it. The Board agreed the black male candidate was best qualified. The woman candidate who was hired had no principal's certificate but was eligible for it at the time and has since obtained it. This procedure is in accordance with existing Board policy, said the superintendent, because certification even for qualified candidates takes 6 to 8 months. Though petitioner said the Board's offer to the black man for less salary than he was then making elsewhere was a ruse for the Board to be able to say it did not racially discriminate, she did not know what he was making nor whether the Board's offer was in keeping with the administrator's salary guide. As above, the superintendent's testimony supplied that information.

CHARGE G,
REDUCTION IN FORCE TO HALF-TIME
GUIDANCE COUNSELLOR APRIL,1979

Petitioner and the superintendent agreed in testimony the procedure for employed staff members to apply for other available positions in the district was by letter or memo. Petitioner knew the position of social studies teacher had been posted by the Board early in 1979, but said she didn't apply for it because she was confident she was going to get the vice principal's position, a matter she had discussed with the particular school principal concerned. The post was filled in August 1979 by a woman who though qualified had never taught in the district. Though certificated, petitioner herself had neither experience nor tenure in the category in Glen Rock.

Petitioner's reduction in force to half-time guidance counsellor was an economy measure taken by the Board at its April 18, 1979 meeting. Petitioner was indeed least senior guidance counsellor. The superintendent said to her at the time, according to petitioner, that every effort would be made to rehire those who were riffed. The superintendent testified that in addition every effort would be made to reassign such personnel within their categories (See N.J.S.A. 18A:28-9; N.J.A.C. 6:3-1.10(b)(h). It was stipulated at hearing that though certificated as social studies teacher, petitioner made no claim to tenure or seniority in that category. Social studies teacher and guidance counsellor are different categories. See N.J.A.C. 6:3-1.10(k)).

Petitioner said she was first hired in 1971 as the only black guidance counsellor because of racial unrest. This circumstance alone, she said, made her reduction to half-time unlawful even though she was least senior.

PETITIONER'S MOTION AT HEARING TO AMEND PETITION TO CHARGE FAILURE TO EMPLOY HER AS SOCIAL STUDIES TEACHER AFTER REDUCTION TO HALF TIME GUIDANCE COUNSELLOR, EVEN THOUGH NON-DISCRIMINATORY, WAS VIOLATIVE OF N.J.S.A. 18A:28-9

Petitioner's eleventh hour motion to amend her petition to allege non-discriminatory violation of her seniority rights proposed to add, in effect, a new cause of action to her petition. Resolution of the motion before the administrative law judge, as in the practice in superior court, raises questions of prejudice to respondent that lie within the reasoned discretion of the judge. Cf. R. 4:9-2. The Board resisted the motion but it sought no adjournment of the hearing to prepare to defend the assertion. Decision on the motion was reserved. I am satisfied now, however, that no prejudice will accrue to the Board's interests if it is granted, and it is hereby so ORDERED. Charge E was broadly controverted by the Board at prehearing and the Board's evidence furnishes reasonable basis for specific resolution of the issue. See Jersey City v. Hague, 18 N.J. 584, 602 (1955).

DISCUSSION

It is unlawful discrimination for an employer to refuse to hire or promote because of race. N.J.S.A. 10:5-12(a). Employment discrimination because of race or any other invidious classification is peculiarly repugnant to this free society. Cf. Peper v. Princeton University Board of Trustees, 77 N.J. 55, 80 (1978). Acts of such discrimination are subtle and difficult to prove, more so, it is said, than any other forms. The higher the job level the more difficult the proof as matters of personality and the subjective judgment of immediate supervisors become determinative. Nevertheless, nothing in the law against discrimination may be construed to preclude discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standard or conditions. N.J.S.A. 10:5-2.1. And in disparate treatment cases, it is a proper judicial inquiry to see whether the failure to promote in place (or hire out of category) was the product of a legitimate business consideration rather than proscribed invidious discrimination. Peper, supra, pp. 80-84 of 77 N.J.

The order and allocation of proof in a private, non-class action challenging employment discrimination in New Jersey, as under Title VII cases, requires that complainant must carry the initial burden of establishing a prima facie case of racial discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Peper, supra, at p. 82 of 77 N.J.:

> "This may be done by showing (a) that he belongs to a racial minority; (b) that he applied and was qualified for a job for which the employer was seeking applicants; (c) that, despite his qualifications, he was rejected; and (d) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.
>
> Assuming complainant meets these requirements, the burden shifts to respondent to come forward with a legitimate non-discriminatory reason for rejection. If respondent does satisfy the burden, complainant is permitted to come forward with evidence indicating the non-discriminatory reason was no more than a pretext to hide discriminatory activities or was discriminatorily applied." Peper, supra, p. 83 of 77 N.J.

In this case, petitioner's burden, as in Peper, was to demonstrate, firstly, that similarly situated non-blacks were promoted in place or hired out-of-category while she was not; and secondly, when the Board offered non-discriminatory reasons therefor, to come forward with evidence the Board's actions were sham and pretextual.

From careful analysis of the record and from especially careful consideration of the demeanor of all witnesses in testimony, I am well satisfied petitioner has not borne her burden of proof and persuasion in either respect on charges E, F and G. The Board's not choosing petitioner for either vice principalship and its reduction of petitioner to half-time guidance counsellor were for valid non-invidious reasons and were, therefore, non-discriminatory within the meaning of N.J.S.A. 5:10-2.1. See P-1. It seems clear, moreover, despite petitioner's conclusory assertions to the contrary, that the Board's treatment of petitioner since her hire in 1971 has been even-handed both departmentally within the guidance department as well as in 1979 when she sought the vice principalship. As to that position, it is of more than little significance that the Board first selected a black man. On this record, one can draw no reasonable inference that such a choice was a pretext to deny the position to petitioner. I am satisfied lastly that the hiring and promotional practices in the district generally since petitioner's hire were in no way characterized by casual, systematic, patterned or institutionalized animus towards or visited upon petitioner because of race. (It should be noted again that despite stipulations petitioner sought no relief on charges A, B, C and D, she was nevertheless permitted to and did adduce testimony

concerning those allegations as background to charges E, F and G). The record shows the Board regularly recruited personnel from colleges and universities from which blacks might be expected to apply. R-1; J-6; and see N.J.A.C. 6:4-1.1, et seq. Its 1979 reductions in force that affected petitioner were because of declining enrollment and for reasons of economy. P-1. Petitioner's case did not overcome those proofs. See Sprague v. Glassboro State College, 161 N.J. Super. 218, 225 (App. Div. 1978) ("...the record amply demonstrates an even handed evaluation process that obliterates appellant's allegations.") In Peper, supra, at p. 87 of 77 N.J. the court said:

> "In evaluating the treatment of an employee in a particular case, we must be mindful that judicial intervention has a limited purpose. Anti-discrimination laws do not permit courts to make personnel decisions for employers. [See N.J.S.A. 18A:11-1; 27-4] They simply require that an employer's personnel decisions be based on criteria other than those proscribed by law. Our courts will be vigilant in enforcing rights against employment discrimination guaranteed by state and federal laws where an employer's conduct is shown to be violative thereof."

And see Kiss v. Community Affairs Department, 171 N.J. Super. 193, 201 (App. Div. 1979), where the court said broad discretion must be accorded an employer in exercising the right of fair selection under the civil service Rule of Three, a non-discriminatory selection mechanism not unlike that of the Board's selection committee here.

CONCLUSIONS

Having in mind the testimony, briefs and exhibits herein and having heard arguments of counsel, I FIND and DECLARE as follows:

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

2. Mabel B. Perry, a black, is a certified, tenured guidance counsellor employed by the Board of Education of the Borough of Glen Rock since 1971.

3. In April 1979, the Board reduced her position of guidance counsellor to half-time for reasons of declining enrollment and budgetary economy.

4. Petitioner was least senior guidance counsellor at the time.

5. There is no credible evidence in the record to support the proposition the reduction in force was prompted or effected because of racial discrimination against petitioner as in charge G.

6. Nor is there any evidence to suggest the reduction was violative of N.J.S.A. 18A:28-9; on the contrary, it was in accord therewith.

7. In June 1979 petitioner applied and was rejected for summer vice principalship and vice principalship for 1979-1980.

8. Neither such rejections, contrary to petitioner's allegations in charges E and F, were for reasons of race.

9. Consistently with N.J.S.A. 10:5-2.1, both such rejections for the vice principalship were for reasonable, non-invidious employment and/or promotional standards.

10. There is no evidence that any of the Board's actions in not hiring or promoting petitioner departmentally or out-of-category were sham or pretextual.

11. There is no evidence of any episodic or systematic animus towards petitioner in such instance by reason of her race.

12. Under N.J.S.A. 18A:28-10 and N.J.A.C. 6:3-1.10, upon her being reduced to half-time guidance counsellor, petitioner had no absolute legal right to be transferred out-of-category to a social studies teaching position, either half-time or full-time, in which she had no tenure. Cf. Newark Teachers Union, Local 481, et al v. Board of Education of Newark, 1978 S.L.D., No. 229-78; and N.J.S.A. 6:3-1.10(b) and (h).

13. Even had she applied for such positions (she did not), her eligibility therefor would have been co-equal with all other qualified, untenured applicants.

14. The Board's selection of another under the circumstances herein was a reasonable management measure and, as against petitioner, damnum absque injuria.

15. Petitioner has failed to sustain her burdens of proof and persuasion herein.

CONCLUSION

Accordingly, based on the foregoing, I CONCLUDE the petition of appeal herein, as amended and supplemented, should be and it is hereby DISMISSED.

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

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

DATE May 12, 1980 JAMES A. OSPENSON, A.L.J.

MABEL PERRY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLEN ROCK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed in a timely fashion 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 adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

June 27, 1980

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY,

PETITIONER,

V.

MR. & MRS. JOSEPH OLIVE, JR., in behalf of their son, "J.O.",

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Jordan and Jordan (John D. Jordan, Esq., of Counsel)

For the Respondents, Nancy L. Heath, Esq.

The Commissioner has reviewed the decision of S. Reed Payne, Classification Officer, in the matter of the placement of J.O., a perceptually impaired (P.I.) child as well as the motion for a stay in executing the decision and the answer thereto.

The Classification Officer has clearly attempted to resolve the controverted issue with the best interests of the child in mind. This involves allowing J.O. to remain in the private out-of-state school he is currently attending through June, 1980 with the expense of tuition and transportation to be borne by the Pennsville Board of Education. The decision also requires the Pennsville Child Study Team to develop a transition plan for J.O. following the administrative review program recommendation made to the Classification Officer to return him to the Pennsville School District program in the fall of 1980.

Since N.J.A.C. 6:28-1.9(j)7 requires that the classification officer's decision be implemented without delay and that no stay be granted unless the decision "may cause harm to the child***," the Commissioner upholds the Classification Officer's denial of the motion to stay and adopts it as his own.

The Commissioner orders petitioner to comply with the Classification Officer's Decision of March 4, 1980 and to reimburse the parents for the transportation and tuition of J.O. for the 1979-80 school year and thereafter to make application for State funds according to law.

Additionally, the Commissioner orders the Pennsville Board of Education to complete an acceptable plan for returning J.O. to the Pennsville School District by September 1, 1980.

Failure to do so shall be cause for remanding the matter to the Division of School Programs for decision as to proper placement of J.O. in 1980-81 and the assumption of costs thereof.

COMMISSIONER OF EDUCATION

June 30, 1980

Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUSAN T. HEADLEY	)	INITIAL DECISION
	)	**O.A.L. DKT. EDU 5682-79**
v.	)	AGENCY DKT. NO. 424-11/79A
	)	
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY	)	

APPEARANCES:

For the Petitioner:

Saul R. Alexander, Esq.

For the Respondent:

James P. Granello, Esq.

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

Petitioner alleges that the Board's denial of the use of accumulated sick days while she was on unpaid maternity leave of absence was ultra vires.

Respondent Board avers, inter alia, that petitioner waived any right she may have had to sick leave benefits when she elected to take an unpaid leave of absence rather than be absent only for the period when she would be disabled.

This matter was transmitted to the Office of Administrative Law on December 6, 1979 as a contested case pursuant to N.J.S.A. 52:14F-1, et seq.

A prehearing conference was held on February 11, 1980 at which time the parties agreed to submit the matter for Summary Decision. Briefs were submitted by the parties as per schedule, and with the expiration of the due date of April 25 for petitioner's rebuttal, which was not received, the record was closed.

This matter is now ripe for Summary decision based on the pleadings, stipulations of facts, documents, arguments of counsel and conclusions of statutory and case law.

The uncontroverted relevant facts are as follows:

1) Petitioner is a tenured teaching staff member.

2) On May 10, 1979 petitioner wrote to the Superintendent and requested "a maternity leave of absence, as per Article XXI (sic, should be XXXI) - C.L. beginning November 26, 1979 through November 26, 1980."

3) On May 29, 1979 the Superintendent wrote to petitioner and stated:

"In regard to your request for maternity leave of absence under Article XXXI, C.L., please be advised that, if you should elect this Article, your leave would start September 26, 1979, two (2) months before the expected delivery date of November 26, 1979.

Most staff members taking a year leave of absence take it for the school year, September through August, which is better for the children and, usually, more convenient for the staff members.

It would be my suggestion that your leave run from September 1, 1979 through August 31, 1980, however, you still have the option of being out on straight disability which would cover the period from one month prior to the expected delivery until one month after delivery."

4) On July 13, 1979 petitioner wrote to the Superintendent and requested "a maternity leave of absence for the coming school year. The maternity leave would run from September 1, 1979 through August 31, 1980."

5) The Board approved the leave of absence for maternity reasons as requested at its August 13, 1979 meeting.

6) On September 17, 1979 petitioner wrote to the Superintendent "requesting the utilization of my sick days as disability leave, commencing October 25, 1979 to December 21, 1979. The expected delivery date is November 26, 1979."

7) On September 20, 1979 the Superintendent wrote to the petitioner and denied the requested use of sick days.

8) Petitioner gave birth on December 15, 1979.

9) No claim is made for disablement which extends beyond the period from October 25, 1979 through December 21, 1979.

10) On February 19, 1980 petitioner's physician wrote that petitioner "was under my care for pregnancy and was unable to work from October 25 through December 21, 1979."

11) Article XXXI (C)(1) reads as follows in pertinent part:

> C.1. Any tenure employee of the Board shall, upon confirmation of pregnancy, apply to the Board for a leave of absence without pay. Upon recommendation of the Superintendent of Schools such leave shall begin no sooner than three (3) months after pregnancy nor later than seven (7) months after pregnancy. This leave of absence shall stand for one (1) year following the birth of the child unless otherwise recommended by the Superintendent of Schools, the same to terminate not later than the next succeeding September 1st. The Board will grant such leave of absence without pay. In the event that normal conditions attendant upon pregnancy and birth do not prevail, the employee may apply to the said Board for permission to return to her position prior to the termination of the period for which leave is granted.

Respondent avers that this dispute should be referred to the contractual grievance procedure since sick leave is a negotiable term and condition of employment. It appears appropriate to resolve the jurisdictional question prior to addressing the substantive issue in this matter.

Respondent relies on the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.3, which provides in part that:

> Notwithstanding any procedures for the resolution of disputes, controversies or grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement. (emphasis supplied)

It is undisputed that Articles XXIX, XXX and XXXI of the Collective Negotiations Contract address the question of sick leave and other leaves of absence. Respondent contends, therefore, that any dispute over the interpretation or application of those Articles must be submitted to the contractual grievance procedure found in Article III, and is not appropriate for resolution by the Commissioner. Respondent also cites Red Bank Board of Education v. Warrington, 138 N.J. Super 564 (App. Div. 1976) in which the Court held that:

> "The New Jersey Employer-Employee Relations Act evidences a clear legislative intent that disputes over contractual terms and conditions of employment should be solved, if possible, through grievance procedures. We are convinced, moreover, that where provision is made for a binding arbitration of such controversies, recourse for their resolution must be by that means, and not to the Commissioner, for to hold otherwise would effectively thwart and nullify the legislative design expressed in the New Jersey Employer-Employee Relations Act." (at 572)

A review of Articles XXIX, XXX and XXXI does not reveal any agreement related to the use of sick days while on a leave of absence. The Superintendent states in his letter of September 20, 1979 that "I know of no provision, authority, or rationale for utilization of sick days while a person is on leave of absence."

Since the substantive issue in the instant matter is the denial of use of sick days while on leave of absence, and the Collective Negotiations Contract is silent on that issue, I **FIND** no reason to address the applicability of Article III and **CONCLUDE** that this Petition of Appeal is properly within the jurisdiction of the Commissioner of Education.

It is undisputed that the leading New Jersey court decision which addressed the question of the use of accumulated unused sick days for a pregnancy-related disability is Castellano v. Linden Board of Education, 158 N.J. Super. 350 (App. Div. 1978), aff'd 79 N.J. 407 (1979).

Castellano was a civil rights case in which the Supreme Court held that improper sex discrimination in employment occurred when the school board enforced mandatory one-year maternity leave policy and refused to allow pregnant teacher to use her accumulated sick leave for her absence due to childbirth. N.J.S.A. 10:5-1, et seq.

Petitioner relies primarily on Logandro v. Board of Education of the Township of Cinnaminson, 1979 S.L.D. _____ (decided August 6, 1979). Respondent refers to a March 28, 1980 report of the legal committee of the State Board of Education which recommends a reversal of the Commissioner's decision in Logandro.

It must be stated that a report of the legal committee does not have the effect of law, nor would a State Board reversal in Logandro replace the controlling case law on issues addressed by the Supreme Court in Castellano. Nevertheless, respect for the wisdom of both the legal committee and the State Board prohibits the preclusion of

relating their determinations to the instant matter. The State Board's reversal of Logandro will be presumed for that purpose.

Respondent properly echoed the Court in Castellano and committee in Logandro with full agreement that sick leave must be made available for pregnancy disabilities to the same extent as it is made available for other disabilities.

Respondent contends in his Brief at pages 4 and 5 that: "There is no rule of law which requires that an employee be allowed to use accumulated sick time while on an unpaid leave. Such benefits are in fact left to collective negotiations, and no Commissioner or court decision has ever held otherwise. The only requirement is that there be no discrimination: that pregnancy be treated exactly the same as any other disability. Since in this case the Board does not allow any employee to use sick time while on an unpaid leave, the petition must be dismissed." (emphasis added)

The legal committee states in its report at page 3 that: "The key issue in this controversy is whether the Board may refuse to pay sick leave for every kind of disability arising during an extended unpaid leave of absence. We believe the Board has this right. We find no statute or judicial decision to the contrary. As the amicus brief of the New Jersey School Boards Association correctly points out, the question of what benefits, if any, are to be paid or made available during unpaid leaves of absence is, except where governed by statute, left up to collective negotiations between the Board and the Teachers' Association". (emphasis added)

In Castellano, 400 A.2d 1182, the Supreme Court said:

> The policy of mandatory one-year maternity leave may have been well intentioned. In purpose and effect, though, it discriminates against teachers because of their sex. It is therefore illegal and void.
>
> The nonallowance of the use of accumulated sick leave during complainant's absence due to childbirth suffers from the same fault. A woman giving birth to a child becomes physically disabled and unable to attend to her teaching duties for that reason. It is discriminatory not to allow her to use her accumulated sick leave during that period of temporary disability, when it can be used for any other period of absence due to physical disability. (at 1184-1185) (emphasis added)

An analysis of the aforesaid raises a number of questions as matters of law:

1) May a Board of Education avoid a discriminatory practice by not allowing any employee to use sick time while on an unpaid leave?

2) Would an employee's absence due to an emergency appendectomy which exceeds accumulated sick days be construed to be the use of sick time while on an unpaid leave, or a leave with pay limited to the extent of one's accumulated sick days?

3) Would a non-emergent leave for gall bladder surgery be paid or unpaid dependent on one's accumulated sick days?

4) Would a leave of absence for heart surgery preclude the use of accumulated sick days during the period of physical disability?

5) Would an employee on sabbatical leave be entitled to the use of accumulated sick days if physically disabled during said leave, regardless of whether said leave is with or without pay?

The legislature has not clothed this humble soul with the discretionary authority to create law, which is not intended here, but neither have they precluded suggestions for their consideration.

Black's Law Dictionary 584 (5th Ed. 1979) defines foreseeability as "the ability to see or know in advance; hence, the reasonable anticipation that harm or injury is a likely result of acts or omissions." This legal concept is an element in the proximate cause theory of negligence, in determining intentional injuries from nuisances, and in establishing liability for damages due to a breach of warranty. Foreseeability, when applied to one wishing to use accumulated sick days for a leave of absence which requires hospitalization, is certainly a non-legal concept. Perhaps it is not unreasonable to assume that one would anticipate using accumulated sick days for any type of leave which requires hospitalization. This would not be designed to add fuel to a discrimination argument, but perhaps a way to distinguish maternity leave from sabbatical leave, military leave or unspecified leaves of absence.

Maternity leave includes both a period of physical disability and a leave of absence. The legislature has defined that period of physical disability in N.J.S.A. 43:21- 39 (e), and the Supreme Court of New Jersey has specifically recognized that a pregnant woman experiences a period of physical disability in Castellano.

In the instant matter, Article XXXI (C) (1) states in pertinent part that "upon confirmation of pregnancy ... this leave of absence shall stand for one (1) year following the birth of the child unless otherwise recommended by the Superintendent ...."

The Superintendent wrote to petitioner on May 29 and said "It would be my suggestion that your leave run from September 1, 1979 through August 31, 1980, however, you still have the option of being out on straight disability which would cover the period from one month prior to the expected delivery until one month after delivery."

Petitioner followed the Superintendent's suggestion relative to the period of leave. In denying petitioner's requested use of sick days in his letter of September 20 to petitioner the Superintendent said in pertinent part:

> I know of no provision, authority or rationale for utilization of sick days while a person is on leave of absence. Therefore, your request is denied.
>
> As I have stated in previous correspondence to you, it would be proper for you to be absent from your duties for a period of one month before to one month after delivery and this period of time would be covered by sick leave just as any other disability would be covered, however, you elected to take the option of a leave of absence rather than be absent only during the time when you would be disabled. (emphasis added)

Although the one year mandatory maternity leave was held to be illegal and void in Castellano, and although "This leave of absence shall stand for one (1) year" in XXXI (C)(1) of the agreement is only mandatory "unless otherwise recommended by the Superintendent", the petitioner in this case requested the full year leave at the suggestion of the Superintendent.

It appears to be clear, however, that petitioner would have been entitled to use her accumulated sick days "for a period of one month before to one month after delivery" if her requested leave was limited to that period of physical disability. She was denied the use of her sick days during her period of physical disability because she followed the Superintendent's suggestion and requested, and was granted, the full year leave.

The respondent correctly points out that no proof was submitted that the Board has granted the use of accumulated sick leave to any male or female employee

while on an unpaid leave of absence. (Rb at 4) And yet the Superintendent clearly indicated to petitioner that if her leave was limited to one month before and one month after delivery she "would be covered by sick leave just as any other disability would be covered." Would this be construed to be the use of sick days on an unpaid leave? If it was a paid leave it would appear that use of sick days would be unnecessary.

N.J.S.A. 18A:30-1 states that "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 ...."

The Appellate Court in Castellano said at page 362 that "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" and further stated that "Sick leave benefits are intended to alleviate economic losses resulting from inability to work because of disability."

The legislature has seen fit to grant local Boards of Education the authority to act affirmatively relative to prolonged absence beyond sick leave period and to pay salaries.

N.J.S.A. 18:30-6:

> 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. 18:30-7:

> 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 fact that a Board has the right to choose not to act affirmatively pursuant to permissive legislation is undisputed, but a Board may not ignore or act contrary to statutory or case law.

The petitioner's physical disability and the period of same cannot be affected by the leave of absence requested, and the inconsistency related to the use or denial of sick days is incomprehensible.

I FIND that the period of physical disability, as verified by petitioner's physician, must be construed as sick leave pursuant to N.J.S.A. 18A:30-1 and court determinations in Castellano, and further that the remaining period of leave must be construed to the prolonged absence or absence not constituting sick leave pursuant to N.J.S.A. 18A:30-6 or N.J.S.A. 18A:30-7.

I ALSO FIND the denial of petitoner's request to use her accumulated sick days during her period of physical disability to be arbitrary, unreasonable and ultra vires, and must be set aside.

I CONCLUDE, therefore, that the Board is hereby ORDERED to compensate petitioner for her period of physical disability to the extent of her accumulated unused sick days.

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

OAL DKT. NO. EDU 5682-79

I HEREBY FILE with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION FRED G. BURKE**, my Initial Decision in this matter and the record in these proceedings.

9 May 1980
DATE

WARD R. YOUNG, A.L.J.

Receipt Acknowledged:

DATE

AGENCY HEAD

Mailed To Parties:

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

SUSAN T. HEADLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Petitioner's exceptions concur with the initial decision while refuting the exceptions filed by the Board.

The Board excepts to certain omissions by Judge Ward R. Young, A.L.J. of portions of correspondence from the Superintendent to petitioner. The Commissioner finds no stated relevance attributed to these omissions. The Commissioner gives no weight to the Board's exception as to his jurisdiction in this matter. Petitioner, even if faced with two possible avenues of appeal through a grievance/arbitration procedure and a Petition of Appeal to the Commissioner should by decision of the Court pursue both in a timely fashion. Sarah Riely, 173 N.J. Super. 109 (App. Div. 1980)

The Board takes exception to the implication in Judge Young's determination that the Superintendent's suggestion to petitioner of taking a maternity leave from September 1, 1979 to June 30 (sic), 1980 instead of November 26, 1979 through November 26, 1980, as originally requested by petitioner, was somehow improper. There is nothing in the record to enable the Commissioner to determine the motives of the Superintendent in his dealings with petitioner. However, the Commissioner finds the Superintendent's letter of May 29, 1979 to be clearly dichotomous as to petitioner's use of sick leave because of her maternity when read in pari materia with his letter of September 30, 1979, each herewith set down in pertinent part:

> "In regard to your request for maternity leave of absence under Article XXXI, C.1., please be advised that, if you should elect this Article, your leave would start September 26, 1979, two (2) months before the expected delivery date of November 26, 1979.

> "Most staff members taking a year leave of absence take it for the school year, September through August, which is better for the children and, usually, more convenient for the staff members.
>
> "It would be my suggestion that your leave run from September 1, 1979 through August 31, 1980, however, you still have the option of being out on straight disability which would cover the period from one month prior to the expected delivery until one month after delivery." (May 29, 1979)
>
> "I know of no provision, authority or rationale for utilization of sick days while a person is on leave of absence. Therefore, your request is denied.
>
> "As I have stated in previous correspondence to you, it would be proper for you to be absent from your duties for a period of one month before to one month after delivery and this period of time would be covered by sick leave just as any other disability would be covered, however, you elected to take the option of a leave of absence rather than be absent only during the time when you would be disabled. (emphasis added)"
> (September 20, 1979)

Such advice clearly leaves petitioner on the horns of a dilemma.

The Commissioner finds that to suggest that a maternity leave of absence for petitioner from September through August is better for the children without provision for the utilization of sick days as weighed against continued service in the district with allowable absence from duties for a period of one month before to one month after delivery, covered by sick leave as any other disability, in the judgment of the Commissioner, places petitioner in an improperly dilemmatic position.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own. Two recent decisions in this field must be noted. See Adrinne Logandro v. Board of Education of the Township of Cinnaminson, Burlington County, State Board of Education June 11, 1980. See also a recent decision by the court, Linda Farley and Pamela Sherman v. Ocean Township Board of Education, Superior Court of New Jersey, Appellate Division, Docket No. A 48-79, June 16, 1980, wherein the court said:

> "***The period of disability resulting from the childbirth is separate and a pregnant teacher should be entitled to both accumulated sick leave for the time in which she is actually disabled, followed by maternity leave for the purpose of raising the child.***" (Slip Opinion at p.4)

The Commissioner directs the Board to accord petitioner compensation for her period of physical disability due to maternity to the extent of her cumulative unused sick days.

COMMISSIONER OF EDUCATION

June 27, 1980

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

LILLIAN HYNES,	)	INITIAL DECISION
	)	
Petitioner,	)	OAL DKT. NO. EDU 5681-79
	)	AGENCY DKT. NO. 426-11/79A
v.	)	
	)	
BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY,	)	
	)	
Respondent.	)	

APPEARANCES:

Goldberg & Simon, Esqs.
Attorneys for Petitioner
By Sheldon H. Pincus, Esq.

John A. Errico, Esq.
Attorney for Respondent.

EXHIBITS MARKED IN EVIDENCE:

J-1	Certification dated September 7, 1978, Gerard Cicalese, MD, of petitioner's pregnancy and expected date of confinement December 27, 1978.
J-2	Certification dated October 19, 1978, Gerard Cicalese, MD, that petitioner may continue working only until November 30, 1978.
J-3	Petitioner's letter to the superintendent, October 30, 1979, re expected confinement December 27, 1978, requesting sick leave December 1, 1978 to January 23, 1979 and maternity leave beginning January 24, 1979.

J-4	Superintendent's letter to petitioner, November 21, 1978, asking termination date of requested maternity leave.
J-5	Superintendent's letter to petitioner, December 13, 1979, requesting she be examined by school physician on December 19, 1978 "to determine any disability for sick leave which you have requested for period of December 1, 1978 through January 24, 1979".
J-6	Superintendent's letter to petitioner, January 31, 1979, congratulating her on birth of son, re expected termination date for maternity leave.
J-7	Petitioner's letter to Superintendent, February 2, 1979, requesting maternity leave from January 25, 1979 to June 30, 1979.
J-8	Superintendent's letter to petitioner, March 27, 1979, notifying her of Board approval of maternity leave from Januay 24, 1979 to June 30, 1979, and Board disapproval of sick leave from December 1, 1978 to January 23, 1979, "since you did not provide sufficient evidence of disability and did not accede to our request to be examined by a Board physician."
J-9	Petitioner's letter to superintendent, April 4, 1979, saying reason she was not examined by school physician on appointed day of December 19, 1978 was she gave birth that day to son, at 5:00 a.m.

J-10	Superintendent's letter to petitioner, May 11, 1979, acknowledging receipt of petitioner's explanation for inability to keep appointment with school physician, and requesting, in support of sick leave claim from December 1, 1978 to January 23, 1979, her physician certify (1) date disability began, (2) nature of disability, (3) whether it prevented her from teaching, (4) treatment prescribed, and (5) date disability terminated.
J-11	Petitioner's letter to superintendent, June 1, 1979, claiming refusal of sick leave 4 weeks before and 4 weeks after delivery is unlawful sex discrimination.
J-12	Superintendent's letter to petitioner, June 28, 1979, saying refusal to furnish "evidence of medical disability as requested "in support of sick leave claim made it impossible for him to review matter with Board.
J-13	Petitioner's letter to Mr. Lelling, N.J.E.A., July 3, 1979, explaining above correspondence.
J-14	Lelling's letter to president of Board, July 12, 1979, making inquiry re petitioner's sick leave claim.
J-15	Superintendent's letter to Lelling, July 17, 1979, in reply to J-14 and enclosing copy of J-10.

BEFORE THE HONORABLE JAMES A. OSPENSON, A.L.J.:

Before confinement, Lillian Hynes, a teacher employed by the Board of Education of the Town of Bloomfield, asked the Board to permit use of her accumulated sick leave for pregnancy, giving her physician's certificate of expected date of confinement and expected beginning date of pre-confinement disability. After the birth, the Board asked, before considering the request, for her physician's certificate as to:

(1) when pre-natal disability began;

(2) nature of the disability;

(3) whether the disability prevented her from teaching duties;

(4) treatment prescribed; and

(5) when post-natal disability ended.

She refused to furnish the certificate, saying sufficient evidence under law had already been given the Board by her physician. Although the Board granted her a maternity leave, it refused her claim for pre-natal and post-natal sick leave for non-compliance with 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."

The petition of appeal was filed in the Division of Controversies and Disputes of the Department of Education on November 9, 1979. The Board's answer in general denial was filed on November 26, 1979. On December 6, 1979 the matter was transmitted to the Office of Administrative Law for hearing and determination as a contested case pursuant to N.J.S.A. 52:14B-9,10.

On March 7, 1980, a prehearing conference was held and an order entered. Relevant documents and correspondence were stipulated and filed herein as joint exhibits J-1 to J-15.

Birth of petitioner's child was stipulated to be December 19, 1978. Her claim for sick leave is from December 1, 1978 to January 24, 1979, or 38 working days, with interest. The matter was submitted as if on cross motions for summary decision on pleadings, stipulations and memoranda of law, pursuant N.J.A.C. 19:65-13.1, et seq. The record was closed on April 29, 1980 when such memoranda were filed.

At issue are the following:

A. Whether the Board acted improperly in denying petitioner's claim for sick leave of absence.

B. Whether petitioner's doctor's prè-confinement certificate (J-1,2), together with the Board's knowledge that petitioner actually gave birth on December 19, 1978, constitutes compliance with N.J.S.A. 18A:30-4.

C. Whether the Board's request after the birth for medical certification on length of pre-natal and post-natal disability was reasonable.

DISCUSSION

Beyond dispute today is the question whether to deprive a pregnant employee of sick leave benefits for absence occassioned by childbirth is unlawful discrimination on account of sex. It is. And the concept that pregnancy is not an illness or injury within the definitional meaning of sick leave in N.J.S.A. 18A:30-1 is too restrictive and literal to be consonant with clearly enunciated State policy against sex discrimination. Cf. Castellano v. Linden Board of Education, 158 N.J. Sup. 350, 361-2 (App. Div. 1978), appr. with modif., 79 N.J. 407 (1979). Sick leave benefits are intended to alleviate economic loss from inability to work because of disability. This salutary purpose would not be furthered by excluding absences for pregnancy. Ibid., 362 of 158 N.J. Sup. Consistently with policy, the Commissioner of Education has ordered boards of education to allow such sick leave credit. See, e.g., Shokey v. Board of Education of the Township of Cinnaminson, 1978 S.L.D. -- (November 29, 1978), aff'd. State Board of Education (April 5, 1979) (Commissioner's slip opinion, No. 231-78, pp. 7-9).

But not all employment interruptions for pregnancy are remediable under anti-discrimination law. A reasonable board policy to avoid interference with continuity of classroom instruction, for example, may justifiably support non-renewal of a non-tenured teacher's contract. Cf. Gilchrist v. Board of Education of Haddonfield, 155 N.J. Sup. 358, 368-9 (App. Div. 1978). In like manner, it lies within a board's power to require a physician's certificate in support of sick leave claimed. N.J.S.A. 18A:30-4. In broad principle, such a requirement is not invidiously discriminatory. See Board of Ed. of the Township of Cinnaminson v. Silver, 1976 S.L.D. 739, 746-7 aff'd. State Board of Education (April 4, 1979) (The Commissioner found the physician's certification of disability in that case to be sufficient to support the teacher's claim for pre-natal sick leave but not sufficient to support her claim for post-natal sick leave beyond a period of one month).

Here, since the Board invoked its rights under N.J.S.A. 18A:30-4 to have medical certification of petitioner's pregnancy-related sick leave claim (J-10), did petitioner's doctor's pre-confinement certificate (J-1,2), together with the Board's knowledge that she actually gave birth on December 19, 1978, constitute compliance with the statute?

More than 3 months before the birth, the doctor gave his opinion that petitioner should not work after November 30, 1978, about 4 weeks before her expected date of confinement. This is no more than an obstetrical prognostication, a prediction of pre-natal disability soon to become acute, and is, for that purpose, little more than mere mortals, however well qualified obstetrically, can furnish, given the vagaries of reproduction in the human female. At that, one perceives, he was in error since petitioner, not uncharacteristically of her sex, delivered a week early on December 19, 1978. The Board's scheduled appointment for petitioner with the school physician that day, through circumstances apparently well beyond petitioner's control, went unkept. For the Board to insist after the birth for more specific certification of disability before the birth, however, does not seem reasonable: such policy strictness may well encourage the employee, for fear of economic loss, to continue working beyond the time she reasonably should, a result not in accord with the salutary policy purpose spoken of by the Castellano court. Ibid., p. 362 of 158 N.J. Sup. In short, general obstetrical prognostications on pre-natal disability,

like that of petitioner's doctor here, would seem a reasonable compliance with the certification requirement.

But the Board, one suspects, is on safer ground in asking, as it did, for certification of the duration of post-natal disability, especially, perhaps, on the word of the treating physician, the one most familiar with the clinical history. That certification, as with temporary disability estimates in other kinds of disability, can be made retrospectively, with less prognostic risk and even, perhaps with more reasonable chance for accuracy. Indeed, a post-natal recovery, given the individual, may be longer or shorter than 30 days and a retrospective view after passage of time seems more likely than not to be fairer both to employee and to the Board, charged as it is with disbursement of public funds. Judged by that standard, the Board's inquiry is no mere caprice, nor does it invidiously discriminate against one of petitioner's sex. It does follow, however, that to the extent of its reasonableness one may question the reasonableness of petitioner's doctrinaire refusal to answer it (J-11). This record does not show any effort by petitioner before her petition was filed, or afterwards, to furnish post-natal disability certification. No new medical examination by a school physician was sought, merely the advices of her own physician. As a result, I am unable to conclude that doctor's pre-confinement certificates (J-1,2), together with the Board's knowledge that petitioner actually gave birth on December 19, 1978, constitutes full compliance with N.J.S.A. 18A:30.4. There was but partial compliance.

Based on the above, therefore, having reviewed pleadings, stipulations and memoranda of law, I FIND and DECLARE as follows:

1. The above discussion, to the extent of any mediate conclusions of fact, is incorporated herein.

2. The jointly stipulated facts represented in J-1 to 15 are incorporated herein.

3. Lillian Hynes, a teacher, being pregnant, asked the Board for utilization of her accumulated sick leave from December 1, 1978 to January 23, 1979.

4. Her physician certified to the Board in September, 1978, that her confinement was expected December 27, 1978, and in October, 1978, that she might continue working only until November 30, 1978.

5. The Board granted petitioner maternity leave from January 24, 1979 to June 30, 1979, which she had also requested, and asked her to be examined by the school physician on December 19, 1978, to determine any disability for the requested sick leave.

6. Petitioner gave birth to a son on December 19, 1978, a week earlier than anticipated, and was unable to keep the appointment for examination by the school physician.

7. After the birth, the Board, in May, 1979, requested in writing, in support of her sick leave claim from December 1, 1978 to January 23, 1979, that her physician certify (1) date disability began, (2) nature of disability, (3) whether it prevented her from teaching, (4) treatment prescribed, and (5) date disability terminated. She refused the request.

8. By statute, the Board had the right to require a physician's certification of pre-natal and post-natal disability in support of her sick leave claim. N.J.S.A. 18A:30-4.

9. Correspondingly, petitioner had the duty to furnish such certification.

10. Petitioner's physician's pre-confinement certificates (J-1,2), together with the Board's knowledge that petitioner actually gave birth on December 19, 1978, constitutes her reasonable compliance with N.J.S.A. 18A:30-4, for a period of pre-natal disability from December 1, 1978 to December 27, 1978, the latter date being a reasonable obstetrical prognostication of confinement.

11. Petitioner is entitled to have her accumulated sick leave entitlement applied for that pre-natal period.

12. Petitioner's physician's pre-confinement certificates do not constitute a reasonable compliance with N.J.S.A. 18A:30-4 for any period of post-natal disability beyond December 27, 1978.

13. On the strength thereof, petitioner is not entitled, therefore, to have her accumulated sick leave entitlement applied for a post-natal period beyond that time.

14. The Board's subsequent request for medical certification was unreasonable as to pre-natal disability and reasonable as to post-natal disability.

15. Petitioner should not be foreclosed, however, from opportunity to furnish post-natal disability certification within a reasonable time hereafter.

Accordingly, I hereby REVERSE so much of any Board or Board-sanctioned administrative action as disallowed utilization of petitioner's accumulated sick leave entitlement for pre-natal disability from December 1, 1978 until December 27, 1978 and DIRECT she forthwith be so paid and credited therefrom in salary.

I ORDER FURTHER that petitioner shall have 30 days from the date hereof within which to furnish her physician's certificate as to any period of post-natal disability. Upon her presentation of that certificate, the Board shall extend such utilization of accumulated sick leave entitlement for any period certified beyond December 27, 1978, until date of commencement of her maternity leave of absence and shall so pay and credit her therefrom in salary. There is no suggestion in this record petitioner's refusal to supply such certification before filing her petition of appeal deprived the Board of an opportunity to confirm or challenge a retrospective diagnosis by its own medical inspector, since the Board's request was for petitioner's physician's certificate. J-10. Conversely, there is no suggestion her physician could not now readily supply it. Any other disposition would tend to penalize petitioner and others like her for harmless if mistaken conclusions of law and, thus, perhaps, to chill legitmate resort to dispute resolution under N.J.S.A. 18A:6-9. No challenge to the untimeliness of petitioner's claim under N.J.A.C. 6:24-1.2 has been raised; here, none should be judicially imposed. But see Schultz v. Board of Education, Bloomfield, 1980 S.L.D. --, (Commissioner's decision, April 28, 1980).

I ORDER LASTLY that petitioner's claim for interest on unpaid sick leave benefits be, and they are hereby DENIED. It is ultra vires statutory powers of a board of education to pay interest as damages for the improper withholding of funds. Bartlett v. Board of Education of Wall Township, 1971 S.L.D. 163, 165-6, aff'd. State Board of Education, October 6, 1971; and see Consolidated Police, etc. Pension Fund Com. v.

Passaic, 23 N.J. 645, 654-6 (1957). Relative equities herein, moreover, are at best in balance. Ibid., p. 655 of 23 N.J.; but see Decker v. Board of Education, City of Elizabeth, 153 N.J. Sup. 470, 475 (App. Div. 1977), cert. den. 75 N.J. 612 (1978). I see no fatal ambivalence in the proposition that Board action here was both unreasonable in part, yet not an unlawful act of employment discrimination contrary to the Law against Discrimination. N.J.S.A. 10:5-4, 5(e), 12(a); 18A:29-2; N.J.A.C. 6:4-1.6(b). Nor does it appear from this record, as petitioner contends, that the Board's conduct was but the most recent outburst of systematic discrimination animus towards female employees in the district.

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

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

May 13, 1980 James A. Ospenson
DATE JAMES A. OSPENSON, A.L.J.

Receipt Acknowledged:

ad

LILLIAN HYNES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Petitioner excepts to the determination of Judge James A. Ospenson that she be required to submit her physician's certificate for any period of post-natal disability. Petitioner alleges her doctor's certificate J-1 and J-2 fully comports with petitioner's responsibilities for obtaining maternity sick leave. The Commissioner notes that these documents are letters from petitioner's physician in relation to her maternity status. They are herewith set down in full.

"Sept. 7, 1978

"To whom it may concern:

"This is to certify that Lillian Hynes is pregnant and under my care. Her expected date of confinement is December 27." (J-1)

"October 19, 1978

"To whom it may concern:

"This is to certify that Lillian Hynes is able to continue working only until Nov. 30." (J-2)

In Cinnaminson, supra, it is stated:

"***The question is whether the difficulties of this period should also be classified as 'illness or injury' for sick leave credit.

> "The Commissioner determines that they must be if, in conformity with the statutory authority (N.J.S.A. 18A:30-4), there is a physician's certificate which specifically attests to the condition as 'disabling' prior to the beginning of the ninth month of pregnancy or after a period of one month following the birth of a child, but that, for the orderly conduct of the schools and the general welfare of employees, a less specific certificate of birth expectancy may suffice in the two month interim.***" (at 746)

The Commissioner does not agree that the Cinnaminson "standards" on which petitioner relies are totally determinative that petitioner was automatically entitled to her entire request for thirty-eight (38) sick leave days due to maternity.

The Commissioner observes that the Board had requested petitioner to be examined by the school physician by an appointment on December 19, 1978. The Commissioner finds that petitioner's apparent intent was one of compliance with the request but petitioner was unable to keep the appointment because of the birth of her child on that date. (J-5, J-9) The Commissioner finds such reason acceptable.

The Commissioner distinguishes the present matter from Judy Schultz v. Board of Education of the Town of Bloomfield, Essex County, 1980 S.L.D. ___ (decided April 28, 1980) wherein he set aside the filing of a retrospective medical diagnosis. Herein petitioner's child was born on the day of her appointment with the school physician. Nothing in the record indicates that the Board made any subsequent attempt to reschedule an appointment for her with the school physician. The Commissioner determines that petitioner shall have thirty (30) days from the date hereof within which to furnish her physician's certificate to the Board for her period of post-natal disability.

The Board, in its exception, pleads for dismissal of the Petition on the basis of laches. Laches, as an equitable defense, must be argued. To be raised for the first time as a matter of law in the Board's exception the Commissioner finds to be inappropriate and therefore laches will not be considered.

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

Petitioner shall be allowed to use her accumulated sick leave entitlement for prenatal disability from December 1, to December 27, 1978. Contingent upon the presentation of a proper certificate from her physician within thirty (30) days the Board

shall extend petitioner's use of her accumulated sick leave to the period of her post-natal disability. Her claim for interest is denied; there is no enabling statutory provision for such awards.

It is so directed.

COMMISSIONER OF EDUCATION

June 30, 1980

LILLIAN HYNES,

PETITIONER-APPELLEE,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 30, 1980

For the Petitioner-Appellee, Goldberg & Simon (Sheldon H. Pincus, Esq., of Counsel)

For the Respondent-Appellant, John A. Errico, Esq.

The problems of sick leave in connection with pregnancy disability continue to give rise to controversies before us. In this decision we shall try to clarify the existing law for the future guidance of local boards.

The Petitioner in this case submitted to the Board of Education a doctor's certificate dated September 7, 1978 to the effect that Petitioner was pregnant and that the expected date of her confinement would begin December 27, 1978. Thereafter the Petitioner's physician made another certificate dated October 19, 1978, that she could continue working only until November 30, 1978, by which date she would be considered disabled. Petitioner on October 30th requested sick leave from December 1, 1978 to January 23, 1979 and maternity leave beginning the next day, January 24th. By letter of December 13th the Superintendent requested that Petitioner be examined by the school physician to determine any disability on her part between December 1, 1978 and January 24, 1979. Petitioner gave birth on December 19th -- the date when she was

to be examined by the physician. Further correspondence between the Superintendent and Petitioner culminated in his request for a certificate from her physician stating among other things the date that her disability began and the date that it terminated. Petitioner refused to undergo a new medical examination or to request the new certification asked for by the Superintendent, claiming that any refusal of sick leave for four weeks before and four weeks after delivery constituted unlawful sex discrimination.

The Commissioner ruled that Petitioner was entitled to sick leave for pre-natal disability from December 1 to December 27, 1978, but that she could not obtain post-natal sick leave unless she furnished a physician's certificate as to the period of post-natal disability.

We believe that the Commissioner's determination was correct, with one qualification hereinafter discussed.

N.J.S.A. 18A:30-4 provides that where sick leave is 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."

In Board of Education of Cinnaminson v. Silver, 1976 S.L.D. 739, the Commissioner indicated that in applying the above quoted statute, a presumption existed that a woman was disabled for one month before the birth of the child and for one month thereafter. Declaring that the difficulties of the period within which birth occurs should be classified as "illness or injury" for sick leave credit, the opinion stated (1976 S.L.D. page 746):

> "The Commissioner determines that they must be if, in conformity with the statutory authority (N.J.S.A. 18A:30-4), there is a physician's certificate which specifically attests to the condition as 'disabling' prior to the beginning of the ninth month of pregnancy or after a period of one month following the birth of a child, but that, for the orderly conduct of the schools and the general welfare of employees, a less specific certificate of birth expectancy may suffice in the two month interim."

> "In this latter regard the practical realities are clearly dominant except that, if a teaching staff member of other employee wishes to continue beyond the beginning of the ninth month of pregnancy or to return prior to one month from the birth of a child, it would appear that a specific certificate of fitness would also be advisable from the employee's own physician and/or from the school's medical examiner."

The State Board affirmed the Commissioner's determination in Cinnaminson, and we now reaffirm the approach set forth in that case. To further elucidate the subject, we believe that in pregnancy cases, if the teaching staff member is requesting no sick leave before the ninth month of pregnancy, the physician need only certify the date that birth is expected. The presumption will then arise that disability begins one month prior to the anticipated delivery. Likewise, if the teacher requests no sick leave beyond one month following delivery, the physician need only certify the date of the actual birth; the presumption of disability will cover the following month. If, however, the staff member wants to take sick leave either more than one month before anticipated delivery or more than one month after the birth, the Board may require a further physician's certificate as to the actual dates that the disability began or terminated, as the case may be. On the other hand, if the teacher continues to work during her ninth month of pregnancy (and the Board's physician does not find her unfit), the presumption of disability for that month is overcome pro tanto.

In the instant case, the physician's certificates given before Petitioner's delivery date clearly established her right to sick leave beginning December 1, 1978 up to the date of birth (December 19th). In order to obtain further sick leave for one month subsequent to December 19th, the Petitioner needed to submit only a doctor's certificate as to the date of the birth. She was then entitled to a presumption of one month's disability thereafter; she did not need the certificate of post-natal disability called for by the Commissioner

Only if she wished to claim sick leave beyond January 19, 1979, would Petitioner have to provide her doctor's certificate as to the additional period of disability.

Accordingly, the Commissioner's decision is modified with respect to the required contents of the physician's certificate as to post-natal disability, but with such modification the decision is affirmed.

December 3, 1980
Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DOROTHY REEVES,	)	ORDER GRANTING
Petitioner,	)	MOTION TO DISMISS
V.	)	**OAL DKT. NO. EDU 5249-79**
BOARD OF EDUCATION OF THE	)	AGENCY DKT. NO. 352-9/79A
WESTWOOD REGIONAL SCHOOL	)	
DISTRICT, BERGEN COUNTY,	)	
Respondent and	)	
Third Party Petitioner,	)	
V.	)	
MICHAEL CIPOLLETTI,	)	
Third Party Respondent.	)	

APPERANCES:

William F. Rupp, for petitioner
(Lesemann & Rupp, attorneys)

Mark G. Sullivan, for respondent and third party petitioner
(Sullivan & Sullivan, attorneys)

Richard A. Friedman, for third party respondent
(Ruhlman & Butrym, attorneys)

BEFORE THE HONORABLE **KEN R. SPRINGER,** A.L.J.:

This matter concerns whether the transfer of a teacher from a position as speech correctionist to a position as teacher of the handicapped violated her seniority

rights under N.J.S.A. 18A:28-9 et seq. and N.J.A.C. 6:3-1.10. On September 6, 1979 petitioner Dorothy Reeves ("Reeves") filed a verified petition with the Commissioner of Education seeking a declaratory judgement that her transfer for the 1979-80 school year contravened the applicable seniority standards. In turn, respondent Board of Education of the Westwood Regional School District ("Board") denied the allegations and impleaded third party respondent Michael Cipolletti ("Cipolletti") who would lose his current job as speech correctionist if Reeves were to prevail.

The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Default previously entered against Cipolletti was vacated by consent of the parties and subsequently Cipolletti filed an answer denying that Reeves had greater seniority for the position of speech correctionist. Presently this matter comes before the Court on Cipolletti's motion to dismiss the petition for failure to set forth a cause of action. Oral argument on this motion was presented on April 11, 1980. Documents entered into evidence as joint exhibits and considered in deciding this motion are listed in the appendix.

Pursuant to the prehearing order entered February 1, 1980 (as amended during the course of oral agument), all parties stipulate the following facts:

1. Since 1971, Reeves has held an instructional certificate with a teacher of the handicapped endorsement and an educational services certificate with a speech correctionist endorsement.

2. In the summer of 1971, Reeves was employed by the Board as a speech correctionist under the Title I program.

3. Commencing in September 1971 and continuing through June 1976, Reeves was employed by the Board as a teacher of the handicapped or neurologically impaired.

4. Commencing in September 1976 and continuing through June 1979, Reeves was employed by the Board as a speech correctionist.

5. The Board employed four speech correctionists during the 1978-79 school year. Effective September 1979, the Board reduced that number from four to three.

6. On or about April 24, 1979, Reeves was advised by Dr. Reno Zinzarella, Superintendent of Schools of the Westwood Regional School District, that she would be assigned as a speech correctionist in the upcoming school year notwithstanding a reduction in force.

7. On or about June 15, 1979, Reeves was advised by Zinzarella that Cipolletti instead of her would be assigned as a speech correctionist for the 1979-80 school year. Zinzarella further informed her that she would be assigned as a teacher of the handicapped.

8. Cippolletti holds an education services certificate with a speech correctionist endorsement and has been employed by the Board as a speech correctionist since September 1974.

9. By letter dated June 22, 1979, Reeves was officially advised that her assignment for the 1979-80 school year would be as a teacher of the handicapped.

As framed by the pleadings and the prehearing order, the issue in this case relates exclusively to seniority as distinguished from tenure. It is inappropriate to examine whether the change in position constituted a "demotion" or merely a transfer to a job of "equivalent rank," since those factors have bearing only on Reeves' tenure rights which are not involved in this case. For purposes of this motion, it must be assumed that Reeves has seniority over Cipolletti. To eliminate confusion with tenure, all parties have also agreed to assume at this stage that the transfer was to a position of comparable rank, and that Reeves did not suffer any reduction in salary. Thus, the narrow legal question is whether the involuntary transfer was invalid because it circumvented seniority rights to which Reeves was entitled. Put another way, may a board of education, in the exercise of

its managerial prerogative, transfer a teacher with higher seniority to another position for which she qualifies in order to save the job of a teacher with lower seniority who would otherwise be dismissed?

Subject only to limitations imposed by the tenure law, boards of education have inherent power to transfer or reassign teachers within the scope of their certifications. Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Educ. 78 N.J. 144 (1978). N.J.S.A. 18A:25-1 expressly confers this authority upon such boards:

> 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.

On my own initiative, I raised the problem of whether Reeves' purported transfer by the Superintendent was illegal since the record appears devoid of any Board minutes or resolution establishing compliance with this statutory requirement. All sides opposed disposition of this matter on such a technical ground. From Reeves' perspective, the practical result of success on this basis would likely be further delay beyond commencement of the 1980-81 school year in obtaining a definitive ruling on the merits. Consequently, leave was given the Board's counsel to bring this problem promptly to the Board's attention for approval or disapproval of the de facto transfer. Thereafter, by resolution passed on April 21, 1980, the Board ratified the prior action of its Superintendent. In the interest of fairness to all concerned, this matter will be decided on substantative rather than procedural grounds. Cf. Bigart v. Bd. of Educ. of Paramus, 1979 S.L.D. 28; Humen v. Bd. of Educ. of Bayonne, 1977 S.L.D. 795.

The thrust of Reeves' argument is that reduction in the number of speech correctionists from four to three positions automatically triggered operation of the seniority standards as the means of determining who should fill the remaining slots. In this regard, N.J.S.A. 18A:28-9 provides that the tenure law does not prohibit any board of education from abolishing any position for reasons of economy or other good cause.

However, N.J.S.A. 18A:28-10 goes on to specify:

> Dismissals resulting from such reduction . . . shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board. (Emphasis added).

Next, N.J.S.A. 18A:28-11 says:

> In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status. . .

Finally, N.J.S.A. 18A:28-12 states:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in the position for which such person shall be qualified and he shall be reemployed by the body causing dismissal if and when such vacancy occurs . . . (Emphasis added)

Read together, these statutory sections clearly contemplate that seniority protection may be invoked only by persons threatened with dismissal. A "transfer" is not a "dismissal." Lascari v. Bd. of Educ. of Lodi, 36 N.J. Super. 426, 430 (App. Div. 1955); Cheeseman v. Gloucester City, 1 Misc. 318,319 (Sup. Ct. 1923). Nothing in the statutory scheme suggests any legislative intent to interfere with boards' traditional authority to transfer personnel to assignments where their skills may be most effectively utilized. Transfers are often advisable in the administration of schools for many reasons. Cheeseman v. Gloucester City, supra. No teacher is guaranteed continuity of assignment, or acquires a vested right to any particular assignment, class or school. Bigart v. Bd. of Educ. of Paramus, supra.

One fallacy in Reeves' argument is illustrated by the following example: Suppose the Board had strictly applied the seniority standards and dismissed Cipolletti as Reeves contends it should have done. There is no question that thereafter the Board would be free at any time to transfer Reeves to another position within the scope of her certifications. If it were to do so, however, a vacancy would occur in the speech correctionist category and Cipolletti, as top person on the eligibility list, would be entitled to fill that vacancy. Therefore, the outcome would be exactly the same as that accomplished by the Board in more direct fashion.

Several recent cases have held that seniority rules do not apply to transfers, but only to determining priority of employment where there has been a reduction in force. Williams v. Bd. of Educ. of Plainfield, State Bd. of Educ., 1980 S.L.D., (decided January 9,

1980), appeal pending before the Appellate Division, Docket No. A-2102-79A, (filed February 14, 1980) (transfer of principal from high school to elementary school); Bigart v. Bd. of Educ. of Paramus, supra (transfer of teacher from regular classroom teaching position to unassigned teaching position); Clark v. Bd. of Educ. of Margate, 1974 S.L.D. 678, aff'd by State Bd. of Educ., 1975 S.L.D. 1082, aff'd by Appellate Division, 1976 S.L.D. 1134 (transfer from teaching the mentally retarded to teaching the neurologically impaired).

Reeves points out that each of the foregoing cases involved just a transfer, without any accompanying reduction in force. Her own case, she urges, did actually involve a reduction in force, even though she was not dismissed as a result. She relies on Lynch v. Bd. of Educ. of Highland Park, 1980 S.L.D. (decided March 7, 1980), which she asserts is directly on point. In Lynch, the board abolished one of four learning disability teacher consultant positions and transferred petitioner to a classroom teacher position, while retaining a teacher with lesser seniority in one of the remaining jobs. Upholding the initial determination that such transfer in disregard of seniority standards was arbitrary, capricious and unreasonable, the Commissioner restored petitioner to her former position. Significantly, neither the Commissioner nor the Administrative Law Judge had occasion in Lynch to consider the effect of the State Board's declaration in Williams v. Bd. of Educ of Plainfield, supra, that seniority rules have no relevance to the legality of involuntary transfers. Moreover, Lynch concerned a demotion in rank from a learning disabilities-teachers consultant, requiring a masters degree and three years teaching experience for proper certification (N.J.A.C. 6:11-12.15), to a classroom teacher, lacking equally rigorous qualifications (N.J.A.C. 6:11-6.3). Accordingly, Lynch can be viewed simply as an application of the well-settled doctrine that a teacher cannot be demoted without consent.

Lastly, Reeves emphasized the standards adopted by the Commissioner for determining seniority, and in particular N.J.A.C. 6-3-1.10(h) which provides:

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

It is suggested that this language mandates that Reeves, who for purposes of this motion has greater seniority than Cipolletti, must be preferred for employment in the "same category" of speech correctionist. However, the regulation is relevant only if the person claiming its benefit is entitled to the statutory protection created by N.J.S.A. 18A:28-9 et seq. A regulation cannot grant greater rights than the statutory authority under which the regulation was promulgated. As previously noted, this statutory protection does not exist unless a teaching staff member is subject to dismissal. Moreover, the quoted regulation merely outlines the orderly procedure to be followed in determining which teacher must suffer the adverse effects of a reduction in force. There in no expression of any intention to negate the overriding managerial prerogative of the Board to transfer a teacher to any position where her educational qualifications may be put to best use.

For the forgoing reasons, it is **ORDERED THAT** the petition and third party petition are **DISMISSED WITH PREJUDICE.**

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

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

May 14, 1980
DATE

Ken R. Springer
KEN R. SPRINGER, A.L.J.

DOROTHY REEVES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner excepts to the determination by Judge Ken R. Springer, A.L.J. that N.J.S.A. 18A:28-10, 28-11 and 28-13 reflect seniority protection only to persons threatened with dismissal by a reduction in staff. Petitioner objects to the Judge's rejection of Lynch, supra, and his reliance on Williams, supra. The Commissioner finds merit in petitioner's exceptions.

N.J.S.A. 18A:28-10 provides in pertinent part:

> "***such reduction shall***be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board."

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

> "In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each person as to his seniority status, and the board may request the commissioner for an advisory opinion with respect to the applicability of the standards to particular situations*** [provided that] [n]o [such] determination*** shall be binding***if any controversy or dispute arises as a result of such determination and an appeal is taken therefrom pursuant to the provisions of this title."

N.J.S.A. 18A:28-13 provides that:

> "The commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services***and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both."

In accordance with the foregoing statutory authority, the State Board of Education adopted rules and regulations for determining seniority and the application thereof which can be found in N.J.A.C. 6:3-1.10(h) which states in pertinent part:

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

The Commissioner cannot agree wherein Judge Springer refers to Lynch, supra, simply as an application of the doctrine that a teacher cannot be demoted without cause. The Commissioner finds Lynch to be directly on point wherein in a reduction in force situation petitioner in that matter was transferred to a teaching position while the Board retained a teacher with less seniority in one of the remaining positions.

The Commissioner notes that Williams, supra, did not involve a reduction in force and the State Board of Education determined that seniority rules have no relevance to the legality of involuntary transfers. The Commissioner finds Williams inapposite to the present matter.

The Board's exceptions are supportive of Judge Springer's determination relying on the Brief in Support of Third Party Respondent's Motion to Dismiss. Additionally, the Board properly points to an error in the listing of exhibits in the initial decision in item J-6 wherein a date listed as May 1976 should correctly be May 1971. The Commissioner so notes.

Whereas petitioner, as stipulated, holds greater seniority in the category of speech correctionist and whereas the Commissioner attaches strong significance to the clear wording in N.J.A.C. 6:3-1.10 wherein is stated "***he shall be given that employment in the same category to which he is entitled by seniority," the Commissioner finds that the Board erred in retaining third party respondent in the position of speech correctionist and reverting petitioner involuntarily to her prior category of employment as a teacher of the handicapped.

The Board is directed to place petitioner in the position of speech correctionist for the 1980-81 school year. Third party respondent shall be placed on a seniority list in accordance with his years of service.

COMMISSIONER OF EDUCATION

June 30, 1980

Pending State Board of Education

ROBERT STEPHENSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
GREEN BROOK BOARD OF EDUCATION, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Paul Koenig, Esq.

For the Respondent, Nichols, Thomson, Peek & Meyers
(Kenneth S. Meyers, Esq., of Counsel)

Petitioner, a tenured music teacher employed by the Board of Education of Green Brook, hereinafter "Board," appeals from actions of the Board which abolished his full time position, created a 3/5ths position, and denied him a salary increment for the 1978-79 school year. He asserts that the Board failed to comply with the requirements of N.J.S.A. 18A:29-14 and prays that the Commissioner restore his increment and declare the abolition of the full time music position void as the actions of the administration and Board were a subterfuge to force the resignation of the petitioner in circumvention of the tenure laws.

The Board avers it acted in good faith in exercising its statutory authority in the reduction of force according to N.J.S.A. 18A:28-9 and in withholding petitioner's increment under N.J.S.A. 18A:29-14.

Four days of hearings were conducted. A total of eight witnesses testified with the high school principal and the Superintendent of Schools being recalled. A report of the relevant uncontroverted facts follows:

Petitioner was evaluated twice during the 1977-78 school year, once each by the assistant principal and the principal, the evaluation by the latter having been on March 17, 1978 and admitted into evidence as P-4. Thirty-four items were numerically evaluated on a scale from 1 to 5. It is significant that only one item was assessed below average, and the principal recommended reemployment and the granting of a salary increment for 1978-79. The evaluation conference was held on March 20, 1978.

The principal wrote a memorandum to the Superintendent under date of March 30 recommending the withholding of petitioner's increment for 1978-79. (P-5) The Superintendent addressed a letter to petitioner, also under date of March 30,

advising him that the Board would consider the principal's recommendation of withholding his increment at its next public meeting on April 10. (R-4)

The minutes of the public meeting of the Board held April 10, 1978 reveal that the Board abolished petitioner's position, then created a 3/5ths district music position, and awarded a contract to petitioner for 3/5ths time at Step 17 in the amount of $10,827, which represented 3/5ths of his current 1977-78 salary. (P-8)

This concludes the report of relevant uncontroverted facts. Relevant testimony now follows concerning the issues of reduction in force and the withholding of petitioner's increment.

Testimony on the reduction in force will first be reported. The principal testified that he was aware there would be a reduction in force in December 1977 and that petitioner would be affected right after Christmas. (Tr. I-77) He also testified that petitioner was not aware that he would be affected by the reduction in force until March 30, 1978. (Tr.I-78)

Board member Mrs. Anderson testified that the 1978-79 budget had to be reduced by $33,000 and that she favored reducing petitioner's position as her rationale gave a lower priority to petitioner's independent chorus program. (Tr. IV-46, 48) She also testified that in November 1978 the Board increased the employment of petitioner to four days due to unanticipated fourth grade requests for instrumental music and an unanticipated salary account balance. (Tr. IV-58) There was also no relationship between the reduction of petitioner's employment and the withholding of his increment. (Tr. IV-63-64)

The Superintendent testified that he instructed his principals to recommend curtailment of areas and programs in the amount of $33,000 and accepted the reduction in force recommendations because the academic areas would be unaffected. (Tr. IV-74)

Relevant testimony related to the withholding of petitioner's increment begins with the principal. He testified that he changed his mind between the evaluation conference of March 20 and his March 30 memorandum to the Superintendent in which he recommended petitioner's increment be withheld. (Tr. I-56) The principal had not advised petitioner of his intent to recommend withholding his increment. (Tr. I-85) The principal's recommendation to withhold the increment was unrelated to petitioner's classroom performance, but was triggered by petitioner's advisory role in the foreign exchange program. (Tr. I-86-87) The principal was distressed because of parental telephone calls as to what he perceived to be last minute housing arrangements for foreign students. (Tr. I-88) The Superintendent was also a little annoyed with the principal. (Tr. I-89)

The principal related to petitioner that his behavior (as extracurricular advisor) resulted in an adverse effect on his (the principal's) own evaluation. (Tr. IV-33) He also testified that it was his responsibility to write to the Council on International Exchange if that program was to be cancelled. (Tr. IV-23) The principal indicated that the athletic director formally evaluated his coaches in writing followed by a conference, but there were no such evaluations of other extracurricular advisors, "***Just the normal observation, informal situation.***" (Tr. IV-44-45) The principal never considered petitioner to be insubordinate. (Tr. I-105)

The testimony of the Board secretary/business manager is only noteworthy due to its incredibility. His inability to recall critical discussions and actions by the Board relative to sensitive issues of reduction in force and increment withholding, which were scantily recorded or not recorded at all in Board minutes, contributes little or no assistance to the Commissioner in his deliberations of the controverted matters. The witness could not recall being directed to advise petitioner that his increment was withheld by Board action. (Tr. II-26) Nor could the witness recall from memory or his notes any discussions held by the Board on petitioner's continued employment or increment withholding. (Tr. II-27) The hearing examiner is constrained to report the necessity of reading a qualitative assessment of recorded minutes into the record in Tr. II-43-44.

The Superintendent testified that the recommendations for the reduced employment of petitioner and withholding his increment were unrelated. (Tr. IV-81) His first awareness relative to withholding petitioner's increment was in the latter part of March 1978. (Tr. IV-81) His testimony was that he handed separate envelopes to petitioner in the presence of the principal on March 30 that enclosed letters of the same date advising petitioner of intentions of eliminating his full time position, offering a 3/5ths position, and withholding his increment. (Tr. IV-100-101) Copies of these letters were placed in petitioner's personnel file. (Tr. IV-102)

Petitioner testified at length. He received a copy of the principal's memorandum of March 30, 1978 to the Superintendent recommending the withholding of his increment with reasons. (P-5; Tr. II-72) Also received on March 30 were two letters, marked in evidence as P-12, B and C, from the Superintendent wherein he was advised of the abolition of his full time position and the creation of a 3/5ths position. Petitioner denied ever receiving or seeing prior to the day of his testimony the letter to him from the Superintendent under date of March 30 (R-4) advising of the anticipated action by the Board at its April 10 meeting to withhold his increment. (Tr. II-75, III-3-4) The principal was aware of all the reasons listed on P-5 supporting the increment withholding recommendation prior to the March 20 evaluation conference, but he did not mention any of them at the conference and, in fact, indicated his intention to recommend the increment. (Tr. II-91-92)

Petitioner testified that the only way the exchange program could be canceled was by a written withdrawal signed by the principal, which the principal never wrote. (Tr. II-82) Housing arrangements for the visiting students were made particularly difficult due to a change in the school calendar which resulted in revised family vacation plans. (Tr. II-83)

Petitioner was present at the April 10 Board meeting and was fully aware of all actions affecting him. (Tr. III-6)

A rebuttal witness testified relative to communication documents in petitioner's personnel file. A copy of the Superintendent's letter to petitioner (R-4) was not in the file, contrary to the testimony of the Superintendent. (Tr. IV-111)

This concludes a report of the testimony considered relevant by the hearing examiner, who now follows with his findings and recommendations for the Commissioner's consideration:

The Board's emerging financial problems provided what it determined to be good cause to reduce its teaching force. No State Board rule or regulation mandates that the Board employ certified music teachers or maintain or adopt a specific type of music curriculum for its schools. Nor does such requirement appear in the New Jersey statutes.

The Commissioner has in the past consistently recognized the discretionary authority of local boards to determine the type of music program to be offered in local districts. In one such instance, he stated in Frank W. Zimmerman et al., v. Board of Education of the Southern Regional High School District, 1973 S.L.D. 741, aff'd State Board of Education 1974 S.L.D. 1441, aff'd Docket No. A-1682-73 New Jersey Superior Court, Appellate Division, March 18, 1975 (1975 S.L.D. 1167):

> "***The Commissioner is of the opinion that musical offerings set forth by the Board could be more advanced, extensive, and individualized, but such offerings frequently have not been possible in public schools, and their establishment is subject to the discretionary judgment of local boards of education.***" (at 748)

In the instant matter the Board reduced petitioner's employment from full to 3/5ths time. It did not exercise its discretionary authority to completely eliminate the music program and petitioner's employment. In fact, the Board increased petitioner's employment to 4/5ths time early in the succeeding school year.

The hearing examiner does not find that the Board's action in reducing petitioner's employment was in bad faith, punitive, arbitrary, capricious or a subterfuge, however regrettable may be the diminution of its program, and recommends that the Commissioner dismiss that portion of the Petition of Appeal.

Relative to the withholding of petitioner's increment, petitioner contends that the Board was prevented from withholding a salary increment for failure to give written notice with reasons therefor within a period of ten days as required by N.J.S.A. 18A:29-14 which states that:

> "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 in the instant matter was certainly aware of the principal's recommendation for the withholding of his increment due to the receipt of a copy of P-5, which included reasons for such recommendation. This was the memo to the Superintendent on March 30, 1978. On this same date the Superintendent's letters were hand-delivered to petitioner advising him of the anticipated Board action to eliminate his position, and offering him part time employment. The second letter described the possibility of the withholding of his increment. (R-4) The letter advising him of the latter was not received by petitioner according to his testimony, nor was a copy placed in his personnel file. The hearing examiner opines that the testimony of petitioner in this regard is credible.

An analysis of the process of withholding petitioner's increment, in the absence of any recorded discussion by the Board in its minutes, leads to the conclusion that both the Superintendent and the Board simply endorsed the principal's recommendation without any independent consideration.

The hearing examiner finds that the indecision and inaction of the principal relating to the foreign exchange program, which admittedly triggered his recommendation, contributed much to his own embarrassment. The behavior of the principal between his March 20 evaluation conference and March 30 recommendation was not in the interest of fair play or due process.

The hearing examiner finds that the principal acted precipitately in recommending the withholding of petitioner's increment; that the Superintendent acted arbitrarily and

capriciously in his endorsement of the recommendation; and the the Board acted capriciously in its action. It is the recommendation of the hearing examiner that the Board be ordered to compensate petitioner in the amount withheld and to place petitioner on the appropriate step of the salary guide for the 1979-80 school year as though his increment had not be withheld.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in this matter, including the report of the hearing examiner and the exceptions thereto filed on behalf of the Board.

No exceptions have been filed by petitioner. As the Commissioner concurs in the proposed conclusion that the Board acted properly in reducing petitioner's full time position to a 3/5ths position pursuant to N.J.S.A. 18A:28-9 and in the further proposed conclusion that the Board's failure to observe the statutory notice requirement of N.J.S.A. 18A:29-14 does not void the Board's action in withholding petitioner's increment, inasmuch as petitioner was fully aware of all actions affecting him (Marshall v. Southern Ocean County Regional Board of Education, 1978 S.L.D. ___ (decided July 10, 1978)), the Commissioner embraces these conclusions as his own.

Respondent disputes only that portion of the report in which the hearing examiner recommends invalidation of the Board's decision to withhold petitioner's salary increment for the 1978-79 school year. With respect to this issue the Commissioner disagrees with the disposition recommended by the hearing examiner.

It is settled that the decision to withhold the salary increment of a teaching staff member is entrusted to the sound discretion of the employing board of education, and that the Commissioner is not empowered to disturb any such decision unless he is persuaded that no reasonable basis existed to support it. Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960). The Commissioner is unable to so conclude here as good and sufficient reasons were articulated in the principal's memorandum recommending such action (P-5) and nothing in the record suggests that the Board predicated its action on proscribed reasons or on any reason other than those contained in said memorandum. While the Commissioner agrees that the conduct of the principal in failing to disclose his criticisms of petitioner prior to recommending that petitioner's increment be withheld falls far short of ordinary principles of fair play, this unfortunate circumstance does not render vulnerable the Board's decision for which a reasonable basis existed in fact and for which prior notice is not required. Compare N.J.S.A. 18A:29-14 with N.J.S.A. 18A:6-11. Nor is the Board's action upset by the fact that independent consideration by the Board of the reasons for withholding petitioner's increment is not reflected in the Board minutes. The specific requirement that an independent determination of the sufficiency of reasons for contemplated action be reflected in the record pertains to decisions to certify tenure charges, N.J.S.A. 18A:6-11, not decisions to withhold increments. As to these, the Board presumed to have acted responsibly absent an affirmative showing to the contrary. Thomas v. Morris Township Board of Education,

89 N.J. Super. 327, 332 (App. Div. 1965), aff'd 46 N.J. 581 (1966); Quinlan v. North Bergen Board of Education, 73 N.J. Super. 40, 46-47 (App. Div. 1962); Kopera, supra

In view of the foregoing, the Commissioner must reject the hearing examiner's recommendation that petitioner's increment be restored. The action of the Board withholding petitioner's increment is sustained. Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

July 2, 1980

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE TENURE HEARING OF JEFFREY WOLFE, SCHOOL DISTRICT OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY	:	INITIAL DECISION DKT. NO. EDU 0429-80 AGENCY DKT. NO. 378-12/77

APPEARANCES:

For the Complainant, Schenck, Price, Smith & King
(Robert Tosti, Esq., of Counsel)

For the Respondent, Greenberg & Mellk
(Arnold M. Mellk, Esq., of Counsel)

BEFORE THE HONORABLE AUGUST E. THOMAS, A.L.J.

DOCUMENTS IN EVIDENCE AND FOR IDENTIFICATION

P-1 Respondent's Expunged Court Records
P-2 Board of Education Pleadings to Acquire the Expunged Records
P-3 Identification Only
P-4 Identification Only
P-5 Identification Only
R-1 Transcript of Proceedings, February 24, 1978

Exhibit A - Superintendent's Statement of Evidence Under Oath
Exhibit B - Board Resolution

Other documents in evidence but not marked, include the pleadings, and interim decisions of the Commissioner and the State Board of Education

The Board of Education of the Township of Randolph, Morris County (Board), filed three tenure charges with the Commissioner of Education alleging unbecoming conduct by

Jeffrey Wolfe (respondent). The Board certified that the charges, if true in fact, warrant respondent's dismissal, or, reduction of salary. Respondent denies the charges; nevertheless, he was suspended without pay. (Exhibits A, B)

This matter was transferred to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14F-1 et seq., and a hearing on the charges was conducted by an Administrative Law Judge (ALJ) in the OAL, Newark, on February 29, 1980.

The tenure charges are predicated on criminal complaints filed against respondent. On March 9, 1978 and subsequent to his court hearing, the complaints and all charges against respondent were suspended in accordance with N.J.S.A. 24:21-27 by Order of the Superior Court of New Jersey, Law Division, Warren County. By a separate Order of the Superior Court, the complaints against respondent were dismissed on September 15, 1978 upon respondent's successful completion of a pretrial intervention (PTI) program. (N.J.S.A. 24:21-27)

Subsequent to the Court's dismissal of the charges against respondent, the Board pressed its tenure charges pursuant to N.J.S.A. 18A:6-11 and a conference of counsel was held on January 9, 1979. Further litigation on the procedures established for this continuing matter was terminated by decision of the Commissioner and the State Board of Education on February 6 and June 6, 1979, in which respondent's demands were denied.

On application by respondent for continued salary, the Commissioner, on August 10, 1979, concluded that respondent had been overpaid four (4) months salary by the Board. This overpayment was attributed to delays in these proceedings caused by respondent. (N.J.S.A. 18A:6-14) He was directed to repay the amount owed by September 1979, or, lose his entitlement to further salary pending a final decision in this matter. He did not repay the Board. On appeal, the State Board of Education affirmed the decision of the Commissioner.

In its preparation for respondent's tenure hearing, the Board learned that his record, regarding the aforementioned criminal complaint, had been expunged by the Court after his completion of a PTI program. Upon application by the Board on February 25, 1980, Judge Martin Bry-Nildsen, Superior Court, Law Division, Warren County, signed an order releasing respondent's records to the OAL (the Commissioner of Education or his representative) for use in the tenure proceedings. The order also permitted testimony by the investigating authorities, in camera, before the Commissioner or the assigned ALJ in the presence of respondent and counsel for the parties. The order concludes:

> "The Commissioner of Education or his representative shall return all records delivered under this Order to the Prosecutor of Warren County forthwith

> upon the final determination of the tenure charges against Jeffrey Wolfe. During the time that the Commissioner of Education or his representative has custody of such records they shall be deemed sealed and shall not be inspected or released to any person except as provided herein or upon further Order of the Court." (Emphasis added.)

This Superior Court Order releasing the records for use in the tenure proceedings was not appealed, consequently, respondent's argument that the Court erred in releasing the records is not a proper matter to be addressed by the undersigned. It appears that an appropriate action by respondent may have been a timely appeal to the Superior Court, Appellate Division.

Two of the Board's tenure charges were confirmed as fact through the unrefuted testimony of the State Police investigator and the record. (P-1) (Tr. 18-33) The Court Order does not allow the public discussion of the charges or the relevant evidence.

Based on my review of the record (P-1) as it relates to the Board's charges, I FIND that Charges Two and Three are true in fact. (See Transcript) Charge One was abandoned by the Board.

CONCLUSIONS OF LAW

A review of pertinent Education statutes reveals the intent of the legislature in its directive to all State supported schools wherein Boards of Education are required to teach the harmful effects of alcohol and narcotics to their pupils. (N.J.S.A. 18A:35-4) Additionally, the legislature has provided that a teacher may be refused a certificate to teach if unable to satisfy the requirements of N.J.S.A. 18A:26-8 regarding his her understanding of the effects of alcohol and narcotics upon the body. Although the substance in question may not be a narcotic as defined in N.J.S.A. 24:18-2, repealed L. 1970, c. 226, § 47, it is a controlled dangerous substance. (N.J.S.A. 24:21-5) Further, the narcotic definition was applicable as applied to the aforementioned education statutes until the 1970 legislative change in definition from narcotic to controlled dangerous substance. In any event, it cannot be seriously argued that the change in definition thereafter precluded the consideration of the offensive material as demanded in N.J.S.A. 18A:35-4 and N.J.S.A. 18A:26-8. Regarding the aforementioned statutes, it is illogical to conclude that a teacher may ignore the vital societal interest set forth therein by setting a personal example which brings notoriety to himself in his community, and at the same time seek reinstatement. Such a result is tantamount to saying 'do as I say; not as I do.'

The Commissioner stated In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97, 98 that:

> "Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and wilfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner." and,
>
> "The public interest demands the public trust of those teachers entrusted to care for and mold the character and attitudes of the pupils of this State." (Emphasis added.)

The Court stated 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) that:

> "Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way." (Emphasis added.)

Irrespective of respondent's successful completion of a pretrial intervention program, the above findings of fact are evidence of conduct unbecoming a teacher. (N.J.S.A. 18A:6-10) In my view they are sufficiently flagrant to warrant his dismissal from his tenured position.

It is ORDERED, therefore, that respondent be dismissed from his tenured position as of the date of his suspension by the Board.

POST SCRIPT

Respondent's records in this matter have been sealed by Judge Martin Bry-Nildsen who has given specific orders for the use of released records. The released records have been resealed and forwarded to the Commissioner for his review. Judge Bry-Nildsen's Order and correspondence in that regard have also been forwarded to the Commissioner.

The case file includes the moving papers, exhibits, letters, documents in evidence, and the post-hearing Briefs. Many of these records reveal information sealed by the Court; consequently, I have also sealed the case file and the certified shorthand reporter's transcript.

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

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

9 May 80
DATE

August E. Thomas
AUGUST E. THOMAS, A.L.J.

IN THE MATTER OF THE TENURE	:	
HEARING OF JEFFREY WOLFE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF RANDOLPH, MORRIS	:	
COUNTY.	:	
	:	

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

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

Respondent's exceptions contend that Judge August E. Thomas, ALJ erred by not adjudging as improper the Order of Judge Martin Bry-Nildsen, Superior Court, Law Division, Warren County, February 25, 1980 wherein Judge Bry-Nildsen signed an order releasing respondent's record to OAL (the Commissioner of Education or his representative) for use in the tenure proceedings. The Commissioner does not agree. Jurisdiction to review a decision of the Superior Court, Law Division, lies exclusively with the Appellate Division of the Superior Court. Accordingly, neither the Commissioner nor the Administrative Law Judge has authority to make such a determination.

The Commissioner is aware that the quantum of proof required to prove criminal charges differs from that necessary to a matter in a civil action as presently before him. In arriving at this determination the Commissioner must examine the record from the Office of Administrative Law including the record, properly sealed, received by him from OAL as released by separate order of the Superior Court of New Jersey, Law Division, Warren County.

The Commissioner cannot agree with respondent's argument that the case In the Matter of the Tenure Hearing of Arlene Dusel School District of the Borough of Sayreville, Middlesex County, 1978 S.L.D. ____ (decided June 5, 1978) is wholly dispositive of the instant matter. In that matter Dusel admitted to sharing, with a man not her husband, an apartment in which marijuana plants were being grown. There was no evidence produced at the hearing that Dusel was herself a user of marijuana or contributed to the growth of the plants. In the instant case the Commissioner, through an examination of the entire record, finds sufficient reasons for respondent's dismissal. The charges brought by the Board are predicated on criminal complaints involving as they do a substance classed as a

controlled dangerous substance. They were confirmed by the unrefuted testimony of the State Police and are of a serious nature of such magnitude that the Commissioner holds respondent must forfeit his right to tenure in his position.

In making this determination the Commissioner recognizes respondent's successful completion of a pretrial intervention program. The Commissioner notes with approval the laudatory purposes of such programs recognized in part by the Legislature in establishing N.J.S.A. 24:21-27:

> "Main purpose of this section relating to suspended proceedings for a first offender charged with or convicted of use . or possession of a controlled dangerous substance is to provide a method whereby a youthful offender may avoid a lifetime criminal record for possession of a controlled dangerous substance. State v. Grochulski, 133 N.J. Super. 586, 338 A.2d 26 (1975).
>
> "Included among the legislative goals in providing a drug offender with a viable alternative to rehabilitation other than incarceration are the protection of the offender, the prevention of contamination of others and the protection of the public. State v. DiLuzio, 130 N.J. Super. 222, 326 A.2d 78 (1974)."

Despite respondent's participation in the program described above, the Commissioner finds the facts in the matter forming the prerequisite for respondent's participation sufficient evidence of conduct unbecoming a teacher.

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

Accordingly, the Board of Education of the School District of the Township of Randolph is directed to dismiss respondent from his tenured position as of the date of his suspension.

COMMISSIONER OF EDUCATION

July 8, 1980

IN THE MATTER OF THE TENURE :
HEARING OF JEFFREY WOLFE, :
SCHOOL DISTRICT OF THE TOWNSHIP :
OF RANDOLPH, MORRIS COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 8, 1980

For the Petitioner-Appellee, Schenck, Price, Smith & King (Robert Tosti, Esq., of Counsel)

For the Respondent-Appellant, Greenberg & Mellk (Alan G. Kelley, Esq., of Counsel)

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

Jack Bagan, S. David Brandt, Sonia B. Ruby and Susan N. Wilson opposed in the matte

November 5, 1980

Pending N.J. Superior Court

IN THE MATTER OF THE TENURE HEARING OF JOHN DINICH, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Complainant Board, Warren, Goldberg & Berman
(Barbara J. Williams, Esq., of Counsel)

For the Respondent, Joel S. Selikoff, Esq.

This matter has been opened before the Commissioner of Education by respondent, a tenured teaching staff member, who was actively employed by the Willingboro Township Board of Education, hereinafter "Board," until December 1, 1978 when he was suspended with pay from his teaching duties, pursuant to the provisions of N.J.S.A. 18A:25-6, which resulted in the Board taking action on April 23, 1979 in proceeding to file with the Commissioner a tenure charge of unbecoming conduct against him.

Respondent has filed a Motion to Dismiss the Board's tenure charge against him, and requests reinstatement as of April 23, 1979 to his teaching position with pay and other emoluments due him. Said Motion, accompanied by a Memorandum of Law with affidavit and exhibits, sets forth his respective legal arguments on two points of appeal which are as follows:

> "Point I
>
> "Petitioner [Board] failed to take official action in accordance with N.J.S.A. 18A:6-11 regarding certification of tenure charges.
>
> ***
>
> "Point II
>
> "Petitioner's [Board's] failure to alter, cease, or continue respondent on status of suspension, upon certification of charges to the Commissioner, effectively ended any status of suspension previously imposed upon him. Petitioner's [Board's] refusal to restore respondent to active teaching duty and refusal to restore all salaries withheld together with benefits and emoluments, is therefore, unlawful."
> (Respondent's Memorandum of Law, at pp. 3, 5)

The Board opposes respondent's Motion and avers that its action with respect to the certification of the tenure charge against him to the Commissioner was in substantial compliance with the applicable provisions of school law.

Oral argument on respondent's Motion was heard by a representative of the Commissioner on November 5, 1979, at the State Department of Education.

The Commissioner has reviewed the record of the instant matter which has been developed thus far, including the transcript of oral argument. In the Commissioner's judgment a recital of the circumstances and events giving rise to the matter controverted herein is necessary at this juncture in order to arrive at a complete understanding of the respective arguments of the parties to be presented subsequent thereto. The revelant facts adduced from the record are these:

1. On or about December 1, 1978, respondent received the following letter from the Superintendent:

> "Under the provisions of 18A:25-6 you are hereby suspended with pay until the next meeting of the Board of Education. At that time, action will be taken either to restore or remove you as the Board shall deem proper subject to the provisions of chapter[s] [6] and [28] of the New Jersey Statutes [18A, Education] annotated." (C-1)

The authority vested in the Superintendent to take such action is subject to the conditions prescribed in N.J.S.A. 18A:25-6 which reads in pertinent part:

> "The superintendent of schools may, with the approval of the president or presidents of the board or boards employing him, suspend any *** teaching staff member, and shall report such a suspension to the board or boards forthwith. The board or boards, each by a recorded roll call majority vote of its membership, shall take such action for the restoration or removal of such person as it shall deem proper, subject to the provisions of [N.J.S.A. 18A:6-1 et seq.] and [N.J.S.A. 18A:28-1 et seq.] of this Title."

While it is not clear herein whether the Superintendent contacted the Board president prior to taking this action, there is reason to conclude that the Board met in a closed meeting (Executive Session) on December 7, 1978 to discuss this action.

The Commissioner has reviewed that portion of the typed minutes of the Board meeting which were filed by Board counsel as directed by the Commissioner's representative. (C-5) Board counsel has represented to the Commissioner that the Board minutes in question were not verbatim. The Commissioner, while not commenting upon the validity of this exhibit, does note that the discussion pertained to respondent's being accused of choking a seventh grade pupil and, further. that a decision was made to proceed with tenure charges against respondent by obtaining a sworn statement against him together with a notarized letter.

It appears from the record of this matter that respondent, by way of a letter dated December 26, 1978 (Respondent's Memorandum, Exhibit B), attempted to determine his employment status by requesting from the Board those minutes of its meeting of December 11, 1978 in which his suspension was to have been acted upon. However, there is no evidence herein that a reply to this was forthcoming from the Board.

2. Respondent received a letter dated March 1, 1979 from the Board Secretary which reads:

> "Attached hereto is a statement of the evidence against you which was submitted to the Willingboro Board of Education on February 26, 1979.
>
> "At that time the Board voted unanimously that I forward this information to you in accordance with N.J.S.A. 18A:6-10 et seq. You have 15 days in which to respond to the attached evidence and/or statement in connection with this matter.
>
> "Please be advised that you shall continue on suspension until further notice." (C-2)

The Commissioner observes that the attached "statement of evidence" is a five page handwritten, notarized letter to the Superintendent, dated January 2, 1979, written by the parent of a seventh grade pupil alleging that respondent placed his hands around his son's neck and stepped on his foot during an incident on November 30, 1978 which began in respondent's classroom and was continued in the hallway outside. The circumstances which precipitated this alleged incident were also reported in the letter. (C-2, attachment)

3. On April 23, 1979, a letter was sent to respondent by the Board Secretary which advised him of the following:

> "This is to inform you that at a public meeting of the Board of Education held on April 23, 1979 the Board voted to certify charges of 'conduct unbecoming a teacher'

> against you. They authorized the Solicitor to proceed in accordance with State Statutes regarding this matter." (C-4)

The Commissioner observes that the Board minutes of April 23, 1979 reveal the following action was taken against respondent:

> ***
>
> "Item #8.1e
> Certification of Charges.
>
> It is recommended that the Board of Education certify the charge of 'Conduct Unbecoming a Teacher' against JD, a teacher at Hawthorne School and authorize the Solicitor to proceed in accordance with state statutes regarding this matter.***" (C-3)

It is further observed from the above-cited minutes that the Board's action against respondent was not a separate one but was combined with other personnel recommendations which were unanimously approved by one recorded roll call vote of the majority membership of the Board.

4. On August 24, 1979, Board's counsel filed a letter with the Assistant Commissioner of the Division of Controversies and Disputes dated August 16, 1979 which reads:

> "I have been appointed Solicitor for the Willingboro Township Board of Education for the duration of the present Board, replacing Stephen Heath, Esquire, as of July 1, 1979.
>
> "The above referenced matter is one of the matters which I 'inherited' from the former Solicitor.
>
> "It is my understanding upon speaking with [the Assistant Commissioner's secretary]*** that Controversies and Disputes has no record of this case on your docket. I am enclosing a letter of Mr. Heath dated April 26, 1979, which was a part of his file, indicating that a Petition of Appeal and supporting documents were sent to Controversies and Disputes on said date. A letter from Mr. Selikoff in Mr. Heath's file indicates that respondent's counsel did receive a copy of all documents enclosed with said letter.

> "In an effort to remedy the existing situation, I am enclosing copies of the Petition of Appeal as prepared by Mr. Heath, as well as all documents which were originally annexed thereto. Mr. Heath's file does not reflect the existence of a Certificate of Determination. As a result, pursuant to N.J.A.C. 6:25-5.2, I have secured the signature of the Board Secretary on a new Certificate of Determination.***" (C-6)

In the Commissioner's judgment the above letter from the new Board counsel speaks for itself with respect to the fact that there was no record of the tenure charge against respondent having been filed with the Commissioner until August 24, 1979, notwithstanding a copy of a letter dated April 26, 1979 (C-6 attachment) from former Board counsel annexed thereto. Absent any proof to the contrary that the Certificate of Determination was not forwarded to the Division of Controversies and Disputes and, further, was not part of the file of the former Board counsel, a new Certificate of Determination had to be issued by the Board Secretary dated retroactively to April 23, 1979. (C-7)

The Commissioner observes that copies of the documents filed by the Board on August 24, 1979 contained the following:

1. A Petition of Appeal dated April 26, 1979 stating that respondent was charged with unbecoming conduct and the reasons for such charge. It is noted that while the date of suspension is indicated as December 1, 1979 it was, in fact, December 1, 1978.

2. A sworn statement of the charge preferred by the Superintendent dated February 26, 1979 (C-8) with an attached notarized report of the incident dated January 2, 1979 in support thereof.

3. The Certificate of Determination signed, but undated, by the Board Secretary, certifying the Board's action of April 23, 1979. (C-7)

Respondent's legal arguments in this matter, as recited, ante, are grounded on the following aspects of the Board's action:

1. The Board failed to take official action in accordance with N.J.S.A. 18A:6-11 regarding the certification of tenure charges.

Specifically, respondent relies on that portion of N.J.S.A. 18A:6-11 which reads:

> "***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.***"

Respondent argues that the Board minutes of April 23, 1979 (C-3) fail to reflect that it reached these two required determinations. Consequently, respondent maintains that the Certificate of Determination of the tenure charge filed with the Commissioner is erroneous through failure of the Board to take the above-referenced actions at said meeting.

2. The Board's failure on April 23, 1979 to arrive at a determination to suspend respondent with or without pay entitles respondent to reinstatement to his teaching position with all back pay and other emoluments due him.

The Commissioner observes that the statute of reference, N.J.S.A. 18A:6-14, in this regard reads in pertinent part:

> "***Upon certification of any charge to the Commissioner, the board may suspend the person against whom such charge is made, with or without pay***."

Respondent relies on prior rulings of the Commissioner which have held that unless a local board of education takes such action to suspend a teaching staff member with or without pay at the time of the certification of tenure charges, it may not do so thereafter. Respondent asserts that his suspension without pay from April 23, 1979 which was continued by the Board as of the 1979-80 school year is therefore unlawful. See: Joseph Banick v. Board of Education of the Township of Riverside, 1975 S.L.D. 518; In the Matter of the Tenure Hearing of Carmine Perrapato, School District of Garfield, 1974 S.L.D. 525.

The Board, in opposing respondent's Motion, maintains that while there may have been certain procedural errors which it made in certifying the charge of unbecoming conduct against respondent, they are not fatal to the instant proceedings. The Board argues that for the Commissioner to determine otherwise would be placing form over substance.

The Board further maintains that respondent's reinstatement to his teaching position during the pendency of the proceedings with respect to the gravity of the tenure charge against him would not be in the best interest of the pupils with whom he comes in contact or their parents.

It is the Board's position that this matter should proceed to a hearing on the merits it certified against respondent.

The Commissioner has reviewed the record of the matter herein, including the legal arguments presented by counsel. In the Commissioner's judgment the record reveals that the Board, in proceeding to a determination with respect to the certification of its tenure charge against respondent, failed to recognize certain mandated requirements prescribed by statute or State Board regulation regarding the certification of tenure charges against teaching staff members as follows:

1. The Board failed to provide respondent with a copy of the actual tenure charge preferred against him by the Superintendent (dated February 26, 1979) when it issued its statement of evidence to him on March 1, 1979. The Commissioner observes that the Superintendent's sworn statement accompanied the Board's charges filed with the Division of Controversies and Disputes on August 24, 1979.

2. The Board minutes of April 23, 1979 (C-3) reveal that its determination to certify tenure charges against respondent was not taken as a separate action but in conjunction with several other unrelated recommendations, all approved by a single action.

3. Although it is not disputed that respondent was removed from his teaching position without pay as of the date of the Board action on April 23, 1979 (C-3), there is no evidence that the Board took appropriate action at that time to suspend him with or without pay as required by N.J.S.A. 18A:6-14.

4. There is no evidence in the record that the Board on April 23, 1979 acted with respect to arriving at a determination of probable cause to credit the evidence in support of the Superintendent's charge as being sufficient to warrant his removal or reduction in salary. (C-3)

5. The statement of charge of February 26, 1979 (C-8) made by the Superintendent against respondent alleged that he struck a pupil. This charge is not supported in the statement of evidence presented to respondent on March 1, 1979. (C-2, with attachment) The charge indicated that he reviewed reports related to the incident of which respondent was accused, however, such reports were not included in the statement of evidence given to respondent on March 1, 1979.

6. There is insufficient evidence by way of proof of service that the Board filed the tenure charge with supporting documentation upon respondent or the Commissioner at any time between April 23 and August 24, 1979. See N.J.S.A. 18A:6-13. This determination is grounded upon the statement of the new

Board attorney in her letter of August 16, 1979 (C-6) accompanied by the Board's charges filed with the Commissioner on August 24, 1979.

7. The Board filed its tenure charge against respondent in the form of a Petition of Appeal contrary to the provisions of N.J.A.C. 6:24-5.1 et seq. This action not only contributed to procedural error by the Board, but also resulted in its failure to provide the required information to respondent and the Commissioner in a timely manner.

In summary, the above findings and determinations by the Commissioner establish that the Board clearly failed to comply with the specific requirements of N.J.S.A. 18A:6-11, 18A:6-14 and N.J.A.C. 6:24-5.1 when it acted to certify its tenure charge of unbecoming conduct against respondent. In the Commissioner's judgment the Board's actions were sufficiently flagrant both procedurally and substantively to warrant such finding and determination herein.

Accordingly, respondent's Motion to Dismiss the tenure charge against him is hereby granted. Additionally, the Board is directed to reinstate respondent to his former teaching position with all back pay and other emoluments owing and due him.

The Commissioner, is aware of the gravity of the Board's allegation against respondent and hereby grants the Board an opportunity to recast said charge against respondent without prejudice pursuant to law. If the Board so determines to renew the tenure charge against respondent such proceedings must be filed with the Commissioner within 45 days of the receipt of this decision.

COMMISSIONER OF EDUCATION

July 9, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN RE:	)	INITIAL DECISION
CAROL A. CHARLEROY v.	)	OAL DKT. NO. EDU 3499-79
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY	)	AGENCY DKT.NO. 308-7/79A

APPEARANCES:

Stephen E. Klausner, Esq., for Petitioner

Philip H. Shore, Esq., for Respondent

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 transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on October 30, 1979, the issues were identified as follows:

1. Did respondent discriminate against petitioner in failing to grant her a "child-care/maternity leave?"

2. Did petitioner fail to exhaust her administrative remedies by failing to proceed through the grievance procedure?

The following significant procedural events took place in the within matter:

1. The petition was filed with the Commissioner of Education on July 30, 1979.

2. An answer was filed on behalf of respondent on August 16, 1979.

3. An order to show cause was presented to the Court seeking to restrain respondent from terminating or attempting to terminate petitioner's tenure status. This order to show cause was executed on December 12, 1979 with a return date of January 2, 1980.

4. A hearing took place on January 2, 1980, the return date of the order to show cause, at which time the relief sought by petitioner was denied and all restraints were lifted.

5. On January 2, 1980 petitioner filed a motion for summary decision.

6. On January 25, 1980 oral argument was held on petitioner's motion for summary decision which motion was denied by the Court.

7. On March 7, 1980 a hearing took place in the within matter.

8. At the conclusion of the hearing, the Court requested post hearing briefs which were to be submitted by May 9, 1980 on which date the hearing was deemed to be concluded. (See Proposed Uniform Administrative Procedural Rules of Practice 19:65-16.1)

The following stipulations were made at the prehearing conference:

1. Petitioner was a tenured teaching staff member as of May 24, 1979.

2. On May 24, 1979 petitioner applied for a leave of absence without pay for the school year 1979/80.

3. Respondent denied petitioner's request by Board action on June 13, 1979.

At the hearing on March 7, 1980 the following witnesses testified on behalf of petitioner: Martha H. Rue, Dora Law Bennett, Alice Miller, Geraldine S. Nostrand, Catherine Maxham and Carol Charleroy. Charles Argento testified on behalf of respondent.

The following exhibits were marked into evidence:

1. J-1, June 13, 1979 Board meeting minutes and resolution in regard to Carol Charleroy.

2. P-1, October 12, 1954 Board meeting minutes and resolution in regard to Mrs. Hammond.

3. P-2, January 14, 1964 Board meeting minutes and resolution in regard to Mrs. Stackhouse.

4. P-3, Letter dated January 15, 1964 from Mr. Trowbridge to Mrs. Stackhouse.

5. P-4, December 11, 1969 Board meeting minutes and resolution in regard to Mrs. Nostrand.

6. P-5, December 10, 1975 Board meeting minutes and resolution in regard to Mrs. Wright.

7. P-6, February 22, 1978 Board meeting minutes and resolution in regard to Mrs. Miller.

8. P-7, October 10, 1979 Board meeting minutes with attachment of September 30, 1979 Board meeting minutes in regard to Dora Bennett.

9. P-8, Letter dated June 19, 1979 from Mr. Argento to Carol Charleroy.

10. R-1, Letter dated May 24, 1979 from Carol Charleroy to Mr. Argento.

11. R-2, Letter dated January 14, 1979 from Mr. Charleroy to Mr. Argento.

12. R-3, 1977/79 agreement between Cranbury Board of Education and Cranbury Education Association.

At the outset of the hearing, respondent's attorney moved to dismiss the petition based upon the failure of petitioner to exhaust her administrative remedies by failing to proceed through the grievance procedure. (See Issue B of the prehearing order.) After hearing argument of counsel, the Court reserved decision on respondent's motion, which it shall now decide. Based on respondent's position in his brief dated April 23, 1980, the Court is treating respondent's motion as being abandoned or

withdrawn. Respondent has concluded from statements by petitioner's attorney that her claim, in fact, is not premised upon any provision of the collective bargaining agreement. Since respondent has abandoned or withdrawn its motion, this Court shall limit itself to the remaining issue which was identified heretofore.

The first person to testify on behalf of petitioner was Martha H. Rue. She testified that she is presently retired but taught in Cranbury for approximately 33 years. In 1958 Mrs. Rue became pregnant. As a result of her pregnancy, she spoke to the principal of her school and requested a leave of absence beginning January 1, 1959 through June 30, 1959. In fact, Mrs. Rue gave birth on January 25, 1959 and returned to work on September 1, 1959. Mrs. Rue's absence from school was an unpaid leave for which she did not use any sick leave time. Upon being asked by the Court whether or not the Board of Education passed a resolution granting her a leave of absence, Mrs. Rue indicated that it was just an understanding between herself and the principal. Her understanding was that she was being granted "...a maternity leave without pay for the purpose of bearing her child." (Tr. 48) Mrs. Rue emphasized that her leave of absence was not to take care of herself but was to take care of her baby who was born prematurely. Mrs. Rue did not nurse her child.

Dora Law Bennett who next testified on behalf of petitioner indicated she is presently employed by the Cranbury Board of Education as a health and physical educator. In September, 1979, she requested a 60-day pregnancy leave of absence from November 1, 1979 to January 1, 1980. Mrs. Bennett who testified that she gave birth to her baby on December 7, 1979 asserted she was not paid during her leave of absence nor did she use any of her accrued sick leave days. Upon being questioned by the Court, Mrs. Bennett indicated that her leave was specifically for her physical condition and was not to take care of the baby after his birth. In fact, Mrs. Bennett returned to work after she recuperated from giving birth.

Alice Miller testified that she was employed by the Cranbury Township Board of Education for approximately ten years as a sixth grade English teacher. In 1971, Mrs. Miller requested a three week leave of absence to accompany her husband on a trip to Europe, which request was granted. Later, in approximately 1978, she requested a sabbatical leave of absence for study, which was granted by the Board.

Dr. Geraldine S. Nostrand testified that she is employed by the Cranbury Township Board of Education as a teacher of social studies. In 1977 she was granted a leave of absence by the Board to take a trip around the world for U.N.E.S.C.O. Also, in 1972 she was granted a leave of absence for travel to eastern Africa. Upon being questioned by the Court, Dr. Nostrand indicated that both of her trips provided her with experiences which she was able, upon her return, to share with the students and faculty.

Catherine Maxham who testified that she is a French teacher at the Cranbury Elementary School indicated that she, over the years, has requested days off to travel in France. She took different amounts of time in different years for such travel and was not paid for such days off. Mr. Argento normally granted all of her requests. On one occasion,Mr. Argento permitted her to take off five days to go to Spain. Upon being questioned by the Court, Mrs. Maxham testified that she shared her travel experiences in France and Spain in her classroom upon her return.

Carol A. Charleroy, the petitioner, who is a teacher for the Cranbury Board of Education, testified that she is certificated as an elementary education teacher and a special education teacher. During the spring of 1979 petitioner testified that she was pregnant and requested a leave of absence. On May 24, 1979 she requested a leave of absence from the Board of Education for good cause, the good cause being child-care. She gave birth on June 2, 1979. On June 13, 1979, at the Board of Education meeting, the Board denied petitioner's request for a leave of absence. This denial was set forth in a letter dated June 19, 1979 (P-8) (Tr. 76) which states:

> "...In response to your letter of June 14, 1979, be advised that the Board of Education denied Mrs. Charleroy's request for a leave of absence without pay for child care for three basic reasons:
>
> (1) The long-term leave request was made under the contract provision, temporary leaves of absence (art. 16), which treats short-term day leaves;
>
> (2) The Teacher/Board contract makes no reference to long-term child-care leave; and
>
> (3) The concept of child-care leave is an item currently being discussed in Teacher/Board negotiations.
>
> Yours truly,
>
> s/Charles Argento"

Mrs. Charleroy testified additionally that she worked until June 1, 1979, the day before she gave birth to the baby.

Mrs. Charleroy indicated that she has been breast feeding her child since the child's birth. She indicated that the breast feeding was recommended by the doctor since the baby was doing well on mother's milk. As a matter of fact, petitioner testified that she is still breast feeding the baby.

On cross-examination, Mrs. Charleroy testified that her baby has no medical disability and that she was not required to breast feed the baby.

Upon being questioned by the Court, Mrs. Charleroy testified that her absence from work is for the purpose of child-care rather than recovering from her pregnancy. (Emphasis added)

After the completion of petitioner's testimony, petitioner rested.

Counsel for respondent moved for what this Court deems to be an involuntary dismissal pursuant to New Jersey Court Rule 4:37-2(b). The Court, after hearing arguments of counsel and based on the landmark decision of Dolson v. Anastasia, 55 N.J. 2 (1969) which indicates that the judicial function on a motion for an involuntary dismissal is quite a mechanical one wherein the trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence but only with its existence, viewed most favorably to the party opposing the motion, denied respondent's motion.

Charles Argento, the administrative principal employed by the Cranbury Board of Education testified on behalf of respondent that he has been employed in that capacity for ten years. He indicated that the Cranbury Board of Education received a letter from Carol Charleroy on or about May 24, 1979 which states in pertinent part:

> "...Dear Members of the Board:
>
> According to article XV1 (temporary leaves of absence), 'other leaves of absence with pay may be granted by the board for good cause.' I am, therefore, requesting a leave of absence without pay for the school year 1979/80. The purpose of this leave is to provide child-care for my infant..." (R-1)

As a result of the Board's receiving the aforementioned letter, Mr. Argento remarked that on June 13, 1979 the Board refused to grant petitioner's request. He said that as a result of the June 13, 1979 Board action, Thomas Charleroy, husband of Carol Charleroy, submitted a letter to him requesting in writing the reasons why the Board did not grant the leave (R-2), which letter was submitted by the witness on June 19, 1979 setting forth therein the reasons why she was denied a leave of absence. (P-8)

Mr. Argento next submitted into evidence the collective bargaining agreement for the years 1977/79 between the Cranbury Township Board of Education and the Cranbury Education Association (R-3). It should be noted at this time that under Article XVl entitled "Temporary Leaves of Absence", the following language is contained:

> "It is recognized that while the following leaves are available when necessary, the typical professional employee will not expect to take every possible leave date.
>
> A. As of the beginning of the school year, teachers shall be entitled to the following temporary non accumulative leaves of absence with full pay each school year:
>
> 1. Up to four (4) days leave of absence for personal, legal, business,household or family matters which require absence during school hours. Notification to the teacher's principal for personal leave shall be made at least three (3) days before taking such leave (except in the case of emergencies) and the notifier for such leaves shall not be required to state the reasons for taking such leaves other than that he is taking it under this section. Personal day (s) will not be granted for the purpose of extending any scheduled school calendar holiday.
>
> 2. Up to three (3) days per year for observance of religious holidays, where said observance prevents the teacher from working on said days.

3. Other days for the purpose of visiting other schools or attending meetings or conferences of an educational or professional nature, with prior approval of the principal.

4. Time necessary for appearances in any legal proceeding connected with the teacher's employment or with the Cranbury School system or in any other legal proceeding when subpoened as a witness only.

5. In the event of death in the immediate family an allowance of up to a total of five (5) days per year shall be granted. Immediate family may be considered a teacher's spouse, child, son-in-law, daughter-in-law, parent, father-in-law, mother-in-law, brother, sister, brother-in-law, sister-in-law, or any relative or friend domiciled with employee.

6. In the event of serious illness in the immediate family an allowance of up to a total of five (5) days per year shall be granted.

7. In the event of a death of any relative or close friend, an allowance of one (1) day shall be granted up to a total of 2 days per year.

8. Other leaves of absence with pay may be granted by the Board for good cause." (R-3 at page 23-24)

Additionally, Article XVll deals with sabbatical leaves. Other than sick leaves under Article X, no other relevant temporary leaves of absence are set forth in the agreement. (Parenthetically, it is abundantly clear and undisputed that the type of leave requested by petitioner is not specifically set forth in the collective bargaining agreement.)

Mr. Argento testified additionally that there are no provisions in the agreement for a pregnancy leave. However, the Board of Education has granted sick days when requested to teachers who are pregnant upon the presentation of evidence of same. The witness testified that there are no provisions in the contract with regard to child-care leave. Mr. Argento indicated that teachers are entitled to sick leave days pursuant to Article X, paragraph F at page 13. (R-3)

The witness indicated that at the request of the Board's attorney, he reviewed the minutes of the Board of Education and ascertained that no child-care leave of absence had ever been granted to a male employee. Mr. Argento asserted that the first collective bargaining agreement between the Board of Education and the Cranbury Education Association went into effect in 1968. He indicated that the present Board, which denied petitioner's request for a child-care leave, was unaware of the leave of absence that was granted to Mrs. Rue in 1959. (Tr. 115)

On cross-examination, however, Mr. Argento indicated that as of December, 1979 or January, 1980, after the Board had denied petitioner's request, it became aware of the prior Board's granting Mrs. Rue a leave of absence.

Additionally, on cross-examination, Mr. Argento testified that although there was no provision in the collective bargaining agreement allowing it, he granted Bette Danser eight school days leave for a belated honeymoon while her husband was president of the Cranbury Board of Education. Also, he indicated that there is nothing in the collective bargaining agreement which would allow Mrs. Maxham to take from five to ten school days off as a temporary leave of absence. (Tr. 125) The collective bargaining agreement, according to Mr. Argento, also has no provision which would have allowed Mrs. Nostrand to take her trip with U.N.E.S.C.O. or to take 14 school days off to visit east Africa. Mr. Argento testified additionally that Mrs. Miller's leave of absence for a trip to Europe with her husband was not permitted under the collective bargaining agreement. Mr. Argento also asserted that Mrs. Bennett was granted a maternity leave of absence by the Board in September, 1979, which leave is not provided for in the collective bargaining agreement. He concluded that the Board has no policy relating to maternity leaves of absence.

It should be noted from the exhibits in evidence that the Board took the following actions with regard to requested leaves of absence:

1. At the Board of Education meeting on June 13, 1979, the Board denied the child-care leave requested by Mrs. Carol Charleroy (see J-1) for the reasons indicated. J-1, #4 states:

"We have received a request for a one-year child-care leave of absence without pay from Carol Charleroy. The personnel commitee recommends that the Board deny the requested child-care leave for two reasons: (A) our Teacher/Board contract makes no reference to such leave, and (B) the concept of child-care leave is an item currently being discussed in Teacher/Board negotiations." (J-1)

2. The October 12, 1954 Board minutes indicate the following:

"Mrs. Hammond's request for a leave of absence beginning at the spring vacation and continuing through the end of the school year was granted. Mrs. Hammond's request was made to enable her to take a trip to Europe. The Board's instructed the secretary to deduct substitutes' pay from Mrs. Hammond's salary and pay her the balance." (P-1)

3. According to the January 14, 1964 Board of Education minutes, the following action took place:

"Mr. Trowbridge also reported that Mrs. Stackhouse had requested a year's leave of absence due to her husband's transfer to Maryland." (P-2)

4. The following letter was sent by John E. Trowbridge, Principal, to Mrs. Herbert Stackhouse, dated January 15, 1964 which reads as follows:

"Dear Jenny:

Your letter requesting a leave of absence was received today and will be read to the Board of Education at its next meeting to convey your words of appreciation to them.

At its meeting last night the Board of Education acted upon your oral request for a leave of absence as related to them by me. The Board unanimously voted to grant you a one year leave of absence effective at the close of the school year, provided that the Board is notified no later than March 1, 1965 if you expect to return to teach at the school. ..." (P-3)

5. According to the Board minutes of December 11, 1969, the following action took place:

"Mr. Ernest read a letter from Mrs. Nostrand requesting a leave of absence with pay so she could take part in a trip sponsored by U.N.E.S.C.O. to Europe and Asia from March 3, to April 6, 1970. Mr. Ernest moved and Mr. Wright seconded a motion that in appreciation of her length of service and the educational value of the trip that Mrs. Nostrand be granted a leave of absence for this period. The motion was unanimously approved by the Board." (P-4)

6. According to the December 10, 1975 Board of Education minutes, the following action took place:

"Mrs. Gartner moved that Mrs. Alicia Wright, 5th Grade Teacher, be granted a leave of absence, for medical purposes for the period January 2 to January 30, 1976. This motion seconded by Mr. Dawson was unanimously adopted." (P-5)

7. According to the Board of Education minutes of February 22, 1978, the following action was taken:

"Mr. Argento requested that the Board approve Mrs. Alice Miller's upper grade English teacher, request for a sabbatical leave for the first half of the 1978/79 school year for the purpose of attending graduate school and working toward a Master's Degree in Curriculum Development and Supervision. (She plans to take at least 12 credits during her sabbatical and plans to complete the degree requirements during the summer of 1979.) Mr. Altieri moved that Mrs. Miller be granted a sabbatical leave in accordance with the Board's contract with the Cranbury Education Association. This motion seconded by Mr. Dawson, was unanimously adopted." (P-6)

8. According to the October 10, 1979 Board of Education minutes, the following action took place:

> "Mr. Argento recommended that Mrs. Dora Bennett, physical education teacher, be granted a 60-day maternity leave of absence, without pay, beginning November 1, 1979, and ending approximately January 1, 1980. Mr. Chido moved that Mrs. Bennett be granted a leave of absence, as indicated. This motion, seconded by Mrs. O'Brien was unanimously adopted." (P-7)

After the completion of Mr. Argento's testimony, the respondent rested.

Petitioner moves for a directed verdict in her favor based on McDonnell-Douglas Corp. v. Green 411 U.S. 792, 36 L. Ed. 2d. 668, 93 S. Ct. 1817 (1973) and Lige v. Town of Montclair, 72 N. J. 5 (1976). In McDonnell-Douglas, supra, the court indicates that in a trial under Title VII of the Civil Rights Act of 1964 (42 U.S.C.S. Sections 2000e et. seq.) once a plaintiff proves a prima facie case, the burden then shifts to the defendant to articulate some legitimate, non-discriminatory reasons for the plaintiff's rejection. In the instant case, from the entire record, assuming arguendo that petitioner established a prima facie case, there is sufficient evidence before this Court, especially from the testimony of petitioner's witnesses on cross-examination and on answers to questions by the Court, which demonstrates some legitimate, non-discriminatory reasons for the respondent granting some leaves of absences and denying petitioner's request. Accordingly, petitioner's motion which was heretofore reserved is hereby denied.

Based upon a careful consideration of the aforegoing, including a careful review and study of the pleadings, the exhibits, the stipulations, the tesimony of the witnesses, the demeanor and credibility of the witnesses, and the inherent probability of their testimony, this Court FINDS:

1. Petitioner was a tenured teaching staff member for the Cranbury Board of Education as of May 24, 1979.

2. On May 24, 1979 petitioner applied for a leave of absence without pay for the school year 1979/80.

3. Respondent denied petitioner's request on June 13, 1979.

4. Petitioner was seeking and applied for a child-care leave of absence. (Emphasis added)

5. Petitioner did not request a maternity leave of absence from the Board.

6. Petitioner did not apply for a sick leave of absence.

7. The purpose of petitioner's request for a leave of absence was so that she could provide child-care for her infant.

8. Subsequent to the birth of petitioner's baby, petitioner began to and has continued to breast feed the child.

9. There is no medical disability that the child has which requires petitioner to breast feed the baby.

10. There is no proof before this Court that the respondent has ever granted a child-care leave of absence to any male employees.

11. Between January 1, 1959 and June 30, 1959 Martha H. Rue, a teacher employed by the Cranbury Board of Education, was given a maternity leave of absence without pay for the purpose of bearing her child.

12. After the filing of the petition in the instant matter, the Board granted Dora Law Bennett, a health and physical educator employed by the Cranbury Board of Education, a 60-day pregnancy leave of absence without pay for the purpose of recuperating from giving birth to her child.

13. Mrs. Bennett's leave of absence was not for the purpose of child-care.

14. In 1971, Alice Miller was granted a leave of absence without pay for a period of three weeks in order to accompny her husband on a trip to Europe.

15. In approximately 1978, Alice Miller was granted a sabbatical leave of absence for study.

16. In 1972, Dr. Geraldine S. Nostrand was granted a leave of absence for travel to eastern Africa.

17. In 1977, Dr. Nostrand was granted a leave of absence to take a trip around the world with U.N.E.S.C.O.

18. Upon Dr. Nostrand's return after each trip, she shared her experiences with the students and faculty.

19. Catherine Maxham, a French teacher employed by the Cranbury Board of Education, was granted days off without pay by Mr. Argento, the administrative principal, in order to travel to France. Upon her return from her travels, she would share her experiences with her classes.

20. Petitioner gave birth to her child on June 2, 1979.

21. Petitioner worked for the Cranbury Board of Education until June 1, 1979, the day before she gave birth to her baby.

22. The specific request by petitioner for a leave of absence was set forth in a letter by her dated May 24, 1979 which states in pertinent part:

"According to Article XVl (Temporary Leaves of Absence), 'other leaves of absence without pay may be granted by the board for good cause.' I am, therefore, requesting a leave of absence without pay for the school year 1979/80. The purpose of this leave is to provide child-care for my infant. ..."

23. The Board of Education denied petitioner's request for a child-care leave of absence for the following reasons:

    A. The long-term leave requested was made under the contract provision, Temporary Leaves of Absence (Artile XVl) which treats short term day leaves;

    B. The Teacher/Board contract makes no reference to long-term child-care leave;

    C. The concept of child-care leave is an item currently being discussed in Teacher/ Board negotiations.

24. The 1977/79 collective bargaining agreement between the Cranbury Township Board of Education and the Cranbury Education Association contains no provision for a child-care leave of absence. (Emphasis added)

25. The 1977/79 collective bargaining agreement between the Cranbury Township Board of Education and the Cranbury Education Association contains no provision for a maternity leave of absence.

26. The type of leave requested by petitioner, namely, a child-care leave of absence, without pay, is not provided for under any provision of the collective bargaining agreement aforementioned.

27. The leave of absence granted Martha Rue is remote in time to the instant leave requested by petitioner, and, if in fact, the Board of Education granted what might be considered a child-care leave of absence to Martha Rue in 1959, this one incident does not establish a pattern of discrimination.

28. The leaves of absence granted to Mrs. Bennett, Mrs. Miller, Dr. Nostrand and Mrs. Maxham are different in kind than that requested by petitioner.

29. This Court, based on the preponderance of the credible evidence, finds no unevenhandedness in treatment by the respondent in granting leaves of absence to Martha Rue, Dora Bennett, Alice Miller, Geraldine Nostrand and Catherine Maxham, and denying a child-care leave of absence to petitioner.

The issue raised in this case seems to be one of first impression in the State of New Jersey. Does respondent's failure to grant petitioner a child-care leave of absence constitute sexual discrimination in violation of Title VII of the 1964 Civil Rights Act, [1] N.J.S.A.18A:6-6 and N.J.S.A.10:5-1 et seq? (Emphasis added)

At the outset, it is important to distinguish between three different types of pregnancy-related leaves of absence which a teacher might request: 1. Sick leave; 2. Maternity leave; and 3. Child-care leave. The legal basis for the aforementioned types of leave is found in either federal or state statutes, court cases or board of education policies.

In reviewing the law dealing with pregnancy-related leaves of absence, it is noted that the relationship between an employer's policy regarding maternity leaves and pregnancy benefits to federal and state fair employment practices statutes is fairly recent. The applicability of Title VII (Title VII of the Civil Rights Act of 1964 - 42 U.S.C.A. Sections 2000e et seq.) to an employer's maternity policies was addressed by the United States Supreme Court in General Electric Co. v. Gilbert, 429 U.S. 125, 50 L.Ed. 2d.343 (1976).

1. Although state courts have concurrent jurisdiction with federal district courts over cases arising under Title VII actions, (See Bennon v. Bd. of Governors of Rutgers, etc., 413 F. Supp. 1274, 1279 (D. N.J. 1976); Endress v. Brookdale Comm. Coll., 144 N.J.Super. 109, 132 (App.Div. 1976); and Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 301 (Ch. Div. 1970))the petitioner herein, by virtue of bringing her sex discrimination action in a state court, should have first filed a charge with the Equal Employment Opportunity Commission as required by 42 U.S.C.§ 2000e-5(e) which is a jurisdictional prerequisite for bringing a Title VII case in a federal court. New Jersey State Courts lack jurisdiction over a Title VII claim as to which the plaintiff has not filed a timely charge before the E.E.O.C. and fulfilled the other requirements under that Act which are prerequisite to bringing suit in federal court. Peper v. Princeton University Board of Trustees, 77 N.J. 55, 74-76 (1978).

In Gilbert, supra,the exclusion of pregnancy-related disabilities from an employer's disability plan was held not to constitute sex discrimination in violation of Title Vll. Justices Brennan and Marshall, dissenting, contended that the exclusion of pregnancy-related disabilities constituted purposeful sex discrimination and not, as the majority asserted, a neutral assignment of risks. The dissent would have accorded greater deference to the E.E.O.C. guidelines interpreting Title Vll.

The decision in Gilbert, supra, was soon followed by Nashville Gas Co. v. Satty, 434 U.S. 136, 54 L. Ed. 2d. 356 (1977). There the denial of accumulated seniority to an employee upon her return from pregnancy leave was held to be sex discrimination violative of Title Vll. The Court held that the practice adversely affected the status of women on account of sex and imposed a substantial burden on women because of their sex. However, the Court held that the denial of sick leave pay to a pregnant employee was not per se violative of Title Vll (and so proof of discriminatory effect would be crucial).

A recent congressional enactment has effectively overruled the court's position on disability benefits and Title Vll. On October 31, 1978 the Pregnancy Discrimination Act, Pub. L. 95-55, 92 Stat. 2076, codified at 42 U.S.C.A. 2000e went into effect. The aforementioned law provides that discrimination on the basis of sex or because of sex shall include, "because of or on the basis of pregnancy, childbirth or related medical conditions." 92 Stat. 2076 (1978). Moreover, the act provided that pregnancy shall be treated like other temporary disabilities for all employment-related purposes (including fringe benefits). The legislative history of the aforementioned act clearly indicates that the law's treatment of pregnancy-based distinctions as per se violations of Title Vll was a direct response to Gilbert, supra. H.R. Rep. No. 95-948, 95th Cong., 2d. Sess., reprinted in 1978 U.S.Code Cong. and Ad. News 4751. Essentially, the act is a reestablishment of the law, as interpreted by the lower federal courts and E.E.O.C. before the Supreme Court opinion in Gilbert, supra.

A few states have probed the legitimacy of employment policies regarding pregnancy-related leaves of absence in light of their own civil rights statute. The denial of accumulated sick leave to a teacher for the period of actual physical disability due to childbirth was held to be unlawful sex discrimination in violation of Massachusetts Law Against Discrimination. School Committee of Braintree v.Massachusetts Comm'n against Discrimination, 19 E.P.D. 9110, 386 N.E. 2d. 1251 (Mass. 1979); School Committee of Brockton v.Massachusetts Comm'n against Discrimination, 19 E.P.D. 9089, 386 N.E. 2d. 1240 (Mass. 1979).

Similarly, the Supreme Court of Maine held that a school board's refusal to allow the use of accumulated sick leave with pay toward the period of physical disability occasioned by pregnancy constituted unlawful discrimination in violation of Maine's Human Rights Law. Murray v. Waterville Board of Education, 17 E.P.D. 8575, 390 A 2d. 516 (Me. 1978). Recently, the Supreme Court of New Jersey has also taken this position. Castellano v. Linden Board of Education, 158 N. J. Super, 350 (App. Div. 1978), aff'd 79 N. J. 407 (1979).

In Castellano, supra, which was a case heard before the Division of Civil Rights, the court held that a tenured teacher was subjected to sexual disrimination by application of the board's policies of a mandatory one-year maternity leave and refusal to allow her to use her accumulated sick leave for her absence due to childbirth. As stated by the court at page 412-413:

> "A woman giving birth to a child becomes physically disabled and unable to attend to her teaching duties for that reason. It is discriminatory not to allow her to use her accumulated sick leave during that period of temporary disability, when it can be used for any other period of absence due to physical disability."

Furthermore, as stated by the Appellate Division, 158 N.J.Super. at 361-2:

> "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. 1 Par. 5.' Levitt & Sons, Inc., v. Div. Against Discrimination, etc., 31 N. J. 514, 524 (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 salutory purpose would not be furthered by excluding pregnancy-related absences merely because the condition may not be an illness by strict definition. ..."

Accordingly, in New Jersey, it seems crystal clear that a pregnant teacher has an entitlement to utilize accumulated sick leave days for an absence occasioned by childbirth and a failure by a Board of Education to allow same would constitute discrimination on account of sex, in violation of our State Civil Rights statute.

Courts in other states have reached the same conclusion as the New Jersey Supreme Court did in Castellano, supra. In Anderson v. Upper Bucks County Area Vocational Technical School, 373 A 2d. 126 (Pa. Cmwlth. 1977), the court held that a school's refusal to apply accumulated sick leave toward a teacher's absence from employment because of pregnancy, was a violation of that state's Human Rights Law. The court was unpersuaded by either the approach taken in Gilbert, supra, or by the fact that the contract expressly provided for maternity leave without pay. Additionally, a school board's refusal to credit accumulated sick days towards a teacher's pregnancy leave was the subject matter of the decision in School Board of Unified School District No. 1 v. Wisconsin State Dept. of Industry, 18 E.P.D.8902 (Wis. Cir. Ct. 1979). Although the contract therein expressly provided for unpaid maternity leave, the court held that the practice of providing disability income on accumulated sick leave basis for virtually all disabilities but pregnancy on its face constituted sex discrimination in violation of Wisconsin's Fair Employment Act.

An employment policy which granted disability benefits to employees but excluded disabilities related to pregnancy/ childbirth was the subject of judicial scrutiny in Franklin Manufacturing Co. v. Iowa Civil Rights Comm'n 18 E.P.D. 8666, 270 N.W. 2d. 829 (Iowa 1978). The Iowa Supreme Court held that the denial of disability benefits to a woman incapacitated by pregnancy, and who was on maternity leave, was violative of the state's civil rights code. Accord, Brooklyn Union Gas Co., v. New York State Human Rights Appeal Board, 41 N.Y. 2d. 84, 390 N.Y.S. 2d. 884, 359 N.E. 2d. 393 (Ct. App. 1976). The court therein expressly rejected the proposition that Gilbert, supra, and the federal cases interpreting Title VII were binding upon a state court construing a state statute. Instead, the court held that the exclusion of all pregnancy-related conditions from the group insurance plans was a clear violation of state law.

The basis for most maternity leaves of absence is found in the negotiated collective bargaining agreement between the Board and the Teachers' Association. Normally, maternity leaves are provided to allow the mother of the newborn baby a period of time to regain her health. This type of leave of absence is distinguished from a sick leave wherein the pregnant

mother is determined to be disabled for a period of time immediately prior to and after the birth of the baby and from a child rearing or child care leave of absence which is designed to enable the mother to care for the newborn baby. It is clear that a maternity leave of absence may be granted in accordance with the terms and conditions of any existing collective bargaining agreement. Additionally, it seems also clear that a Board of Education may grant, in its discretion, a maternity leave of absence, absent any collective bargaining agreement, so long as such a leave is made available to male and female employees on a non-discriminatory basis. See Demes v. Pascack Valley Reg. Bd. of Ed. (Div. on Civil Rights, Februrary 5, 1976). Dkt.No.EB36SE-7728.

Finally, the third category of pregnancy-related leaves of absence may be characterized as a child-care or child-rearing leave. (Emphasis added). Again, some collective bargaining agreements between the board and a teacher's association have prescribed this type of leave. In the instant case, it should be noted that the collective bargaining agreement (R-3) contains no provisions for either a maternity leave of absence or a child-rearing or child-care leave of absence (See R-3 Article XVl, page 23-24). No New Jersey case to date has interpreted our civil rights statute, N.J.S.A. 10:5-1 et seq., as requiring a Board of Education to grant a child-care leave for breast feeding purposes. Or, putting it another way, no New Jersey court has held that the failure to grant a woman a child-care leave of absence for the purpose of breast feeding her child constitutes sex discrimination. In only one reported case has a state interpreted its civil rights statute as requiring an extended post child-birth leave. Bd. of Sch. Directors of Fox Chapel v. Rossetti, 17 E.P.D. 8483, 387 A 2d. 957 (Pa. Cmwlth. 1978). In that case, a school board's refusal to extend a teacher's leave to allow her to breast feed her child constituted a discriminatory practice in violation of state law. The court therein reasoned that this was a natural extension of childbirth and, under the circumstances there existing, was necessary to postpone allergic reactions in the infant. However, the aforementioned case was recently reversed by the Pennsylvania Supreme Court on December 21, 1979. See Bd. of School Dir. Fox Chapel School Dist. v. Rossetti, 21 E.P.D. 30,540 411 A 2d. 486 (Pa. 1979). As the court stated a p. 13,899:

> "The evil which the Pennsylvania Human Relations Act seeks to overcome is the dissimilar treatment on the basis of sex of persons similarly situated. But appellee has in no way suggested that male teachers have been or would be granted discretionary leaves of absence while females were denied them. To the contrary, appellee has been treated no differently than any male teacher would be who had to remain at home to care for a physically or emotionally disabled newborn infant. ..."

As a result of the Pennsylvania Supreme Court's reversing the lower court's decision in Rossetti, supra, there is now no case directly on point which would support petitioner's position. Applying the reasoning of the Supreme Court's decision in Rossetti, supra, it seems clear in the instant case that there has been no showing of disparate treatment. Petitioner was treated no differently than any male teacher. Petitioner has showed no instance in which any male teacher was granted a child-care leave of absence.

In the leading case of Peper v. Princeton University Board of Trustees, supra, the court indicated in a sex discrimination case, that it is the disparate treatment of the female plaintiff as compared to her male peers which would constitute a prima facie showing of sex discrimination. As the court stated at page 84;

> "We conclude that in the context of this suit, Peper's burden of demonstrating a prima facie case required her to show that similarly situated males were promoted while she was not."

Applying the reasoning of Peper, supra, to the instant matter, it seems clear that petitioner had the burden of establishing that other males who had become the fathers of newborn babies were granted child-care leaves of absence while she was not. See also Gilchrist v. Board of Education of Haddonfield, 155 N.J. Super. 358, 366 (App. Div. 1978).

This court is unable to conclude that there has been any gender-based discrimination which would be a violation of N.J.S.A. 10:5-1, et. seq. Nor does this court find that the action of the Board in the instant case in denying petitioner a child-care leave of absence submitted petitioner to an unevenhanded or disparate treatment. From the proofs before this Court, no pattern of discrimination has been established.

The normal rule is that the burden of proof by a preponderance of the credible evidence is on the complaining party in a discrimination case. See Jackson v. Concord Company, 54 N. J. 113, 119 (1969) and Jones v. College of Med. and Dent. of N. J. Rutgers, 155 N. J. Super. 232, 238 (App. Div. 1978) cert. den. 77 N.J. 482 (1978). The proper test for a prima facie case is set forth in McDonnell-Douglas Corporation v. Green, supra. See also Peper, supra, which has applied that test in New Jersey cases. Although McDonnell-Douglas, supra, dealt with racial minorities, the test set forth therein is:

> "The complainant in a Title Vll trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing,(1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and(4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. (411 U.S. at 802, 93 S. Ct. at 1824, 36 L. Ed. 2d. at 677)

As stated in Peper, supra, the tests in McDonnell-Douglas, supra, are equally applicable to other forms of employment discrimination, such as discrimination against females based on sex. See Meyer v. Mo. State Highway Commission,567 Fd. 2d. 804, 808 (8 Cir. 1977) cert. den. 435 U.S. 1013, 98 S. Ct. 1888, 56 L. Ed. 2d. 395 (1978). Consequently, assuming that plaintiff meets these requirements, the burden then shifts to defendant to come forward with a legitimate non-discriminatory reason for employees' rejection.

Although this Court seriously questions whether petitioner, using the test set forth in McDonnell-Douglas, supra, and Peper, supra, has established a prima facie case, assuming arguendo, however, that petitioner has met the test, it seems clear from the entire record that legitimate non-discriminatory reasons are evident in each of the cases where respondent granted a non-child-care leave of absence. Although, this Court questions the relevancy of petitioner's proofs of other women being granted other types of leaves of absence, and although this Court feels that in a sex discrimination case the disparate, unevenhanded treatment would involve male employees, this Court, nevertheless, CONCLUDES that the leaves of absence granted to Dora Bennett, Alice Miller, Geraldine Nostrand and Catherine Maxham were based on reasonable, non-discriminatory grounds.

Based on the status of the existing law, it is CONCLUDED that respondent's failure to grant petitioner a child-care leave of absence did not constitute sex discrimination in violation of Title Vll of the 1964 Civil Rights Act, N.J.S.A. 18A:6-6 or N.J.S.A. 10:5-1 et seq. Additionally, respondent violated no provision of the Collective Bargaining Agreement between the Board and the Cranbury Teachers' Association. Nor, did the Board act arbitrarily, capriciously or unreasonably under the existing circumstances.

Accordingly, it is ORDERED that the petition be and is hereby dismissed with prejudice.

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

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

May 13, 1980
DATE

Robert P. Glickman
ROBERT P. GLICKMAN, A.L.J.

Receipt Acknowledged:

mh

CAROL A. CHARLEROY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed in a timely manner by petitioner pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Petitioner excepts to the conclusion of Judge Robert P. Glickman, A.L.J. that respondent's failure to grant petitioner a child-care leave of absence did not constitute sex discrimination. The Commissioner does not agree with Judge Glickman wherein he finds that the Board's action denying a child care leave of absence did not constitute unevenhanded or disparate treatment.

The Commissioner notes from the record that the Board has no leave of absence in its policy as requested by petitioner nor does it have anything in its policy for a maternity leave of absence. The Commissioner finds nothing in the collective bargaining agreement to explain the basis for the granting of leaves variously given other staff members, as to a teacher for her belated honeymoon while her husband was president of the Cranbury Board of Education, to another for a trip around the world with UNESCO and to yet another teacher who on different years was allowed time to travel to France or Spain. The Commissioner finds such action by the Board taken in the absence of written policy to be inconsistent in nature, based on noncompelling educational reasons and in some cases smacking of nepotism and paternalism.

The Commissioner, finding no sound, consistent basis exhibited by the Board in granting prior leaves of absence, determines the Board's action in the present case in denying petitioner's request was patently arbitrary.

Accordingly, the decision herein is set aside and the Board is herewith directed to accord petitioner her request for a year's leave of absence without pay due to maternity for the purpose of rearing her child.

COMMISSIONER OF EDUCATION

July 10, 1980

CAROL A. CHARLEROY,

PETITIONER-APPELLEE,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 10, 1980

For the Petitioner-Appellee, Stephen E. Klausner, Esq.

For the Respondent-Appellant, Golden, Shore, Zahn & Richmond (John P. Boyle, Esq., of Counsel)

The State Board of Education reverses the Commissioner's decision for the reasons expressed by the Administrative Law Judge. Request for oral argument is denied.

Susan Wilson and Jack Bagan opposed in the matter.

December 3, 1980

Pending N.J. Superior Court

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