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NEW JERSEY
SCHOOL LAW DECISIONS
Indexed

January 1, 1975 to December 31, 1975

vol. 1

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Carolyn Henry,

Petitioner,

v.

Board of Education of the City of Wildwood, Cape May County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ms. Carolyn T. Henry, *Pro Se*

For the Respondent, Edwin C. Bradway, Esq.

Petitioner, a resident of the City of Wildwood, alleges that the Board of Education of the City of Wildwood, hereinafter "Board," acted improperly and illegally in its appointment of a teaching staff member and in its reappointment of its medical inspector on May 8, 1973, because two members of the Board were allegedly in conflict of interest resulting from their respective relationships with the appointees. The Board denies the allegation and asserts that its action regarding the two appointments was proper and legal. The Board seeks dismissal of the instant matter on the grounds that petitioner fails to state a claim upon which relief should be granted.

There being no dispute as to the essential facts, the matter is referred to the Commissioner of Education for adjudication on the basis of the record, including Briefs, affidavits, and documentary evidence.

The facts herein are set forth as follows:

At the regular meeting held May 8, 1973, the Board appointed Joseph Sladek, hereinafter "teacher," as a teaching staff member at the Wildwood High School effective September 1, 1973. The teacher is the son of a member of the Board, Augusta G. Sladek, with whom he resides. Mrs. Sladek resigned her membership on the Board as of April 16, 1974. (R-4) At the same regular meeting the Board reappointed its medical inspector for the 1973-74 school year. The medical inspector, Dr. Norman Gordon, is the husband of Hilda Gordon who was a member of the Board. Mrs. Gordon resigned her membership on the Board as of December 10, 1973. (R-3) Dr. Gordon had served as medical inspector in the school district for sixteen consecutive years prior to his reappointment by the Board for the 1973-74 school year.

Petitioner argues that the family incomes of Mrs. Sladek and Mrs. Gordon have been enhanced by the Board's actions in contravention of the statutory proscription of *N.J.S.A.* 18A:12-2 which provides that:

> "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board."

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The Board asserts in its affidavit as filed by the Board Secretary (R-5) that the two named Board members did not participate in the discussion or the voting which resulted in the subsequent appointment of their immediate relatives at the regular Board meeting held May 8, 1973. It was stated further that Mrs. Gordon was not present at the May 8, 1973 regular meeting.

Petitioner maintains in her Brief that a conflict of interest exists and continues regardless of whether a Board member participates directly in such appointments. Petitioner asserts that the Board members in question become involved in a conflict of interest when they participate in decision-making on the Board of such matters as negotiating terms and conditions of employment, including salaries, as well as other areas of decision-making by the Board including reemployment of staff, teacher tenure, transfer and promotion.

Petitioner relies on *Griggs v. Princeton Borough,* 33 *N.J.* 207, 219, which states in pertinent part:

> "***The question is whether there is a potential for conflict, not whether the public servant succumbs to the temptation or is even aware of it."

The Board maintains that in *Griggs* the "***employees of Princeton University, 4 in number, as members of the governing body and subordinate bodies, did in fact, vote for an ordinance which could have redounded to the benefit of the University through a real estate holding company of said University.*** The Court indicated approval of the actions of the two members who abstained and found the ordinance defective because of the voting and acting upon the ordinance by the other two members who were affiliated with the University.***" (Board's Brief, at p. 3)

Petitioner emphasizes the basic responsibility of a board of education to its constituency in citing *Cullum v. North Bergen Board of Education,* 27 *N.J. Super.* 243, 248 (*App. Div.* 1953); *Zell v. Borough of Roseland,* 42 *N.J. Super.* 75, 83 (*App. Div.* 1956); *Piggott v. Borough of Hopewell,* 22 *N.J. Super.* 106, 112 (*Law Div.* 1952); *Aldom v. Borough of Roseland,* 42 *N.J. Super.* 495, 503 (*App. Div.* 1956), and furthermore asserts that no man can serve two masters whose interests are in conflict.

The Deputy Assistant Commissioner of Controversies and Disputes communicated with both parties on July 2, 1974, and again on July 12, 1974, in an effort to obtain agreement on the mootness of the instant matter arising from *In the Matter of the Election of Dorothy Bayless to the Board of Education of the Lawrence Township School District, Mercer County,* 1974 *S.L.D.* 595, reversed by the State Board of Education 603.

The Board, in its letter of July 9, 1974, held that the matter was closed. However, by a letter dated July 19, 1974, petitioner argues that *Bayless, supra,* does not render the instant matter moot and asserts that further guidance is needed from the Commissioner as to whether a board member subsequent to his election to a board of education may appoint "*** *any close* family member to a position in the school district***." (P-1)

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The Commissioner has carefully considered the arguments set forth by both parties in this matter and at this juncture he observes that the State Board of Education in *Bayless, supra,* held that Mrs. Bayless' membership on the Lawrence Township Board of Education did not constitute a direct and continuing conflict of interest notwithstanding the fact that her husband was a full-time employee of the Board of Education. In arriving at its determination, however, the State Board cautioned that its decision to reverse an earlier determination rendered by the Commissioner in this matter "*** pertains to the case of Mrs. Dorothy Bayless solely and that any future controversy involving a conflict of interest shall be reviewed on its own merits." *Bayless, supra*

In the instant matter the Commissioner is constrained to observe that the charges as set forth in petitioner's original allegations in conjunction with any issues argued by both parties herein are determined to be moot by virtue of the resignations of Mrs. Gordon (R-3) and Mrs. Sladek (R-4) as members of the Board.

It has been well established that the Commissioner does not decide moot issues. See *Sharon Ann Pinkham v. Board of Education of the Borough of South River et al., Middlesex County,* 1974 *S.L.D.* 1103; *Patrick E. Tedesco v. Board of Education of Lodi, Bergen County,* 1955-56 *S.L.D.* 69; *R. McAllister v. Board of Education of the Borough of Lawnside, Camden County, et al.,* 1951-52 *S.L.D.* 39; *Robert M. Rodgers v. Board of Education of the City of Orange, Essex County,* 1956-57 *S.L.D.* 50; In *Moss Estate, Inc. v. Metal and Thermit Corporation,* 73 *N.J. Super.* 56, 67 (*Chan. Div.* 1962), the Court said:

> "***It is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally functioning in the abstract, and 'to decide only concrete contested issues conclusively affecting adversary parties in interest.' *Borchard, Declaratory Judgments* (2*d ed.* 1941), pp. 34-35 ***."

Accordingly, there is no necessity for the Commissioner to rule on the remaining points raised in the Board's Motion to Dismiss. The Petition is dismissed.

COMMISSIONER OF EDUCATION

January 13, 1975

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In the Matter of the Special School Election Held in the School District of Rancocas Valley Regional High School District, Burlington County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Dietz, Allen, Radcliffe & Sweeney (Bayard Allen, Esq., of Counsel)

A special election was held on December 3, 1974, seeking approval of the voters of the Rancocas Valley Regional High School District for the Board of Education to purchase, or condemn, a tract of land in the Township of Lumberton and a tract of land in the Township of Southampton, and to expend therefore moneys not exceeding $445,000 and to issue bonds in the principal amount of $450,000. The election resulted in a tie vote with 249 votes being cast for, and against, the proposal.

At a special meeting of the Board held December 5, 1974, the Board voted to apply to the Commissioner of Education for a recount since it believed that an error had been made in the counting of the paper ballots.

Pursuant to a letter request from the Board Secretary under date of December 6, 1974, the Commissioner directed the Assistant Commissioner of Education in charge of Controversies and Disputes to conduct a recount of the ballots cast. *N.J.S.A.* 18A:14-63.3 The recount was conducted by an authorized representative of the Commissioner at the office of the Burlington County Superintendent of Schools, Mt. Holly, on December 31, 1974.

As a result of the recount of the uncontested ballots, with five ballots voided by the Commissioner's representative and seven ballots challenged and referred to the Commissioner, the tally stood as follows:

Question	At Polls
Yes	248
No	238

There were no absentee ballots, and three other ballots were completely blank. Three ballot stubs were included in this extra count; however, neither the ballots nor the stubs had any effect on the totals of the poll list or the actual ballots counted.

A significant error was made in reading and reporting the votes cast in the Mt. Holly polling place. The tally sheet shows that 99 votes were cast for the proposal and 145 votes were cast against the proposal; however, the tally sheet Grand Total column erroneously indicates that 150 votes were cast against the proposal. A correction of this obvious error, therefore, eliminates five "No" votes and they will be subtracted in the final count.

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The table below summarizes the total ballot count at the close of the special election and after the recount by the Commissioner's representative:

Number of names on poll list	498
Number of ballot stubs counted	498
Number of votes cast	498

Therefore, there is no discrepancy in the totals reported at the original count, or in the totals after the recount.

After the recount, the unofficial totals were as follows:

	Yes	No
Mt. Holly	99	144
Lumberton	58	64
Eastampton	32	5
Westampton	16	20
Hainesport	43	5
TOTALS	248	238

An examination of the contested ballots reveals that four of the five voided ballots had marks in the NO area and one ballot had a mark in the YES area, all of which were unacceptable to the Commissioner's representative.

Of the seven challenged ballots, five had questionable marks in the NO squares and two had questionable marks in the YES squares.

Assuming *arguendo* that the four voided ballots marked NO and the five challenged ballots marked NO could be counted in the grand total, the total NO vote would be only 247, and the referendum would pass; therefore, an analysis of the twelve aforementioned ballots is unnecessary.

It is recommended therefore, that the Commissioner reverse the determination made after the special election on December 3, 1974, and declare that the referendum has passed.

* * * *

The Commissioner has read the report of his representative, and examined the five voided ballots and the seven challenged ballots. He agrees with the report as submitted and adopts its findings, conclusions and recommendations as his own; therefore, no need has been established for an analysis of the twelve questionable ballots.

Accordingly, the Commissioner determines that the proposal was approved by the majority of the votes cast.

COMMISSIONER OF EDUCATION

January 16, 1975

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Edwin B. Robinson,

Petitioner,

v.

Robert B. Goodwin, Superintendent of Schools, and Board of Education of the Borough of Runnemede, Camden County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Edwin B. Robinson, *Pro Se*

For the Respondents, Hyland, Davis and Reberkenny (Arthur J. Abramowitz, Esq., of Counsel)

Petitioner, a former resident of the Borough of Runnemede, Camden County, and the parent of a pupil enrolled in the Runnemede public schools during the school year 1971-72, avers that his child's school placement in a special class during that school year constituted the denial of an entitlement to a suitable education. He demands judgment to this effect and compensation for the loss of education. Petitioner further requests that all files or records of any kind with respect to his child's enrollment in the Runnemede schools be furnished to him. Respondents maintain that petitioner's child, hereinafter "J.R.," was afforded a suitable educational program and advance a Motion to Dismiss the Petition of Appeal.

Oral argument on the Motion to Dismiss the Petition was conducted on September 9, 1974 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. Briefs have been submitted by the parties. The report of the hearing examiner is as follows:

Petitioner represents himself *pro se* in this matter in his claim against the Superintendent of Schools in the Borough of Runnemede, hereinafter "Superintendent." This official is joined in defense of the Petition by the Board of Education of the Borough of Runnemede, hereinafter "Board," as the result of a Motion by respondents at the oral argument (Tr. 7) and a subsequent ruling by the hearing examiner.

The instant Petition was filed on May 21, 1974 against the Superintendent, and it sets forth detailed and lengthy allegations against him and against other school officials. The Petition alleges that petitioner requested a first grade placement for J.R. in September 1971; however, the requested placement was refused and J.R. was placed in a special class in a neighboring school district. While J.R. attended this class during the 1971-72 school year "***no progress of any kind was made there because it wasn't a school in the true sense of the word but rather like a custodial place for retards.***" (Petition of Appeal, at p. 3) School officials proposed an evaluation of J.R. in September

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1972 which was refused by petitioner because he was told he was not entitled to be furnished the reports of the examination. Thereafter, petitioner took J.R. out of the Runnemede schools and placed her in a private school "***at a cost of $50. a month***." (Petition of Appeal, at p. 5) J.R. made great academic progress in this private school from September 1972 to February 20, 1974. On February 25, 1974, petitioner again made application for regular school placement in Runnemede and was refused. Petitioner avers that such refusal was an injustice because "***of all the proved evidence of academic progress which I obtained at a private school at $50. a month for 16 months.***" (Petition of Appeal, at p. 13) In support of this avowal he also cites certain portions of an evaluation report done by a psychologist whom petitioner employed in March 1974. Accordingly, petitioner requests the Commissioner for:

> "*** consideration of compensation for the loss of education of my child for the school year from September 1971 to June 1972 *** and also for the loss of the present school year [1973-74] now ending ***;
>
> "*** all files of records of any kind wherever located that pertain to this child's 'school history' *** in order that corrections can be made of any possible inaccuracies that may exist.***" (Petition of Appeal, at p. 16)

Respondents' Motion to Dismiss is grounded primarily in an argument that these requests or prayers for relief are improper and that such relief may not be granted by the Commissioner. They assert that petitioner's stated claim for a consideration of compensation is, in effect, a claim for damages, which the Commissioner lacks the authority to grant. In support, they cite *Jack Noorigian v. Board of Education of Jersey City, Hudson County,* 1972 *S.L.D.* 266 wherein the Commissioner said:

> "*** The Commissioner holds, therefore, that claims for the payment of interest, of fees and other expenses, or of damages other than lost earnings, is not within the contemplation and meaning of the statute.***" (1972 *S.L.D.* at p. 273)

Respondents further assert, with respect to petitioner's second prayer for relief, summarized *ante,* that petitioner is not entitled to have access to any records for the purpose of review and possible correction. In support of this assertion they cite *N.J.A.C.* 6:28-2.4(f) which states:

> "Only those personnel and approved agencies directly concerned with determining the classification or the making of recommendations for placement, and those directly involved in the educational program of the individual child shall have access to the classification records."

Respondents set forth certain other arguments with respect to petitioner's present residence which the hearing examiner concludes are not specifically germane to the Motion.

Petitioner argues that his stated claim is not for damages but for compensation. He further argues that *Noorigian, supra,* supports his position

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that the Commissioner may award such compensation since in *Noorigian* the Commissioner did award compensation for days when the petitioner was absent because of illness and for which he had not been paid. In petitioner's view:

> "*** the Commissioner can direct the respondent to pay to the petitioner a financial award as a penalty (to be used for tutoring costs) for the refusal to give my child a chance to learn to read at age eight and therefore a wilful refusal to give my child an education.***" (Petitioner's Brief in Opposition to Motion to Dismiss, at p. 3)

Thus, the issues posed for determination by the Commissioner in the Motion to Dismiss may be concisely stated:

> 1. May the Commissioner afford the relief of an award of compensation if it is proven as a result of a full plenary hearing that a child has been denied a suitable educational program.
>
> 2. Is there authority for the Commissioner to direct respondents to furnish petitioner "files of records of any kind" with pertinence to the education of J.R.

If the answer to the first question is in the affirmative, it is evident that a full plenary hearing would be required with respect to the quality and suitability of the education afforded J.R. in the period 1971-72. If, however, the answer to that question and to the remaining question is a negative one, the Motion to Dismiss must be granted.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the matter, *sub judice,* the report of the hearing examiner and the exceptions thereto filed by both parties pursuant to *N.J.A.C.* 6:24-1.16.

Petitioner, herein, unilaterally withdrew J.R. from the Runnemede public schools and enrolled her in a private school. He now seeks an order requiring the Board to reimburse him for tuition he has paid to the private school and a further award of money which he alleges to be reasonable and necessary in order that he may provide for future compensatory tutoring of his daughter.

The Commissioner has consistently maintained in similar matters that he will not order a board of education to pay for private school tuition and transportation which is unilaterally contracted by a parent. This position was succinctly stated in *Parents, on behalf of "G.S." v. Board of Education of the Borough of Rockaway, Morris County,* 1974 *S.L.D.* 637 wherein it was said:

> "***Petitioners could have availed themselves of *** [the public school] placement for G.S., but they clearly chose not to do so. Instead, they chose to continue the enrollment of G.S. in the Wilson School's special

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education program. While petitioners have every right to make such a choice, they cannot expect the Board to be required to reimburse them under these circumstances.***" (at p. 643)

Similarly the Commissioner stated in *Malcolm Woodstein and Ina Woodstein v. Board of Education of the Township of Clark, Union County,* 1970 *S.L.D.* 220 that:

"***While parents have a right to make a choice between private and public school placement, they do not have a right to require that public school districts pay tuition costs to private schools in the event that this is the parental choice. See *R.v. The Board of Education of the Town of West Orange,* 1966 *S.L.D.* 210; also *Lange v. Hi-Nella Board of Education,* 1959-60 *S.L.D.* 65. In the *R.v. West Orange* decision, *supra,* the Commissioner said at p. 212:

" 'It is clear that R was *** placed in private school on her parents' volition and with no involvement on the part of respondent. Under such circumstances the financial obligations incurred by that action devolve solely upon the parents and not upon the Board of Education.'***" (at p. 224)

See also *Parents of "K.K." v. Board of Education of the Town of Westfield, Union County,* 1971 *S.L.D.* 234, 240.

Nor will the Commissioner in the instant matter order the Board to compensate petitioner for private school tuition for which he unilaterally contracted.

Petitioner's prayer for compensatory damages is likewise without merit. *In the Matter of "T" et al. v. Board of Education of the Borough of Tenafly, Bergen County,* 1974 *S.L.D.* 420 the Commissioner found that a proper special education classification had been made. However, he elaborated further that:

"***Even assuming, *arguendo,* that the Commissioner is wrong in his judgment of this child's classification, the Commissioner can find no authority of law whereby, under those circumstances, he could order the Board to pay an award of monetary damages to the parents of 'T' for expenditures for educational services they have privately obtained rather than availing themselves of the instructional program provided by the school district. The words of the New Jersey Superior Court in *Jackson v. Concord Company,* 101 *N.J. Super.* 126 (*App. Div.* 1968) are particularly applicable to the question of whether an administrative agency of the State has the authority to confer an award of monetary damages. The Court stated the following conclusion:

" '***The award of damages to a person suffering monetary loss as the result of the unlawful action of a third party has traditionally been limited to judicial proceedings. Power to award damages will

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> not be extended to an administrative body unless the legislative purpose to grant such power is plainly indicated.***' (at p. 133)***" (at p. 429)

Accordingly, in the light of such clear law, the Commissioner determines that he may not order the Board to award damages to petitioner. See also *Celina G. David v. Board of Education of the Borough of Cliffside Park, Bergen County,* 1967 *S.L.D.* 192; *Fred Bartlett, Jr. v. Board of Education of the Township of Wall, Monmouth County,* 1971 *S.L.D.* 163; and Jack *Noorigian v. Board of Education of Jersey City, Hudson County,* 1972 *S.L.D.* 266.

Petitioner further prays that the Board be ordered to make available to him the complete classification data and records which pertain to J.R. In a similar matter, *"D.N., Sr., et al. v. Board of Education of the Borough of Closter, Bergen County,* 1974 *S.L.D.* 1332, the Commissioner spoke regarding the board's policy restricting the access of parents to such records. He said:

> "***[T]he Board's policy was properly in accordance with the rules of the New Jersey State Board of Education (*N.J.A.C.* 6:3-1.3) and the statutory provision that such regulations be promulgated pursuant to *N.J.S.A.* 18A:46-11 and *N.J.S.A.* 18A:36-19. Absent a showing that the Board or its agents acted in arbitrary or capricious matter, the Commissioner determines that the Board's refusal to allow petitioners to see and copy the entire classification file of D.N., Jr. was in accord with its own policy and the pertinent laws and regulations of the State of New Jersey.
>
> "Petitioners argue that *N.J.S.A.* 47:1A-1 *et seq.*, mandates the relief they seek. Again the Commissioner does not agree. This statute states clearly that:
>
> > " 'The Legislature finds and declares it to be the public policy of this State that public records shall be readily accessible for examination by the citizens of this State, *with certain exceptions,* for the protection of the public interest.' (*Emphasis supplied.*)
>
> "Similarly, *N.J.S.A.* 47:1A-2 recognizes that there is limitation to the right of access to records wherein it says:
>
> > " 'Except as otherwise provided in this act or by any other statute, resolution of either or both houses of the Legislature, executive order of the Governor, rule of court, any Federal law, regulation or order, *or by any regulation promulgated under the authority of any statute* or executive order of the Governor, all records which are required by law to be made, maintained, or kept on file by any board *** shall, for the purposes of this act, be deemed to be public records.***' (*Emphasis supplied.*)
>
> "The Legislature made no move when it promulgated this 'Right to Know Law' to revise the provisions of *N.J.S.A.* 18A:46-11 or *N.J.S.A.*

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18A:36-19 which give the New Jersey State Board of Education the right to establish regulations relative to educational services. Until such time as they may be changed, they remain an extension of the effective laws of this State.

"This being so, the Commissioner finds no violation of petitioners' constitutional, statutory, nor common law rights. Nor does he find the Board's denial of access to be violative of the federal Family Educational Rights and Privacy Act of 1974 (Pub. Law 93-380, August 21, 1974) since this Act seeks only to regulate the distribution of federal funds rather than directly control the existing practices in the several States.***"

(at p. 1339-1340)

The Commissioner is constrained, however, to advise the parties that proposed new regulations regarding right of access of parents to pupil records are currently being advertised by the State Board of Education. In the event that these are promulgated in their present form, it appears that petitioner would thereafter be entitled to examine the contents of the classification file of J.R.

The Commissioner is further constrained to state that, while boards of education in New Jersey are not directly bound by the provisions of Public Law 93-380, *ante*, they may not with impunity disregard the provisions thereof relative to disclosure, especially if they are the recipients of Federal funds. Therefore, boards in such matters should seek the competent advice of legal counsel in order that their action may be taken in the best public interest.

There being no relief which is within the authority of the Commissioner to grant petitioner, it is found that the Petition herein is without merit. Accordingly, it is dismissed. However, petitioner may at any time enroll J.R. in the public school district in which he resides. Thereupon, the child study team of that district shall evaluate J.R. to determine whether the processes of education and maturation warrant a reclassification.

COMMISSIONER OF EDUCATION

January 20, 1975

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John J. Kane,

Petitioner,

v.

Board of Education of the City of Hoboken, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Thomas P. Calligy, Esq.

For the Respondent, Robert W. Taylor, Esq.

Petitioner, a vice-principal employed by the Board of Education of the City of Hoboken, Hudson County, hereinafter "Board," alleges that the Board's failure to appoint him to one of three vacant positions as a principal was arbitrary, capricious, and unreasonable. He requests relief in the form of an order of the Commissioner of Education declaring the three positions of principal vacant, and appointing him to one of the three principalships. The Board denies petitioner's allegations and requests that the matter be dismissed and a judgment entered against petitioner for costs, including legal fees.

Hearings in this matter were conducted on September 10, 1973, and January 3, 1974 at the office of the Hudson County Superintendent of Schools by a hearing examiner appointed by the Commissioner. Thereafter, the Board filed a Brief on the issues of the jurisdiction of the Commissioner and the application of the doctrine of laches as an equitable defense. The report of the hearing examiner is as follows:

Petitioner was first employed by the Board in 1935 as a classroom teacher. He continued in that position until 1956 when the Board appointed him a vice-principal assigned to the Wallace School, containing grades kindergarten through sixth. Petitioner remains in that position and that school today. (Tr. II-4)

On September 1, 1971, the Superintendent issued a communication (P-1) to all staff members which stated that applications would be accepted for various job vacancies including the position of elementary school principal. The last two paragraphs of that communication state:

> "Applicants must follow directions as posted, provided in the rules regarding certification from the State Department of Education.
>
> "Closing date for submission of applications is September 24, 1971. All supportive materials, i.e. transcripts, certificates, etc., must be complete and in individual personnel file by September 24, 1971."

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Following the issuance of this communication (P-1), the Superintendent began receiving applications for the various vacancies listed, including petitioner's application for the position of elementary school principal. Petitioner testified that his complete application, including his elementary school principal certificate, was filed with the Superintendent's office by September 24, 1971, as required by the Superintendent's communication. (P-1) (Tr. II-4-5) It is stipulated by the parties that petitioner is the holder of a secondary school principal certificate. (Tr. I-16)

On January 10, 1972, the Superintendent submitted a written recommendation (P-4) to the Board for the appointment of three applicants to the three vacant positions of elementary school principal. Petitioner was not included among the three who were recommended. The Board accepted the Superintendent's recommendations and appointed principals for the Wallace School, the Joseph F. Brandt Junior High School, and the Daniel S. Kealey School. Each of the preceding appointments became effective February 1, 1972. (P-3) As was stated, the Wallace School houses grades kindergarten through sixth, while the Joseph F. Brandt Junior High School houses grades kindergarten through ninth, and the Daniel S. Kealey School houses grades kindergarten through eighth. The Superintendent testified that the Joseph F. Brandt Junior High School houses elementary grades kindergarten through sixth, in addition to junior high school grades seventh through ninth. (Tr. I-5-6)

Petitioner contests this specific action of the Board appointing three applicants to positions as elementary school principals. Petitioner asserts that his application was timely and included his certificate as an elementary school principal. He alleges that the successful candidate for the Brandt Junior High School principalship did not possess a certificate as an elementary school principal. It is stipulated by the parties that the junior high school principal has held a secondary school principal certificate since February 1969, and was issued an elementary school principal certificate in April 1972. (Tr. I-16) Petitioner argues that, because the junior high school principal did not hold the elementary school principal certificate on September 24, 1971, the last day for filing complete applications (P-1) and was not issued that certificate until April 1972, the Board's action appointing him as an elementary school principal for the Brandt Junior High School effective February 1, 1972, must be set aside.

Petitioner avers that the school laws, Title 18A, Education, require a person to have an appropriate certificate in hand in order to properly hold a position. (Tr. II-18) Finally, petitioner argues that the Board violated the provisions of its policy (J-1) which had been negotiated with the Hoboken Administrators' and Supervisors' Association (Tr. II-24) of which petitioner is a member. Specifically, petitioner contends that Article Six of the policy (J-1) regarding appointments and promotions was violated by the Superintendent and the Board because he was not appointed to one of the three vacant principalships. Article Six of the policy provides as follows:

***

"6. Appointment and promotion to administrative and supervisory

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positions shall be made with the following criteria *influencing* selection:

"a) Certification
"b) Seniority
"c) Experience
"d) Personal characteristics which determine capability to respond to particular demands of the position.
"e) Consideration shall be given to personnel in the existing administrative and supervisory structure.***"

(*Emphasis supplied.*)

It is stipulated that petitioner and the three successful candidates met the criterion of subsection d, "Personal characteristics." (Tr. I-20) Petitioner argues that his qualifications in regard to the criteria set forth in subsections a, b, c, and e are superior to those of the three successful candidates; therefore, he should have been appointed to one of the three principalships.

In regard to the seniority criterion of Article Six of the policy (J-1), petitioner grounds his argument on the fact that he has been employed in the School District since 1935 as a classroom teacher and since 1956 as a vice-principal. In comparison, petitioner points out that the junior high school principal has been employed by the Board since 1961, the principal of the Kealey School has been employed since 1955, and the principal of the Wallace School since 1950. Accordingly, says petitioner, his seniority of employment by the Board is greater than that of the three candidates who were recommended by the Superintendent and appointed by the Board.

In regard to subsection c, "Experience," petitioner points out that he has been a vice-principal since 1956, while the junior high school principal has been a vice-principal since 1969. The Wallace School principal was appointed a supervisor of instruction for grades seven through nine in 1962. In 1967 he was appointed director of a Title III, Elementary Secondary Education Act (E.S.E.A.) project, and in 1969 he was appointed director of a Title VII, E.S.E.A. project. In 1971 the Wallace School principal was appointed an administrative supervisor in the Superintendent's office, after which he was appointed to the principalship of the Wallace School.

The principal of the Kealey School was appointed director of pupil activities in 1963. He was appointed vice-principal in 1965, followed by his appointment as director of pupil aid in 1968. Subsequently, he was appointed principal of the Daniel S. Kealey School.

Petitioner argues that his experience qualifies him for the appointment he seeks in this matter particularly in view of the junior high school principal's limited experience as a vice-principal. Petitioner testified that he has more experience, seniority, and overall qualifications than all other persons who applied for the elementary school and junior high school principalships. (Tr. II-26-27)

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Prior to filing the instant Petition of Appeal before the Commissioner, petitioner exhausted his available remedies at the local level by filing a grievance with the Superintendent and, finally, was granted a grievance hearing before the Board on March 21, 1972. A transcript of that hearing was submitted into evidence. (P-8) The grievance was denied by the Board on January 4, 1973.

The Superintendent testified that, in his judgment, the junior high school principal, while not the holder of an elementary principal certificate on September 24, 1971, was, nevertheless, eligible for such a certificate on that date. (Tr. I-48) The Superintendent determined that he was properly certified for the position of principal of a kindergarten through ninth grade school because he possessed a secondary school principal certificate and was eligible for an elementary school principal certificate.

The hearing examiner has determined from the Commissioner's official records that the principal of Brandt Junior High School was issued the regular secondary school principal certificate in February 1969, and he was issued his regular principal certificate in April 1972 although he was, in fact, eligible for such a certificate in June 1969.

Prior to February 1969 when certification rules (*N.J.A.C.* 6:11 *et seq.*) were revised, there were separate certificates for school principals at the secondary and elementary levels. Since the revision of the rules the two separate certificates have been consolidated into one regular "principal" certificate. This certificate is now required for the position of principal at either the elementary or secondary level. *N.J.A.C.* 6:11-10.4

The Superintendent testified that he had carefully considered all the criteria set forth in Article Six of the policy (J-1), when he made his recommendations to the Board. (Tr. I-81-82) The Board President testified that the Board considered the provisions of the policy when it made the three disputed appointments. (Tr. II-47) Furthermore, the Board President testified that the personality of the junior high school principal was a factor which assisted his candidacy. (Tr. II-47)

In its Brief, the Board asserts that the Commissioner's jurisdiction to hear and determine controversies and disputes is limited to those arising under school law. The Board states that, since petitioner relies on Article Six of a policy which was negotiated (J-1) as the basis for his claim, the instant matter does not arise under the school laws. The hearing examiner does not agree. Boards of education have the legislative authority to adopt policies for their own operation (*N.J.S.A.* 18A:11-1) which may be negotiated between boards and associations. Boards have the authority to appoint teaching staff members (*N.J.S.A.* 18A:27-1), including principals. (*N.J.S.A.* 18A:1-1) It is clear that the appointment of a principal by a local board of education is a matter arising under school law.

Secondly, the Board argues that the relief requested would require the Commissioner to substitute his judgment for that of the local Board which, it contends, is beyond the authority of the Commissioner.

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The hearing examiner points out that the Commissioner has repeatedly relied upon the guidance of the Court as set forth in *Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 329, wherein it was held:

> "*** We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence.***" [cases cited] (at p. 332)

Accordingly, the Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious, or unreasonable. See *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County,* 1973 *S.L.D.* 167; *James Mosselle v. Board of Education of the City of Newark, Essex County,* 1973 *S.L.D.* 197, aff'd State Board of Education January 9, 1974; *Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County,* 1973 *S.L.D.* 217, affirmed State Board of Education, March 6, 1974.

Thirdly, the Board avers its appointment of three candidates as elementary school principals was consistent with its policy, particularly Article Six, *ante.*

Finally, the Board argues that petitioner should be barred from seeking relief because the period of time which has elapsed since the Board acted upon the appointments to the time petitioner filed the instant Petition on February 28, 1973, has been excessive. The hearing examiner points out that the Board did not issue its decision on petitioner's grievance until January 4, 1973, so that any delay in the filing of the instant matter cannot be attributable to petitioner.

The issues to be decided herein are:

1. Was the Board's appointment of the junior high school principal legal and proper.

2. Was the Board's action appointing three candidates, other than petitioner, to principalships arbitrary, unreasonable or discriminatory.

In regard to the first issue set forth above, the Superintendent testified that in his judgment the candidate for the junior high school principalship was eligible for the regular principal certificate on September 24, 1971, the deadline for filing applications. This judgment was confirmed from the Commissioner's own records that, as of June 1969, the junior high school principal was eligible for the certificate. The Superintendent's authority to determine whether the candidate was eligible for the principal certificate is described in *N.J.A.C.* 6:11-3.5(a). This rule of the State Board of Education provides that:

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"(a) The local superintendent of schools shall ascertain if professional staff members are properly certificated***."

To hold that a candidate would be precluded from appointment to a position of principal because he did not have *in his possession* a specific certificate, while acknowledging he was eligible for it, would place form over substance.

As to the second issue, the hearing examiner finds that the Board did not improperly discriminate against petitioner. The testimony of the Superintendent and the Board President discloses that the appointment of the three successful candidates was made on the basis of the qualifications of each appointee.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and reviewed the exceptions filed by petitioner.

The hearing examiner correctly states that it would be a matter of placing form over substance to hold that an otherwise eligible candidate should be barred from consideration for promotion to the position of principal because he did not have the required certificate in his possession, while acknowledging that the candidate was eligible for the certificate. Although teaching staff members may not serve in positions for which they are not certified, *N.J.S.A.* 18A:27-2 and *N.J.A.C.* 6:11-10.5, in this instance the successful candidate's eligibility for proper certification must be deemed sufficient for his appointment as a principal by the Board.

The record is barren of any proof of discriminatory or unreasonable motives on the part of the Board. Boards have the responsibility to appoint the most able and competent persons to fill teaching staff positions, including all administrative and supervisory positions. This is a basic responsibility through which boards of education provide what, in their judgment, is the most thorough and efficient education program possible for their pupils. See *Lynch et als. v. Board of Education of the Essex County Vocational School District, Essex County,* 1974 *S.L.D.* 1308.

Petitioner has not shown that the Board acted outside its authority, nor is there any evidence to that effect. The report of the hearing examiner is, therefore, adopted in its entirety.

The Commissioner has previously stated that:

"***[I]t is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to

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substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.***" *Boult and Harris v. Board of Education of Passaic,* 1939-40 *S.L.D.* 7, 13, aff'd State Board of Education 1939-40 *S.L.D.* 15, aff'd 135 *N.J.L.*329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E.&A.* 1948)

The Commissioner finds and determines that petitioner's allegations are without merit; therefore, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

January 20, 1975

In the Matter of the Tenure Hearing of Lawrence Hayes, School District of the City of Elizabeth, Union County.

COMMISSIONER OF EDUCATION

ORDER

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

This matter having been opened before the Commissioner of Education by the City of Elizabeth Board of Education, hereinafter "Board," through its determination on September 12, 1974 to certify charges of unbecoming conduct and inefficiency against Lawrence Hayes, a teaching staff member with a tenure status in its employ; and

It appearing that Lawrence Hayes was notified by the Board on April 15, 1974 of the alleged inefficiencies; and

It appearing that Lawrence Hayes has absented himself from his responsibilities as a teaching staff member in the City of Elizabeth Public Schools since April 30, 1974; and

It appearing that efforts by the Board to serve Lawrence Hayes with the charges, *ante,* have proven unsuccessful; and

It appearing that efforts by the Division of Controversies and Disputes to serve Lawrence Hayes with the charges have been similarly unsuccessful; and

It appearing that the Board has moved for Summary Judgment in its favor on the record and on the additional grounds that Lawrence Hayes has abandoned his position with the Board; and

It appearing that the charges as filed by the Board, absent a defense thereto by Lawrence Hayes, are sufficient to warrant dismissal; and

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It appearing that the Commissioner determines that the charges against Lawrence Hayes are true in fact; now, therefore

The Commissioner of Education finds and determines that Lawrence Hayes has forfeited his claim to his teaching position in the employ of the City of Elizabeth Board of Education as of September 12, 1974, the date of his suspension by the Board.

Ordered this 23rd day of January 1975.

COMMISSIONER OF EDUCATION

January 23, 1975

Pearl Schmidt,

Petitioner,

v.

Board of Education of the Passaic County Regional High School, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Francis R. Giardiello, Esq.

Petitioner, a school nurse who enjoyes a tenure status in the employ of the Board of Education of the Passaic County Regional High School, Passaic County, hereinafter "Board," alleges that the Board violated her tenure rights through the improper establishment of her salary for the 1973-74 academic year. Petitioner now seeks an order from the Commissioner of Education which would direct the Board to compensate her the difference in the amount she received compared to the amount she alleges she should have received for 1973-74, and further direct that the Board henceforth comply with the provisions of *N.J.S.A.* 18A:29-4.2. The Board denies the allegations set forth herein and, in its own right, seeks reimbursement from petitioner for an amount of money it allegedly overpaid her for the 1972-73 academic year.

A hearing in this matter was conducted at the office of the Passaic County Superintendent of Schools on January 24, 1974 by a hearing examiner appointed by the Commissioner. Subsequent thereto, the parties filed respective Memoranda of Law, and petitioner filed a Reply Memorandum. The report of the hearing examiner is as follows:

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Petitioner has been employed by the Board for fifteen years (Tr. 7), and holds a permanent standard school nurse certificate (J-1), issued by the New Jersey State Board of Examiners. *N.J.S.A.* 18A:6-38; *N.J.A.C.* 6:11-12.8 Petitioner does not possess a baccalaureate degree.

On August 29, 1972, subsequent to the passage of Assembly Bill No. 623, *Chapter* 29, *Laws* of 1972 (now *N.J.S.A.* 18A:29-4.2), the Board notified petitioner by memorandum (J-3) that her salary for the 1972-73 school year had been set at $13,500. It appears from the minutes of the Board meeting conducted on August 29, 1972 (J-4) that the figure of $13,500 was established by the Board in order to comply with its view of the then newly-passed law, *N.J.S.A.* 18A:29-4.2. At this meeting, the Board voted to compensate petitioner according to the rate set for the 14th, or maximum, step on the bachelor's degree scale of its teachers' salary guide.

On November 15, 1972, the matter of *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, Passaic County,* 1972 *S.L.D.* 577 was decided by the Commissioner, wherein *N.J.S.A.* 18A:29-4.2 was held to require boards of education to compensate school nurses who hold standard certificates, *as well as bachelor's degrees,* according to the bachelor's scale of the teachers' salary guide. The Commissioner determined that for school nurses who hold a school nurse's standard certificate but do not hold a bachelor's degree, several options were provided for local boards. Among these was an option to compensate school nurses who do not hold a bachelor's degree, but who do hold a standard school nurse's certificate, according to the appropriate non-degree salary scale existing in the district. The Commissioner further determined that a board which does not have a non-degree salary scale in existence could (a) negotiate according to proper procedures with the school nurses to establish a non-degree scale, or (b) compensate such school nurses, if the board so desired, according to its established bachelor's degree scale.

Thereafter, on March 20, 1973, the Board notified petitioner by memorandum (J-2) that her salary for the 1973-74 school year was set at $12,104. Petitioner sent back the acceptance slip to the Board with the notation thereon as follows: "***Reduction of salary [from 1972-73] is violation of State law, therefore I do not agree to the above amount [of $12,104]." (J-2) Petitioner asserts the Board violated the provisions of *N.J.S.A.* 18A:29-4.2 and, further, by reducing her salary from that received during 1972-73, violated the protection afforded her by her tenure status.

The Board, to the contrary, avers that its action setting petitioner's salary for 1973-74 at $12,104 is consistent with both the law and its own policy regarding the payment of school nurses who do not hold a degree. In this regard, petitioner asserts that the Board does not, and did not, have a non-degree salary scale for teachers; consequently, petitioner contends, it may not establish a separate non-degree policy for school nurses. (Petitioner's Memorandum, at p. 3)

The record reflects that petitioner's yearly salary had been established, prior to the passage of *N.J.S.A.* 18A:29-4.2, according to a ratio system applied to the amount she would have received had she been compensated according to

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the bachelor's degree scale of the teachers' salary guide. The ratio used was .85 percent applied to the specific amount set forth for the appropriate step of the bachelor's degree scale. Specifically, if petitioner was in her tenth year of employment with the Board and the tenth step of the bachelor's degree scale was the amount of $10,000, petitioner's salary would be $8,500. In her eleventh year, if the eleventh step of the bachelor's degree scale was $10,500, petitioner's salary for that year would have been $8,925.

This ratio policy for the determination of salary for school nurses without a degree was first adopted by the Board on December 5, 1967, according to copies of minutes of that meeting filed by the Board. The ratio policy was then adopted by each subsequent Board thereafter and made part of the salary guide for professional staff as reflected in the agreement (R-1) between the Passaic Valley Education Association and the Board, for 1972-73, and for 1973-74. (R-2)

Even before the ratio policy was established for non-degree school nurses, the Board, on December 6, 1966, amended its existing policy regarding salary determination through the use of a ratio system for certain guidance and administrative positions, known as policy 4141. (R-3) As a result of the December 6, 1966 amendment, the Board adopted a separate salary guide for school nurses without a degree. A year later, as noted *ante*, the Board adopted its ratio policy of .85 percent. (R-1, R-2, R-3)

The hearing examiner finds that the Board did, in fact, have a non-degree salary scale in existence for salary determination purposes for its professional staff members, including school nurses, who did not possess baccalaureate degrees. In this regard, the Board Secretary testified that another school nurse who did not possess a bachelor's degree was also employed by the Board and paid in the same manner as petitioner. When that nurse acquired her bachelor's degree she was placed on the appropriate step of the teachers' bachelor's degree scale. (Tr. 16-17) Furthermore, a non-degree industrial arts teacher was employed by the Board whose salary was determined by applying a ratio of .95 percent to the bachelor's scale, and another non-degree person was employed whose salary was determined by applying a ratio of .90 percent to the bachelor's scale of the teachers' salary guide. (Tr. 17-18)

The pertinent statute, *N.J.S.A.* 18A:29-4.2, provides in its entirety as follows:

> "Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the full use of the same experience steps and training levels that apply to teachers."

For an interpretation of the legislative intent of this statute, see *Lenahan, supra; Julie Ann Sipos et al. v. Board of Education of the Borough of Manville,* 1973 *S.L.D.* 434.

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The Board asserts that its action setting petitioner's salary for 1972-73 at $13,500 was a mistake in law and fact and was contrary to its own policy and, accordingly, it should not now be bound by its misinterpretation of the law. (Board's Memorandum, at pp. 2-3) When it set petitioner's salary for 1973-74 at $12,104, the Board argues, it did so because the public has the right to expect its public officials to correct an action the Board had erroneously committed. In this regard, the Board relies upon *Board of Education of Passaic et al. v. Board of Education of the Township of Wayne et al.,* 120 *N.J. Super.* 155 (*Law Div.,* 1972).

Furthermore, the Board contends that its method of establishing petitioner's salary by utilizing the ratio policy of .85 percent, *ante,* is, in fact, consistent with the law and the Commissioner's decision in *Lenahan, supra,* because petitioner does not possess a degree.

Finally, in its counterclaim, the Board seeks a judgment of $2,025 to be entered against petitioner which represents the difference between what the Board avers it should have paid ($11,475) and what it did pay her ($13,500) for the 1972-73 academic year.

Petitioner contends that the lesser amount of money she received for 1973-74 as compared to the amount she received for 1972-73 constitutes a reduction in salary and is therefore violative of her tenure protection. In support of this position, petitioner cites *Albert DeRenzo v. Board of Education of Passaic,* 1973 *S.L.D.* 236.

Petitioner asserts that the factual pattern in *Passaic, supra,* clearly demonstrated a mistake of law so that the action taken therein to correct the mistake was proper. Petitioner argues that, in the instant matter, the Board's action was not a mistake of law, and that the Board acted with a clear understanding of the impact of its action.

Petitioner argues that it was the responsibility of the Board to gather the appropriate information upon which to act. Accordingly, petitioner concludes the Board did have the necessary information upon which to make a determination for her 1972-73 salary, and she should not now be punished for its action. Petitioner cites *John Cervase et al. v. Kawaida Towers et al.,* 124 *N.J. Super.* 547 (*Law Div.* 1973) in support of this position.

The hearing examiner finds the action of the Board in establishing petitioner's salary for 1972-73 at $13,500 was proper and legal. The issue to be determined by the Commissioner is whether the Board may properly establish petitioner's salary for 1973-74 at $12,104, or $1,396 less than she received for 1972-73.

This concludes the report of the hearing examiner.

* * * *

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The Commissioner has reviewed the record in this matter including the hearing examiner's report and the exceptions and objections filed by petitioner.

The Commissioner agrees that petitioner's salary was set properly, after consideration and deliberation by the Board, at $13,500 for the 1972-73 school year. The Board's later determination to reduce petitioner's salary to $12,104 is in violation of petitioner's rights under tenure pursuant to *N.J.S.A.* 18A:6-10 which states in part:

> "No person shall be ***reduced in compensation *** if he is *** under tenure ***"

except as provided for by the Tenure Employees Hearing Law.

Petitioner is under tenure; therefore, her proper salary for the 1973-74 school year could not be set at a rate lower than that she had received the previous year.

Having determined that her salary was properly set for the 1972-73 school year, the Commissioner finds no need to discuss the Board's claim for reimbursement of moneys it alleged to be an overpayment of her salary.

Pursuant to the Commissioner's decision in *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, Passaic County,* 1972 *S.L.D.* 577, the Board's conclusion was correct that it did not have to compensate petitioner according to its degree scale of the salary guide since she held no degree. The Board may hold petitioner at the same salary level, $13,500, until her years of experience entitle her to receive the next increment on the non-degree salary scale. Thereafter, the Board may utilize its non-degree guide in determining her annual salary. See *Stiles and Ferraioli v. Board of Education of the Borough of Ringwood,* 1974 *S.L.D.* 1170.

Petitioner's objection to the creation of a non-degree nurses guide, *per se,* is a valid objection since any non-degree guide should apply uniformly to all non-degree teaching staff members. Nurses are teaching staff members. *N.J.S.A.* 18A:1-1 The Board adopted a ratio policy of .85 percent to be applied to each step of the teachers' salary guide as a base for determining a non-degree nurse's salary. If written out in its several steps, this guide would parallel the degree guide, being in each instance .15 per cent lower. This is a proper non-degree teaching staff member guide. However, the Board employed at least two other non-degree teachers and set two additional and different ratios to be applied to the teachers' salary guide. Thus the Board had, in effect, established three non-degree guides for its non-degree teaching staff members: one at .85, one at .90, and one at .95 per cent of the appropriate step of the teachers' salary guide. This is clearly an inequitable arrangement and it must be set aside.

The Board has the statutory authority to offer a higher salary than that called for on its initial steps on the salary guide for degree and non-degree teaching staff members alike. The applicable statute, *N.J.S.A.* 18A:29-9, reads as follows:

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

The Commissioner finds, therefore, that these initial steps are negotiable; however, once a board compensates a teaching staff member according to a salary guide which recognizes educational achievement, all teaching staff members similarly situated must be compensated accordingly; *i.e.*, non-degree teachers on the non-degree guide, and degree teachers on the degree guide.

In summary, the Commissioner finds that petitioner was compensated properly at $13,500 for the 1972-73 school year and should have received at least the same salary for the 1973-74 school year. The Board is directed, therefore, to pay her the difference between the amount she actually received ($12,104) and that she should have received ($13,500) for the 1973-74 school year. Petitioner's salary for the 1974-75 academic year and thereafter shall be determined based upon the guide for non-degree teaching staff members until such time as she attains her degree. All other non-degree teaching staff members should be likewise placed on the appropriate step of a uniform non-degree salary guide as of the date of this decision.

COMMISSIONER OF EDUCATION

January 21, 1975

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In the Matter of the Tenure Hearing of Russell Grill, School District of Roselle, Union County.

COMMISSIONER OF EDUCATION

ORDER

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

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

This matter having been opened before the Commissioner of Education (Eric G. Errickson, Assistant Director, Division of Controversies and Disputes) on October 31, 1974 by the certification of charges pursuant to *N.J.S.A.* 18A:6-10 *et seq.* by the Board of Education of the Borough of Roselle, hereinafter "Board," against its tenured teaching staff member, Russell Grill; and

The matter having been heard on December 23, 1974 at the State Department of Education, Trenton, Howard Schwartz, Esq., appearing for the Board, Theodore Simon, Esq., appearing for respondent; and

It appearing that the matter had been resolved by mutual agreement of the contending parties on December 23, 1974; and

It appearing that documents setting forth the terms of the aforementioned mutual agreement were signed on December 23, 1974 by both parties to the matter; and

It appearing that the Board at a special meeting held December 23, 1974 by resolution withdrew the charges against Russell Grill, without prejudice, which act it believed to be in the public interest (Tr. 13); and

The Commissioner, having reviewed the pleadings, the documentary evidence in the matter, and the transcript of proceedings of December 23, 1974, and having determined that the matter may properly be withdrawn from litigation before him; therefore

IT IS ORDERED that this matter is dismissed without prejudice.

Entered this 23rd day of January 1975.

COMMISSIONER OF EDUCATION

January 23, 1975

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"T.W.D.," an infant by his guardian *ad litem*, Susan D. Citarella,

Petitioner,

v.

Board of Education of the Town of Belleville, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Barry A. Aisenstock, Esq.

For the Respondent, Max N. Schwartz, Esq.

Petitioner, hereinafter "T.W.D.," claims to be eligible for enrollment in the School District of Belleville, and alleges that his entitlement to a free public school education has been denied by the Board of Education of the Town of Belleville, hereinafter "Board," on the grounds that petitioner's necessary affidavit is invalid. His appeal is for interim relief in the form of admission to the Board's school pending a full hearing on the merits of the instant matter.

Oral argument and the testimony of T.W.D.'s sister, with whom he resides in Belleville, were presented on January 7, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

T.W.D. is fifteen years of age and resides with his sister in the Town of Belleville. His parents reside in Newark. During the beginning of October 1974, T.W.D.'s sister filed an affidavit with the Board pursuant to *N.J.S.A.* 18A:38-1(b) which reads as follows:

> "Public schools shall be free to the following persons over five and under 20 years of age:
>
> ***(b) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the Board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term***."

The Board questioned the validity of the affidavit and as the result of its own investigation rejected petitioner's application for admission. The Board asserts that the only reason T.W.D. resides with his sister is to attend its schools rather than attending the public schools in the City of Newark.

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Black's Law Dictionary 80 (rev. 4th ed. 1968) defines affidavit as follows:

> "A written or printed declaration or statement of facts, made voluntarily, and *confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.* Cox v. Stern, 170 Ill. 442, 48 N.E. 906, 62 Am. St. Rep. 385; Hays v. Loomis, 84 Ill. 18. A statement or declaration reduced to writing, and *sworn to or affirmed before some officer who has authority to administer an oath* or affirmation. Shelton v. Barry, 19 Tex. 154, 70 Am. Dec. 326, and In re Breidt, 84 N.J. Eq. 222, 94 A. 214, 216." (*Emphasis supplied.*)

There is no question that the affidavit was properly filed with the Board; however, the adjudication of this matter turns on the validity of that document in an identical manner as the validity of an affidavit disposed of *In the Matter of "C" v. Board of Education of the City of East Orange, Essex County,* 1971 *S.L.D.* 395.

* * * *

The Commissioner has read the report of the hearing examiner. The Board's decision to examine and approve those affidavits it finds acceptable is *ultra vires,* as was determined *In the Matter of "C", supra,* and cannot be condoned. Petitioner has followed the provisions of *N.J.S.A.* 18A:38-1(b) by properly filing an affidavit with the Board to establish his domicile.

Absent any determination by a court of competent jurisdiction that this instrument is a false affidavit, the Board is obligated to accept petitioner and to provide him with a free public school education appropriate to his needs. The courts alone have the authority to legally determine domicile after such an affidavit has been filed.

Accordingly, the Commissioner hereby orders the Board of Education of the Town of Belleville to admit petitioner forthwith to its schools, provide an educational program suitable to the needs of T.W.D., and also provide supplemental instruction as necessary for T.W.D. to compensate for the schooling he has missed since September 1974.

COMMISSIONER OF EDUCATION

January 24, 1975

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Board of Education of the Township of Howell,

Petitioner,

v.

Township Committee of the Township of Howell, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Bathgate, Wegener and Sacks (Richard K. Sacks, Esq., of Counsel)

For the Respondent, Cerrato, O'Connor, Braelow & Mehr (Richard T. O'Connor, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Committee," certifying to the Monmouth County Board of Taxation a lesser amount of appropriations for the 1974-75 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were submitted in the form of written testimony, and a hearing was conducted on November 1, 1974 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held February 13, 1974, the voters of the school district rejected the Board's proposal to raise $3,691,495 for the current expenses of the school district for the 1974-75 school year. The proposed budget was then delivered to the Committee, pursuant to statute, for the determination of the amount of appropriation for school purposes to be certified to the County Board of Taxation. Subsequently the Committee adopted a resolution certifying the sum of $3,479,495 for such expenses. The amounts in issue are shown as follows:

	Proposed By Board	Certified By Committee	Reduction
Current Expense	$3,691,495	$3,479,495	$212,000
Capital Outlay	–0–	–0–	–0–

The Board contends that the reduction deemed appropriate by the Committee will leave the Board with insufficient funds to conduct its educational program. It labels the Committee's action as arbitrary, capricious and unreasonable. The Committee advances a contrary view and avers that reductions may be made from thirty-six line items of the budget. These line items and the proofs in support thereof will be reviewed, *post,* in narrative and chart form by the hearing examiner. At this juncture, some general background information is necessary in order that specific proposed reductions may be considered in an appropriate context.

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It is of major importance that the Board's reserves in unappropriated current expense balances were completely exhausted in school year 1973-74, and, according to testimony at the hearing, the Board ended its budget year on June 30, 1974 with a small deficit. Such deficit was occasioned by a variety of factors. State aid was reduced by $82,061 from the amount the Board had anticipated. Expenditures exceeded estimates by a total of $44,133. Certain federal aid was not received. The net result is that the Board has moved in one year's time from a position wherein it held an unappropriated current expense balance exceeding $110,000 to a position of deficit.

In this context it is apparent that the Board must stay within line item allocations during school year 1974-75 to avoid an illegal deficit, and yet, it was testified, certain commitments have already exceeded budget estimates. Salary increases following negotiated agreements have exceeded allocations within certain line items, and some salaries still have to be firmly established. Equipment has had to be unexpectedly replaced. Contracted services are costing more than had been anticipated.

In such a context the hearing examiner concludes that many, if not most, of the Committee's reductions must be deemed inappropriate at this juncture although, at the time when such reductions were made, they may have been both appropriate and reasonable. Events and economic facts have changed the complexion of the Board's total financial position.

The hearing examiner will now examine the Committee's reductions and set forth recommendations. The reductions totaling $212,000 are itemized as follows. At a time subsequent to the hearing the Committee abandoned its suggested reduction of $37,000 from line item J520a.

CHART I

Account Number	Item	Board's Proposal	Committee's Proposal	Amount Reduced
Current Expense:				
J120d	Other Contr. Servs.	$ 7,500	$ 5,000	$ 2,500
J130a	Bd. of Educ. Exp.	8,940	7,540	1,400
J130b	Bd. Secy. Exp.	3,100	2,600	500
J130f	Supt. Off. Exp.	5,630	5,130	500
J211	Prins. - Sals.	176,367	174,367	2,000
J212	Supvrs. - Sals.	86,006	84,006	2,000
J213	Tchrs. - Sals.	3,068,845	3,008,245	60,600
J214a	Sch. Libr. - Sals.	95,728	93,728	2,000
J214c	Ch. St. Tm. - Sals.	144,322	129,332	15,000
J215	Prins. Secys. - Sals.	63,828	60,828	3,000
J220	Textbooks	50,844	48,344	2,500
J230a	Lib. Books	23,000	22,000	1,000
J230c	A-V Mats.	23,608	22,108	1,500
J240	Teaching Supls.	98,364	93,364	5,000
J250a	Misc. Supls.	5,000	4,000	1,000
J250c	Misc. Exp.	37,125	33,125	4,000

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J410a-1,2,3	Phys. Exp.	114,317	109,317	5,000
J510b	Trans.	90,126	88,126	2,000
J510d	Trans. - Mech.	15,000	9,000	6,000
J520a	Contr. Trans.	115,000	78,000	37,000*
J520b	Trans. - Priv. Schls.	20,000	15,000	5,000
J535	Repl. Veh.	10,000	5,000	5,000
J610	Custs. - Sals.	272,037	269,037	3,000
J640b	Electricity	85,690	83,690	2,000
J640d	Telephone	16,000	15,000	1,000
J650a	Cust. Supls.	25,000	22,000	3,000
J650b	Supls. Veh.	1,000	500	500
J710	Maint. - Sals.	48,850	40,850	8,000
J720a	Contr. Serv. Grnds.	32,380	22,380	10,000
J720b	Contr. Serv. Bldgs.	57,302	52,302	5,000
J730a	Repl. of Educ. Equip.	5,850	4,850	1,000
J730c	Purch. Educ. Equip.	27,000	25,000	2,000
J730c-1	Purch. Noninstr. Equip.	21,350	16,350	5,000
J740b	Bldg. Repair	9,885	8,885	1,000
J810a	Pension Funds	37,280	35,280	2,000
J810b	Social Security	43,852	42,852	1,000
J820a	Property Ins.	37,000	34,000	3,000
Total Current Expense		$3,691,495	$3,479,495	$212,000

*The Committee abandons this reduction at this juncture and accedes to the Board's proposal.

The hearing examiner has considered these reductions in light of the evidence educed at the hearing and from written testimony, and sets forth his recommendations as follows:

J213 Teachers – Salaries *Reduction $60,600*

The Committee avers that this reduction is appropriate because savings through attrition and the elimination of new positions will enable the Board to fund its commitments. The Committee further states that moratoriums on the building of dwellings will result in fewer numbers of school pupils.

The Board states, by affidavit of its Board Secretary, that contracted salaries within the line item now total $3,113,500 against the allocation of $3,008,245 deemed appropriate by the Committee. Such over-expenditures, the Board testifies, have been necessitated by salary agreements containing unexpected increases of approximately twelve percent. The Board further testifies that it has not employed a learning disabilities specialist although such position had been intended.

The hearing examiner observes that this line item is, in fact, already in deficit and will remain so, even though all of the Committee's reduction is restored. The hearing examiner recommends full restoration.

Summary: Amount of Reduction $60,600

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Amount Restored	$60,600
Amount Not Restored	–0–

J214c Child Study Team - Salaries *Reduction $15,000*

This controverted reduction is for a new position the Board has proposed for a learning disabilities specialist. The Committee avers the Board already has two and that no demonstrated need exists for a third person. The Board avers there is a need for the extra position to alleviate the present delay in test procedures.

The hearing examiner observes that from September 30, 1973 to September 30, 1974, the pupil enrollment in Howell Township Schools decreased from 4,881 pupils to 4,654, and he finds no evidence that the trend is reversed in 1974-75. In fact the Committee's testimony (R-1), not refuted, is that further pupil reduction is expected. Accordingly, the hearing examiner recommends that the Committee's reduction be sustained.

Summary:	Amount of Reduction	$15,000
	Amount Restored	–0–
	Amount Not Restored	$15,000

J240 Teaching Supplies *Reduction $5,000*

The Board expended $68,970 for teaching supplies in 1971-72, $89,035 in 1972-73 and budgeted $71,000 for such supplies in 1973-74 and $98,364 in 1974-75. It appears that the 1973-74 budget was insufficient to meet the need, but the hearing examiner finds no explanation for the amount in the record before him. The Committee correctly avers that even with its reduction the Board will have a sum remaining which is thirty-one percent greater than the Board budgeted for supplies in 1973-74.

The hearing examiner observes that the reduction is a relatively small one and that reasonable economy may be expected to compensate for it. Accordingly, he recommends the reduction be sustained.

Summary:	Amount of Reduction	$5,000
	Amount Restored	–0–
	Amount Not Restored	$5,000

J410a-1,2,3 Physician's Expense *Reduction $5,000*

This line item composite is budgeted for school health examinations and for the salaries of school nurses. At this juncture, by affidavit of the Board Secretary, the Board states that it has contracted a total of $105,250 for such examinations and salaries. The budgeted amount proposed by the Board was $114,317. Thus, even with the reduction, the line item is fully funded and, accordingly, the hearing examiner recommends that the reduction be sustained.

Summary:	Amount of Reduction	$5,000
	Amount Restored	–0–
	Amount Not Restored	$5,000

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J510d Transportation - Mechanics *Reduction $6,000*

The Board had budgeted $15,000 in this line item for a garage mechanic. The Committee states that "***no Board garage has yet been established***" (R-1) and that no new hiring may be anticipated. The Board's testimony is barren with respect to the need for expenditure within the line item.

The hearing examiner recommends the reduction be sustained.

Summary:	Amount of Reduction	$6,000
	Amount Restored	–0–
	Amount Not Restored	$6,000

J520b Transportation - Private Schools *Reduction $5,000*

The Board expended $19,726 from this line item in school year 1972-73 and its written testimony (P-1) indicates its expenditures were $22,000 in 1973-74. This latter amount contrasts with a budgeted total of only $15,000. The Committee avers that the budget for 1974-75 should remain identical to the inadequate amount of the prior year.

The hearing examiner cannot agree that a prior budgeted amount is more indicative of an expected future cost than the facts based upon experience which are shown by the Board. It is recommended that the suggested reduction of $5,000 be restored.

Summary:	Amount of Reduction	$5,000
	Amount Restored	$5,000
	Amount Not Restored	–0–

J535 Replacement Vehicles *Reduction $5,000*

The Board proposed to expend $10,000 from this line item for the replacement of two handi-van vehicles used as school buses. The Board avers the present vans have traveled more than 100,000 miles each and that such use exceeds the State guidelines. The Committee proposes to phase the purchase over two years.

The hearing examiner cannot concur with such a reduction particularly where, as here, the Board has demonstrated the need to purchase replacement vans in the near future.

Accordingly, full restoration is recommended.

Summary:	Amount of Reduction	$5,000
	Amount Restored	$5,000
	Amount Not Restored	–0–

J710 Maintenance - Salaries *Reduction $8,000*

The Committee proposes this reduction for an employee not yet hired. The Board concurs that it has not been committed to the contracted salary of

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the proposed new employee and states that its total obligation within this line item is $42,200. The proposed budget of the Board is $48,850.

Thus, it appears that the Board has adequate funding for the line item and the hearing examiner recommends that the reduction be allowed to stand.

Summary:	Amount of Reduction	$8,000
	Amount Restored	–0–
	Amount Not Restored	$8,000

J720a Contracted Services, Grounds *Reduction $10,000*

The Board expended only $9,800.13 within this line item during 1972-73 and budgeted $8,900 in 1973-74. It states that the total sum budgeted for 1974-75 is necessary to correct drainage problems and to effect miscellaneous repairs. The Committee argues that its reduction will still provide a sum 151 percent greater than that budgeted for 1973-74.

The hearing examiner finds that the Board's work sheets indicate $14,000 of the sum herein controverted is specifically allocated to construction of a new parking lot. There is no testimony, however, which specifically documents the need for this improvement. Accordingly, the hearing examiner finds no reason to interfere with the suggestion by the Committee, and he recommends the reduction be sustained.

Summary:	Amount of Reduction	$10,000
	Amount Restored	–0–
	Amount Not Restored	$10,000

J720b Contracted Services, Buildings *Reduction $5,000*

The Board's budgeting for expenditures, both actual and proposed, from this line item may be shown as follows:

Expenditures	1971-72	$39,201.76
	1972-73	74,713.22
Budgeted	1973-74	34,750.00
	1974-75	57,302.00

Thus, there has been a wide fluctuation in budgetary provision. The Board's estimates are documented on a school by school basis in its budget work sheets, but there is no other testimony which supports a restoration of the reduction deemed appropriate by the Committee. Accordingly the hearing examiner recommends the reduction be sustained.

Summary:	Amount of Reduction	$5,000
	Amount Restored	–0–
	Amount Not Restored	$5,000

J730c-1 Purchase Noninstructional Equipment *Reduction $5,000*

The Board budgeted no funds for noninstructional equipment in 1973-74

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and proposed to expend $21,350 in 1974-75. The Committee recommends a "spacing" of such expenditures over a period of years. (R-1) The hearing examiner finds no testimony by the Board which clearly categorizes the proposed expenditures as being essential. The hearing examiner recommends the reduction be sustained.

Summary:	Amount of Reduction	$5,000
	Amount Restored	–0–
	Amount Not Restored	$5,000

The hearing examiner has similarly examined the record before him and sets forth the following recommendations with respect to the remaining relatively small reductions deemed appropriate by the Committee:

CHART II

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
Current Expense:				
J120d	Other Contr. Servs.	$ 2,500	$ 2,500	$ –0–
J130a	Bd. of Educ. Exp.	1,400	–0–	1,400
J130b	Bd. Secy. Exp.	500	–0–	500
J130f	Supt. Off. Exp.	500	370	130
J211	Prins. - Sals.	2,000	2,000	–0–
J212	Supvrs. - Sals.	2,000	2,000	–0–
J214a	Sch. Libr. - Sals.	2,000	1,000	1,000
J215	Prins. Secys. - Sals.	3,000	3,000	–0–
J220	Textbooks	2,500	–0–	2,500
J230a	Lib. Books	1,000	–0–	1,000
J230c	A-V Mats.	1,500	–0–	1,500
J250a	Misc. Supls.	1,000	1,000	–0–
J250c	Misc. Exp.	4,000	2,000	2,000
J510b	Trans.	2,000	2,000	–0–
J610	Custs. - Sals.	3,000	3,000	–0–
J640b	Electricity	2,000	2,000	–0–
J640d	Telephone	1,000	500	500
J650a	Cust. Supls.	3,000	3,000	–0–
J650b	Supls. Veh.	500	500	–0–
J730a	Repl. of Educ. Equip.	1,000	–0–	1,000
J730c	Purch. Educ. Equip.	2,000	–0–	2,000
J740b	Bldg. Repair	1,000	–0–	1,000
J810a	Pension Funds	2,000	2,000	–0–
J810b	Social Security	1,000	1,000	–0–
J820a	Property Ins.	3,000	3,000	–0–
Subtotal Current Expense		$45,400	$30,870	$14,530

In summary the recommendations of the hearing examiner are set forth as follows:

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CHART III

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
Current Expense:				
J213	Tchrs. – Sals.	$ 60,600	$ 60,600	$ –0–
J214c	Ch. St. Tm. - Sals.	15,000	–0–	15,000
J240	Teaching Supls.	5,000	–0–	5,000
J410a-1,2,3	Phys. Exp.	5,000	–0–	5,000
J510d	Trans. - Mech.	6,000	–0–	6,000
J520a	Contr. Trans.	37,000	37,000	–0–*
J520b	Trans. - Priv. Schls.	5,000	5,000	–0–
J535	Repl. Veh.	5,000	5,000	–0–
J710	Maint. - Sals.	8,000	–0–	8,000
J720a	Contr. Serv. Grnds.	10,000	–0–	10,000
J720b	Contr. Serv. Bldgs.	5,000	–0–	5,000
J730c-1	Purch. Non-Instr. Equip.	5,000	–0–	5,000
SUBTOTAL		$166,600	$107,600	$59,000
CHART II		45,400	30,870	14,530
TOTAL CURRENT EXPENSE		$212,000	$138,470	$73,530

*Conceded by Committee

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter, the report of the hearing examiner, and the exceptions thereto filed by the parties pursuant to *N.J.A.C.* 6:24-1.16.

It is observed that the Board, in its exceptions, seeks to introduce additional evidence relative to line item J214c. This, however, may not be considered, it having been untimely submitted, thereby precluding any opportunity for cross-examination thereon. Only those evidentiary items entered previous to or during the hearing or subsequently called for by the hearing examiner may be considered when a determination is made in the case of a defeated school budget.

Evidence in the record of the herein controverted budget supports the findings and recommendations of the hearing examiner. The Commissioner determines, therefore, that in addition to the amount previously certified for current expenses, the sum of $138,470 is necessary for a thorough and efficient system of education in the Township of Howell for the school year 1974-75. Accordingly, the Commissioner hereby certifies to the Monmouth County Board of Taxation the additional amount of $138,470 for current expenses of the School District of Howell, so that the entire amount of such certification for the school year 1974-75 shall be $3,617,965.

COMMISSIONER OF EDUCATION

January 27, 1975

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Board of Education of the City of New Brunswick,

Petitioner,

v.

Mayor and City Council of the City of New Brunswick, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Terrill M. Brenner, Esq.

For the Respondent, Malcolm R. Busch, Esq.

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," certifying to the Middlesex County Board of Taxation a lesser amount of appropriations for school purposes for the 1974-75 school year than proposed by petitioner in its budget. Further, the Board, by an Amended Petition of Appeal, sets forth a second claim against the Commissioner of Education and the State of New Jersey, or in the alternative against Council, for the reimbursement of lost tuition revenue occasioned by an interim order of the Commissioner dated August 15, 1974.

The facts underlying the controversy, in the form of written and oral testimony, were presented on October 17, 1974 at a hearing conducted by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

The matter controverted herein has two separate and distinct parts. The first part is concerned with certain budgeted expenditures proposed by the Board which the local Board of School Estimate and Council deem unnecessary to the operation of a thorough and efficient school system in New Brunswick. The second part is not concerned *per se* with expenditures for programs of education but with the loss of anticipated tuition revenue to support such programs.

The hearing examiner will divide his report into two parts. He will consider first the Board's proposed expenditures which were reduced by action of the Board of School Estimate and Council.

On February 1, 1974, the Board, pursuant to law, submitted its proposed budget for the 1974-75 school year to the Board of School Estimate of the City of New Brunswick. This budget proposed that a total of $7,516,678.50 be raised in local taxation for the current expense costs and capital expenditures of the school district in the ensuing school year.

Thereafter, on February 13, 1974, the Board of School Estimate voted to decrease the budget by $334,992 and forwarded the budget to Council for

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formal certification. Council subsequently certified the reduced amount to the Middlesex County Board of Taxation and the instant appeal ensued. The Board's proposal and Council's certification are shown in the following table:

	Board's Proposal	Council's Certification	Reduction
Current Expenses	$7,499,695.50	$7,164,703.50	$334,992
Capital Outlay	16,983.00	16,983.00	–0–
Totals	$7,516,678.50	$7,181,686.50	$334,992

At this juncture, the Board avers that Council's reduction leaves it with an insufficient amount of money to provide a thorough and efficient system of schools in the City of New Brunswick for the school year July 1, 1974 to June 30, 1975. Council, on the other hand, maintains that the reduction is an appropriate one and sets forth a series of budget line items wherein economies may be effected. (R-1) This series of proposed line item reductions is detailed as follows:

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J130f	Supt. Off. - Other Exp.	$ 11,190	$ 4,190	$ 7,000
J130i	Bus. Adm. Off. - Other Exp.	1,650	1,600	50*
J130j	Bldgs. & Grnds. - Other Exp.	1,050	1,000	50*
J1301	Pers. - Other Exp.	1,550	1,500	50*
J130m	Prtg. & Publ. - Other Exp.	15,960	13,960	2,000
J130n	Adm. Misc. Exp.	38,910	36,910	2,000
J213	Sals. - Tchrs. **	5,397,862	5,241,570	156,292
J215a	Sals. - Clerks **	177,588	169,428	8,160
J215c	Sals. Clerks - Other **	63,594	51,528	12,066
J216	Sals. - Other Instr.	293,309	268,000	25,309
J220	Textbooks	66,059	50,000	16,059
J230a	Library Books	23,100	16,000	7,100
J230c	A-V Mats.	2,500	1,800	700
J410a3	Sals.-Nurses **	177,832	175,851	1,981
J420a	Supls. Health	7,000	6,000	1,000
J710b	Sals. - Bldg. Rep.	130,751	121,024	9,727
J720a	Contr. Serv. Grnds	2,500	–0–	2,500
J730b	Repl. Equip. - Non. Instr.	7,500	2,500	5,000
J730c	Purch. Equip.	44,712	19,712	25,000
J740b	Other Exp. Bldgs.	67,000	50,000	17,000
J820bl	Ins. - Work Comp.	40,000	30,000	10,000
J1112a	Sals. - Comm. Agents	17,448	–0–	17,448
J-4.213	Sals. - Eve. Sch. Tchrs.	23,400	18,400	5,000
J1114	Sals. - Summer Sch.	61,560	59,560	2,000
J1181	Sals. - Work Study	7,000	6,000	1,000
J-7.610a	Sals. - Eve. Sch. Cust.	2,500	2,000	500
	TOTAL CURRENT EXPENSE	$6,683,525	$6,348,533	$334,992

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*Reductions conceded by the Board.
**Board's proposal amended. See narrative, *post*.

The hearing examiner has reviewed the proposed reductions, and the testimony of the Board and Council pertinent thereto, and his recommendations will be set forth in both narrative and chart form.

J130f Superintendent's Office – Other Expenses *Reduction $7,000*

The Board expended $5,389 from this line item during school year 1972-73, but budgeted only $3,500 for expenditure during 1973-74. It now proposes to increase this amount for school year 1974-75 to $11,190. Council avers that the proposed expenditure is excessive and that the specific allocation within the line item of $9,250 for supplies and paper is grossly excessive. (R-1)

The Board states that during the 1973-74 school year it actually expended $7,038 from this line item. It maintains that an approximate increase of 40 percent (P-1) in the cost of paper, together with a new district effort in the production of "learning units," is justification for the increase.

The hearing examiner observes that this line item was under-budgeted for the 1973-74 year, and he recommends that the budgeted amount for school year 1974-75 be increased over prior 1973-74 expenditures by a total of thirty percent in correlation with the increase actually experienced between the 1972-73 and 1973-74 school years. Thus the recommended amount is $9,150.

Summary:	Amount of Reduction	$ 7,000
	Amount Restored	$ 4,960
	Amount Not Restored	$ 2,040

J213 Salaries – Teachers *Reduction $156,292*

The Board expended $4,647,691 for teachers' salaries during the 1972-73 school year and budgeted $4,900,215 for such salaries in 1973-74. It proposed to increase this allocation to $5,397,062 for 1974-75. This increase is approximately ten percent.

Council avers that the line item was under-expended by $59,000 in 1973-74 and it proposes, by an involved series of deductions and accretions, that the total sum of $5,241,570 be established as the need for 1974-75.

The Board states that Council's calculation of the required allocation for this line item is totally invalid (P-1) and that, except for a sum of $324,533 which the Board has excised from the line item as the result of savings which were effected by the Commissioner's interim order (reported, *post*), the total sum is required. Further, the Board itemizes these exact requirements in specific detail.

The hearing examiner has examined the various proofs offered by the parties and has reviewed the original budget of the Board *in pari materia* with the amended budget. It is noted that the Board's listed current requirement of

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$5,073,329 for this line item includes a total reduction greater than the total reduction of $284,300 which the Board states it has effected as the result of the Commissioner's interim order. The Board stated at the hearing that the large reduction of $324,533 effected herein is offset by net increased requirements of $45,609 in other line items. (Note: A total of twelve line items in the Board's amended budget now show increased requirements.) (See Tr. 18.)

The hearing examiner concludes from a study of such proofs that the sum of $156,292 excised by Council from this line item is required by the Board in the context of the Board's amended budget proposals. Negotiated salary commitments were greater than Council had anticipated. The Board's detailed written testimony (P-1), not refuted at the hearing, has established the necessity for full restoration.

Summary:	Amount of Reduction	$156,292
	Amount Restored	$156,292
	Amount Not Restored	–0–

J215a Salaries – Clerks *Reduction $ 8,160*

Council's written testimony with respect to this line item indicates that it used a formula herein similar to that for line item J213 to calculate the Board's requirement.

The Board, on the other hand, details seventeen specific known requirements for expenditure from the line item and only one contingency requirement of $8,000 proposed for substitute employees. The line item increase when compared to the Board's budget for the 1973-74 school year was ten percent, and the Board's amended budget considered, *post*, has excised $4,000 from that originally proposed. ($177,588 to $173,588)

The hearing examiner considers the Board's detailed exposition of need as definitive at this juncture, and he recommends full restoration.

Summary:	Amount of Reduction	$ 8,160
	Amount Restored	$ 8,160
	Amount Not Restored	–0–

J215c Salaries – Clerks – Other *Reduction $12,066*

The Board actually expended $42,179 from this line item in 1972-73 and budgeted $64,724 for school year 1973-74. Its original budget for school year 1974-75 was $63,594 which sum was reduced to $57,527 in the amended budget.

Council's calculation of the requirement herein was essentially the same as for accounts J213 and J215a, *ante*. The Board again lists detailed salary requirements, in this instance, for eight employees.

The hearing examiner again finds for the Board on the basis of this detailed known requirement.

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Summary:	Amount of Reduction	$ 12,066
	Amount Restored	$ 12,066
	Amount Not Restored	–0–

J216 Salaries – Other Instruction *Reduction $25,309*

Council has calculated this reduction in the same manner as for accounts J213, J215a and c.

The Board avers that Council's suggested reduction is incorrect with respect to certain expenditures attributable to transferred employees, and the Board details its requirement at a total of $301,734. The total budgeted amount for the line item is $293,309 in both the original budget and the amended budget of the Board.

The hearing examiner concludes from these facts that the line item may already be viewed as in deficit, and he recommends full restoration.

Summary:	Amount of Reduction	$ 25,309
	Amount Restored	$ 25,309
	Amount Not Restored	–0–

J220 Textbooks *Reduction $ 16,059*

The Board actually expended $47,172 for textbooks in 1972-73 and proposed to expend $55,000 in 1973-74. A total sum of $66,059 was proposed for expenditure in 1974-75.

Council states that the expenditure for texts in 1973-74 was only $42,000 and this statement was not refuted by the Board. Council maintains therefore, that the reduction to a total of $50,000 is appropriate for the 1974-75 school year.

The Board's testimony (P-1) avers that the total sum of $66,059 is required on the basis of its calculation of an allotment of $10.50 per pupil, and because of new programs and recent legislation involving private school pupils. Testimony at the hearing disclosed that $26,000 had been expended to date (Tr. 37) Further testimony educed the opinion of the Superintendent of Schools that further expenditures would be required by late orders. (Tr. 38-39)

The hearing examiner cannot find clear and convincing evidence in the record before him that a sum in excess of $50,000 will be required by the Board for textbooks during the 1974-75 school year. Accordingly, he recommends that Council's total reduction be sustained.

Summary:	Amount of Reduction	$ 16,059
	Amount Restored	–0–
	Amount Not Restored	$ 16,059

J230a Library Books *Reduction $7,100*

The Board expended $16,449 for library books for school year 1972-73

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and proposed a decrease for such expenditures to $15,800 in 1973-74. The amount proposed for 1974-75 was $23,100.

Council avers that its reduction leaves the Board with the amount of $16,000, which exceeds the amount the Board actually expended in 1973-74. The Board does not refute this avowal, and in fact, states (P-1) that its actual expenditures were only $14,222.39 in 1973-74. The Board avers, however, that the total amount of its proposal is required to upgrade and adequately supply its libraries.

The hearing examiner concludes, from a review of such testimony, that an increased appropriation for library books would be desirable, but in the context of Council's determination, he cannot find that an increased expenditure of more than $16,000 is required.

Summary:	Amount of Reduction	$ 7,100
	Amount Restored	–0–
	Amount Not Restored	$ 7,100

J730 Purchase Equipment *Reduction $ 25,000*

The Board budgeted no funds for the purchase of educational equipment in 1972-73 and only $9,949.50 in 1973-74. The Board states it expended only $1,245.42 in local tax money in that latter year because large federal grants totaling approximately $34,000 were utilized. At this juncture the Board avers that federal funds are not available and that $44,712 from local taxation is required for such expenditures. The Board testified that a total of almost $30,000 has already been expended from this line item. (Tr. 40)

Council maintains that its reduction is an appropriate one and that the sum remaining should be adequate (R-1), although Council takes no notice of the reduction in federal funds.

The hearing examiner has reviewed these varied contentions and recommends that the allocation for this line item be approximately the same as was expended during school year 1973-74. Such expenditures totaled approximately $35,000. Accordingly, the recommendation herein is that a reduction of $9,712 be sustained but that $15,288 be restored.

Summary:	Amount of Reduction	$ 25,000
	Amount Restored	$ 15,288
	Amount Not Restored	$ 9,712

J710b Other Salaries – Building Repair *Reduction $ 9,727*
J740b Other Expenses – Buildings *Reduction $17,000*

These items are grouped together because they are directly related to the maintenance of school buildings. The principal contention between the parties is concerned with the way such maintenance should be accomplished. The Board proposes an increase in its own maintenance staff and also the purchase of

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certain equipment. Council proposes that the Board continue past practice of contracting certain maintenance and repair projects.

An examination of the Board's expenditures in prior years shows that the Board expended only $146,854 from these two line items in 1972-73. It budgeted $154,751 for such expenses in 1973-74 and proposes to expend $197,741 in 1974-75. Thus, the proposed increased amount is greater by approximately $43,000.

In this context, the hearing examiner observes that even with Council's reduction left intact the Board is left with a sum for these maintenance projects which is $24,170 greater than that required in 1972-73. It is further observed that the increased amount available in 1974-75, as compared with 1973-74, is approximately twice the increase projected by the Board for the 1973-74 school year when compared with the prior year.

The hearing examiner has considered these facts and finds no testimony by the Board which substantiates a necessity for the restoration of funds within this line item. Council's determination appears to be commensurate with the need, and there is no testimony to support a contrary view.

Summary:	Amount of Reduction	$ 26,727
	Amount Restored	–0–
	Amount Not Restored	$ 26,727

J820bl Insurance – Workmen's Compensation *Reduction $10,000*

The Board actually expended $41,551 for workmen's compensation insurance in 1972-73 and budgeted $46,614 for 1973-74. Council states that only $26,614 was required from this item in 1973-74 and, thus, its provision of $30,000 now appears to be sufficient. (R-1)

It was testified at the hearing, however, that the Board's insurance costs for 1974-75 are now definitely billed at $48,796. (Tr. 41) Accordingly, the hearing examiner recommends full restoration.

Summary:	Amount of Reduction	$10,000
	Amount Restored	$10,000
	Amount Not Restored	–0–

J1112a Salary – Community Agents *Reduction $17,448*

This line item provides funds for the employment of two community agents "*** to maintain appropriate rapport with the Black and Puerto Rican communities. ***" (P-1) The dispute concerning it arises principally with respect to whether or not it is a new expenditure or one funded in previous years.

The hearing examiner has examined the Board's advertised budget and written testimony and concludes that the program herein controverted is a continuing one with salary costs itemized at $17,414 for the 1974-75 school year. Accordingly, he recommends full restoration.

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Summary:	Amount of Reduction	$17,448
	Amount Restored	$17,448
	Amount Not Restored	–0–

Other recommendations of the hearing examiner which are grounded in the total record before him are as follows:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J130i,j,l	Adm. Exp.	$ 150	$ –0–	$ 150*
J130m	Prntg. & Publ. - Other Exp.	2,000	–0–	2,000
J130n	Adm. - Misc. Exp.	2,000	–0–	2,000
J230c	A-V Mats.	700	–0–	700
J410a3	Sals. - Nurses	1,981	1,981	–0–
J420a	Supls. Health	1,000	–0–	1,000
J720a	Contr. Serv. Grnds.	2,500	1,500	1,000
J730b	Repl. Equip. - Non. Instr.	5,000	5,000	–0–
J-4.213	Sals. - Eve. Sch. Tchrs.	5,000	5,000	–0–
J1114	Sals. - Summer Sch.	2,000	2,000	–0–
J1181	Sals. - Work Study	1,000	–0–	1,000
J-7.610a	Sals. Eve. Sch. Cust.	500	–0–	500
SUBTOTALS CURRENT EXPENSE		$23,831	$15,481	$8,350

*Conceded by the Board

In summary, the recommendations of the hearing examiner are set forth as follows:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J130f	Supt. Off. - Other Exp.	7,000	$ 4,960	$ 2,040
J213	Sals. - Tchrs.	156,292	156,292	–0–
J215a	Sals. - Clerks	8,160	8,160	–0–
J215c	Sals. - Other Clerks	12,066	12,066	–0–
J216	Sals. - Other Instr.	25,309	25,309	–0–
J220	Textbooks	16,059	–0–	16,059
J230a	Library Books	7,100	–0–	7,100
J710b	Sals. - Bldg. Repair	9,727	–0–	9,727
J730c	Purch. Equip.	25,000	15,288	9,712
J740b	Other Exp. - Bldgs.	17,000	–0–	17,000
J820bl	Insurance - Work. Comp.	10,000	10,000	–0–
J1112a	Sals. Comm. Agents	17,448	17,448	–0–
SUBTOTALS		$311,161	$249,523	$61,638
CHART II		$ 23,831	$ 15,481	$ 8,350
GRAND TOTALS		$334,992	$265,004	$69,988

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Thus, with respect to the first part of this budget dispute between the Board and Council, the hearing examiner recommends that the Commissioner direct the Middlesex County Board of Taxation to raise an additional $265,004 for the support of a thorough and efficient system of education in New Brunswick for the 1974-75 school year. This additional amount, the hearing examiner finds, is required by the Board within the specific line items.

This finding is a limited one grounded in the documentation pertinent to specific accounts and within the context of the Board's amended budget. It does not embrace in scope any review of whether or not the Board's amended total budget is a true reflection not only of decreased responsibility but of decreased costs which emanate therefrom.

This decreased responsibility of the Board and resultant decreased costs for education were occasioned by an interim order of the Commissioner in *Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick and Board of Education of the Borough of Milltown,* 1974 *S.L.D.* 938. This order directed, *inter alia,* that pupils from the Township of North Brunswick were to be permitted to attend their own high school for the 1974-75 school year, rather than New Brunswick High School where they had been expected and where tuition revenue had been anticipated by the Board. This lost revenue factor is the prime subject of consideration in the final section of this report.

It was represented by the Board at the hearing that the revenue loss from tuition of North Brunswick pupils as the result of the Commissioner's interim order was a total of $962,195. (Tr. 5) This figure is calculated on the basis of a loss of 565 pupils at an estimated cost of $1,703 per pupil (Tr. 5), and it is an estimate which may be designated as a gross loss projection.

The net loss, as calculated by the Board, is a considerably smaller figure of $677,895 which, however, is further altered by the addition of $7,000 for scheduling costs necessitated by the Commissioner's interim order and the subtraction of $69,000 because of certain funding to be provided by the Commissioner from emergency funds. Thus, the Board's projection of lost tuition revenue may be shown as follows:

	Gross loss of tuition	$962,195
Less:	Reduced costs for 565 fewer pupils	284,300
	Net loss of tuition	677,895
Add:	Cost of special scheduling	7,000
Less:	Funding by the Commissioner	69,000
	Deficit in revenue	$615,895

The funding of $69,000 by the Commissioner is detailed in a letter to the Board dated October 3, 1974. The letter (P-2) reads in part as follows:

"In keeping with the understanding reached between you and Dr. William A. Shine, Assistant Commissioner, Division of Curriculum and Instruction,

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on August 30, 1974, the Department of Education will fund the cost of salary and fringe benefits for seven (7) teachers at New Brunswick High School for the 1974-75 school year.***

"It is expressly understood that this support is for the 1974-75 school year only and is provided in keeping with my interim decision of August 15, 1974, which stipulated there be no reduction in staff at New Brunswick High School because of the removal of North Brunswick students.

"Please provide the needed fiscal data on each of the above teachers so reimbursement may be facilitated."

At this juncture, however, the Board and Council do not regard such support as adequate. The Board avers:

"*** we don't feel that the City of New Brunswick should be obliged to pay $677,895; we feel that is a direct legal and moral obligation of the State of New Jersey incurred by the Commissioner of Education. We don't feel it is fair that the taxpayers of New Brunswick bear the burden of this decision, which we submit we feel is untimely, at the eleventh hour August 15th ***." (Tr. 6)

Council joins the Board in this avowal that the responsibility for funding the currently calculated net deficit in revenue ($615,895) should be borne by the State and not by the taxpayers of New Brunswick. (Tr. 12)

The hearing examiner has set forth and reviewed the principal alleged facts and contentions of the Board with respect to its current financial status but he has not examined the Board's financial accounts in detail. He concludes, however, that a detailed audit containing cost projections for the balance of the 1974-75 school year is required at this juncture. Accordingly, he recommends that the Commissioner direct that such an audit be conducted without further delay, and that the results be consolidated with the balance of the instant report as a complete delineation of the requirements of the Board for additional funds for the operation of its schools.

When these requirements are known to the Commissioner, the determination with respect to funding must be addressed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and, subsequent to its publication, directed that a complete audit of the financial records of the Board be conducted by auditors of the State Department of Education. This audit has now been accomplished, and a report dated January 24, 1975, has been submitted by the Chief Auditor of the Department.

Such report encompasses both an overview of those specific line item

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accounts examined by the hearing examiner and also all other general funds of the Board's budgetary plan except cafeteria and activity accounts. As a result, it is now possible to project the Board's financial requirements through the end of the school year in June 1975 and to analyze such requirements in the context of revenues which are available.

In summary, the audit projects a need for an additional sum of $594,816.97 over and above the sum of $265,004 recommended by the hearing examiner to be raised in local taxes and the sum of $69,000 which has already been authorized by the Commissioner to be paid to the Board from emergency funds from State appropriations. Thus the total funding required at this juncture totals $928,820.97 of which sum only $334,004 is available, or may be directed to be made available by the Commissioner, from State funds and local taxes. These accounts may be shown as follows:

Gross Requirement	$928,820.97
Available-State Funds	69,000.00
Additional Local Taxes	265,004.00
Net Requirement	$594,816.97

It is this latter amount which poses the specific and pressing need for urgent and almost immediate action if the Board's educational program is to be continued through the remaining months of the 1974-75 school year. As observed by the hearing examiner, the projected deficit was occasioned by the necessity of the Commissioner's interim order of August 15, 1974, *ante,* which followed lengthy and complex litigation and was promulgated at a time when the Board's budgetary plan for school year 1974-75 could not be altered. The specific reason for the deficit is the fact that tuition revenues anticipated by the Board are approximately $688,695.45 less than those anticipated in the advertised budget for the year. A practical result of the deficit is that the Board cannot, without additional resources, continue its present educational program through the present school year.

Accordingly, the Commissioner:

1. directs the Middlesex County Board of Taxation to add an additional sum of $265,004 to the amount of $7,181,686.50 previously certified by Council as the amount required to conduct a thorough and efficient program of education in New Brunswick for school year 1974-75 so that the total tax requirement for the year shall be set at $7,446,690.50, and

2. respectfully advises the Legislature of the need for an additional sum of $595,000 to be required by the Board in additional funding as the result of the special circumstances of reference, *ante,* and urges prompt consideration of Assembly Bill No. 2258 amended to provide such funding.

COMMISSIONER OF EDUCATION

January 31, 1975

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South Plainfield Independent Voters, James Mebane, President,

Petitioners,

v.

Board of Education of the Borough of South Plainfield, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, David Mills, Esq., of Counsel

For the Respondent, Wilentz, Goldman & Spitzer (Robert J. Cirafesi, Esq., of Counsel)

Petitioners, a group of citizens and taxpayers residing in the School District of South Plainfield, allege that certain actions taken by the Board of Education of the Borough of South Plainfield, hereinafter "Board," were illegal and improper. Petitioners initially filed a petition, *pro se,* and the Board filed a Motion to Dismiss. Thereafter, petitioners secured counsel and were granted leave to file an Amended Petition. The Board then filed a Motion to Dismiss and for Summary Judgment, and petitioners filed a Cross-Motion for Summary Judgment. Both parties filed Briefs, and the Board submitted affidavits of several of its members. Oral argument on both Motions was held May 23, 1974 before the Deputy Assistant Commissioner. The entire record in this matter, including the transcript of the oral argument, is now before the Commissioner of Education. The absence of any dispute regarding the relevant facts obviates the need for plenary hearing: therefore, the matter is ripe for Summary Judgment.

The genesis of this controversy derives, in part, from a previous matter determined by the Commissioner entitled *Frances Licato v. Patrick J. Crilley, Robert J. Hoffman* and *Frank Cirigliano,* 1973 *S.L.D.* 361. In *Licato,* petitioner alleged that Respondents Crilley, Hoffman and Cirigliano, all of whom had been elected to the Board of Education of South Plainfield in the February 1972 election, had participated, as members of special interest groups, in improper election campaign activities, and subsequent to the election had engaged in certain improper activities and had been in a position of conflict of interest. For reasons stated in *Licato,* the Commissioner dismissed each of the allegations raised by petitioner.

The three Board members initially defended themselves, *pro se,* in *Licato, supra,* but later secured counsel. At a special meeting of the Board held April 3, 1973, the Board acted by a vote of five ayes and three nays, with one member absent, to bear the expense of attorney fees and costs for its members, Messrs. Crilley, Hoffman and Cirigliano, as respondents in *Licato.* (Exhibit P-3)

In the instant matter, petitioners allege that the Board's action authorizing payment of the defense costs for its three members in *Licato, supra,* was

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improper because the votes of the three members who were respondents were included in the five affirmative votes which adopted the resolution, thereby constituting a conflict of interest. Additionally, petitioners allege that the Board's vote to indemnify its three members was improper on the grounds that the alleged actions of the three did not arise out of and in the course of their duties as members of the Board, but rather almost exclusively from involvement in pre-election activities.

The statute which provides for the indemnification of members of local boards of education in *N.J.S.A.* 18A:12-20, reads as follows:

> "Whenever a civil or a criminal action has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses."

The first question to be considered is whether the participation by Messrs. Crilley, Hoffman and Cirigliano in the vote, which was five affirmative and three negative with one member absent, to authorize the Board's attorney to defend them as respondents in *Licato, supra*, constituted an impermissible conflict of interest. This vote was taken on April 3, 1973, prior to the amendment of *N.J.S.A.* 18A:12-20 by *L.* 1973, *c.* 336, § 1, effective December 27, 1973. The statute, prior to amendment, reads as follows:

> "Whenever a civil or a criminal action has been brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the cost of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, shall be borne by the board of education."

Thus, it may be seen that the most recent amendment broadened the scope of the statute.

In their Brief, petitioners cite numerous cases regarding conflicts of interest decided by the courts of this State. The doctrine was clearly stated by Judge Lane in *Township Committee of the Township of Hazlet v. Morales*, 119 *N.J. Super.* 29 (*Law Div.* 1972) as follows:

> "***A public officer has the duty of serving the public with undivided loyalty, uninfluenced in his official actions by any private interest or motive whatsoever. He holds a position of public trust. He is under an inescapable obligation to serve the public with the highest fidelity, good

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faith and integrity. The law tolerates no mingling of self-interest; it demands exclusive loyalty. *Driscoll v. Burlington-Bristol Bridge Co.*, 8 *N.J.* 433, 474-475 (1952), cert. den. *Burlington County Bridge Commission v. Driscoll*, 344 *U.S.* 838, 73 S. Ct. 25, 97 *L. Ed.* 652 (1952); *Newton v. Demas*, 107 *N.J. Super.* 346, 349 (App. Div. 1969), cert. den. 55 *N.J.* 313 (1970); *Aldom v. Roseland*, 42 *N.J. Super.* 495, 500-501 (App. Div. 1956).

"A member of a municipal governing body may be disqualified from voting on a matter in which he is personally interested. See *Griggs v. Princeton Borough*, 33 *N.J.* 207, 219-220 (1960); *Van Itallie v. Franklin Lakes*, 28 *N.J.* 258, 267 (1958); *McNamara v. Saddle River*, 64 *N.J. Super.* 426, 429 (App. Div. 1960); *Aldom v. Roseland, supra*, 42 *N.J. Super.* at 501; *Piggott v. Hopewell*, 22 *N.J. Super.* 106, 110 (Law Div. 1952). See generally, Annotation, 'Member of governmental board voting on measure involving his personal interest,' 133 *A.L.R.* 1257 (1941).

"Generally, whether a particular interest is sufficient to disqualify is factual, depending upon the circumstances of the particular case. *Van Itallie v. Franklin Lakes, supra*, 28 *N.J.* at 268; *Aldom v. Roseland, supra*, 42 *N.J. Super.* at 503. The question is always whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty. *Griggs v. Princeton Borough, supra*, 33 *N.J.* at 219; *Van Itallie v. Franklin Lakes, supra*, 28 *N.J.* at 268. Actual proof of dishonesty need not be shown. *LaRue v. East Brunswick*, 68 *N.J. Super.* 435, 447 (App. Div. 1961); *S. & L. Associates, Inc. v. Washington Tp.*, 61 *N.J. Super.* 312, 329 (App. Div. 1960), aff'd in part, rev'd in part 35 *N.J.* 224 (1961); *Aldom v. Roseland, supra*, 42 *N.J. Super.* at 503.

"The interest which disqualifies is a personal or private one, not such an interest as the public officer has in common with all other citizens. *Kramer v. Bd. of Adjust., Sea Girt*, 45 *N.J.* 268, 282 (1965); *Aldom v. Roseland, supra*, 42 *N.J. Super.* at 507; *Piggott v. Hopewell, supra*, 22 *N.J. Super.* at 111.

"In *Aldom v. Roseland, supra*, Justice, then Judge, Francis said:

> 'The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interests conflict. Basically the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official. And in the determination of the issue, too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect. Such an approach gives

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> recognition to the moral philosophy that next in importance to the duty of the officer to render a righteous judgment is that of doing it in such a manner as will beget no suspicion of the pureness and integrity of his action,***[42 *N.J. Super.* at 502]'
>
> "However, a remote and speculative interest will not be held to disqualify. See *Van Itallie v. Franklin Lakes, supra,* 28 *N.J.* at 269.
>
> "In most cases in which it has been held that a public officer had a disqualifying interest, a direct or indirect pecuniary or other benefit to the official himself or to a relative or employer was involved. See *Griggs v. Princeton Borough, supra,* 33 *N.J.* at 207***." (119 *N.J. Super.* at 33-34)

The distinguishing feature of the matter herein controverted is that the statute, *N.J.S.A.* 18A:12-20, specially requires that the Board act to bear the costs of defending the three Board members. From the wording of the statute, *ante,* it must be concluded that the legislative intention is clearly expressed that "***the costs of defending such action***shall be borne by the board of education."

In the judgment of the Commissioner, there was no impropriety in the fact that the three Board members voted in the affirmative that the Board should bear the costs of their defense. The statute, *N.J.S.A.* 18A:12-20, as it read prior to the 1973 amendment, did not contain such a prohibition. Had the Legislature intended that the board member or members to be defended must not vote to authorize the action, it could have added that requirement to the statute. Of course, an action by a local board of education under the authority of *N.J.S.A.* 18A:12-20 is always subject to attack by a citizen or group of citizens, in any capacity. In attacking such an action by a local board of education, the petitioner must overcome the presumption of correctness such action possesses by a clear showing of proof that the action was improper. *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327, 332 (*App. Div.* 1965), aff'd. 46 *N.J.* 581 (1966)

The Commissioner can envision logical circumstances where local board members who stand accused must vote to effectuate *N.J.S.A.* 18A:12-20 and thus provide for their own defense. Such a situation would arise at any time that a majority of the members of a local board were subject to a civil suit or criminal action. To hold, as petitioners argue, that no member of a local board of education may vote to effectuate the statute and thus provide himself indemnification because such participation in the voting constitutes a conflict of interest, would in many instances render the statute a nullity. Statutes are not to be construed so as to lead to absurd or unreasonable results. *State v. Gill,* 47 *N.J.* 441, 444 (1966) The objective of a statute is to be fulfilled insofar as the terms of the legislation and proper consideration of the interests of those subject to it will fairly permit. *State v. Provenzano,* 34 *N.J.* 318, 322 (1961) It may not be assumed that by enacting the statute, *N.J.S.A.* 18A:12-20, the Legislature intended something which it knew in practice would mean nothing. *Gualano v. Board of Estimate of Elizabeth School District,* 39 *N.J.* 300, 313 (1963)

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It is also conceivable that one or more members of a local board of education, less than a majority, might be denied a legal defense by the vote of the majority members. In such circumstances the member or members denied a defense under *N.J.S.A.* 18A:12-20 would be forced to bring a civil suit against the majority in order to secure reimbursement of their legal costs. Such a suit would probably result from the instant matter, were the Commissioner to determine that the vote of the three Board members constituted a conflict of interest. This would be an undesirable result under any circumstances, since the Legislature could not have intended that minority board members must institute a civil suit against their board in order to have the benefit of the provisions of *N.J.S.A.* 18A:12-20.

In the instant matter, the Board's present attorney had advised that the Board should vote approval of the defense of its three members. Eight of nine Board members were present and a majority of five was necessary to approve the action. The three members in question voted affirmatively with two other members, while the remaining three members present voted negatively. (Exhibit P-3) This vote was proper under the circumstances of this case, and the Commissioner so holds.

Petitioners' second argument is that the Board should not have paid for a portion of the legal fees and expenses incurred in the defense of the three members in *Licato, supra,* because that case included allegations that the three members had participated in improper election activities, and such activities could not be construed as "***arising out of and in the performance of***" their duties as members of the Board.

The Commissioner has carefully reviewed the pleadings and his prior determination of *Licato, supra.* This review discloses that, although there was some reference in the Petition to certain alleged activities prior to the Board election, those allegations had the primary thrust of charging a conflict of interest on the part of the three successful candidates, in their roles as Board members, purportedly because of relationships with special interest groups. In the determination of *Licato,* the Commissioner found "***that the imprecise and indefinite nature of the charges against respondents with respect to the 1972 election campaign should be dismissed forthwith.***" (1973 *S.L.D.* at 367) Having considered the nature and context of the election allegations and their disposition in *Licato,* the Commissioner determines that the three Board members, Crilley, Hoffman and Cirigliano, were properly afforded a legal defense by the Board under the provisions of *N.J.S.A.* 18A:12-20, and are accordingly not required to reimburse the Board for any portion of the cost thereof.

The third issue raised by petitioners specifically concerns the vote adopting a resolution at a Board meeting held April 17, 1973. A brief review of the events preceding that vote is necessary for an understanding of the issue. The minutes of the Board meeting held June 21, 1972 (Exhibit P-1) disclose that the then Superintendent of Schools advised the Board that Board member Crilley had given the confidential personnel records of seven school principals employed by the Board to Robert Jarrett, assistant principal of the high school. These

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personnel records contained evaluation reports of the respective principals. The Superintendent further reported that Assistant Principal Jarrett had reviewed these personnel files with Harry Lobby, Principal of the middle school, who wrote questions and comments on the files and was in the process of showing department chairmen the official evaluations of their respective principals for their review and comment. The minutes of the June 21, 1972 meeting also disclose that Board member Crilley admitted that he gave the above-mentioned files to Assistant Principal Jarrett. (Exhibit P-1)

The minutes of the Board meeting held June 30, 1972 (Exhibit P-2) disclose that the Board acted by a vote of five ayes and three nays to withhold a salary increment from Harry Lobby, the middle school principal, for the 1972-73 school year. The minutes make clear the Board's intention that this withholding of a salary increment from the principal was a penalty and a disciplinary action resulting from his involvement in the incident concerning the confidential personnel records of the principals. Board member Crilley was not present at the June 30, 1972 Board meeting. At this same meeting the Board formally acted by a vote of five ayes and three nays to:

> "***relieve Mr. Jarrett of his administrative responsibilities, returning him to teaching duties in the High School.***" (Exhibit P-2)

The minutes of this June 30, 1972 meeting (Exhibit P-2) did record the fact that the two actions described above were taken by respective votes of five ayes and three nays, but the minutes do not show a recording of the roll call vote. As a result the minutes fail to show the names of the Board members who voted in favor of the action, as well as the names of those who voted in opposition.

In regard to the Board's action withholding the salary increment of the middle school principal for the 1972-73 school year, the applicable statute, *N.J.S.A.* 18A:29-14, reads in pertinent part 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.***"

In the judgment of the Commissioner, a recorded roll call majority vote of the full membership of the board must be interpreted as requiring the inscription in the minutes of the names of those board members voting affirmatively, as well as the names of those board members voting negatively, and the names of any members abstaining. It may be logically presumed that by the language of this statute, the Legislature intended to provide a clear and permanent record of such roll call vote in order to insure that a majority of the full membership of the board, whether consisting of three, five, seven, nine or more members, regardless of the number actually present, did in fact vote to withhold an increment from a teaching staff member. This reasoning is supported by the fact that prior to the amendment of *N.J.S.A.* 18A:29-14 by *L.* 1968, *c.* 295, § 13, the statute required only "***a majority vote of all the members of the board of education.***"

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The amendment became effective September 9, 1968, and the statute has remained unchanged since that date. In the Commissioner's judgment, any interpretation other than that hereinbefore stated would have the result of rendering the amendatory language of the statute inoperative, meaningless and superfluous. Such a result must be assiduously avoided. *O'Rourke v. Board of Review,* 24 *N.J.* 607, 611 (1957); *Abbotts Dairies v. Armstrong,* 14 *N.J.* 319, 328 (1954); *Hoffman v. Hock,* 8 *N.J.* 397, 406 (1952)

The Board's action transferring the high school assistant principal to a classroom teaching assignment was taken under the authority of *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."

As was previously stated, the minutes of the June 30, 1972 meeting (Exhibit P-2) failed to record the necessary roll call vote on this action. Therefore, the same reasoning set forth above, in regard to the Board's action withholding the increment, is also applicable in this instance.

Accordingly, the Commissioner finds and determines that the Board's actions of June 30, 1972, to withhold the salary increment from the middle school principal for the 1972-73 academic year, and to transfer the high school assistant principal to a classroom teaching assignment, were procedurally defective in that the voting was not recorded as required by *N.J.S.A.* 18A:29-14 and *N.J.S.A.* 18A:25-1, respectively. Both actions are a nullity, and the Commissioner so holds.

At the special meeting of the Board held June 30, 1972, the Board also certified tenure charges against the high school assistant principal, Robert Jarrett, to the Commissioner, in accordance with *N.J.S.A.* 18A:6-11. These charges, which are recited in the minutes of the June 30, 1972 special meeting (Exhibit P-2), became the subject of *In the Matter of the Tenure Hearing of Robert Jarrett, School District of the Borough of South Plainfield, Middlesex County* (dismissed May 4, 1973). In that case, Respondent Jarrett moved that the Commissioner dismiss the charges on the grounds that the Board did not formally vote to certify the charges to the Commissioner. The Commissioner determined that the charges had been properly voted upon and certified by the Board, and that the transcriber of the minutes had inadvertently failed to record the vote. See *In re Jarrett,* Decision on Motion, December 20, 1972.

The Commissioner takes judicial notice of the minutes of the special meetings of the Board held August 28, 1972 (Exhibit J-1) and October 10, 1972 (Exhibit J-2), which were submitted in evidence in *Jarrett* and which are germane to this case.

At the special meeting held August 28, 1972, the Board adopted a resolution which stated in effect that Robert Jarrett was suspended without pay as an administrator effective June 30, 1972, and that from the same date he

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would be paid in accordance with his duties as a classroom teacher. The minutes of this meeting disclose that Jarrett was to be assigned the duties of a teacher of industrial arts in the high school. (Exhibit J-1)

The minutes of the special meeting held October 10, 1972 (Exhibit J-2) disclose that the Board adopted a resolution whereby Jarrett's suspension without pay from his duties as assistant principal in the high school was to be effective August 28, 1972, and he was not to be required to assume the duties of a classroom teacher. This resolution was adopted by a recorded roll call vote with five Board members, Brooks, Diana, Diegnan, Schulte and Strassle affirmative, and three Board members, Cirigliano, Crilley and Hoffman, opposed. The ninth member was absent. These minutes state that the resolution resulted from an agreement reached between the Board and Jarrett, through their respective counsel.

The charges against Respondent Jarrett, *In the Matter of the Tenure Hearing of Robert Jarrett, supra,* were dismissed on May 4, 1973, as the result of a resolution adopted by the Board at a meeting held April 17, 1973. This resolution is reproduced in its entirety as follows:

> "WHEREAS, on June 30, 1972 and August 28, 1972 the Board, as previously constituted, took certain actions and authorized certain charges against Mr. Robert W. Jarrett and Mr. Harry Lobby; and
>
> "WHEREAS there is presently pending before the New Jersey Department of Education, Office of the Commissioner, certain proceedings with respect to the charges against Robert Jarrett and certain proceedings initiated by Harry Lobby; and
>
> "WHEREAS the Board is desirous of ending and resolving any further controversies and disputes with respect to the aforesaid actions, and has received certain General Releases from Robert Jarrett and Harry Lobby; and
>
> "WHEREAS the Board has thoroughly reviewed the actions taken by the previously constituted Board on June 30, 1972 and August 28, 1972 and has determined that said actions were unwarranted and not in the best interest of the educational system of the Borough of South Plainfield;
>
> "NOW, THEREFORE, BE IT RESOLVED that the disciplinary action of the former Board of Education of South Plainfield taken against Mr. Harry Lobby at its meeting of June 30, 1972 purporting to withhold an increment which may or would be due Mr. Lobby be rescinded, and that any records of said disciplinary action be removed from the personnel files of Mr. Lobby; and
>
> "BE IT FURTHER RESOLVED that any and all charges and proceedings presently pending before the New Jersey Department of Education, Office of the Commissioner, initiated by the Board stemming from

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actions taken by the formerly constituted Board of Education on June 30, 1972 and August 28, 1972 be dismissed by the Board, with prejudice and that any records of said charges or actions be removed from the personnel files of Mr. Jarrett; and

"BE IT FURTHER RESOLVED that the action of the formerly constituted Board on August 28, 1972 suspending Robert Jarrett be rescinded, and Mr. Jarrett be reinstated, effective immediately, as an Assistant Principal of the South Plainfield High School at a salary commensurate with the salary at which he was employed as of August 28, 1972, and that all monies, if any, withheld from Robert Jarrett for the 1972/73 school year, commensurate with the position of Assistant Principal, be reimbursed to him." (Exhibit P-4)

The minutes of the April 17, 1973 meeting (Exhibit P-4) disclose that the resolution was moved by Board member Risoli and seconded by Board member Crilley. The roll call vote records that four Board members, Brooks, Diegnan, Farrell and Parello opposed the resolution, and five Board members, Crilley, Hoffman, Cirigliano, Risoli and Tyler, voted for its adoption. Thus, the pivotal vote, which provided the majority of five votes for the adoption of the resolution, was cast by Board member Crilley. It is this vote which is challenged by petitioners in the instant matter.

The Commissioner is constrained to point out that, when the case of *In re Jarrett, supra,* was dismissed as of May 4, 1973, the letter from the Board and the enclosed resolution, *ante,* did not disclose the nature of the recorded roll call vote by which the resolution was adopted. At that time, the resolution was not questioned because it possessed the presumption of correctness afforded the formal action of an agency of the State, taken under express powers granted by the Legislature. *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327, 332 (*App. Div.* 1965) The issue of the vote on the resolution, having been raised by petitioners in the matter herein controverted, is now properly before the Commissioner for consideration.

It is abundantly clear from the facts in this case that the entire root cause of both the Board's withholding of a salary increment from the middle school principal and its certification of charges against and suspension without pay of the high school assistant principal, was the action of Board member Crilley giving the confidential personnel records of various principals to the high school assistant principal, and his subsequent disclosure of those records to the middle school principal.

From this clear fact, it must be logically concluded without fear of serious contradiction that Board member Crilley possessed a serious self-interest in any disciplinary actions taken against Lobby and Jarrett by the Board, and in the final outcome of such disciplinary action. Therefore, the affirmative vote which adopted the resolution reversing the Board's disciplinary actions against Lobby and Jarrett was infected with the taint of self-interest. Board member Crilley's vote must be disqualified by reason of his self-interest which was at variance with the impartial performance of his public duty. As the Supreme Court of this

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State pointed out in *Pyatt et al. v. Mayor and Council of Dunellen et al.*, 9 *N.J.* 548, 555-556 (1952), it is an ancient principle of Anglo-American justice that "no man shall be a judge in his own cause." *Bonham's Case,* 8 *Co.*, 113*b*, 118*a*, 77 *Eng. Rep.* 646, 652 (*K. B.* 1610) In this instance the taint of Crilley's self-interest permeates the entire vote on the resolution. In such a situation, "The infection of the concurrence of the interested person spreads, so that the action of the whole body is voidable." *State, West Jersey Traction Co. v. Board of Public Works of City of Camden,* 56 *N.J.L.* 431, 440 (*Sup. Ct.* 1894), affirmed 57 *N.J.L.* 710 (*E. & A.* 1895); *Pyatt v. Mayor and Council of Dunellen, supra,* at 557 In a deliberation of a local board of education, particularly with respect to disciplinary action against any employee, "***it is of the very essence that justice avoid even the appearance of injustice***." *James v. State of New Jersey,* 56 *N.J. Super.* 213, 218 (*App. Div.* 1959); *Hoek v. Board of Education of Asbury Park,* 75 *N.J. Super.* 182, 189 (*App. Div.* 1962) For the reasons set forth above, the Commissioner finds and determines that the action of the Board adopting the resolution on April 17, 1973, was improper and is hereby declared null and void.

The Board raises the argument that Board member Crilley's action in regard to the handling of the personnel records was litigated and disposed of in *Licato, supra,* and therefore the instant matter is *res judicata.*

The broad doctrine of *res judicata* embodies two main rules. The first is that a final judgment of a court of complete jurisdiction on the merits concludes the rights of the parties and privies, and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. Also, any right, fact or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court in which a final judgment is rendered on the merits is conclusively settled and cannot again be litigated between the parties and privies whether or not the claim or demand, purpose or subject matter of the two suits is the same. 50 *C.J.S. Judgments,* § 592 The sum and substance of the whole doctrine is that a matter, once judicially decided, is finally decided. *Black's Law Dictionary* 1470 (rev. 4th ed. 1968) To be applicable, it requires identity in things sued for as well as identity of cause of action, of persons and parties to action, and of quality in persons for or against whom claim is made. *Freudenreich v. Mayor and Council of Borough of Fairview,* 114 *N.J.L.* 292, 293 (*E. & A.* 1934); *Black's Law Dictionary* 1470; 50 *C.J.S. Judgments,* § 598 This doctrine is grounded on the two maxims that it is in the interest of the state that there should be an end to litigation, and that no one should be vexed twice for the same cause of action. 50 *C.J.S. Judgments,* § 592

The doctrine of *res judicata* was discussed in *Sarson v. Maccia,* 90 *N.J. Equity* 133 (*Ch.* 1919) wherein the Court stated the following:

> "***the record of the case exhibits beyond question all the essential elements of a plea of *res judicata* - the identity of the parties, the cause of action, and the subject matter. The only difference between the suit in equity, decided, and the action at law, pending, is the form, the form of the remedy and the nature of the relief.*** This difference does not

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prevent the decree from operating in estoppel. 23 *Cyc.* 1116, 1169***It is enough if the matter was triable in the first suit, and that *it was actually litigated and adjudicated.****" (*Emphasis ours.*) (90 *N.J. Eq.* at 136)

The case of *Bragg v. King,* 104 *N.J.L.* 4 (*Sup. Ct.* 1927) describes the doctrine as follows, at page 6:

"***The doctrine of *res judicata,* as defined by our Court of Errors and Appeals, is that the judgment of a court of competent jurisdiction on a question of law or fact, *when litigated and determined,* is, so long as it remains unreversed, conclusive upon the parties and their privies, not only in the suit in which it is pronounced, but in all future litigation between the same parties or their privies, touching upon the same subject matter. *In re Walsh's Estate,* 80 *N.J. Eq.* 565.***" (*Emphasis ours.*)

A careful scrutiny of the pleadings and the final determination by the Commissioner of *Licato, supra,* fails to show that the vote on the contested resolution on April 17, 1973, was ever raised in that case, even though the final determination of *Licato* was made by the Commissioner on June 29, 1973. Therefore, the Board's reliance on the doctrine of *res judicata* is misplaced.

As a result of the Board's action at the special meeting held June 30, 1972, withholding a salary increment from the middle school principal, a Petition of Appeal was filed entitled *Harry Lobby v. Board of Education of the Borough of South Plainfield, Middlesex County* (dismissed May 23, 1973). By letter dated May 18, 1973, counsel for Lobby advised the Commissioner that a settlement had been reached between the parties, and the matter was therefore dismissed on May 23, 1973.

In the instant matter, the Commissioner has determined that the two actions taken on June 30, 1972, regarding both Lobby and Jarrett respectively, were improper. Consequently, the withholding of a salary increment from Lobby for the 1972-73 academic year is of no effect. The voiding of the Board's June 30, 1972 action against Jarrett has no practical effect, because the Board's subsequent action at a special meeting held October 10, 1972, made Jarrett's suspension without pay effective August 28, 1972. (Exhibit J-2) As was previously stated, the tenure charges against Jarrett, certified on June 30, 1972, were later ruled to have been properly voted upon. *In re Jarrett, supra,* decision on Motion, December 20, 1972

The effect of the nullification by the Commissioner of the Board's resolution of April 17, 1973, withdrawing the tenure charges against Jarrett, is that those charges are again viable as of the date of this decision. The Board may, of course, choose to consider the adoption of a similar resolution with respect to Assistant Principal Jarrett. The Commissioner must caution the Board, however, that in any deliberations on this subject matter, Board member Crilley may not counsel with the other members, nor may he participate in any vote by the Board on the subject of the charges against Jarrett. Board member Crilley's self-interest in this matter disqualifies him, so that he must refrain from participation in any discussion and he must abstain from any voting. Failure to

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follow this directive could result in the nullification by the Commissioner of any future action by the Board on the subject of the tenure charges against Assistant Principal Jarrett.

COMMISSIONER OF EDUCATION

February 7, 1975

Arthur Barber and Barry Kelner,

Petitioners,

v.

Board of Education of the Town of Kearny, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, George O. Savino, Esq.

For the Respondent, Koch and Koch (Calvin S. Koch, Esq., of Counsel)

Petitioners, teachers employed by the Board of Education of the Town of Kearny, hereinafter "Board," request that the Commissioner of Education direct the Board to dismiss Ralph Borgess from his position as head football coach. They also request that the Board be directed to remove from their respective personnel files any and all evaluations made by Ralph Borgess which pertain to their performances as coaches.

This matter is submitted to the Commissioner for adjudication on statements of facts, addenda to the statements of facts, and Briefs. Several documents have been submitted in evidence.

The Statement of Facts, Exhibit D, is summarized as follows:

Arthur Barber and Barry Kelner are full-time teachers at Kearny High School who formerly served as assistant football coaches under head coach Ralph Borgess, a tenured employee in the school district who serves as Board Secretary and was conditionally appointed as School Business Administrator on May 22, 1967. Ralph Borgess holds a valid certificate as a school business administrator issued by the State Board of Examiners and dated February 2, 1967. He does not hold any teaching certificate. He has been a substitute teacher at Kearny High School from time to time for approximately 100 to 150 hours of teaching time. He has served as Secretary of the Kearny Board of Education since 1961.

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Assistant coaches are evaluated annually by three members of the professional staff, one of whom is the head football coach. Based on such evaluations, the Superintendent of Schools did not recommend reappointment of petitioners as assistant football coaches; nevertheless, they formally applied to serve as assistant football coaches for the 1974 season in response to a posting of coaching vacancies. Ralph Borgess has been head football coach at Kearny High School since his initial appointment in March 1970. (Statement of Facts, Exhibit D)

Subsequent to petitioners' learning that they would not be reappointed to their coaching positions, they filed a Petition of Appeal which challenges the qualifications of Ralph Borgess to serve as a coach. They assert that he is not a professional staff member because his position of school business administrator has never been recommended by the County Superintendent of Schools and approved by the Commissioner of Education and the State Board of Education, and that he is not a certified teacher.

Petitioners assert that, until the Board proves the existence of the Hudson County Superintendent's recommendation and the approval of the Commissioner and the State Board of Education to establish the position of school business administrator in the Kearny School District, petitioners cannot agree that Ralph Borgess is a school business administrator or a teaching staff member as provided in *N.J.S.A.* 18A:1-1 whch reads as follows:

> "***'Teaching staff member' means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse."

Petitioners admit that Ralph Borgess is the Secretary of the Kearny Board of Education, but aver that the post of school business administrator has never been approved as required by *N.J.S.A.* 18A:17-14.1 which reads as follows:

> "A board or the boards of two or more districts may, under rules and regulations prescribed by the state board, appoint a school business administrator by a majority vote of all the members of the board, define his duties, which may include serving as secretary of one of the boards, and fix his salary, *whenever the necessity for such appointment shall have been agreed to by the county superintendent of schools or the county superintendents of schools of the counties in which the districts are situate and approved by the commissioner and the state board. No school business administrator shall be appointed except in the manner provided in this section."* (*Emphasis supplied.*)

The essential questions to be answered are these: (1) is Ralph Borgess eligible to be a coach pursuant to *N.J.A.C.* 6:29-6.3(a) and (b); and (2) shall the

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Board be required to remove from petitioners' files any and all evaluations made by Ralph Borgess pertaining to their performance as coaches.

The pertinent statutes *N.J.A.C.* 6:29-6.3(a) and (b) read as follows:

"(a) No person not certified as a teacher and not in the employ of a board of education shall be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction; or coaching or for conducting games, events, or contests in physical education or athletics.

"(b) Every person appointed subsequent to June 1, 1960, to coach, teach or train individual pupils or school teams for inter-school athletic competition shall be a certified member of a school faculty in that same school district and shall be employed full-time during the regular school day when classes are in session. He shall be officially designated by the district board of education for the duties for which he is to be held responsible."

The Board adopted a resolution on May 22, 1967, which reads in pertinent part as follows:

"BE IT RESOLVED: That the Board of Education of the Town of Kearny *** requests hereby that the County Superintendent of Schools and the State Board of Education approve the establishment of the position of School Business Administrator for the Kearny School District and

***

"BE IT FURTHER RESOLVED: Any person appointed by the Board of Education to the position of School Business Administrator shall hold an appropriate certificate prescribed by the State Board of Education, and he shall be considered a member of the professional staff of the district.

"BE IT FURTHER RESOLVED: The School Business Administrator shall perform those business functions as outlined in the policy of the Board of Education, and as approved by the Commissioner of Education and the State Board of Education.

"BE IT FURTHER RESOLVED: That nothing in these regulations shall prevent the School Business Administrator from serving as Secretary of the Board of Education, or from carrying out responsibilities delegated by statute to the Secretary of the Board of Education, should he serve in that role for the Board of Education which requests the establishment of the position of School Business Administrator pursuant to these rules. It is the intent of this resolution that nothing contained herein shall deprive the Superintendent of Schools of any of his present prerogatives.

"BE IT FURTHER RESOLVED: That Ralph Borgess Secretary of the Board of Education of the Town, County and State aforesaid, be appointed School Business Administrator for the Kearny School District,

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effective upon approval of the position by the County Superintendent of Schools, the Commissioner of Education, and the State Board of Education." (Exhibit A)

Prior to Ralph Borgess' appointment as coach, the Board requested and received the following pertinent information dated October 15, 1968 from the office of the State Board of Examiners to the Superintendent of the Kearny Public Schools:

"We believe that a school district could assign the holder of a school business administrator's certificate to serve as coach if it so wishes." (Exhibit B)

The Commissioner has examined the records of the Hudson County Superintendent of Schools, his own records, and the records of the State Board of Education regarding this matter and he finds as follows:

1. The Hudson County Superintendent of Schools has never recommended the establishment of the position of school business administrator in the Kearny School District pursuant to *N.J.S.A.* 18A:17-14.1.

2. The Commissioner and the State Board of Education have not approved the establishment of that position as required by *N.J.S.A.* 18A:17-14.1.

It is clear from the facts in this case that the Board Secretary's appointment to the position of school business administrator was defective and a nullity because the Board failed to secure the necessary approvals for the establishment of that position. The Board's resolution recognizes the requirement and states that the appointment of the Board Secretary as school business administrator was to be "*** effective upon approval of the position by the County Superintendent of Schools, the Commissioner of Education and the State Board of Education." (Exhibit A) Accordingly, the adoption of the resolution was an empty act, and the Board Secretary is not, and never has been, a duly appointed school business administrator. The Board may, of course, immediately act to secure the recommendation of the acting County Superintendent, and by resolution request the approval of the Commissioner and the State Board for the establishment of the position. As the matter now stands, the Board Secretary is not a member of the professional staff of the school district and may not continue to serve as a coach.

The Commissioner is constrained to comment on the letter from the State Board of Examiners to the Superintendent. (Exhibit B) Since the letter consists of only the one quoted sentence, *ante,* it must be assumed that the State Board of Examiners had been advised that the local Board was seeking approval to establish the school business administrator position, intended to appoint the Board Secretary to that position, and desired to know whether he could be appointed to serve as a coach. Had the Board taken the necessary steps, its appointment of the Secretary as school business administrator would have been proper, and likewise his appointment as a coach of interscholastic athletics.

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There is nothing in the record to show that the Board Secretary was ever aware of the Board's neglect to fulfill the requirements for his proper appointment as school business administrator or that, consequently, his appointment as a coach was also invalid. The fault lies with the Board and not the Secretary. For this reason, the Commissioner will not hold that his previous annual appointments as a part-time football coach were void. As was previously stated, he may not be reappointed as a football coach for the 1975-76 school year unless he is properly appointed either as school business administrator or to another professional staff position under an appropriate certificate.

The Commissioner will consider next petitioners' request that the Board be ordered to remove from the personnel files any and all evaluations relating to their respective performances as coaches, which were written by the Board Secretary in his previous capacity as head football coach.

The Board did not reappoint petitioners as assistant coaches in accordance with the recommendation of the Superintendent, who relied, at least in part, upon the evaluations made by the Board Secretary. Petitioners do not claim that these evaluations were made incompetently, irresponsibly, or in bad faith. Nor does the record contain any evidence that the evaluations were substantively in error. Petitioners' plea is based upon the grounds that the coach who evaluated their performance as assistant coaches was not a properly certified member of the professional staff at the time and, therefore, should not have been a coach.

It must be borne in mind that all persons who serve as coaches of interscholastic athletics in public schools in this State are first and foremost teaching staff members. Their academic preparation, training and experience are centered upon teaching. The knowledge that these teaching staff members possess in regard to various types of athletic events is usually derived from their own participation in amateur athletics during their secondary schooling and undergraduate college careers. They are professional teachers and not professional coaches. As the Commissioner previously pointed out in *Point Pleasant Beach Teachers' Association v. Board of Education of the Borough of Point Pleasant Beach et al., Ocean County,* 1974 *S.L.D.* 241, the purposes of the rule, *N.J.A.C.* 6:29-6.3 (a), (b), are twofold. These are to avoid the evil of having local boards of education employ professional athletes or other uniquely qualified persons on a minimal part-time basis as a guise for securing their coaching talents, and also to insure that boys and girls in the public schools will be coached by teachers who have been trained to foster the development of the mind, body, and character of each pupil as the foremost goal.

Teachers who are highly skilled and successful in the classroom do not always achieve the same degree of skill and success when they attempt to coach various athletic teams. Also, some teachers achieve more skill and success coaching one athletic event as compared to another. Thus, a teacher may discover that he can coach baseball more effectively than football or basketball. It is also commonly held that a teacher may be successful as a coach in one set of circumstances or in one school district, and not in another. The public is adequately familiar with the regular changes in coaching staffs on the undergraduate college level; therefore, there is no need to belabor the point.

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For the reasons set forth above, the Commissioner determines that written evaluations of the coaching performance of teachers should not be kept in the personnel file of each teacher. The purpose of such evaluations can be served by retaining them in a separate folder, and such coaching evaluations should not be permitted to cast a negative influence upon a teaching staff member's overall performance as a professional teacher. Certainly, when a teacher seeks employment in another school district, any evaluation of his past performance as a coach should not be used to cast a shadow upon his professional standing as a teacher.

Accordingly the Commissioner directs that written evaluations of petitioners' performances are to be removed from their personnel files. These evaluations may be retained in separate folders while petitioners are employed within the Kearny School District, but are to be destroyed in the event that petitioners leave the District. Such evaluations are not to be utilized adversely against petitioners should they make application for employment as teachers elsewhere. This procedure is to be followed for all teaching staff members assigned as part-time coaches within the Kearny School District.

In conclusion the Commissioner is constrained to state that local boards of education are not required to reappoint teaching staff members to various coaching assignments, and may make changes in such assignments at their discretion, providing that their actions are not based upon proscribed reasons and are not wholly arbitrary. Teaching staff members do not acquire a tenure status as coaches, and there are many circumstances under which changes of such assignments may be desirable. *Frank Monaco v. Board of Education of Hanover Park Regional High School District,* 1973 *S.L.D.* 272; dismissed State Board of Education 1974 *S.L.D.* 1413. See also *Nello Dallolio v. Board of Education of the City of Vineland, Cumberland County,* 1965 *S.L.D.* 18 (football coach); *Joseph J. Dignan v. Board of Education of Rumson-Fair Haven Regional High School, Monmouth County,* 1971 *S.L.D.* 336, affirmed State Board of Education 1974 *S.L.D.* 1376 (faculty advisor); *Henry R. Boney v. Board of Education of the City of Vineland et al., Atlantic County,* 1971 *S.L.D.* 579 (department chairman).

COMMISSIONER OF EDUCATION

February 10, 1975

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Barbara T. Buchanan, Arline Zatz and Joel L. Zatz,

Petitioners,

v.

Board of Education of the Borough of Highland Park, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioners, Barbara T. Buchanan, *Pro Se;* Arline Zatz, *Pro Se;* Joel L. Zatz, *Pro Se*

For the Respondent, Campbell and Snedeker (William P. Snedeker, Esq., of Counsel)

This matter having been brought before the Commissioner of Education by petitioners as parents of pupils enrolled in the School District of the Borough of Highland Park; and

It appearing that the Highland Park Board of Education, hereinafter "Board," has, for the first time in the 1974-75 school year, exercised its discretion to operate a school cafeteria pursuant to statutory authority (*N.J.S.A.* 18A:33-3); and

It appearing that school pupils other than those who choose to buy their lunch from the cafeteria are required to pay a fee of $.25 to cover the costs of supervision; and

It appearing that such supervision of pupils who are present on school premises during the course of the school day and participating in an approved school program is a vital service required of the school, *Robert A. Titus v. Richard Lindberg et al.,* 49 *N.J.* 66 (1966); and

It appearing that such supervision may not properly or legally be the reason for the imposition of a fee; therefore

It is determined by the Commissioner of Education that the practice of charging a fee to pupils for the privilege of carrying a lunch to school must be discontinued forthwith. The Commissioner so orders. A more detailed exposition of the contentions of the parties herein and the basis of this determination will follow publication of this order.

Ordered this 23rd day of January 1975.

COMMISSIONER OF EDUCATION

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Barbara T. Buchanan, Arline Zatz and Joel L. Zatz,

Petitioners,

v.

Board of Education of the Borough of Highland Park, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Barbara T. Buchanan, *Pro Se;* Arline Zatz, *Pro Se;* Joel L. Zatz, *Pro Se*

For the Respondent, Campbell and Snedeker (William P. Snedeker, Esq., of Counsel)

Petitioners, parents of pupils enrolled in a public elementary school in Highland Park, allege that these pupils are charged a fee of $.25 per day by the Board of Education of the Borough of Highland Park, hereinafter " Board," for the privilege of eating their lunch in school. They demand judgment that the imposition of such a fee is illegal and request an end to the practice The Board avers that the lunch program is not an instructional program and does not have to be provided free to all pupils and, therefore, that the imposition of the fee is a proper exercise of its discretion.

The matter is submitted for Summary Judgment by the Commissioner of Education. The essential facts are not in dispute and are recited as follows:

The Board has for the first time in the 1974-75 school year instituted a school cafeteria program which makes it possible for pupils to purchase their lunch at school. As an alternative, as in prior years, pupils may also bring lunches from home to school and eat in the school cafeteria under the supervision of school employees.

In school year 1974-75, also for the first time, the Board has required the payment of $.25 per day, or $1.25 per week, from pupils who bring their lunches from home. The Board states that this fee is levied "***to cover the extra administrative costs of supervising those students not purchasing their lunches but present in the lunch room facilities and eating bag lunches***." (Answer of the Board to Petition of Appeal, at p. 1) It is stipulated that the Board, at its October 1974 meeting, decided to eliminate a factor of distance-from-school as grounds for an exemption of payment of the fee. Exemptions for hardship are considered upon request.

Petitioners, acting *pro se,* argue that the fee contradicts the "spirit of the free public school" and should not be allowed to be continued. Their prayer is for an exemption from payment of the fee and an end to the practice for all pupils.

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The Board defends the fee it levies and advances three defenses of its action. These defenses are that:

1. A voluntary school lunch program is not an instructional program and does not have to be provided without charge as an integral part of the "thorough and efficient" program of free public education required by the New Jersey Constitution (*Art.* VIII, *Sec.* IV, *Par.* 1).

2. The practice herein is not unique but, to the contrary, a common one since many or all school districts impose charges for athletic events, dramatic productions, etc., when such affairs are voluntarily provided.

3. The lunch program, in this instance, is completely voluntary and petitioners are not required to have their children participate in it but may, if they choose, have their children eat at a place other than school or purchase the school lunch, in which latter event no fee for supervision will be charged.

The Commissioner has considered such facts and arguments and determines that the practice of requiring a fee for the use of a school cafeteria facility during the course of a school day on the pretext that such fee is intended to cover supervisory costs is clearly illegal and must be halted forthwith. The decision to supply and operate a cafeteria "***for dispensing food to public school pupils without profit to the district***" (*N.J.S.A.* 18A:33-3) was made voluntarily by the Board. Pupils who use this school cafeteria, whether to eat food purchased there or obtained elsewhere, must be supervised in the same manner as pupils in any program authorized by Board action and such supervision may not legally be the reason for the imposition of a fee. The Commissioner so holds.

As the Court said in *Robert A. Titus et al. v. Richard Lindberg et al.*, 49 *N.J.* 66 (1967):

> "***The duty of school personnel to exercise reasonable supervisory care for the safety of students entrusted to them, and their accountability for injuries resulting from failure to discharge that duty, are well-recognized in our State and elsewhere.***" (49 *N.J.* at p. 73)

Furthermore, as the Commissioner said *In the Matter of the Appeals of the Boards of Education of the Black Horse Pike Regional School District and the Sterling Regional School District, Camden County,* 1973 *S.L.D.* 130 with respect to the imposition of a fee for attendance at a "volunteer" summer school program:

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

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The determination in the instant matter is the same.

Accordingly, the Commissioner has by Order of January 23, 1975, directed that the controverted fee levied by the Board of Education of the Borough of Highland Park be discontinued forthwith. This decision formally confirms that Order and makes it permanent.

COMMISSIONER OF EDUCATION

February 10, 1975

Freehold Township Education Association and Barbara Marzulli,

Petitioners,

v.

Board of Education of the Township of Freehold, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Gerald Dorf, Esq.

Petitioner, a school nurse employed by the Board of Education of the Township of Freehold, hereinafter "Board," alleges that her salary for the 1972-73 academic year was improperly established by the Board in contravention of the provisions of *N.J.S.A.* 18A:29-4.2 and prior case law. Petitioner now seeks to recover the amount of money allegedly owed her by the Board for 1972-73. The Freehold Township Education Association, hereinafter "Association," the duly recognized representative for all teaching staff members, including school nurses employed by the Board, joins in this action on behalf of four other named school nurses similarly employed by the Board.

The parties have submitted this matter for adjudication by the Commissioner of Education on the record, including a joint Stipulation of Facts.

Prior to a recitation of the pertinent facts, the Commissioner points out that *N.J.S.A.* 18A:29-4.2, the controlling statute, provides in its entirety as follows:

> "Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the

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full use of the same experience steps and training levels that apply to teachers."

Subsequent to the enactment of the above-cited law on June 9, 1972, there followed a series of decisions by the Commissioner interpreting its provisions. *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, Passaic County,* 1972 *S.L.D.* 577; *Julia Ann Sipos et al. v. Board of Education of the Borough of Manville, Somerset County,* 1973 *S.L.D.* 434; *Elizabeth Stiles and Grace Ferraioli v. Board of Education of the Borough of Ringwood, Passaic County,* 1974 *S.L.D.* 1170; *Pearl Schmidt v. Board of Education of the Passaic County Regional High School, Passaic County,* 1975 *S.L.D.* 19

For the provisions of *N.J.S.A.* 18A:29-4.2 to apply, a person employed as a school nurse must possess a standard school nurse certificate. *Lenahan, supra* In the instant matter, all named petitioners acquired standard school nurse certificates on the following dates:

Petitioner	*Date Certificate Acquired*
Barbara Marzulli	June 1972
Shirley Muller	June 1972
Elizabeth Hughes	August 1964
K. Patricia Ryan	November 1972
Justina Gerega	June 1972

The Commissioner observes that the permanent school nurse certificate acquired by Petitioner Hughes during August 1964 is equivalent to the standard school nurse certificate requirement today. *N.J.A.C.* 6:11-12.8

Subsequent to the enactment of *N.J.S.A.* 18A:29-4.2, the Commissioner pointed out in *Lenahan, supra,* that a person may obtain a standard school nurse certificate without first obtaining a baccalaureate degree. Accordingly, boards of education were advised that if school nurses it employed possessed both a baccalaureate degree and a standard school nurse certificate, they must be compensated according to the same levels as other teaching staff members, on the bachelor's scale of the teachers' salary policy. If, however, boards of education employed school nurses who possessed a standard school nurse certificate but not a baccalaureate degree, such nurses, at the discretion of the Board, might be compensated according to the levels set forth in the bachelor's scale of the teachers' salary policy, or, if a non-degree guide existed in the district, then such nurses might be compensated according to the rates set forth therein. Finally, if boards of education chose not to compensate school nurses who possessed a standard school nurse certificate, but no degree, according to the bachelor's scale of its teachers' salary policy and did not have a non-degree teachers' salary scale in effect, then boards of education would be required to negotiate to establish a non-degree salary scale.

In the instant matter, the Board's salary policy for 1972-73, the only year in dispute, provided six salary scales for its teaching staff members, with a differential recognizing the attainment of a tenure status in its employ beginning

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at the bachelor's level. (Stipulation of Facts, at page 5) Below the bachelor's level, the Board's salary policy provided a column for "Provisionally Certificated Nurse," and a column entitled "No-Degree." No explanation is presented regarding the column "Provisionally Certificated Nurse," although the "No-Degree" column is for those teaching staff members with "no degree but fully certified." (Stipulation of Facts, at page 5)

The gravamen of the dispute herein is that, notwithstanding the fact that four of the five petitioners were fully certificated as of June 1972, and Petitioner K. Patricia Ryan was fully certificated as of November 1972, the Board chose to compensate all five petitioners for 1972-73 at the lower rates set forth in the scale entitled "Provisionally Certificated Nurse."

Specifically, the Commissioner observes that the 1972-73 salaries actually paid petitioners on the "Provisionally Certificated Column" compared to the "No-Degree" column for those "fully certificated" are as follows:

Petitioner	1972-73 Actual Salary-Provisional Level	Salary No-Degree Level	Difference
Barbara Marzulli	$ 9,110	$10,490	$1,380
Shirley Muller	8,740	10,015	1,275
Elizabeth Hughes	11,590	14,540	2,950
K. Patricia Ryan	7,630	8,655	1,025
Justina Gerega	8,185	9,315	1,130

After a review of the record herein, the Commissioner finds and determines that the establishment of the salaries of Petitioners Marzulli, Muller, Hughes, Ryan (as of November 1972) and Gerega for 1972-73 by the Board was in violation of *N.J.S.A.* 18A:29-4.2, and was also contrary to its own adopted salary policy. Each of the named petitioners, excepting Petitioner Ryan, was fully certified as of June 1972, and their salaries for 1972-73 should have been established according to the steps in the "No-Degree" level. Petitioner Ryan's salary for 1972-73 should have been adjusted according to the date of her acquisition of the standard school nurse certificate. The Commissioner is cognizant of the argument advanced in the Board's untimely Brief dated February 3, 1975, which suggests that it was prohibited by federal regulations from increasing salaries of the named school nurses because the Board lacked specific authorization to do so by the Cost of Living Council.

The Commissioner is not swayed by this argument, since there has been no proof offered by the Board that it received such advice from the then-existent Cost of Living Council.

The Commissioner observes that petitioners seek interest on the amounts of money owed them by the Board. It has been previously determined that there is no provision in the statutes for payment of interest, costs, and legal fees. *Fred Bartlett, Jr. v. Board of Education of the Township of Wall,* 1971 *S.L.D.* 163, affirmed State Board of Education 166 Petitioners' requests for monetary interest are denied.

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The Commissioner hereby directs the Board of Education of the Township of Freehold to pay to Petitioners Marzulli, Muller, Hughes, Ryan (as of November 1972) and Gerega at the next regular pay period, the difference between the salaries already tendered them for the 1972-73 academic year and the amounts they should have respectively received according to the "No-Degree" level of the salary policy for 1972-73.

COMMISSIONER OF EDUCATION

February 14, 1975

Board of Education of the Union County Regional High School District No. 1,

Petitioner,

v.

Daniel W. Seib, Jr.,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

It appearing that a Petition of Appeal was filed in this matter challenging the qualifications of Daniel W. Seib, Jr. as a qualified candidate for a seat on the Board of Education of the Union County Regional High School District No. 1, hereinafter "Board"; and

It further appearing that an affidavit filed with this office by the Secretary of the Board shows that respondent does not qualify to run for a seat on the Board; therefore

YOU ARE HEREBY ORDERED to show cause before a representative of the Commissioner of Education on February 14, 1975 at 1 p.m. in the State Department of Education, 225 West State Street, Trenton, New Jersey, why the Commissioner of Education should not direct the Secretary of the Board to remove your name from the list of names to be printed on the ballot as qualified candidates.

If you fail to appear on the date and time indicated, the Commissioner will direct the Board Secretary to remove your name from the ballot.

COMMISSIONER OF EDUCATION

February 11, 1975

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Board of Education of the Union County Regional High School District No. 1,

Petitioner,

v.

Daniel W. Seib, Jr.,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Johnstone & O'Dwyer (Franz J. Skok, Esq., of Counsel)

For the Respondent, Daniel W. Seib, Jr., *Pro Se*

It appearing that a Petition of Appeal was filed in this matter challenging the qualifications of Daniel W. Seib, Jr. as a qualified candidate for a seat on the Board of Education of the Union County Regional High School District No. 1, hereinafter "Board"; and

It appearing that an affidavit filed with this office by the Secretary of the Board shows that respondent does not qualify on the basis of residence (*N.J.S.A.* 18A:12-1) as a candidate for a seat on the Board; and

It appearing that the Commissioner of Education issued an Order to Show Cause directing respondent to appear on February 14, 1975 at 1 p.m. at the State Department of Education, 225 West State Street, Trenton, New Jersey; and

It appearing that respondent did not appear at the time and place directed in the aforementioned Show Cause Order; and

It further appearing that the Commissioner finds as a fact that respondent is not qualified to be a candidate for election to a seat on the Board of Education; therefore

The Commissioner ORDERS AND DIRECTS this 19th day of February 1975 that the Secretary of the Board remove respondent's name from the ballot as a candidate for election to the Board of Education of the constituent district of the Township of Berkeley Heights, New Jersey, at the annual school election to be held on March 4, 1975.

COMMISSIONER OF EDUCATION

February 19, 1975

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Board of Education of the Pascack Valley Regional High School District,

Petitioner,

v.

Mayors and Councils of the Boroughs of Hillsdale, Montvale, and Woodcliff Lake, and Mayor and Township Committee of River Vale, Bergen County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Parisi, Evers and Greenfield (Irving C. Evers, Esq., of Counsel)

For the Respondents, Wittman, Anzalone, Bernstein & Dunn (Walter T. Wittman, Esq., of Counsel)

Petitioner, the Board of Education of the Pascack Valley Regional High School District, hereinafter "Board," appeals from an action of the Mayors and Councils of the Boroughs of Hillsdale, Montvale, Woodcliff Lake, and the Mayor and Township Committee of the Township of River Vale, hereinafter "governing bodies," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Bergen County Board of Taxation an amount of appropriation for current expense purposes for the 1974-75 school year $84,000 less than the amount proposed by the Board in its school budget which was defeated by the voters. The facts of the matter were adduced at a hearing conducted on August 27, 1974 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. Prior to the hearing, the Board filed supporting written testimony. The report of the hearing examiner is as follows:

At the annual school election, the voters rejected the Board's proposal to raise by taxation for current expenses the amount of $4,630,925. Thereafter, the Board submitted its proposed budget to the governing bodies for determination of the amount necessary to operate a thorough and efficient educational program in the Pascack Valley Regional High School District for the 1974-75 school year, pursuant to *N.J.S.A.* 18A:22-37.

After consultation among the parties, the governing bodies determined (C-1) to certify to the Bergen County Board of Taxation an amount of $4,546,925 for current expenses, a reduction of $84,000 from the amount originally proposed to the voters by the Board. As part of that determination, the governing bodies suggested to the Board items of the budget in which they believed economies could be realized without jeopardy to the thorough and efficient educational program as follows:

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Account Number	Item	Board's Proposal	Governing Bodies' Proposal	Amount Reduced
CURRENT EXPENSE:				
J110f	Sals. - Supt's Office	$24,000	–0–	$24,000
J130	Other Exps. - Adm.	7,500	–0–	7,500
J213	Sal. - Tchrs.	21,000	–0–	21,000
J214c	Psych. Servs.	12,000	–0–	12,000
J230e	Other Exps. - Lib.	1,000	–0–	1,000
J240	Teaching Supls.	5,000	–0–	5,000
J250	Oth. Exps. - Instr.	2,000	–0–	2,000
J730c	Repl. of Equip. (Purch.)	3,500	–0–	3,500
J800	Fixed Chrgs.	3,000	–0–	3,000
J1123	Oth. Exps. - Spec. Proj.	5,000	–0–	5,000
TOTAL CURRENT EXPENSE		$84,000		$84,000

For budget disputes such as controverted herein, the New Jersey Supreme Court set forth guidelines for the parties in 1966 in order to assist the Commissioner in arriving at a just and equitable determination. In *East Brunswick Board of Education et al. v. East Brunswick Township Council et al.*, 48 *N.J.* 94 (1966), that Court held as follows:

> "***The governing body may, of course, seek to effect savings which will not impair the educational process.*** Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, *it [the budget] should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.* This is particularly important since, on the board of education's appeal under R.S. 18:3-14 [now *N.J.S.A.* 18A:6-9], the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found.***" (*Emphasis supplied.*) (at pp. 105-106)

In preparation for the proceedings in this matter, the Assistant Commissioner in charge of Controversies and Disputes, by letter dated April 10, 1974, notified the governing bodies of the following:

> "***In accordance with the directive of the New Jersey Supreme Court in the case of *East Brunswick Board of Education v. East Brunswick Township Council,* 48 *N.J.* 94 (1966), you are directed to include in your answer two copies of a detailed statement setting forth the governing body's underlying determinations and supporting reasons for its action to reduce the budget of the Board of Education.***"

No response has been received from any one of the four governing bodies who are respondents herein and only two of the governing bodies, River Vale and Hillsdale, filed an Answer to the Petition of Appeal. All four of the governing bodies were represented at the hearing by one counsel. (Tr.6) In

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regard to the lack of the governing bodies' "underlying determinations" for the proposed budget reductions, counsel stated:

> "***[W]e do not have at this time any documentation before us. The position that the Municipalities take is that they will rely upon the resolution [C-1] that was adopted by them and sufficient evidence [which] may develop during the course of cross-examination.***" (Tr.5)

Notwithstanding the failure of the governing bodies to submit documentation in support of its recommended reductions, the Board is required to demonstrate the necessity for restoration of the items in dispute.

Accordingly, the hearing examiner will deal *seriatim* with the governing bodies' proposed reductions and will make recommendations to the Commissioner.

J110f Salaries – Superintendent's Office *Reduction $24,000*

These moneys reflect a new position entitled assistant superintendent of schools. The governing bodies recommend the elimination of the position thereby effectuating a saving of $24,000.

The Board operates two high schools with a pupil enrollment in excess of 3,000. Furthermore, it employs approximately 220 professional employees and 80 nonprofessional employees.

The Board asserts that the new position is essential to assist its Superintendent in the areas of curriculum, policies, and other duties associated with the office of its chief school administrator.

The hearing examiner finds the position of assistant superintendent of schools essential to the thorough and efficient operation of the Board's educational program and recommends restoration of $12,000, or one half the amount in dispute, for the remainder of this school year.

J130 Other Expenses – Administration *Reduction $7,500*

The total amount budgeted in the J130 line item is $10,159, spread among six sub-categories. The governing bodies recommend a general reduction of $7,500 without specifying which sub-category should be reduced. The Board asserts the moneys proposed for reduction are necessary to publish an informational document, *Regional Report,* to employ a professional negotiator, to pay increased dues to the New Jersey School Boards' Association which by law it is required to join (*N.J.S.A.* 18A:6-45) and to present a referendum to its voters for land development.

Although no dollar cost is set forth herein for each separate item the Board avers it requires, the Superintendent's testimony disclosed (Tr.31-33) that the amount budgeted for the *Regional Report* is $2,500. The hearing examiner finds that the publication is not essential to the operation of a thorough and efficient educational program, but does find the other items essential. Ac-

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cordingly, he recommends that $2,500 of the proposed reduction be sustained and that $5,000 be restored.

J213 Salaries – Teachers *Reduction $21,000*

The governing bodies recommend a reduction of $21,000 which the Board asserts it needs for an additional remedial reading teacher. The hearing examiner points out that this position is properly chargeable to line item J213.1, while the addition of an audiovisual director is properly chargeable to J214d.

The Board avers that, because of the size of its pupil enrollment the present remedial reading teacher serves as the reading teacher, the coordinator of the developmental reading program, the in-service teacher trainer of staff, and the director of the State assessment program.

The hearing examiner finds that the need for an additional remedial reading teacher has been established by the Board.

The Board avers that an audiovisual director is necessary because a teacher in each school is presently assigned the task of coordinating audiovisual aids. Furthermore, the Board contends that with the completion of a modern media center and the upgrading of the high school's media department, a director of media is essential for coordination and economy in purchasing practices.

The hearing examiner finds that the need for an audiovisual director has been established by the Board and, accordingly, recommends the restoration of $10,500 of this reduction, or one half, for the remainder of the academic year.

J214c Salaries – Psychological Personnel *Reduction $12,000*

The governing bodies recommend a reduction of $12,000 in this line item which the Board contends is necessary for an additional school psychologist. The Board argues that with its 3,000 pupil enrollment, the present ratio of 1:3,000 is much too high. The Board States that this causes a time lapse of from two to four months before the present psychologist is able to schedule initial interviews with pupils who have been referred to him.

The hearing examiner finds that the need for a second psychologist has been established by the Board and, accordingly, recommends the restoration of $6,000 to this line item for the remainder of the academic year.

J230e Other School Library Expenses *Reduction $1,000*

The total amount budgeted for line item J230e, which is used for paper, pencils, index cards, and other office supplies in the school library, is $2,350. The governing bodies recommend a reduction of $1,000.

The Board argues that these moneys are essential to maintain its present library collection in proper repair and to continue the proper cataloging of new books.

The hearing examiner finds that the need for the moneys recommended

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for reduction has been established by the Board. Accordingly, the hearing examiner recommends the restoration of $1,000 to this line item.

J240 Teaching Supplies *Reduction $5,000*

The total amount budgeted in line item J240 for 1974-75 is $82,275, from which the governing bodies recommend a reduction of $5,000. The Board argues that if the reduction is sustained, it would spend less than the amount which was budgeted in the 1973-74 school year. The Board's written testimony indicates that the total amount budgeted in line item J240 for 1973-74 was $66,860. Notwithstanding this apparent error, the Board further states that $1,800 in additional funds had to be used during 1973-74 for adequate supplies for industrial arts and home economics.

The hearing examiner is cognizant of the current high rate of inflation in the purchase of paper products, and finds that the Board has established its need for the moneys in dispute. Therefore, he recommends the restoration of $5,000 to this line item.

J250 Other Expenses – Instruction *Reduction $2,000*

The governing bodies recommend a $2,000 reduction in line item J250a guidance supplies. The total amount budgeted by the Board for guidance office supplies is $8,560 for 1974-75, compared to $5,850 for 1973-74.

The Board argues that the $2,000 recommended for reduction is necessary for supplies in its new Career Education Program, and the purchase of educational testing materials for a new testing program.

The hearing examiner finds that the Board has demonstrated its need for these funds and, accordingly, recommends the restoration of $2,000 to this line item.

J730 Purchase of Equipment *Reduction $3,500*

The total amount budgeted in line item J730 is $97,251, from which the governing bodies recommend an unspecified reduction of $3,500.

The Board argues that the total amount budgeted represents the bare minimum necessary for additional and replacement equipment and furniture for both instructional and noninstructional uses. The Board asserts that, if the proposed reduction is sustained, its educational standards would be affected in a negative manner.

The hearing examiner finds that the Board has established its need for the moneys proposed for reduction herein and, accordingly, recommends the restoration of $3,500.

J800 Fixed Charges *Reduction $3,000*

The amount budgeted by the Board in the J800 series of line items totals $361,475. These moneys represent costs for the Board's contributions to

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employees' retirement funds, insurance and judgments, and tuition payable. The governing bodies recommend a $3,000 reduction in fringe benefits based upon their earlier recommendations for eliminating personnel positions. In light of the hearing examiner's recommendations to restore fifty percent of those moneys for each position recommended for elimination, it is recommended that $1,500 of the proposed reduction herein be restored.

J1123 Other Expenses – Special Projects *Reduction $5,000*

The Board budgeted a total amount of $7,200 for line item J1123 from which the governing bodies recommend a reduction of $5,000.

The Board argues that these moneys are necessary to continue the E.S.E.A., Title III Forum Seminar Instructional Program, which began in 1968.

The hearing examiner finds that the Board has demonstrated its need for these moneys. Accordingly, it is recommended that the $5,000 be restored.

In summary, it is recommended that the combined line items discussed, *ante,* be determined as follows:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110f	Sals. - Supt's Off.	$24,000	$12,000	$12,000
J130	Other Exps. - Adm.	7,500	5,000	2,500
J213	Sals. - Tchrs.	21,000	10,500	10,500
J214c	Sals. - Psych. Servs.	12,000	6,000	6,000
J230e	Other Exps. - Lib.	1,000	1,000	–0–
J240	Tchng. Supls.	5,000	5,000	–0–
J250	Oth. Exps. - Instr.	2,000	2,000	–0–
J730	Repl. of Equip. (Purch.)	3,500	3,500	–0–
J800	Fixed Chargs.	3,000	1,500	1,500
J1123	Other Exps. - Spec. Proj.	5,000	5,000	–0–
TOTAL CURRENT EXPENSE		$84,000	$51,500	$32,500

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed and considered the report of the hearing examiner and has noted the absence of exceptions, objections or replies pertinent thereto. The Commissioner concurs with the report and the recommendations therein.

Accordingly, the Commissioner finds and determines that an amount of $51,500 must be added to the amount previously certified by the governing bodies of the Boroughs of Hillsdale, Montvale, and Woodcliff Lake and the Township of River Vale, to the Bergen County Board of Taxation to be raised for the current expenses of the Pascack Valley Regional High School District in

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order to provide sufficient funds to maintain a thorough and efficient system of public schools in the district. He, therefore, directs the Bergen County Board of Taxation to add the amount of $51,500 to the previous certification of the four governing bodies for the current expenses of the school district so that the total amount of the local tax levy for 1974-75 shall be $4,598,425.

COMMISSIONER OF EDUCATION

February 19, 1975

In the Matter of the Inquiry of the School District of the Township of Sandyston-Walpack, Sussex County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Busche, Clark & Leonard (R. Webb Leonard, Esq., of Counsel)

For the Respondent, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

Petitioner, the father of two pupils formerly excluded from enrollment in the Sandyston-Walpack elementary school but presently in attendance there on a temporary basis by Court Order, avers that they have an entitlement to continue to be provided a free public education by the Sandyston-Walpack Board of Education, hereinafter "Board." The Board maintains that the house in which petitioner and his family lives is on federal land recently purchased by the United States Government and that the Board's policy and certain provisions contained in a house use permit require the payment of tuition by petitioner if his children are to be enrolled in the Sandyston-Walpack elementary school on a permanent basis.

A hearing of inquiry in this matter was conducted on October 10, 1974 at the office of the Sussex County Superintendent of Schools, Newton, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

Petitioner is a tenured teaching staff member in the employ of the Newton Board of Education. In the years prior to the 1972-73 school year, he was assigned by that Board to teach in school facilities operated by the Board in Newton, Sussex County.

In the fall of 1972, however, petitioner's work location was changed and he was assigned as Director of the Thunder Mountain Environmental and Education Center, hereinafter "Center." This Center is located some distance

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from Newton on land owned by the federal government and leased to the Newton Board. The land is part of the large tract set aside for the Tocks Island Dam project proposed for construction.

For a short time in the fall of 1972, petitioner commuted a distance of approximately forty miles from his home, which was then in Andover, New Jersey, to the Center. In October of that year, however, he moved his family to a house on the Center's grounds and attempted to enroll his two children in the Sandyston-Walpack elementary school. Such enrollment was refused although pupils from the same house occupied by petitioner had formerly attended this school. Petitioner then offered to pay the difference between the amount of money the district received in State and federal aid and the cost of their education, but this offer was not accepted. (Tr. 14) At that juncture petitioner requested the Newton Board, his employer, to enroll his children, and it consented to the request. At first this enrollment was without tuition cost but petitioner supplied transportation. (Tr. 14) In January 1973, however, petitioner was told by the Newton Board that tuition payment would be required of him at a reduced rate, and he did pay a total of $1,200 in tuition charges for the months of January through June 1973. (Tr. 15)

In the interim, petitioner again sought entrance to the Sandyston-Walpack school for his children during the 1973-74 school year but was again refused. Again, however, the children were accepted by the Newton Board and their enrollment again continued throughout the 1973-74 year but without tuition charge. (Tr. 21)

On June 17, 1974, the Commissioner addressed the following letter to the Superintendent of Newton Schools in response to a letter the Commissioner had received. This letter reads in pertinent part as follows:

> "It has been brought to my attention that the Sandyston-Walpack Board of Education adopted a resolution which is contrary to the provisions of N.J.S.A. 18A:38-1.
>
> "Due to the Federal Government acquiring property for the Tocks Island National Recreation Areas, the Sandyston-Walpack Board of Education has received additional State aid through special legislation as follows:

Assembly No.	Year	Amount
1015	1969-70	$50,000
912	1970-71	30,000
2366	1971-72	30,000

> "The Sandyston-Walpack Board of Education must enroll pupils residing within the district."

Despite this letter, the Sandyston-Walpack Board maintained its refusal to accept petitioner's children, and in August and September 1974 petitioner pressed complaints against the Board before the Commissioner and in Court. A

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hearing in the matter before the Commissioner was scheduled for August 30, 1974, but was adjourned at the Board's request and a new date of October 10, 1974, was set down. In the interim between those dates petitioner requested and received a Court Order enrolling his children in the Sandyston-Walpack elementary school on a temporary basis with a further Court appearance scheduled for October 18, 1974. It is represented that the date of that appearance has been extended ninety days pending consideration of this matter by the Commissioner. (Tr. 4)

This concludes a factual recital with respect to the school attendance of petitioner's children during the 1972-73, 1973-74 and 1974-75 school years. During all of this period, from October 1972 to the present day, petitioner has lived in a house situated clearly, and historically, in an area within the Sandyston-Walpack School District. His children now attend the Sandyston-Walpack elementary school but only by virtue of the Court Order. The question for determination is whether they have a legal entitlement to continue such attendance.

The Sandyston-Walpack Board's position in this regard is summarized in a resolution adopted by the Board on May 2, 1972. This resolution is recited in its entirety as follows:

"WHEREAS The Federal Government is purchasing large portions of Sandyston and Walpack Townships thus making it non-taxable land, thus far resulting in the loss of more than 9 million dollars in tax ratables, and

"WHEREAS There will only be approximately 9,340 acres of taxable land remaining, and

"WHEREAS The Federal Government, Superintendent of Park Service, Department of Interior, and Corps of Engineers are now permitting residency in formerly vacated homes located on federal properties, thereby placing the burden of educating these children on people of the Sandyston-Walpack Consolidated School District, and

"WHEREAS The financial burden will continually fall on the very few property owners remaining in the community, in the form of property taxes at an accelerated rate which is almost confiscatory, now, therefore, be it

"RESOLVED That the Sandyston-Walpack Consolidated School Board of Education will require tuition from anyone registering or sending students residing on federal property, which has been vacated, in the Sandyston-Walpack Consolidated School District." (PR-1)

At the hearing the Board provided considerable elaboration with respect to the resolution and the necessity for it. Succinctly stated, it is the Board's

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position that its greatly diminished tax base cannot support a large influx of pupils who are domiciled on federal lands and, therefore, tuition payments by the parents of such pupils are required. The Board states that only approximately twenty taxpayers remain in Walpack Township and that the tax ratables there have decreased from $12,000,000 to $1,000,000 as the result of federal purchases. (Tr. 94-95) The Board further avows that the area of Sandyston containing tax ratables has been decreased from approximately 27,000 acres to an area that, in the near future, may be as small as 9,000 acres. (Tr. 55) In such a situation, the administrative principal of the district avers that the Board is "***extremely concerned about how to continue paying the costs because costs, as you can see, have not gone down even though our enrollment has gone down***." (Tr. 99) In fact the Sandyston-Walpack School District is now responsible for the education of 329 pupils. (Tr. 70) Of this total, 55 pupils are enrolled from tax exempt land now owned by the federal government. (Tr. 70) Another 11 pupils reside on tax exempt land owned by the State of New Jersey. (Tr. 71) Thus a total of 66 pupils, or approximately twenty percent of the pupils resident in Sandyston-Walpack, presently reside on tax exempt land. The present apprehension with respect to such enrollment is not grounded primarily on that fact, but on the uncertainty of future federal policy and the possible effect on the remaining smaller populace of the district. (Tr. 55-57, 98)

Testimony at the hearing disclosed that special State and federal funding, totaling approximately $163,288.09 in the years 1969 through 1973 has served to provide a major part of educational costs incurred by the Board to date. (See PR-2.) (Tr. 91) The Board's fear is occasioned by retrenchment and the uncertainty with respect to future commitments.

This trepidation occasioned the Board's resolution (PR-1) to require tuition payment. It also prompted the Board to encourage the development of a codicil by the National Park Service to be incorporated in use permits granted by the government. (Tr. 38) These permits now provide that "***no children residing on these properties, as a result of this special use permit issued by the National Park Service, would be permitted to attend our [Sandyston-Walpack] schools without the payment of full tuition.***" (Tr. 38) Thus, in effect, the codicil's provisions appear to impose a waiver of school entitlement upon pupils who, in the future, may move to homes on federal lands which have been vacated by previous private owners or tenants. The Board, however, defends both the codicil and its own resolution (PR-1) which must be read *in pari materia* with it. (Tr. 56) The defense is grounded primarily on the practicalities of the situation. Counsel for the Board stated at the hearing that the Board has "***been to the Federal Government and the State trying to work out a proper solution***" (Tr. 57) and that he believes the Board's resolution (PR-1) is "reasonable." (Tr. 57) He leaves to the Commissioner or the Court a determination with respect to its "legality." (Tr. 57)

There are many peripheral questions raised by the parties to this matter which may not be discussed or decided here. Certainly the Commissioner has no jurisdiction over disputes between a school district and the federal government's land use policy. It would appear, however, that a jurisdiction may, at some future time, arise in practical terms if the Sandyston-Walpack Board of

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Education is unable to meet its obligation to provide a thorough and efficient educational program for the pupils of its district. The responsibility for providing a system of education is not alone the responsibility of local school districts.

In recognition of this fact a representative of the office of Public Advocate was present at the hearing and expressed the view that the broader problems of the Sandyston-Walpack Board of Education must be "examined seriously." (Tr. 106) The hearing examiner concurs with this view but finds the appeal in the matter, *sub judice,* is a limited and narrow one and that the question for decision is uncomplicated. This question is whether or not petitioner's children have a legal entitlement to an education in the Sandyston-Walpack School District and whether such an entitlement has been denied in the past.

The hearing examiner finds that the children have, and have had, such an entitlement and that the Board's resolution (PR-1) has denied it to them. Since the fall of 1972, they have lived in a house clearly within the Sandyston-Walpack School District. For purposes of school enrollment there is no significance in whether or not the house is on tax exempt land. The right to a free public education is guaranteed to all pupils in the State by the New Jersey Constitution and the school law (*Title 18A, Education*) and may not be bargained away or set aside.

As the Court said in *Township of Brick, Ocean County, et al. v. Harry Vannell and Joseph McCarthy and Helen McCarthy and Point Pleasant Manor Building Company,* 55 *N.J. Super.* 583 (*App. Div.* 1959):

> "***The board of education was under an obligation to provide the children of residents of the municipality with educational opportunities, *N.J.S.A.* 18A:14-1, and this *regardless of the status of the land occupied by their parents.****" (*Emphasis supplied.*) (at p. 592)

While the Court's dicta in the *Township of Brick, supra,* involved possession of dedicated lands, it can be no less applicable herein. The criteria for school enrollment is not narrowly but broadly based. Petitioner's children are clearly domiciled in the Sandyston-Walpack School District.

> "*** 'Domicile' is the relation which the law creates between an individual and a particular locality or country. In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. 17 *Am. Jur.* 588, 590; 28 *C.J.S.* 3. It is the place with which he has settled connection for certain legal purposes, either because his home is there or because that place is assigned to him by the law.***" *Kurilla v. Roth,* 132 *N.J.L.* 213 (*Sup. Ct.* 1944) (at p. 215)

Accordingly, the hearing examiner recommends that the Commissioner direct the Sandyston-Walpack Board to continue the enrollment of petitioner's children in the schools of the district as long as their domicile within the district

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remains unchanged. He further recommends that the Board be directed to reimburse petitioner for tuition costs incurred by him during the school year 1972-73 as the direct result of the Board's exclusion of his children.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the short replies pertinent thereto filed by both petitioner and the Board. Such replies, in essence, represent a concurrence with the major findings of the hearing examiner, which findings are concerned with domicile and the entitlement of petitioner to school enrollment for his children. It is noted, however, that petitioner abandons all claims for tuition reimbursement and has entered into an amicable agreement with the Board in this regard.

Accordingly, at this juncture the Commissioner determines that petitioner has been, and continues to be, domiciled within the Sandyston-Walpack School District and that his children are entitled to the free public education which that District must afford to all resident pupils. He directs, therefore, that petitioner's children be continued in their present enrollment.

COMMISSIONER OF EDUCATION

February 19, 1975

Arthur Levine, individually and as President of the Fort Lee Committee on Bangladesh, and the Fort Lee Committee on Bangladesh,

Petitioners,

v.

Board of Education of the Borough of Fort Lee, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Stephen Apollo, Esq.

For the Respondent, Joseph T. Skelley, Esq.

Petitioners are president and members respectively of the unincorporated, nonprofit Committee on Bangladesh, hereinafter "Committee," which raises money for the Bangladesh Relief Fund in conjunction with UNICEF. They protest an action of the Board of Education of the Borough of Fort Lee,

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hereinafter "Board," denying the use of its school auditorium for a public fund raising showing of the film "Woodstock." They petition the Commissioner of Education to set aside the Board's refusal to authorize use of its auditorium for the showing of this film, to order the Board to allow petitioners to use its auditorium for a showing of the film, and to further order the Board to hold proper and fair hearings prior to making such decisions in the future.

The Board asserts that its refusal to allow the use of its auditorium for this purpose was legal, a sound exercise in discretion, and in the best interest of the public.

The Petition herein was filed May 25, 1972 and was followed by the Board's Answer on June 19, 1972. Thereafter, a conference of counsel was held at the State Department of Education, Trenton, on August 9, 1972 at which time it was agreed that the matter should be submitted for Summary Judgment by the Commissioner on the Stipulation of Facts, affidavits and Briefs. Petitioners' Brief was filed January 22, 1974 and respondent's Brief on September 13, 1974.

A review of the pertinent facts reveals that pupils in the Fort Lee High School Photography Club initially filed an application with the Board on February 3, 1972 to show the film "Woodstock" in the Fort Lee High School auditorium on the evenings of March 17 and 18, 1972. The Board considered this request at its regular meeting held February 10, 1972, and allowed numerous high school pupils and adults to express their opinion regarding its appropriateness. The Board deferred action on the application and requested that two adults sign an amended application as required by Board policy which restricts pupils from holding fund raising activities for benefit of non-school organizations. (R-2) Thereafter, petitioners filed the herein controverted application. (P-1)

Several members of the Board, the Superintendent and the Board attorney attended a showing of the film "Woodstock" elsewhere during the following weekend and reported their findings to the Board at its February 14, 1972 organization meeting, at which time the Board considered the revised application. The Superintendent by affidavit summarized that which was said at the meeting by members and agents of the Board as follows:

> "*** [The] attorney for the Board of Education rendered a legal opinion as to the legality of the presentation of the film at the High School. He stated that he observed scenes in the film depicting complete nudity and sexual activity. The above depictions were confirmed by members of the Board of Education and me who viewed the film.
>
> "*** On the basis of the aforesaid [the Board attorney] stated that he was of the legal opinion that if the film were shown to children and minors of Fort Lee Public Schools, the Board of Education would be exposing itself to criminal prosecution pursuant to *N.J.S.A. 2A: [1] 15-1 et seq.*
>
> "*** [A Board member] stated that he found the film unsuitable for

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viewing by students and that his position was supported by the clergymen of the Fort Lee area***.

"*** [Another Board Member] who voted against the denial of the presentation of the film "Woodstock" admitted that 'there is complete nudity in the picture.'

"***

"*** I declared that after having viewed the film, I found the film included 'drug abuse' and 'other social abnormalities' which made the film unsuitable for presentation to children.***"

(Superintendent's Affidavit, at pp. 2-3)

At this reorganization meeting of the Board, further comments from the public were entertained. Thereafter, the Board, by a vote of eight ayes and one nay, approved the use of its auditorium for fund raising to benefit the Bangladesh Relief Fund. By a separate motion and a vote of eight ayes and one nay, the Board denied the use of its auditorium to show the film "Woodstock." (R-3) Thereafter, a concert was approved and staged to raise funds for the Bangladesh Relief Fund.

It is clear that the Board was aware on February 14, 1972, that the Motion Picture Association of America, Inc., had confirmed to a member of the Board by letter dated February 1, 1972, that "Woodstock" had been rated "R" by its Code and Rating Administration. (R-4) This rating requires that *any person under seventeen years of age be admitted only if accompanied by a parent or adult guardian.* It is further clear that petitioners were aware of this rating, since attached to the application was an addendum which stated that no person under seventeen would be permitted in the auditorium without a parent or adult guardian. (P-1)

Petitioners charge that the Board's denial of the use of its auditorium constituted an illegal abridgement of petitioners' freedom of speech as guaranteed by the First and Fourteenth Amendments of the United States Constitution and Article I of the New Jersey State Constitution. They further assert that the Board's denial was made without proper standards, discloses improper censorship, and is otherwise improper in the light of numerous cited State, district, and federal cases as typified by that which is quoted in petitioners' Memorandum of Law as follows:

"*** 'The citizen's constitutional right under the First and Fourteenth Amendments to communicate ideas and views to his fellow citizens, however unpopular such views may be, represents one of the bulwarks of our free, democratic society. Traditionally our public streets, meeting halls, parks and similar places have been recognized as locations in which this sacred right may be exercised, not only because such places, being dedicated to public use, are held in trust for all citizens, but also because they are usually locations where the ears of large numbers of citizens can most effectively be reached. Such public sites are the 'natural and proper places for the dissemination of information and opinion.' *Schneider v.*

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State, 308 U.S. 147, (1939); *Hague v. C.I.O.,* 307 U.S. 496, 585, 516 (1939). ***" (at p. 15)

Thus, petitioners conclude that the Board may not properly restrict the use of its schoolhouse merely because it disapproves of material in the film or deems it to be controversial or objectionable.

Conversely, the Board argues that it is clothed with broad discretionary powers in granting use of its schoolhouse, and that such powers may be duly exercised, absent unreasonable, arbitrary, or capricious action on its part. The Board further avers that it was compelled to act *in loco parentis* to the pupils of the Fort Lee public schools when faced with the application accompanied by a petition bearing names, ninety percent of which were of Fort Lee public school pupils. Therefore, the Board asserts that it conscientiously sought to determine the suitability of the film for children and minors.

The Board further cites its general regulations governing the use of public school buildings and facilities which contain, *inter alia,* the following:

"USE OF SCHOOL FACILITIES ARE GRANTED SUBJECT TO THE FOLLOWING CONDITIONS:

"1. All programs and entertainments shall be of high moral standard and their nature must be stated on the application form.

***

"6. Users must *** be responsible for the observation of all laws, ordinances, and rules of state and borough.

***

"12. No part of a building shall be used unless so specified in the application and authorization of the Board of Education." (P-1)

The Board asserts that in its judgment the proposed showing of the film "Woodstock" was contrary to its requirement that programs be of high moral standard and would additionally have been violative of *N.J.S.A.* 2A:115-1 *et seq.* which state that:

"The Legislature finds that salacious and lascivious material is increasingly available to State residents under 18 years of age, that it is harmful to their mental and moral health because they lack the maturity to cope with it, and that, to help insulate them from it, it is necessary to establish the separate standard of obscenity, designated 'material obscene for persons under 18' ***." (*N.J.S.A.* 2A:115-1.6)

"***'Material obscene for persons under 18' means any description,

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> narrative account or depiction of a specified anatomical area or specified sexual activity contained in, or consisting of, a picture or other representation, publication, sound recording or film, which *** emits sensuality with sufficient impact to concentrate prurient interest on the area or activity.***" (*N.J.S.A.* 2A:115-1.7)

> "Any person who knowingly admits a person under 18 years of age to a theatre then exhibiting a film obscene for persons under 18 years of age as defined in this act is guilty of a misdemeanor." (*N.J.S.A.* 2A:115-2.6)

The Board maintains that it made a reasonable inspection to ascertain the content of the film "Woodstock," and having determined that it contained explicit scenes of sexual activity and drug abuse, properly denied its facilities for exhibition of the film as required by both State law and its own policy.

The Board holds that such denial is in no way violative of petitioners' constitutional rights and cites in support thereof *Goodman v. Board of Education of South Orange-Maplewood, Essex County,* 1969 *S.L.D.* 88 wherein the Commissioner stated that:

> "***Certainly some decision-making is called for to determine the suitability of materials to be passed out to pupils in the schools.***"
> (at p. 96)

And,

> "***[C]onstitutional liberties are not absolute but are subject to the restrictions necessary to preserve the rights of others. Thus, freedom of speech may be limited for the purpose of preserving good order and insuring the general welfare.***" (at p. 95)

The Commissioner has considered and weighed the extensive arguments set forth in the Memoranda of Law of the respective parties. The Board's refusal to allow the showing of the film "Woodstock" in its auditorium was taken in accord with its own reasonable policy, which it was empowered to make pursuant to *N.J.S.A.* 18A:11-1. However, in a similar case, that of *Theodore C. Seamans et als. v. Board of Education of the Township of Woodbridge, Middlesex County,* 1968 *S.L.D.* 1, it was said that:

> "***The Commissioner *** conceives it his responsibility to examine not only the reasonableness of the board's regulations *** but also the proper use of the board's discretion in the application of such regulations.***"
> (at p. 5)

In *Seamans* it was determined that the Board of Education for insufficient and arbitrary reasons denied use of an auditorium for the purpose of a public debate.

Similarly, in *Preston K. Mears, Jr. et als. v. Board of Education of the Town of Boonton, Morris County,* 1968 *S.L.D.* 108, the Commissioner found that, while the Board's policy for the use of school facilities was proper, there

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existed no reasonable basis to deny petitioners' use of its auditorium for a lecture by a Columbia University faculty member.

In the instant matter, however, it is clear that members of the Board sought to determine the appropriateness of the film "Woodstock" by viewing it themselves. They further shared their findings with other members of the Board and the public in a public meeting. Additionally, the Board solicited and received the legal opinion of its attorney who stated that he believed such a showing would be contrary to statutory restrictions. No covert action may be attributed to the Board in that, at two meetings, members of the public were invited to express their views. Viewed within such a context, it is clear that the Board did not act in an arbitrary or capricious manner. Nor was it required to conduct further or more elaborate hearings in consideration of such requests for the use of its school facilities.

It remains to determine whether the Board's reasons for denial of the use of its schoolhouse were reasonable and legal.

A reading of the addendum accompanying petitioners' application for use of the auditorium shows that it was their intent to limit attendance of pupils and others *under seventeen years of age* to those accompanied by a parent or guardian. *No such guarantee was made regarding those seventeen years of age. N.J.S.A.* 2A:115-2.6 prohibits the admission of persons "***under eighteen years of age to a theatre then exhibiting a film obscene for persons under 18 years of age***" as defined by statute. *N.J.S.A.* 2A:115-2.5 further defines as obscene for persons under eighteen years of age any film which portrays less than completely covered male or female genitalia or acts of sexual activity.

The Board, having made reasonable inspection and inquiry and having determined that nudity and acts of sexual activity were openly displayed in the film, had reasons to consider the appropriateness of the film for its pupils, many of whom had signified interest in viewing it by signing the petition, *ante.*

Petitioners mistakenly rely upon their willingness to enforce the restrictions pertaining to the "R" rating of the Motion Picture Association of America, Inc. Such restrictions in no way stand in the place of legal requirements in this State. The statutory requirements of the State of New Jersey prohibit films depicting nudity, erotic and specific sexual activity from being shown to *any* children under eighteen in a public place. In any event, petitioners had no apparent intention of restricting attendance of persons seventeen years of age. Thus, it may be concluded that they were in error.

The Supreme Court of the United States in *Miller v. California,* 413 *U.S.* 418, 37 *L. Ed. 2d* 419, 93 *S. Ct.* 2607 stated that:

> "***In sum, we (a) reaffirm the *Roth* holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States ***; and (c) hold that obscenity is to be determined by applying 'contemporary community standards'***, not national standards.***" (at p. 438)

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A board of education, elected by the voters of the community, is in a unique position to be responsive to the standards of the community when such board establishes policy and applies that policy in matters such as that herein controverted.

The Commissioner is constrained to reemphasize that which was said in *Goodman, supra,* as follows:

> "*** Pupils in the public schools are persons and are entitled to enjoy rights as such. It must be recognized, however, that they are persons of tender years and as such have not reached the degree of maturity where all supervision and control should be removed. Such control does not constitute in itself, and need not be, an overt form of suppression. The Commissioner finds no arbitrary attempt or intention *** herein to eradicate or suppress the expression of controversial points of view by students such as the Court found and determined to be unacceptable in *Tinker* [*v. Des Moines Independent Community School District et al.,* 21 *L. Ed. 2d* 731 (1969)].***" (at p. 95)

In the instant matter, the Board gave full consideration to its prime objective, the welfare of its pupils, and for valid reasons denied the use of its school auditorium. Its action was in accord with statutory prohibitions and with its own adopted policy. In this instance, the Board has met the requirements as set forth by the Court in *Tinker, supra,* wherein it was stated:

> "*** In order for the State in the person of school officials to justify prohibitions of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.***" (at p. 739)

The Board's denial of the application to use its school auditorium was a sound exercise in discretion and in no way violative of petitioners' constitutional rights. The Petition of Appeal, being without merit, is dismissed.

COMMISSIONER OF EDUCATION

February 21, 1975

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John McAllen, Jr.,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, George G. Gussis, Esq.

For the Respondent, Frank Piscatella, Esq.

Petitioner, a teacher with a tenure status employed by the Board of Education of the Borough of North Arlington, Bergen County, hereinafter "Board," asserts that he has been denied proper placement on the Board's salary guide for the academic year 1973-74.

This matter is submitted to the Commissioner of Education for adjudication on a joint Stipulation of Facts, Briefs, and exhibits.

Petitioner is properly certified as a teacher and was being compensated on the bachelor's degree plus 30 credits level of the Board's salary guide beginning in September 1969. Petitioner was awarded a master's degree by Fairleigh Dickinson University in May 1973. He alleges that his proper placement on the salary guide for 1973-74 is the master's degree plus 30 credits level. The Board avers that his proper placement is the master's degree level. The Board asserts that this is so because teaching staff members must receive prior approval from the Superintendent of Schools for graduate courses taken beyond the master's degree level, and that additional graduate courses may be pursued only after a master's degree is conferred if teachers are to have such courses considered for the purpose of advancement on the salary guide.

The Board's salary policy provides for compensation at the following levels: (a) bachelor's degree; (b) bachelor's degree plus 15 credits; (c) bachelor's degree plus 30 credits; (d) master's degree. That policy provides additionally as follows:

Master's Plus		
MA + 10	$200	
MA + 20	$250	
MA + 30	$300	(Attachment 1b)

Petitioner prays for an Order of the Commissioner directing the Board to compensate him according to the master's degree plus 30 level, rather than the master's degree level on which he is now being paid.

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The joint Stipulation of Facts may be summarized as follows:

Petitioner is fully certified as a teacher and holds both bachelor's and master's degrees. In September 1969, prior to his matriculation in a master's degree program, he was being paid on the bachelor's degree plus 30 credits level of the salary guide. At least thirty credits were graduate level credits; however, some of them were necessary to secure his permanent certificate as a teacher of Distributive Education and Business Education.

Petitioner was awarded his master's degree on May 25, 1973. There is no duplication of courses between those taken to achieve the bachelor's degree plus 30 credits level and the graduate courses which were included in petitioner's master's degree program. None of the thirty credits in question were completed after petitioner received his master's degree. In fact, all of the disputed thirty semester hour credits were earned by petitioner prior to his matriculation in the program leading to a master's degree. Petitioner is not aware of any policy which requires prior approval by the Superintendent for courses taken beyond the bachelor's degree. There is no provision in the Board's negotiated salary policy that the thirty credits necessary for placement upon the salary scale at master's degree plus 30 level must be taken after receipt of the master's degree, except that there was in existence a directive from the Superintendent's office dated January 10, 1963 to this effect. There is no evidence that such a policy was ever adopted by the Board prior to the negotiation of the existing salary guide. In 1963 there was no negotiated agreement between the Board and the teachers' association as there is at the present time.

The question which must be determined by the Commissioner is whether or not petitioner is entitled to placement on the salary guide at the master's degree plus 30 credits level.

Boards of education have the 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***." *N.J.S.A.* 18A:29-4.1 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. (Attachment 1a, b)

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 (Attachments 2, 3); however, those directives cannot be considered as existing Board policy.

The Board is directed, therefore, to place petitioner on the master's degree

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plus 30 credits level and the corresponding step of the salary guide for his number of years' experience. The Board is further directed to compensate petitioner retroactively beginning September 1973.

COMMISSIONER OF EDUCATION

February 24, 1975

John McAllen, Jr.,

Petitioner-Appellee,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 24, 1975

For the Petitioner-Appellee, George G. Gussis, Esq.

For the Respondent-Appellant, Frank Piscatella, Esq.

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

June 4, 1975

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Patricia Bolger and Frances Feller,

Petitioners,

v.

Board of Education of the Township of Ridgefield Park, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Parisi, Evers and Greenfield (Irving C. Evers, Esq., of Counsel)

Petitioners are teachers who were employed by the Board of Education of the Township of Ridgefield Park, Bergen County, hereinafter "Board," for three consecutive academic years and were not reemployed for the fourth. Petitioners pray for reinstatement in their former positions, together with any back pay to which they are entitled, on the grounds that the Board's action concerning their non-reemployment was procedurally and statutorily defective in that written notice was not given them by the Board.

This matter is submitted to the Commissioner of Education for Summary Judgment on stipulations, affidavits, exhibits, and Briefs. There are no facts in dispute.

Petitioners were employed for the 1971-72, 1972-73, and 1973-74 academic years but were not reemployed for the 1974-75 academic year. The Superintendent of Schools attended private work sessions conducted by the Board on March 20 and 27, 1974 at which time the employment status of petitioners was considered. At those work sessions, the Superintendent was directed by the Board to notify petitioners that their contracts would not be renewed. A full quorum of the Board was present at each work session. (Superintendent's Affidavit) Petitioners were thereafter notified by the Superintendent in accordance with *N.J.S.A.* 18A:27-10 as follows:

> "***I am officially notifying you that the Ridgefield Park Board of Education will not be offering you a contract for employment for the 1974-75 school year, and that your employment will terminate as of June 30, 1974." (Schedules A, B)

The Board adopted a resolution at a special meeting, held May 15, 1974, ratifying its action relative to the nonrenewal of contracts for petitioners and two other nontenure teachers. (Exhibit A)

Thereafter on May 22 and 24, 1974, petitioners notified the Board in

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writing of their intention to accept employment for the 1974-75 academic year pursuant to *N.J.S.A.* 18A:27-10, 11 and 12, the relevant statutes, which are reproduced here as follows:

N.J.S.A. 18A:27-10

"On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

"a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

"b. A written notice that such employment will not be offered."

N.J.S.A. 18A:27-11

"Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."

N.J.S.A. 18A:27-12

"If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable."

The Board denies that its notice to petitioners was defective (Schedules A, B, and Exhibit A) citing *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County*, 1974 *S.L.D.* 207 and *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County*, 1974 *S.L.D.* 396 and asserts that it has met its statutory and contractual obligations to petitioners, which obligations terminated on June 30, 1974. The Board requests that the Commissioner grant Summary Judgment in its favor on the grounds that the Petitions of Appeal are false in fact and insufficient in law.

The sole issue to be determined in this matter is whether or not the notice sent to petitioners is adequate and proper pursuant to the relevant statutes, *ante*.

Prior to the enactment of *N.J.S.A.* 18A:27-10 *et seq.*, employment contracts of nontenured teachers expired automatically by their own terms on June 30 of each academic year, since an affirmative action to reemploy such

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teachers was then required of each local board of education. *N.J.S.A.* 18A:27-1 reads as follows:

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

The enactment of *N.J.S.A.* 18A:27-10 in 1971 significantly modified the law as set forth in *George H. 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; aff'd Superior Court (*App. Div.*) 1969 *S.L.D.* 202, in which it was held, *inter alia,* that:

> "***Respondent took no action with respect to petitioner's third contract nor was any called for. It simply fulfilled its obligations under the contract and took no action to continue the relationship. The Commissioner knows of no statute or rule which requires a board of education to take some formal action with regard to the nonrenewal of a probationary contract which has expired. The employment of teachers who have not achieved tenure status in the district is a matter lying wholly within the discretionary authority of the board. *N.J.S.A.* 18A:11-1c, 18A:16-1, 18A:27-4 See also *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962). Respondent was under no obligation to renew its agreement with petitioner, and in failing to take any action with respect to his reemployment it did no more than exercise the discretionary powers accorded it by statute.
>
> "A board of education's discretionary authority is not unlimited, however, and it may not act in ways which are arbitrary, unreasonable, capricious or otherwise improper. *Cullum v. North Bergen Board of Education,* 15 *N.J.* 285 (1954)***." (at pp. 8-9)

The enactment of *N.J.S.A.* 18A:27-10 *et seq.*, changed this body of law in that the statutes now provide for automatic renewal of nontenure teacher contracts where notice in writing is not given on or before April 30.

The primary purpose of these statutes is to provide teachers with timely notice when they are not going to be reemployed so that they may seek employment elsewhere. When local boards of education waited until the months of May or June, or later, to notify teaching staff members that they would not be reemployed, this late action created a hardship for those employees. The new statutes remedied that situation by providing for notice by April 30 of each academic year, sixty days prior to the expiration of standard teacher contracts on June 30.

Petitioners do not contest the timeliness of the notice, but, rather, its form. They contend that the Board's determination not to reemploy them must be made at a public meeting of the Board and not at a private work session, as occurred in the matter herein.

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The provisions of *N.J.S.A.* 18A:17-20 are relevant to the instant matter. It reads in pertinent part as follows:

> "The superintendent of schools shall have general supervision over the schools of the district or districts under rules and regulations prescribed by the state board and shall keep himself informed as to their condition and progress and shall report thereon, from time to time, to, and as directed by, the board and he shall have such other powers and perform such other duties as may be prescribed by the board or boards employing him.***"

The Commissioner asserted in *Aitken, supra,* as follows:

> "***[I]t is clear, that it is the local board of education which must decide the status of its nontenured employees each year, and it must do so on or before April 30. It is equally clear that *subsequent to such decision,* but within the same time parameter, the *decision* must be transmitted by the Board through its administrative agents in 'written form' to such employees.***" (*Emphasis supplied.*) (1974 *S.L.D.* at 209)

In *Burgin, supra,* the Commissioner determined that *N.J.S.A.* 18A:17-20 read *in pari materia* with *N.J.S.A.* 18A:27-10 clearly permits that written notice can be

> "***given by any designated school administrator or board secretary, *after the board has made its decision* [not to renew contracts] *in public or private* [session] ***." (*Emphasis supplied.*) (1974 *S.L.D.* at 400)

As was previously stated, the intention of the notice statute, *N.J.S.A.* 18A:27-10, is to provide timely written notice to teaching staff members who will not be reemployed for the subsequent academic year. In the judgment of the Commissioner, the requirements of the statute are met when local boards of education decide in public session or executive conference session that reemployment will not be offered to certain teaching staff members and directs the school administrator or board secretary to give notification to such teaching staff members in writing of this determination on or before April 30.

In the instant matter, the determination made by the Board did not deprive petitioners of any rights or any protection afforded by the school laws.

It is the Commissioner's considered opinion that problems regarding staff personnel should not be discussed by local boards of education in public sessions. Likewise, when a board discusses recommendations concerning the performance of nontenured teaching staff members with the purpose of determining who shall be offered reemployment, it is in the best interest of the teaching staff members, the board and the entire school system that such deliberations not be public. Conversely, when such final determinations have been made, the Commissioner strongly recommends that each local board of education inscribe in the minutes of a special or regular meeting, prior to April 30, that it has made a determination as to which nontenured teaching staff

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members will not be reemployed for the subsequent year, and that the school administrator or board secretary, as the case may be, has been directed to give a written notice of such determination to each affected teaching staff member prior to April 30. This procedure will ensure that a permanent record exists of the board's efforts to comply with the statutory requirements. The names of the teaching staff members who will not be reemployed need not be inscribed in the minutes, if the board deems that this might be harmful to the individuals in their efforts to secure employment elsewhere. In any event, a list of the names of those teaching staff members who will not be reemployed, containing the date upon which the board made its determination, should be retained in the files of the board or the school administrator, although not in the official board minutes.

The Commissioner believes that adherence to the procedures described above will deter numerous instances of litigation in regard to the efforts of local boards of education to comply with the provisions of *N.J.S.A.* 18A:27-10, and will also insure fair play for the affected teaching staff members.

In the instant matter, the Commissioner finds and determines that the Board's determination not to reemploy petitioners for the 1974-75 academic year was made in conformance with the statutory requirements, and the written notices mailed to petitioners by the Superintendent of Schools under dates of March 25 and March 28, 1974, were proper and timely.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

February 27, 1975

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Patricia Bolger and Frances Feller,

Petitioners-Appellants,

v.

Board of Education of the Township of Ridgefield Park, Bergen County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 27, 1975

For the Petitioners-Appellants, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent-Appellee, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

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

May 7, 1975
~~Pending~~ before Superior Court of New Jersey
aff'd Docket No. A-3214-74
App Div April 21, 1976

Robert Savoia,

Petitioner,

v.

Board of Education of the City of Hoboken, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Philip Feintuch, Esq.

For the Respondent, Robert W. Taylor, Esq.

Petitioner, a tenured janitorial employee of the Board of Education of the City of Hoboken, hereinafter "Board," avers he has been illegally denied retroactive salary payment by the Board for a period when he was suspended from such employment. He demands judgment to this effect and the payment which he avers is due him. The Board maintains that petitioner's claim is untimely and must be rejected.

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Petitioner has advanced a Motion for Summary Judgment and a Brief in support thereof. Respondent moves to dismiss the Petition. The matter is before the Commissioner of Education on such Motions, the pleadings, and Briefs. The principal relevant facts are not in dispute.

Petitioner's service as an employee of the Board prior to November 10, 1970, was satisfactory and without cause for complaint. However, on that date petitioner was charged by local police with the crime of contributing to the delinquency of a minor on school property and school authorities were notified. Thereafter, petitioner was suspended by the Board without pay. Such suspension continued, pending consideration by the Hudson County Grand Jury, to the date of February 24, 1971. On that date, however, the Grand Jury returned "No Bill" in the criminal matter against petitioner and this event prompted the Board to reconsider petitioner's status as a Board employee.

The Board maintains, in this regard, that at that juncture it entered into an agreement with petitioner which would allow him to return to work. According to this agreement, the Board avers, petitioner was to abandon a claim for salary for the period November 10, 1970 through March 3, 1971, if the Board refrained from preferring charges against him pursuant to the Tenure Employees Hearing Law. *N.J.S.A.* 18A:6-10 *et seq.* This avowal is nowhere denied by petitioner in the moving papers or documents which are part of the record before the Commissioner. The Commissioner concludes, therefore, that petitioner did in fact enter into such an agreement.

In any event, subsequent to his return to work as an employee of the Board on March 3, 1971, petitioner filed no claim for retroactive salary payment until October 11, 1972. On that date petitioner's attorney addressed a letter to the Secretary of the Board which stated, *inter alia,* that "***demand is made upon the Hoboken Board of Education that he receive full pay for the period of time that he was suspended." Thus, for the period of March 3, 1971, when petitioner resumed his work for the Board, to the date of October 11, 1972, when his claim was filed, petitioner made no complaint. The period comprised a total of one year and approximately seven months.

The Board maintains that this fact alone requires that petitioner's claim be rejected on the equitable grounds of laches. The Board avers that further delay then ensued since the instant Petition was not filed with the Commissioner until February 14, 1973. Thus, the period of delay approximates almost all of two years. In support of its affirmative defense of laches, the Board cites *Crowder v. Terhorst,* 21 *N.E.* 2*d* 141, 146; *Burton v. Ryan,* 165 *N.E.* 260, 261; *Kennedy v. Denny,* 36 *S.W.* 2*d* 41, 42; *Elowitch v. Bayonne Board of Education,* 1967 *S.L.D.* 78, aff. State Board of Education 86; *John Sousa et al. v. Board of Education of the City of Rahway, Union County,* 1970 *S.L.D.* 140; and *Johnston v. Board of Education of Township of Wayne, Passaic County,* 1966 *S.L.D.* 180, aff. N.J. Superior Court, 1966 *S.L.D.* 182.

Petitioner, in support of his claim, avers that he was suspended without pay on November 10, 1970 by a unilateral act of the Board and without

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compliance with the procedures mandated by the Tenure Employees Hearing Law. *N.J.S.A.* 18A:6-10 *et seq.* He states that such suspension was imposed without a hearing and without certification of charges to the Commissioner and therefore, his suspension was illegal and must be set aside. In support of this view, he cites *In re Fulcomer,* 93 *N.J. Super.* 404 (*App. Div.* 1967).

The pertinent statute, *N.J.S.A.* 18A:6-10, is recited in its entirety as follows:

"No person shall be dismissed or reduced in compensation,

> "(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or
>
> "(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner:

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, 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.

"Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law."

The Board does not contest petitioner's assertion that he was suspended without pay for the period in question or that such suspension was imposed without the preferment of written charges or a hearing.

The Commissioner has reviewed such facts and the arguments of the parties and concludes that petitioner's suspension during the period November 10, 1970 to March 3, 1971 was clearly illegal. No "written charges" were ever preferred against him as required by the statute. *N.J.S.A.* 18A:6-10 *et seq.* No hearing with respect to such charges was ever held. The authority which ordered his compensation to be reduced was not that which the statute mandates.

In such circumstances it remains to be determined only what effect, if any, petitioner's inordinate delay has on his claim. The question for decision is whether or not the equitable doctrine of laches bars petitioner from asserting a claim which is otherwise valid. The Commissioner determines that it does.

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In support of this determination, the Commissioner cites *Elowitch, supra,* and particularly the words of the Courts with respect to the equitable doctrine of laches which is set forth therein. The Court's statement previously cited by the Commissioner in *Harenberg v. Newark Board of Education et al.,* 1960-61 *S.L.D.* 142, aff. New Jersey Superior Court, Appellate Division, Docket Nos. A-323-58 and A-426-60, decided July 7, 1961, is set forth as follows:

> "***In *Park Ridge v. Salimone,* 36 *N.J. Super.* 485, affirmed, 21 *N.J.* 28, the Court said:
>
> > 'The courts have long recognized the need for prompt action by public employees in seeking judicial review of their discharge. The reason is obvious. It is important that public duties to be carried on without interruption or with as little interruption as possible. A governing body must be allowed to fill the employment in the public service with all necessary dispatch free from unnecessary risk of double payment of wages.' [36 *N.J. Super.* at 494-495]
>
> "The Supreme Court in its affirmation made this further statement at page 46:
>
> > 'But, the time must come when the appointing authority can rely upon the conclusion of the issue and proceed to make arrangements in the interest of the public to replace the dismissed employee without fear that its action will be undone. *** Although the status there involved' -- in *Marjon, supra* -- 'concerned tenure, the principle is the same.'
>
> "In *Atlantic City v. Civil Service Commission,* 3 *N.J. Super.* 57 at 61, it was said:
>
> > 'The law of this State is well settled that in the case *sub judice,* a public employee's rights to reinstatement, even assuming, but not deciding, that his removal or other interference with his rights may be unjust and unwarranted, may be lost by his unreasonable delay in asserting his rights. This recognized principle of law is founded upon considerations of public policy and its application is warranted here.'
>
> "Justice Heher said in the case of *Marjon v. Altman,* 120 *N.J.L.* 16 at page 18:
>
> > 'While laches, in its legal signification, ordinarily connotes delay that works detriment to another, the public interest requires that the protection accorded by statutes of this class be invoked with reasonable promptitude. Inexcusable delay operates as an estoppel against the assertion of the right. It justifies the conclusion of acquiescence in the challenged action.***Taylor v. Bayonne,* 57 *N.J.L.* 376; *Glori v. Board of Police Commissioners,* 72 *Id.* 131; *Drill v. Bowden,* 4 *N.J. Misc.* 326; *Oliver v. New Jersey State Highway Commission,* 9 *Id.* 186; *McMichael v. South Amboy,* 14 *Id.* 183.'

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"The Commissioner finds some similarity also between the instant case and *Jordan v. Newark,* 128 *N.J.L.* 469. In both cases, the petitioners carried on discussions and consulted counsel about the matter, but neglected to bring action. ***" (1960-61 *S.L.D.* at 145-146)

From a review of the facts of the instant matter in the context of such criteria, it is clear that petitioner's delay of almost two years in filing a claim with the Commissioner cannot be labeled a "prompt action" which the Court said in *Park Ridge, supra,* was needed in all cases requiring judicial review. To the contrary, the Commissioner holds it was inexcusable delay which "*** operates as an estoppel against the assertion of the right." *Marjon, supra*

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

February 27, 1975

Robert Savoia,

Petitioner-Appellant,

v.

Board of Education of the City of Hoboken, Hudson County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 27, 1975

For the Petitioner-Appellant, Philip Feintuch, Esq.

For the Respondent-Appellee, Robert W. Taylor, Esq.

The appeal from the decision of the Commissioner of Education is dismissed for lack of prosecution.

June 4, 1975

You are viewing an archived copy from the New Jersey State Library.

"R.D.H." and "J.D.H.",

Petitioners,

v.

Board of Education of the Flemington-Raritan Regional School District, Hunterdon County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Schechner and Targan (David Schechner, Esq., of Counsel)

For the Respondent, Wesley L. Lance, Esq.

Petitioners, the parents of a handicapped daughter, hereinafter "E.D.H.," allege that she was improperly classified by the Flemington-Raritan Board of Education, hereinafter "Board." They charge that as the result of this classification the Board has refused to provide E.D.H. with proper facilities and programs pursuant to *N.J.S.A.* 18A:46-13 and the regulations of the New Jersey Administrative Code. They seek an order from the Commissioner of Education directing the Board to reclassify E.D.H. as neurologically impaired, to provide suitable facilities and programs for her education at the nonpublic Midland School, and to reimburse them for moneys they have expended for tuition and transportation at the Midland School during the present and past school years.

The Board, for its part, denies that E.D.H. was improperly classified, that it failed to provide proper programs and facilities or that it is in any way liable for tuition or transportation to the private school in which petitioners unilaterally chose to enroll their daughter.

A plenary hearing in this matter was conducted on September 9, 1974 and October 15, 1974 at the offices of the Hunterdon County Superintendent of Schools, Flemington, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

A review of the uncontroverted facts reveals that E.D.H. was born on October 26, 1960. Instructional problems were observed in the fall of 1967 which resulted in the scheduling of a psychological examination. Supplementary instruction was provided by the school and continued throughout the 1968-69 school year. A second psychological evaluation was conducted on September 17, 1969. This was followed by a psychiatric examination on December 21, 1970. On January 18, 1971, the supplemental teacher recommended that E.D.H. be dropped from the supplemental instruction program because of lack of progress therein.

Petitioners sought alternate evaluations of E.D.H. from the Willis School

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and from Dr. Avrum Katcher of the Hunterdon Medical Center during the spring of 1971. The child study team made its reports available to these independent evaluators in accord with the Board's policy and practice.

On May 11, 1971, E.D.H. was formally classified by the Board's fully staffed child study team as primarily educable-mentally retarded with a secondary classification of neurologically impaired (Exhibit H) and was assigned to the school's intermediate educable class for the 1971-72 academic year. The classification and placement were unacceptable to petitioners who thereafter made available to the school the evaluations of the Willis School (Exhibits D, F) and of Dr. Katcher (Exhibit G). Petitioners, in September 1971, unilaterally entered E.D.H. at their own expense in the nonpublic Midland School which she has since attended.

On July 19, 1972, the child study team received an evaluation report from the Midland School which recommended that she return there for the ensuing school year and that consideration be given by the child study team to changing her primary classification to that of neurologically impaired. No action on this suggestion was taken by the child study team on grounds that E.D.H. was not then enrolled in the Flemington-Raritan schools. Later, as the result of certain directives, the child study team did an incomplete reevaluation of E.D.H. on December 17, 1973. (Tr. I-145) No change was made in her primary classification, nor has it in any way been modified since that time.

At the request of petitioners, the classification records of the child study team were reviewed in June 1971 by the Hunterdon County Supervisor of Child Study who stated that:

> "***On the basis of all reports presently available, I feel that there does not seem to be sufficient evidence to justify a change in ***[E.D.H.'s] classification. Therefore, I must sustain the Flemington-Raritan classification of mentally retarded educable.***" (R-4)

A further review of the controverted classification was conducted by the State Department of Education, Bureau of Special Education Regional Team which on February 9, 1973, reported the following findings and recommendations: (Tr. I-153)

> "(1) Based on the information available ***[E.D.H.] has been legally classified in accordance with Chapter 46, Title 18A, New Jersey Statutes Annotated.
>
> "(2) The available information supports the classification of***[E.D.H.] as Educable Mentally Retarded.
>
> "(3) The Child Study Team***should meet their responsibility by developing an appropriate educational prescription and program for*** [E.D.H.] that will be ongoing and meet her educational needs." (R-2)

Additionally, petitioners ordered a psychiatric evaluation by Kenneth S.

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Gould, M.D., and a neurologic evaluation by the A.M. Chutorian Neurological Institute, whose reports were made available to the child study team in September 1973. (Exhibits B, C) Further conferences between petitioners and the Board and its agents failed to resolve the matter. Thus, petitioners have appealed to the Commissioner.

Petitioners maintain that E.D.H. suffers from minimal brain dysfunction. (Tr. I-5) They contend that her primary classification should be that of neurological impairment and that a program should be provided that is oriented to the needs of the neurologically impaired. (Tr. I-6-12) They further contend that the Board's proposed placement of E.D.H. in an intermediate mentally retarded class is inappropriate and contrary to the provisions of both *N.J.S.A.* 18A:46-8 *et seq.* and the provisions of the New Jersey Administrative Code which have been promulgated pursuant thereto.

Appearing on behalf of petitioners, Dr. Avrum Katcher, a specialist in pediatrics, testified that he had examined E.D.H. on a number of occasions between May 18, 1971, and May 29, 1974. He stated that, on the basis of his own examination and the results of psychological tests, a psychiatric report, and the report of educational consultations done by others, it was his opinion that:

> "***[E.D.H.'s] abnormality was mild and was consistent with what might be seen in a child with neurological dysfunction leading to a learning disorder.
>
> "My feeling at that time was that she should be thought of as neurologically impaired, rather than mentally retarded.***" (Tr. I-21)

The school psychologist at the Midland School, an ungraded private educational rehabilitation center with an enrollment of 130 pupils, testified that E.D.H. has progressed academically at the school commensurately with each passing chronologic year. He further stated that "***this growth rate is not that of a retarded child.***" (Tr. I-73) He further testified that E.D.H. entered the Midland School as a shy, withdrawn, apprehensive, fearful girl (Tr. I-74) but that, today, she performs socially at her chronologic age level in a free and happy manner. (Tr. I-79, 82)

Conversely, the child study team psychologist, called as a witness by the Board, testified that he sees E.D.H. as a pupil five years retarded performing at the fourth grade level at age thirteen. (Tr. I-96) He stated that no information made available to the Board has caused him to question the validity of the primary classification of E.D.H. as mentally retarded. He further stated that, in his opinion, the problem of intellectual deficiency was greater than that of the neurological impairment (Tr. I-116-117, 135), thus justifying the primary classification of mental retardation. When asked whether the child study team had reclassified E.D.H. since 1971, he stated that her file had been reviewed at various times but that, since she was not enrolled in the district, the child study team was neither required nor authorized to reclassify her. (Tr. II-221, 224) He further stated that, in the event that she were reenrolled, such a classification review process would be imperative. (Tr. II-249)

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The Hunterdon County Supervisor of Child Study testified that, in his opinion:

> "*** [C]lassification is for the purpose of planning an educational program.*** Therefore, the primary classification indicates the predominance of evidence which would support a particular educational program that the child study team feels the child ought to have.
>
> "The secondary classification is often noted for the purposes of indicating that there are other factors involved in the child's handicap.***"
>
> (Tr. II-265)

The Director of the Bureau of Special Education of the New Jersey State Department of Education testified that in his opinion E.D.H. had been legally classified in accordance with statutory prescription (Tr. I-153), and that the Board is under no obligation to reclassify her since she is not now legally enrolled in the public schools of the State of New Jersey. (Tr. I-156)

The hearing examiner has reviewed the extensive testimony of the hearing, the documentation submitted into evidence, and the extensive consultation and evaluation reports required by the hearing examiner at the hearing. (Exhibits A through T) He finds that according to the information available to them on May 11, 1971, E.D.H. was classified by the child study team without procedural flaw pursuant to *N.J.S.A.* 18A:46-1 *et seq.* and *N.J.A.C.* 6:28-1.1 *et seq.* It is further found that, when this classification was contested by petitioners, the Hunterdon County Supervisor of Child Study and a special team from the Bureau of Special Education, State Department of Education, in procedurally sound fashion reviewed the record of E.D.H. which was maintained by the child study team and supported her classification as primarily mentally retarded with a secondary classification of neurologically impaired.

The hearing examiner further finds that petitioners unilaterally removed E.D.H. from the Board's school and entered her in the Midland School. Thereafter, as a result of this action, the Board or its agents were not then nor are they now under obligation to reexamine or reclassify her. This finding is grounded in the regulation of the State Board of Education *N.J.A.C.* 6:28-1.8 which states that:

> "***Local boards of education shall be responsible for the identification of handicapped children between the ages of five and 20 who are residents of their school district and *are not attending nonpublic schools.* ***"
>
> (*Emphasis supplied.*)

It is further grounded in the words of the State Board of Education in *The Parents of "K.K." v. Board of Education of the Town of Westfield, Union County,* 1971 *S.L.D.* 240, where, in a similar matter in which parents had removed a special education pupil from the public schools, it was said:

> "***The identification, examination and classification required by *N.J.S.A.* 18A:46-8 shall be made within 30 days following the opening of

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> the 1971-72 school year, *provided petitioners enroll the child in the appropriate school of respondent's district for the 1971-72 school year.* ***" (*Emphasis supplied.*) (at p. 241)

In another similar case, that of *Parents, on behalf of "G.S." v. Board of Education of the Borough of Rockaway, Morris County,* 1974 S.L.D. 637, the Commissioner stated in like fashion:

> "***Petitioners are free at any time to enroll their child as a pupil in the Rockaway Township School District, but the Board's child study team must recommend an appropriate placement*** and the school administrators will then make the final determination for such placement.***" (at p. 643-644)

Petitioners have petitioned the Commissioner to order the Board to continue E.D.H. in the Midland School and pay both past and future transportation and tuition costs there. The Commissioner has at numerous times spoken on identical matters. In *"G.S.," supra,* he stated:

> "***Petitioners could have availed themselves of this educational placement for G.S., but they clearly chose not to do so. Instead, they chose to continue the enrollment of G.S. in the Wilson School's special education program. While petitioners have every right to make such a choice, they cannot expect the Board to be required to reimburse them under these circumstances.***" (at p. 643)

In "K.K.," *supra,* 1971 *S.L.D.* 234 he said:

> "***While parents have a right to send their children to private schools, they do not have a right to require that public school districts pay the tuition costs involved. *Malcolm Woodstein and Ina Woodstein v. Board of Education of the Township of Clark, Union County,* decided by the Commissioner July 17, 1970; *In the Matter of 'R' v. the Board of Education of the Town of West Orange,* 1966 *S.L.D.* 210.***" (at p. 240)

Similarly he stated in *Woodstein, supra,* that:

> "***While parents have a right to make a choice between private and public school placement, they do not have a right to require that public school districts pay tuition costs to private schools in the event that this is the parental choice. See *R.v. The Board of Education of the Town of West Orange,* 1966 *S.L.D.* 210; also *Lange v. Hi Nella Board of Education,* 1959-60 *S.L.D.* 65. In the *R. v. West Orange* decision, *supra,* the Commissioner said at p. 212:
>
> > 'It is clear that R was***placed in private school on her parents' volition and with no involvement on the part of respondent. Under such circumstances the financial obligations incurred by that action devolve solely upon the parents and not upon the Board of Education.'

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> "The Commissioner finds and determines that the Clark Township Board of Education has fulfilled its statutory obligations with respect to the education of petitioners' son and that no liability devolves upon it for the payment of tuition or of transportation costs to a non-public school.***"
> (1970 *S.L.D.* at 224)

In the light of such clear law, the hearing examiner recommends that the Commissioner deny petitioners' prayer to order the Board to reimburse them for transportation and tuition costs at the Midland School in which they unilaterally enrolled E.D.H. It is further recommended that the Commissioner deny petitioners' prayer to order the Board that E.D.H. be continued at that institution at the Board's expense.

The hearing examiner has examined the reports and recommendations of the numerous highly-qualified educational and medical experts who have examined E.D.H. While there is no finding of arbitrary, capricious, or otherwise improper action concerning her classification in 1971, it is clearly apparent that competent specialists who have since examined her, and whose reports are now available to the Board, have presented conflicting opinions regarding what her primary classification should be. Paramount among these is the September 19, 1973 report of Dr. Chutorian, the only neurological specialist whose report is available. He stated, *inter alia:*

> "***My impression is that [E.D.H.] harbors minimal brain dysfunction, and not frank mental retardation.***" (Exhibit C)

The most recent psychiatric report available is that of Dr. Kenneth Gould (September 24, 1974) which stated:

> "***At this point the evidence seems reasonably conclusive that the cognitive deficit is on an organically based neurologic impairment.*** I would not, at this time, transfer her from Midland.
>
> "In the future***I would like to see how she functions in a regular school setting.*** [A]t this particular time I know of no public school system that can fill this bill.***" (Exhibit B)

The above reports, conflicting as they do with certain earlier advisements of qualified specialists, coupled with what appears to have been a weighting in favor of mental retardation in the primary classification of E.D.H. based on unofficial reports from the Bureau of Special Education (Tr. II-207, 210, 214), raise valid questions regarding the existing classification of E.D.H. Considered with her favorable progress reports from the Midland School (Exhibits L through T), they appear to warrant a total review of her primary and secondary classification. Such review is indicated also by the fact that three years have elapsed since her initial classification. *N.J.A.C.* 6:28-2.4(d) requires that:

> "***Reexamination and classification shall be made whenever conditions warrant. However, a comprehensive review of a child's classification and

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his special education program shall be made by the basic child study team within a period not to exceed three years after classification.***"

The Commissioner has set forth in *"K.K.," supra,* his role regarding classification of special education pupils as follows:

"***It is also clear that the task of judging the severity of handicap is one that is delegated specifically by statute (*N.J.S.A.* 18A:46-11) to the 'psychological examiner' and 'special education personnel' employed by each board of education in the State.

"Admittedly, this is a difficult task, but in order to insure that it is carried out properly, the State Board of Education has required each district to employ highly-qualified personnel representing many disciplines. The certification standards for these team members are high. When, as in this instance, such a team makes a judgment it is qualified and mandated to make—to classify or not to classify a child as handicapped and in need of special class or other special placement—, that judgment will not be determined to be faulty or incorrect by the Commissioner, absent a clear showing of procedural fault or an arbitrary exercise of discretion without proper diagnostic information.***" (at p. 239)

In keeping therewith, the hearing examiner recommends that the Commissioner deny petitioners' prayer to order a reclassification of E.D.H. as long as she is not enrolled in the Flemington-Raritan School District. He further recommends that the Commissioner direct the Board to have its child study team reexamine and classify E.D.H. pursuant to *N.J.A.C.* 6:28-2.4(d) if and when petitioners reenroll her in its school. In this manner it will be determined whether those complementary processes of maturation and education have worked together in such ways as to require a reclassification.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions pertinent thereto which have been filed by petitioners. Such exceptions are lengthy and detailed but, in summary, petitioners aver that the classification and placement of their child was so erroneous as to leave them no alternative to removal of the child from the Flemington-Raritan Schools. They argue that the Commissioner should determine the basic correctness of the classification, and set it aside if he finds evidence of an arbitrary exercise of discretion without proper diagnostic information. Further, they aver the Commissioner should order an immediate reclassification by the Board so that petitioners can know what education their child will receive in the coming year.

The Commissioner has reviewed such arguments in the context of the hearing examiner's report and is constrained to emphasize that primary responsibility and jurisdiction with respect to the classification and placement of handicapped children does not rest with the Commissioner of Education. It rests

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squarely and clearly with local boards of education pursuant to direct and specific statutory authority. *N.J.S.A.* 18A:46-6 *et seq.*

N.J.S.A. 18A:46-6 "*Each board of education* shall identify *** what children *** if any, cannot be properly accommodated through the school facilities usually provided because of handicaps." (*Emphasis supplied.*)

N.J.S.A. 18A:46-7 "*Each board of education* shall report annually *** the names of all children who are in special education instructional programs***." (*Emphasis supplied.*)

N.J.S.A. 18A:46-11 "*Each board of education* shall separately or jointly with one or more boards of education employ a psychological examiner, who *** shall administer the *procedures* for diagnosis and classification required in this chapter***." (*Emphasis supplied.*)

N.J.S.A. 18A:46-13 "It shall be the duty of *each board of education* to provide suitable facilities and programs of education for all the children who are classified as handicapped under this chapter***." (*Emphasis supplied.*)

The jurisdiction and authority of the Commissioner with respect to the classification and placement of handicapped children is, thus, not primary in nature but one of appellate review. In all such cases, as the hearing examiner correctly observed, the Commissioner's authority is concerned with the correctness of procedures followed by local boards and with the reasonableness of their respective exercise of discretion. Absent a showing of gross negligence or abuse in such matters, the Commissioner has not, and will not, substitute his own discretion for that of local boards or of properly certificated personnel directed by such boards to render professional judgments. This determination follows the general rule that, when an administrative agency created and empowered by legislative fiat acts within its authority, its decisions are entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decisions are arbitrary, capricious or unreasonable. *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327 (*App. Div.* 1965), 46 *N.J.* 581 (1966); *Boult and Harris v. Board of Education of the City of Passaic,* 1939-49 *S.L.D.* 715, 136 *N.J.L.* 521 (*E. & A.* 1948)

It remains to determine whether or not in the instant matter there has been such abuse or whether the facts pose other reason for intervention. (See *Jonathan Traurig v. Board of Education of the Township of Livingston, Essex County,* 1971 *S.L.D.* 260.)

The Commissioner determines that they do not. The hearing examiner found that petitioners' child was classified correctly by a child study team pursuant to statutory mandate. *N.J.S.A.* 18A:46-1 *et seq.*; *N.J.A.C.* 6:28-1.1 *et seq.* He further found that such classification was then reviewed and supported by a qualified team from the State Department of Education. There is no clear

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evidence in the record to support a conclusion that a contrary classification was clearly warranted at the time petitioners withdrew their child from school.

In the circumstances, therefore, petitioners have no valid claim against the Flemington-Raritan School District. The Commissioner so holds. *G.S., supra; Woodstein, supra* Neither, the Commissioner determines, may they present a claim for a reclassification of their child unless and until the child is formally enrolled and in attendance in the Flemington-Raritan School District. *N.J.A.C.* 6:28-1-1 School officials may, of course, take whatever steps are necessary and required in a preliminary way, after formal enrollment, to enable them to properly place pupils on their first day of attendance.

The Commissioner finds no cause for action in this matter and, accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

February 26, 1975

"R.D.H." and "J.D.H.,"

Petitioners-Appellants,

v.

Board of Education of the Flemington-Raritan Regional School District, Hunterdon County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 26, 1975

For the Petitioners-Appellants, Schechner and Targan (David Schechner, Esq., of Counsel)

For the Respondent-Appellee, Wesley L. Lance, Esq.

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

In addition, Petitioners-Appellants are advised that records relating to their child must be made available to them, pursuant to and in accordance with State Board rules, *N.J.A.C.* 6:3-2.1 *et seq.*

June 4, 1975

~~Pending~~ before Superior Court of New Jersey A-3815-74

aff'd Nov 5, 1976

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Sarah Armstrong,

Petitioner,

v.

Board of Education of the Township of East Brunswick, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris & Oxfeld (Sidney Birnbaum, Esq., of Counsel)

For the Respondent, Rubin and Lerner (Frank J. Rubin, Esq., of Counsel)

Petitioner is a teacher who was employed for the two academic years of 1972-73 and 1973-74 by the Board of Education of the Township of East Brunswick, Middlesex County, hereinafter "Board," and was not reemployed for a third successive academic year. She alleges that notice of her non-reemployment was statutorily defective and prays for reinstatement and any retroactive pay to which she is entitled.

This matter is submitted to the Commissioner of Education for Summary Judgment on a joint Stipulation of Facts, exhibits, and Briefs.

Petitioner was employed for the 1972-73 and 1973-74 academic years as a teacher in the Foreign Language Department of the East Brunswick High School. She was advised by letter from the high school principal dated March 1, 1974, as follows:

> "I am sorry but I must inform you that I am concerned as to whether enrollments in your curricular area will be sufficient to continue our present level of staffing. As the least senior member of the department, I will not be able to employ you for the next year unless enrollments warrant it. It is anticipated that more specific information will be available by approximately April 15th. Because this occurs after the normal date for advising you of your contractual status for the forthcoming year, I feel I will have no choice but to withhold offering you a contract until this information is known.
>
> "I would stress that my rationale for this letter is based solely on projected enrollments and in no way indicates dissatisfaction with your performance. I would also assure you that if enrollments warrant the continuance of our present staffing, you will be offered a contract. I have also contacted the Superintendent's office concerning this situation and

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> they have assured me that every effort will be made to place you in a position for which you are certified for the school year 1974-75."
>
> (Exhibit A)

This letter was personally handed to petitioner in the principal's office on March 1, 1974.

At its regular meeting held on April 10, 1974, the Board voted not to offer petitioner reemployment for the 1974-75 academic year, and the Director of Personnel sent petitioner the following letter dated April 29, 1974:

> "This letter is in reference to your employment in the East Brunswick Public Schools for the 1974-75 school year. The East Brunswick Board of Education at its official meeting on April 10th, 1974, voted not to renew your contract for the 1974-75 school year." (Exhibit B)

Petitioner did not reside at the 208 Lawrence Street, New Brunswick address to which the letter was mailed, this being her former address; therefore, she did not receive the letter through the mail. It was returned, marked "addressee unknown." (Exhibit C)

A letter from the high school principal to petitioner, under date of May 2, 1974, was given to petitioner at school. This letter read as follows:

> "I am very sorry to inform you that Foreign Language enrollments have remained at a level where we will be unable to continue your services as a Spanish teacher for the school year 1974-75.
>
> "As I indicated in my previous correspondence, I must terminate your employment with regrets. The action has been due solely due (sic) to the declining enrollments and not because of any dissatisfaction with your performance.
>
> "I hope you will feel free to use me as a reference during your search for another position. I can assure you that I will give you a most positive recommendation.
>
> "I wish you well in your efforts to find employment elsewhere."
>
> (Exhibit D)

On May 3, 1974, the returned letter (Exhibit C) was mailed to petitioner at her actual address and she received it on May 4, 1974. (Exhibit E) Thereafter, under date of May 9, 1974, petitioner sent the following letter to the Board:

> "I hereby notify you in writing pursuant to Chapter 436 of the laws of 1971 that I hereby accept your offer of employment for the coming school year (1974-1975)." (Exhibit F)

This letter refers to *N.J.S.A.* 18A:27-10, 11, and 12 which are reproduced as follows:

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N.J.S.A. 18A:27-10

"On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

"a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

"b. A written notice that such employment will not be offered."

N.J.S.A. 18A:27-11

"Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."

N.J.S.A. 18A:27-12

"If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable."

In response to petitioner's letter dated May 9, 1974 (Exhibit F), the Director of Personnel addressed a communication to petitioner under date of May 13, 1974, which reviewed the steps taken by the Board to inform petitioner that she would not be reemployed. The personnel director stated, *inter alia,* in that letter, that the Board's determination not to reemploy petitioner was an action taken at a public meeting, that the reason for her non-reemployment was explained to her by the school principal (Exhibit A), and that she regretted "that this situation has occurred," meaning obviously, the mailing of the written notice to the wrong address. (Exhibit G)

It is further stipulated that petitioner's correct address was known by the Board on April 29, 1974, the date that written notice of her non-reemployment was mailed to her, and that she had previously received mail, including payroll checks and income tax forms, from the Board at her correct address.

The Board notified petitioner by letter dated June 18, 1974 from the Superintendent of Schools that:

"Be it Resolved:

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"Upon advice of counsel and without prejudice to the Board of Education position that no contract exists between the Board of Education and Sarah Armstrong. Notice is hereby given that said alleged contract is terminated pursuant to the notice of termination provision as contained in said contract." (Exhibit I)

Petitioner's 1973-74 contract contained a termination clause which provided in part that "***this contract *may at any time be terminated by either party* giving to the other Sixty (60) days' notice in writing***." (*Emphasis added.*) (Exhibit J)

Petitioner does not allege that the Board displayed bad faith in the series of actions described, *ante,* nor does she deny having knowledge of the action taken by the Board at the public meeting held April 10, 1974 at which the Board voted not to reemploy her for the 1974-75 academic year. The precise issues to be determined may be summarized as follows:

1. Were the series of "notices" from Board officials sufficient to meet the statutory requirements of *N.J.S.A.* 18A:27-10? (Exhibits A, D, and E)

2. If such notice was insufficient and if a contract of employment for the 1974-75 academic year did in fact exist, was it properly terminated by the Board? (Exhibit I)

In the judgment of the Commissioner, the primary intent of the statute, *N.J.S.A.* 18A:27-10, is to provide teaching staff members timely notice that they will not be reemployed in order that they may seek employment elsewhere. It is clear from the facts in this matter that petitioner knew prior to April 30, 1974, that she would not be reemployed for the 1974-75 academic year. She was warned, in good faith, by her principal on March 1, 1974, that declining pupil enrollment might necessitate eliminating her position. She does not deny that she knew at the time of the Board meeting on April 10, 1974, that the Board voted not to reemploy her. It may be concluded that petitioner was not misguided nor led to believe that she would be reemployed. Unfortunately, she received the written notice of her non-reemployment on May 4, 1974, four days after the statutory deadline. *N.J.S.A.* 18A:27-10 It is unfortunate, but obvious, that the written notice was sent in time, but to the wrong address because of a clerical error. This technical error, which accounted for a delay of four days, led to the untimely notice received by petitioner on May 4, 1974.

The matter herein is distinguishable from *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207 and *Ronald Elliott Burgin v. Board of Education of the Borough of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396. In those cases, the Commissioner determined that the respective boards of education had not decided prior to April 30, that petitioners would not be reemployed. In the instant matter, the Board determined on April 10, 1974, not to reemploy petitioner for the succeeding academic year.

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Under the circumstances of this particular case, the Commissioner finds that the notice received by petitioner on May 4, 1974, was untimely and not in compliance with *N.J.S.A.* 18A:27-10.

As a result of the Board's untimely written notice to petitioner, she was entitled to a contract of employment for the 1974-75 academic year under the same terms and conditions as the previous year, but with such increase in salary as required by the Board's policies. *N.J.S.A.* 18A:27-11 This new contract for the 1974-75 academic year included the identical provision for a sixty day written notice of termination by either party. (Exhibit J) This notice clause was effectuated by the Board by means of the letter dated June 18, 1974 (Exhibit I) addressed to petitioner by the Superintendent. The intent of such notice was to terminate the 1974-75 contract, not petitioner's 1973-74 contract which expired on June 30, 1974. Therefore, the effective date of the Board's notice to petitioner was July 1, 1974, and the sixty day period ran until August 29, 1974, at which time the 1974-75 contract, which required her services as a teacher beginning September 1, 1974, was terminated.

Under these circumstances there is no relief which the Commissioner can afford to petitioner. See *Currie v. Board of Education of the School District of Keansburg, Monmouth County,* 1966 *S.L.D.* 193.

The Commissioner is constrained to decide this controversy solely on its legal merits. His conclusions herein should not be interpreted as endorsement or condonation of the Board's eleventh-hour action in regard to petitioner's reemployment. While the action at issue in this case must be sustained legally, the Commissioner deplores such belated action with respect to teacher contracts, and advocates its avoidance and a strict adherence to the provisions of *N.J.S.A.* 18A:27-11 *et seq.*

For the reasons stated, the Petition is dismissed.

COMMISSIONER OF EDUCATION

February 26, 1975

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Sarah Armstrong,

Petitioner-Appellant,

v.

Board of Education of the Township of East Brunswick, Middlesex County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 26, 1975

For the Petitioner-Appellant, Rothbard, Harris & Oxfeld (Sidney Birnbaum, Esq., of Counsel)

For the Respondent-Appellee, Rubin and Lerner (Frank J. Rubin, Esq., of Counsel)

Because of untimely "Notice of Non-Reemployment," Petitioner-Appellant Armstrong was entitled to a contract of employment for the 1974-75 academic year, as stipulated by *N.J.S.A.* 18A:27-10 and 11:

"18A:27-10. Nontenure teaching staff member; offer of employment for next succeeding year or notice of termination before April 30

On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

b. A written notice that such employment will not be offered. L. 1971, c. 436, § 1, eff. Sept. 1, 1972."

"18A:27-11. Failure to give timely notice of termination as offer of employment for next succeeding year

Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same

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terms and conditions but with such increases in salary as may be required by law or policies of the board of education.
L. 1971, c. 436, § 2, eff. Sept. 1, 1972."

By letter of May 9, 1974 (Exhibit F), Armstrong accepted such employment, pursuant to *N.J.S.A.* 18A:27-12.

"18A:27-12. Notice of acceptance; deadline

If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable.
L. 1971, c. 436, § 3, eff. Sept. 1, 1972."

As a result, a contract of employment did exist between Armstrong and the Board for the 1974-75 school year, beginning September 1, 1974.

On June 18, 1974, the Board terminated Armstrong pursuant to its 60-day "Notice of Termination" clause (Exhibit I). The Commissioner found:

"***The intent of such notice [notice of termination, Exhibit I] was to terminate the 1974-75 contract, not petitioner's 1973-74 contract which expired on June 30, 1974. Therefore, the effective date of the Board's notice to petitioner was July 1, 1974, and the sixty day period ran until August 29, 1974, at which time the 1974-75 contract, which required her services as a teacher beginning September 1, 1974, was terminated.

"Under these circumstances there is no relief which the Commissioner can afford to petitioner. See *Currie v. Board of Education of the School District of Keansburg, Monmouth County,* 1966 *S.L.D.* 193.***"

We affirm that part of the Commissioner's decision which found, "***The intent of such notice was to terminate the 1974-75 contract, not petitioner's 1973-74 contract which expired on June 30, 1974.***" We do not agree with that part of the Commissioner's decision which found, "***there is no relief which the Commissioner can afford to petitioner.***"

The Supreme Court decision in *Canfield v. Board of Education of Pine Hill Borough,* 51 *N.J.* 400 (1968) [1966 *S.L.D.* 152, affd. State Board of Education April 5, 1967, affd. 97 *N.J. Super.* 483, 491-92 (*App. Div.* 1967), reversed 51 *N.J.* 400 (1968)] established the law regarding the termination of contracts under their cancellation clauses. As stated by Judge Gaulkin in his dissenting opinion, which reasoning was adopted by the Supreme Court:

"***If the contract contained no cancellation clause, and the board elected not to permit the teacher to teach beyond the date of notice of dismissal, it seems to me the teacher would, at most, be entitled to his

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> salary for the full term of the contract, but not to tenure. If I am correct in this, I see no reason why the result should be different when the contract contains a cancellation clause but the board's notice of dismissal is not given in accordance with the cancellation clause. *Suppose here the board had simply discharged plaintiff and not even offered her the 60 days pay? It seems to me that she would then be entitled to the 60 days' pay, under Section 11, or, at most, damages for the breach of the contract, but not to tenure.* ***" (*Emphasis added.*) (97 *N.J. Super.* at p. 492)

When a teacher is now given a contract by a board, or the teacher is the recipient of a contract by virtue of the board's inaction pursuant to *N.J.S.A.* 18A:27-10, that teacher acquires vested rights to the new contract. Likewise, the board acquires a vested right in that teacher's service beginning with the first day of that contract, in this case September 1, 1974. See *In the Matter of the Suspension of the Teacher's Certificate of Raymond F. Reehill, School District of Bernards Township, Somerset County,* 1966 *S.L.D.* 201. The termination of any contract between a nontenure teacher and the employing board must be made considering the rights of both parties beginning on the first day of the new contract year.

Therefore, we reverse the Commissioner's decision and hold that Petitioner-Appellant Armstrong be paid by Respondent a sum of money equal to what she would have earned from her teaching employment commencing with the first day of September 1974 and ending October 30, 1974, subject to mitigation resulting from her earnings during that period.

Dr. Allen Potter abstained.

June 4, 1975
Pending before Superior Court of New Jersey

You are viewing an archived copy from the New Jersey State Library.

"M.W.," a minor,

Petitioner,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Michael D. Schottland, Esq.

For the Respondent, Mark Saker, Esq., for Dominick Cerrato, Esq.

This matter having been opened before the Commissioner of Education (Eric G. Errickson, Assistant Director, Division of Controversies and Disputes) by Michael D. Schottland, Esq., counsel for petitioner on a Notice of Motion for Interim Relief received December 4, 1974, requesting temporary restraint against the Board of Education of the Freehold Regional High School District, hereinafter "Board," to prevent said Board from excluding M.W. from attendance at school pending a determination of the matter by the Commissioner, Mark Saker, Esq., for Dominick Cerrato, Esq., appearing for the Freehold Regional High School District; and

The arguments of counsel having been heard regarding the allegation by petitioner that irreparable harm may result if respondent Board is not restrained from continuing to exclude M.W. pending a final determination of the matter by the Commissioner; and

Arguments having been heard regarding petitioner's further allegations, that he was both denied due process and subjected by the Board to excessively harsh punishment by depriving him of his constitutional and statutory rights to a free public education; and

Arguments having been heard regarding the Board's allegation that its exclusion of M.W. was a sound exercise of discretion in the interests of the orderly operation and protection of the school and its pupils; and

It appearing that petitioner was suspended from school as a result of his involvement in an affray which occurred on Friday, October 25, 1974, and which resulted in serious injury to another pupil in the school; and

It appearing that M.W. has admitted to a portion of the acts of which he stands accused; and

It appearing that numerous pupils were involved in this serious affray

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which appears to have been in large part premeditated and occurred at more than one time and place and involved assault upon a pupil; and

It appearing that M.W. was afforded a hearing by the Board on November 25, 1974 at which petitioner was represented by counsel; and

It appearing that at a meeting held November 26, 1974, the Board, by a vote of four to one voted to expel M.W. from the Marlboro High School; and

It appearing that this action of the Board was not official in that no minutes of this meeting were taken or recorded pursuant to *N.J.S.A.* 18A:17-7 which disclose that the Board was convened in a special meeting; and

It appearing that it is the intent of the Board to take official action to expel M.W. at a forthcoming special meeting; and

It appearing that petitioner seeks to introduce testimony of additional eyewitnesses on his own behalf; and

It appearing that M.W. remains excluded from school by virtue of his suspension of October 25, 1974; and

It appearing that M.W. has not been provided with suitable home instruction to insure that his lengthy suspension will not result in irreparable harm; and

It appearing that the Board has not referred M.W. to its child study team for an evaluation nor provided him with alternative means of continuing his education within the intendment set forth in *John Scher v. Board of Education of the Borough of West Orange, Essex County,* 1968 *S.L.D.* 92, as follows:

> "*** Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible. It involves a momentous decision which 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. Such advice can be obtained from its staff of educators, from its school physician and school nurse, from its psychologist, psychiatrist, and school social worker, from its counsel, and from other appropriate sources. The recommendations of such experts are an essential ingredient in any determination which has as significant and far-reaching effects on the welfare of a pupil as expulsion from school. It is obvious that a board of education 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. The Commissioner suggests, therefore, that boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see that the child

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comes under the aegis of another agency able to deal with the problem. ***" (at p. 96)

And the Commissioner, having considered the criteria set forth by the courts for the exercise of discretion in the issuance of a *pendente lite* restraint (*United States v. Pavenick, 197 F. Supp.* 257, 259-60 (*D.N.J.* 1961) and *Communist Party of the United States of America v. McGrath,* 96 *F. Supp.* 47-48 (*D.D.C.* 1951)); and

The Commissioner, having balanced the arguments and interests of petitioner for temporary reinstatement in the school against the Board's arguments and desires to maintain a safe and orderly program of education within the school, concludes that the Board's exclusion of M.W. was taken in the public interest and is entitled to a presumption of correctness. (*Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327 (*App. Div.* 1965)); therefore,

IT IS ORDERED that petitioner's request for interim relief, *pendente lite,* is denied; and

IT IS ORDERED that this matter proceed to an evidentiary hearing as expeditiously as possible; and

IT IS FURTHER ORDERED that the Board forthwith provide M.W. with suitable home instruction during the period of his continuing suspension and during any official expulsion (if such action is taken by the Board) until the final determination of the matter by the Commissioner. By so doing the Board will guarantee that no irreparable harm will befall M.W. relative to his continued educational progress.

Entered this 16th day of December 1974.

COMMISSIONER OF EDUCATION

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"M.W.," a minor,

Petitioner,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Michael D. Schottland, Esq.

For the Respondent, Cerrato, O'Connor, Braelow & Mehr, (Dominick Cerrato, Esq., of Counsel)

This matter having been brought before the Commissioner of Education (Eric G. Errickson, Assistant Director, Division of Controversies and Disputes) by Michael D. Schottland, Esq., counsel for petitioner, in the form of a Motion dated January 2, 1975, Dominick Cerrato, Esq., appearing for the Freehold Regional High School District; and

It appearing that this Motion seeks an order of the Commissioner to impound the entire transcript or in the alternative that portion thereof relating to the testimony of petitioner in the matter in litigation before the Commissioner; and

It appearing that the reason petitioner seeks such an order is that both a civil suit and a criminal suit against petitioner are pending in the courts; and

It appearing that the aforementioned suits arise from the same events that resulted in the Board's expulsion of petitioner; and

It appearing that petitioner seeks the beforementioned order to avoid his testimony before the Commissioner being used as evidence in the matter before the courts, thus possibly resulting, in effect, in his testifying against himself; and

The arguments of counsel for petitioner having been heard whereby he asserts that the Commissioner has the power to impound the transcript of such testimony by petitioner; and

No arguments having been offered by counsel for respondent relative to the desired impoundment; and

The Commissioner having considered and weighed the arguments of petitioner relative to the requested order; and

The Commissioner having considered the matter of his own authority to

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issue such an order impounding a transcript or a portion thereof in a matter in litigation before him; and

The Commissioner having determined that his powers under *N.J.S.A.* 18A:6-9 and *N.J.A.C.* 6:5-1.2 (a,1) do not extend to the impoundment of a transcript of a matter in litigation before him; and

The Commissioner having determined that the sought after order of impoundment, if granted, would be contrary to *N.J.S.A.* 47:1A-2 which provides that:

> "Except as otherwise provided in this act or by any other statute *** rule of court, any Federal law, regulation or order, or by any regulation promulgated under the authority of any statute or executive order of the Governor, *all records which are required by law to be made, maintained or kept on file by any board, body, agency, department, /or / commission *** shall, for the purposes of this act, be deemed to be public records.* Every citizen of this State *** shall have the right to inspect such records. ***" (*Emphasis supplied.*);

therefore,

IT IS ORDERED that petitioner's Motion is denied.

Entered this 8th day of January, 1975.

COMMISSIONER OF EDUCATION

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"M.W.," a minor,

Petitioner,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Michael Schottland, Esq.

For the Respondent, Cerrato, O'Connor, Braelow & Mehr, (Dominick Cerrato, Esq., of Counsel)

This matter having been brought before the Commissioner of Education (Eric G. Errickson, Assistant Director, Division of Controversies and Disputes) by Michael D. Schottland, Esq., counsel for petitioner, in the form of renewal of a previous Motion for Interim Relief, *pendente lite,* requesting temporary restraint against the Board of Education of the Freehold Regional High School District, hereinafter "Board," to prevent said Board from continuing to exclude M.W. from school attendance pending a determination of the matter by the Commissioner, Dominick Cerrato, Esq., appearing for the Freehold Regional High School District; and

The arguments of counsel having been heard regarding the allegation by petitioner that irreparable harm may result if the Board is not restrained from continuing to exclude petitioner from school attendance pending the final determination of the controverted matter by the Commissioner; and

Arguments having been heard regarding petitioner's further allegations that he was denied due process and subjected by the Board to excessively harsh punishment by the Board's action; and

Arguments having been heard regarding the Board's allegation that the aforesaid expulsion of petitioner was a sound exercise of discretion in the interests of the orderly operation of the school and the protection of its pupils; and

The Commissioner having previously denied petitioner's Motion for Interim Relief by Order dated December 16, 1974; and

The Board having complied with the directive of the Commissioner in the aforesaid Order to provide appropriate home instruction for petitioner pending a final determination; and

The testimony having been heard of three additional persons who

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represent themselves as eyewitnesses to at least one portion of the events that precipitated petitioner's expulsion by the Board; and

The testimony having been heard of agents of the Board and of those who stand as petitioner's accusers; and

The Commissioner, by Order dated January 8, 1975, having denied that he has authority to grant petitioner's further Motion to impound the transcript of proceedings of the instant matter; and

Petitioner having declined to testify both in the hearing before the Board and in the hearing before the Commissioner for the ostensible reason that assault charges arising from the same events are pending before the Courts; and

The Commissioner, having balanced the arguments and interests of petitioner for temporary reinstatement in the school against the Board's arguments and desires to maintain a safe and orderly program of education, concludes that the Board's exclusion of M.W., taken pursuant to *N.J.S.A.* 18A:37-2,5 and absent a clear showing that due process was denied, is entitled to a presumption of correctness (*Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327 (*App. Div.* 1965)); therefore

IT IS ORDERED that for the reasons and considerations set forth herein and in the previous Order dated December 16, 1974, petitioner's renewed Motion for Interim Relief, *pendente lite,* is denied; and

IT IS FURTHER ORDERED that the Board continue to provide suitable home instruction to petitioner until a final determination of this matter.

Entered this 23rd day of January 1975.

COMMISSIONER OF EDUCATION

January 23, 1975

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"M.W.," a minor,

Petitioner,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Cerrato, O'Connor, Braelow & Mehr, (Dominick Cerrato, Esq., of Counsel)

Petitioner, a minor, was enrolled as an eleventh grade pupil in the Marlboro High School when he was expelled on November 26, 1974 by the Board of Education of the Freehold Regional High School District, hereinafter "Board," as the result of his alleged involvement in an assault upon another pupil. He alleges that the Board's action expelling him was illegal, arbitrary, unreasonable and taken without a proper quorum. He appeals to the Commissioner of Education to direct the Board to reinstate him in school.

The Board denies any improper or illegal act on its part and maintains that petitioner's expulson was taken in the interest of maintaining a safe and orderly program of education in its school.

Petitioner on December 4, 1974, filed a Notice of Motion for *pendente lite* relief seeking reinstatement to the school. Oral argument was heard on December 6, 1974 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The hearing examiner required that the Board present at the oral argument the minutes of the action expelling M.W. It was stated that the minutes were not yet transcribed and approved but would be forwarded to the Commissioner. (Tr. I-63)

On December 16, 1974, the Commissioner issued an Order denying petitioner's request for reinstatement but ordered the Board to provide M.W. with suitable home instruction pending a final determination. Thereafter, on December 26, 1974, the official minutes of the December 16, 1974 meeting of the Board were received. These December 16, 1974 minutes show that the Board approved the minutes of the Board's previous special meetings of November 25 and November 26, 1974 which were in the form of a single document setting forth the Board's findings and determinations resulting from an expulsion hearing held November 25, 1974.

At a conference of counsel in the matter petitioner's attorney represented

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that three additional eye witnesses of the assault, not present at the Board's expulsion hearing of November 25, 1974, were prepared to testify on his behalf and that an offer to produce these witnesses made to the Board subsequent to the expulsion hearing had evoked no response. (Tr. II-12) On the basis of this representation, the hearing examiner agreed to hear the testimony of these three witnesses and, in order to balance the testimony, to hear the testimony of those other witnesses who had testified at the expulsion hearing regarding petitioner's involvement in the incidents attendant upon the assault. (Tr. III-188)

A hearing was conducted at the offices of the Monmouth County Superintendent of Schools, Freehold, on January 2, 1975 and January 10, 1975. On January 2, 1975, petitioner moved for an order to impound the transcript of the proceedings before the Commissioner in recognition of the possibility that it might conceivably be used as evidence against petitioner in the two suits pending before the Courts wherein he was named a respondent. The Motion was denied on January 8, 1975 by an Order of the Commissioner on grounds that he is without authority to impound the transcript of a matter in litigation before him. *N.J.S.A.* 18A:6-9 *et seq.*; *N.J.S.A.* 47:1A-2; *N.J.A.C.* 6:5-1.2(a,1)

Petitioner, at the hearing, renewed his Motion for reinstatement, *pendente lite,* which was denied by a third interlocutory Order issued January 23, 1975. The Commissioner therein stated that, absent a clear showing that petitioner was denied his rights of due process (to state his side of the matter, to be represented, to be heard by the Board, and to question his accusers), the Board's decision to expel M.W. was entitled to a presumption of correctness.

Petitioner maintains that he was never legally expelled by the Board (Tr. I-61; Tr. II-13), that expulsion requires an affirmative recorded roll call vote of a majority of the full membership of the Board (Tr. III-255-257), and that expulsion in this instance is unduly severe and contrary to his rights to a free public education as expressed in *Robinson v. Cahill,* 62 *N.J.* 473 and the New Jersey Constitution.

The Board's position is that a majority vote of the full membership is not required to expel a pupil (Tr. II-18) and that its action to expel was legal and necessary to preserve an orderly process of education whereby pupils may attend school without fear of attack. (Tr. I-37)

The hearing examiner has reviewed the extensive testimony of the agents of the Board and the pupils who were present or involved in a series of incidents attendant upon the aforementioned assault. Additionally, he has reviewed the documents submitted into evidence. The report of the hearing examiner and his recommendations to the Commissioner are as follows:

On October 25, 1974, two pupils, "R.F." and a smaller boy, "A.M.," were participating in a game of floor hockey in a gym class when they engaged in a brief altercation which was stopped by another pupil. It was of such brief duration as not to attract the attention of the teacher. Thereafter, words were exchanged but no further blows struck when these two boys confronted each

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other in the locker room. However, in the lunch period which followed, A.M., M.W. and several other boys in misguided fashion determined to "settle the matter" by inflicting upon R.F. swift retribution. M.W. was instrumental in determining that R.F. was at that time in a chemistry class. (Tr. I-34) Thereupon, the group proceeded from the lunchroom to the corridor outside the chemistry room. When the period ended and R.F. entered the corridor, he was forcibly escorted by M.W. and others into the boys' lavatory immediately adjacent. (Tr. II-62) There he was, in the presence of at least twelve boys, buffeted by A.M., M.W. (affidavit of M.W., Sr.) and others. (Tr. II-59)

Meanwhile, "S.S.," a friend of R.F.'s, had notified the chemistry teacher that R.F. was being "mugged" in the lavatory. The teacher forced his way into the lavatory (Tr. II-71) and noting that no blows were being struck at that time, directed all persons to clear the room and disperse. R.F. made no complaint to him at that time and proceeded down the corridor in company with S.S., his friend. A.M. left the group and proceeded to his class, but at least eight persons, including M.W., followed in a group close behind R.F. and S.S. (Tr. II-33) One pupil advanced from the group and struck R.F. a sharp blow to the eye. Thereupon, another boy tapped R.F. on the shoulder and, when he turned, struck a severe blow, fracturing his nose, drawing blood, and knocking him down. Finally, when R.F. sought to flee from the group, he was tackled by yet another boy and brought to the floor. (Tr.II-53) R.F. rose, entered a room, gained assistance from a teacher and subsequently reported the matter to the vice-principal who proceeded to investigate the hostilities.

R.F. testified at the hearing of January 2, 1975, that M.W. struck him in the eye, which testimony was corroborated by S.S. (Tr. II-33-34, 62) Three other eye witnesses who either saw or participated in the hostilities testified that they did not see M.W. strike such a blow. (Tr. III-126, 134, 155) However, the hearing examiner is unable to rely upon the testimony of *any* of these witnesses with respect to whether or not the blow was struck by M.W. Neither R.F. nor S.S., when initially reporting the incident to the vice-principal, accused M.W. of striking the blow. (Tr. III-225, 243; R-2) It was not until the Board's expulsion hearing a month later that the vice-principal heard them testify that they saw M.W. strike the blow. Nor is the hearing examiner able to place credence in the testimony of those three additional witnesses whose testimony sharply conflicts with otherwise established facts and whose powers of observation and recall appear to be so highly selective as to be unreliable.

Thus, the hearing examiner finds that M.W. was inextricably involved in those events which threatened both the well-being and safety of R.F. and resulted in harm to his person. In no sense may these events be termed as a fight since, the sides being grossly unequal, R.F. at no time struck back at his tormentors. There is, however, no finding that M.W. did or did not inflict the blow that caused temporary damage to R.F.'s eye.

M.W. and two other participants in these events were suspended by the vice-principal for two days. (P-1) Following investigation of complaints by the local police, this suspension was continued until the Board conducted an expulsion hearing on November 25, 1974. (P-2; P-4; P-5) At this hearing a total

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of five pupils were considered for expulsion and were represented by counsel and/or parent and given opportunity to cross-examine witnesses and to make statements or testify on their own behalf. M.W. declined to testify, in view of the suits pending before the juvenile authorities and the Courts. He later declined to take the stand in the proceeding before the hearing examiner for the same reasons.

The hearing examiner has reviewed the testimony pertinent to the suspension of M.W. and the five hours of the Board's expulsion hearing recorded on magnetic tape. He finds no procedural flaw therein relative to petitioner's rights of due process.

The expulsion hearing was conducted in exemplary fashion by the Vice President of the Board who allowed ample opportunity for cross-examination of witnesses. Each pupil being considered for expulsion or his parent or counsel was allowed to make statements on his behalf. The hearing was concluded without making a determination at 2:00 a.m. on November 26, 1974. (Tr. II-9) Six members of the Board participated in the hearing, two members having disqualified themselves and one being absent.

On the evening of November 26, 1974 five of the six Board members who had participated in the hearing met in caucus session to determine their findings. (Tr. II-9, 22) They determined by a four to one vote while still in caucus to expel M.W. and one other pupil and to return to school but place restrictions on the three other pupils. (Tr. II-15, 24; R-1) There is no evidence that at any time during the expulsion hearing or the subsequent meeting of the Board on November 26, 1974, the Board announced that it was in public session pursuant to the requirement of *N.J.S.A.* 18A:10-6 requiring that all board meetings be public. (R-1; Tr. II-18) Thus, the hearing examiner concludes that the vote taken in caucus session was not a legal act of the Board. There is in the entire record no evidence that at any time a motion was made and seconded in a public meeting of the Board and passed by a majority of the members present to expel the two pupils. Nor was such a motion entered in the official board minutes as required by *N.J.S.A.* 18A:17-7.

The Board maintains that its motion at its public meeting of December 16, 1974 to adopt the minutes of the meetings of November 25 and 26, 1974, which motion was unanimously adopted by the five members present, made official the previous decision to expel M.W.

Assuming *arguendo* that such an action could transmogrify and make official the previous determination of November 26, 1974 to expel, the hearing examiner finds that one member who voted to adopt the minutes had previously disqualified himself from participating in the expulsion hearing proceedings and final determination. (R-1) Absent this member who had previously disqualified himself, the Board lacked a quorum of a majority of its membership to act on the matter of expulsion. (December 16, 1974 Official Minutes of the Board) Further doubt is cast upon the efficacy of this act to validate the former action by the fact that one member present and voting on December 16, 1974, had voted not to expel M.W. at the caucus meeting of November 26, 1974. There is

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nothing in the record that substantiates the belief that his vote on December 16 to approve the minutes of November 26 was intended as a reversal of his position taken on November 26 when he voted against expulsion. (Tr. II-24; R-1) Yet, the December 16, 1974 recorded roll call vote was unanimous (5-0) to approve the minutes of the previous meeting of November 26, 1974.

In recognition of the above findings, it is recommended that the Commissioner determine that M.W. was not legally expelled. It is further recommended that the Commissioner order the Board to reinstate M.W. to the Marlboro High School with such restrictions as will guarantee that he will not further threaten and disturb the orderly operation of the school or engage in further physical violence. Such precaution is indicated not only by his involvement in the affray herein detailed, but also by his record of previous instances of fighting which resulted in suspension from school on three occasions since he entered the school in the ninth grade. (Tr. III-193-195)

Finally, the hearing examiner calls the attention of the Commissioner to the fact that there is in litigation before him a matter wherein the other pupil expelled by the Board, *ante,* similarly seeks reinstatement.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the controverted matter, the report of the hearing examiner, and the exceptions thereto filed by counsel pursuant to *N.J.A.C.* 6:24-1.16. He accepts the findings of the hearing examiner and holds them for his own.

In its exceptions to the hearing examiner's report the Board argues that its meeting on November 26, 1974, was a continuation of its meeting of the previous day and was a duly constituted public meeting. However, the record shows clearly that the meeting of November 26, 1974 at which the expulsion vote was taken was a caucus session. (Tr. II-9)

The Board further states in its exceptions that in the light of *"E.H." v. Board of Education of the City of Trenton, Mercer County,* 1972 *S.L.D.* 475, its action of approving its previous minutes on December 16, 1974, validated its previous expulsion vote. The Commissioner does not agree. In *"E.H."* he recognized the propriety of a delegated committee of that Board conducting an expulsion hearing but further stated that:

> "***The Commissioner is constrained to notice that local boards of education must of necessity delegate some procedural matters to a committee or to school administrators for the purpose of determining facts and developing recommendations. However, the Commissioner emphasizes that, following the conclusion of a hearing on pupil discipline as described in the instant matter, the Board as a whole must receive and consider either the transcript or a detailed, written report of the hearing, prior to taking any final action. In the instant matter, the report *** of

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> the Legal Committee of the Boad is obviously deficient, since it contains merely petitioner's name and a recommendation that he be expelled from school. The record is barren of any evidence that the Board, apart from the two members who conducted the hearing, had any detailed knowledge of petitioner's testimony or that of the witnesses who testified in petitioner's behalf or against him. In that vacuum of knowledge, the decision made by vote of the whole Board can only be judged to be arbitrary.
>
> "Accordingly, and in consideration of the fact that petitioner has already been suspended from school attendance for a period comprising almost one year, the Commissioner directs that petitioner be readmitted to the same academic program in which he was enrolled at the time of his suspension.***" (at p. 478)

In the instant matter the record is barren of evidence that the responsibility for conducting a hearing was delegated to a committee of the Board or that either the magnetic tapes or a full and detailed summary of the expulsion hearing was made available to or reviewed by those members of the Board not present at the expulsion hearing.

Petitioner argues that a majority of the entire membership of the Board must vote to expel if an expulsion is to be legal. Nowhere do the statutes require such a vote to expel a pupil. While it is desirable to have the thinking of all members of the Board in such an important, last-resort action as expulsion of a pupil, the Legislature in its wisdom has not so required. *N.J.S.A.* 18A:37-2,5 See *Ivan Polonsky et al. v. Red Bank Board of Education,* 1967 *S.L.D.* 93, 96.

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

As was said by the Court in *Cullum v. Board of Education of North Bergen,* 15 *N.J.* 285 (1954):

> "***The open meeting they held was nothing more than a sham and as Judge Hartshorne suggested in *Grogan v. DeSapio,* 15 *N.J. Super.* 604, 611 (*Law Div.* 1951), it ought to be dealt with 'as if it had never occurred.' The Legislature has unmistakably and wisely provided that meetings of boards of education shall be public***; if a public meeting is to have any meaning or value, final decision must be reserved until fair opportunity to be heard thereat has been afforded. This in no wise precludes advance

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meeting during which there is free and full discussion, wholly tentative in nature; it does, however, justly preclude private, final action as that taken by the majority in the instant matter.***" (at p. 294)

Similarly, in the instant matter, the Board's reasoning is flawed wherein it contends that mere approval in public session of the minutes of its previous private sessions makes legal the expulsion of M.W.

The Board's failure, herein, at any time while in public session to move, second, and vote affirmatively by a majority of members of a quorum present to expel M.W. or to record such action properly in its minutes pursuant to *N.J.S.A.* 18A:17-7 is fatal to the Board's case. Having notified M.W. on November 27, 1974, that he was expelled, the Board thereafter improperly prevented him from returning to his classes. Therefore, the Commissioner directs that he be reinstated forthwith.

M.W. has been denied the right to attend school for a period exceeding three months, which penalty should be sufficient to impress upon him the seriousness of his offense. However, no rationale may justify his participation in those heinous and unfair acts of which he and his fellow antagonists were guilty of perpetrating upon a lone pupil. Similar threats and violence have in the past resulted in permanent physical and mental impairment of pupils who have engaged in or been unwittingly the victims of such violence. They may never be condoned. The Commissioner so holds.

The Commissioner is further constrained to remind the Board that he has previously said in *John Scher v. Board of Education of the Borough of West Orange, Essex County,* 1968 *S.L.D.* 92 that:

"*** Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible. It involves a momentous decision which 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. Such advice can be obtained from its staff of educators, from its school physician and school nurse, from its psychologist, psychiatrist, and school social worker, from its counsel, and from other appropriate sources. The recommendations of such experts are an essential ingredient in any determination which has as significant and far-reaching effects on the welfare of a pupil as expulsion from school. It is obvious that a board of education 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. The Commissioner suggests, therefore, that boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see that the child comes under the aegis of another agency able to deal with the problem. ***" (at pp. 96-97)

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Herein, the Board is faced with a record of events which it rightly believes requires that action be taken to insure the peacefulness and safety of the Marlboro High School. It chose at its hearing to view the matter as it concerned M.W. as an isolated incident and did not consider his past record which contains further evidence that M.W. had at other times engaged in fighting with other pupils in the school. In view thereof, the Commissioner directs that the Board instruct its child study team, and such other consultants as it believes necessary, to examine M.W. and determine whether he presents a continuing danger to the orderly and safe operation of the school. Until such time as the Board receives their reports, it may place M.W. under whatever reasonable restriction it believes to be necessary. It may not, however, exclude him from school, absent such a recommendation from its qualified experts, except for further serious violation of the Board's policies or the rules of the school. As was said in *Gustave M. Wermuth and Sylvia Wermuth, as natural parents and guardians for Marsha Wermuth v. Julius C. Bernstein, Principal of Livingston High School, and Board of Education of the Township of Livingston, Essex County,* 1965 *S.L.D.* 121:

> "*** An effective school is an orderly one, and to be so it must operate under reasonable rules and regulations for pupil conduct. 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. ***" (at p. 129)

Petitioner's prayer for reinstatement is granted to the limited extent that he may attend his classes under such restrictions as the Board may reasonably determine to be necessary in order to insure the orderly and safe program of education in its school. It is so ordered.

COMMISSIONER OF EDUCATION

February 26, 1975

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"M.W.," a minor,

Petitioner,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

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

For the Respondent, Cerrato, O'Connor, Mehr & Saker (Mark Saker, Esq., appearing on behalf of Dominick Cerrato, Esq., of Counsel)

This matter having been reopened before the Commissioner of Education by Michael D. Schottland, Esq., attorney for petitioner on a Notice of Request that the Commissioner stay that portion of his decision in *"M.W.," a minor v. Board of Education of the Freehold Regional High School District, Monmouth County,* 1975 *S.L.D.* 127 (decided February 26, 1975), wherein he directs the Board to "instruct its child study team, and such other consultants as it believes necessary, to examine M.W. and determine whether he presents a continuing danger to the orderly and safe operation of the school" (at p. 134); Mark Saker, Esq., appearing for Dominick Cerrato, Esq., on behalf of the Board of Education of the Freehold Regional High School District; and

The decision of the Commissioner having been appealed by petitioner with Cross-Appeal by the respondent Board; and

Petitioner having failed to request the desired stay from the State Board of Education at the time of the filing of the Appeal with that Board; and

Petitioner having thereafter requested that the Commissioner stay his own decision; and

The respective arguments of counsel having been heard by a representative of the Commissioner on April 23, 1975; and

Petitioner's argument having been heard whereby he contends that, if the Board is allowed to proceed to direct the child study team to examine M.W., irreparable harm will result in that, once examined, M.W.'s basis of appeal would therein be rendered ineffective and moot; and

The further argument of petitioner having been heard that the requirement of such examination by the child study team is an unreasonable imposition in the face of the Board's illegal expulsion of M.W.; and

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Petitioner having cited, in support of his additional request that supplementary instruction be provided by the Board, *R.R. v. Board of Education, Shore Regional High School District,* 109 *N.J. Super.* 337 (*Chan. Div.* 1970); and

The arguments of the respondent Board in opposition to the requested stay having been heard, to wit, that the decision has the full effect of law, until and unless it is reversed on appeal; and

The argument of the Board having been heard that the Board, in any event, is clothed with discretionary authority to direct its child study team to examine M.W. or any pupil irrespective of the Commissioner's decision, and that the Commissioner may not properly interpose his judgment by placing such a restriction on the Board; and

The Board's further argument having been heard that it is obliged to take every precaution to insure that its pupils are protected from further violence and disorder; and

The Board's argument having been heard in opposition to a directive that it provide additional supplementary instruction and that *R.R., supra,* is in no way applicable to the within matter; and

The Commissioner having reviewed the Board's representation that continuing home instruction was provided in mathematics and other subjects during the beginning weeks of the second semester as were provided previously thereto as directed by the Commissioner; and

The Commissioner having carefully weighed the respective arguments of counsel relative to the within request; now, therefore,

It is determined that the Board has complied with the Commissioner's directive that home instruction be provided during the time of litigation; and

It is further determined that the Commissioner's previous directive that the Board instruct its child study team to examine M.W. is in no way a punishment, but is aimed only at the insuring of a safe and orderly school and is likewise in the best interests of M.W. within the context of his previous involvement in school disorders; and

The Commissioner having determined that the Board's discretion to require that an examination of M.W. be conducted by its child study team pursuant to *N.J.S.A.* 18A:46-5 is in no way made ineffective by the decision of February 26, 1975; now therefore,

Having determined that the requests of petitioner that the Commissioner stay a portion of his previous decision and direct that additional supplementary instruction be provided are without merit and inappropriate;

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IT IS ORDERED that the hereinbefore described requests of petitioner be and are denied.

Entered this 1st day of May 1975.

COMMISSIONER OF EDUCATION

"M.W.," a minor,

Petitioner-Appellant,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent-Cross-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 26, 1975.

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

For the Respondent-Cross-Appellant, Cerrato, O'Connor, Mehr & Saker (Dominick A. Cerrato, Esq., of Counsel)

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

June 4, 1975

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North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO, an Unincorporated Labor Organization, and Beth Ann Prudente,

Petitioners,

v.

Board of Education of the Township of North Bergen, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Victor P. Mullica, Esq.

For the Respondent, Joseph V. Cullum, Esq.

Petitioners allege that the Board of Education of the Township of North Bergen, hereinafter "Board," illegally rescinded the teaching contract of Beth Ann Prudente, hereinafter "petitioner," and prevented her from performing her teaching duties from September 1, 1973 through February 27, 1974. They appeal to the Commissioner of Education to order the Board to pay her the full amount of her contracted salary for this period. The Board denies any improper action on its part.

A hearing in the matter was conducted on July 26, 1974 at the office of the Hudson County Superintendent of Schools, Jersey City, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

A recitation of the uncontroverted facts reveals that petitioner was employed by the Board as a teacher from September 1970 through June 1973. On April 13, 1973, she was notified by the Board that her contract would be renewed for the school year 1973-74. (P-1) On May 29, 1973, she notified the Board in writing that she accepted the Board's offer of employment. (P-4) Thereafter, she was notified by letter of the Board Secretary, dated June 30, 1973, as follows:

> "I have been directed by the North Bergen Board of Education to advise you that this letter constitutes a legal 60-day notice of the termination of your services as a teacher in the North Bergen Public Schools, effective September 1, 1973, in the interest of continued efficiency, productivity and proper administration of the school system." (P-5)

Upon receipt of this letter, petitioner and the North Bergen Federation of Teachers on her behalf filed a grievance pursuant to the Agreement between the Board and the North Bergen Federation of Teachers. (P-3) In a letter dated July 26, 1973, the Board denied the grievance stating, *inter alia,* the following:

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"***In the existing contract between the North Bergen Board of Education and the North Bergen Federation of Teachers it is stated that 'Nothing herein contained shall be deemed to change or modify the existing law with reference to nontenure teachers.'

"It is on this basis that the North Bergen Board of Education has terminated Mrs. Prudente's services as a teacher***." (P-7)

A Petition of Appeal was filed with the Commissioner on November 28, 1973, seeking an order reinstating petitioner to her teaching position. Thereafter, on February 18, 1974, the Board passed the following resolution:

"RESOLVED, by the North Bergen Board of Education that Beth Ann Prudente, upon completion of her maternity leave, shall be reassigned to teaching duties in the North Bergen Public Schools, effective March 1, 1974." (P-6)

Following this action by the Board, an Amended Petition of Appeal and Answer thereto were filed dealing solely with the matter of petitioner's alleged entitlement to pay for the period September 1, 1973 through February 28, 1974.

Petitioners assert that a binding contract between the Board and petitioner, based on offer and acceptance (P-1, P-4), was effectuated pursuant to *N.J.S.A.* 18A:27-10, 12 which reads in pertinent part:

"On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

"a. A written offer of a contract for employment for the next succeeding year ***, or
"b. A written notice that such employment will not be offered." *N.J.S.A.* 18A:27-10

"If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein.***" *N.J.S.A.* 18A:27-12

Petitioners further assert that:

"***Beth Ann Prudente did not apply for maternity leave *** nor did the Board act and grant such leave. It was never discussed among the parties, for the obvious reason, she did not want maternity leave, she wanted to continue employment on September 4, 1973.***"
(Closing Argument of Petitioners, at p. 6)

Petitioners additionally argue that the Board's letter of June 30, 1973, rescinding its prior notice of intent to employ petitioner, *ante,* was not only

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untimely in that it was postmarked on July 6, 1973, but was in violation of *N.J.S.A.* 18A:6-6 which provides that no discrimination based on sex shall be made in matters pertaining to the employment of teachers in this State.

The Board argues that its action reinstating petitioner to a teaching position on February 28, 1974, and petitioner's acceptance thereof rendered moot all matters regarding back pay. Additionally, the Board states that, as a public body, it could not compensate her for services not rendered. (Tr. 11)

The Board further argues that its offer of employment (P-1) was given without knowledge of petitioner's pregnant condition, and that she was not physically nor mentally fit to undertake teaching duties in September 1973. (Answer to Amended Petition, at p. 2) Thus, the Board alleges that it was their understanding that she was on maternity leave from September 1973 through February 1974.

Additionally, the Board contends that petitioners were guilty of laches in waiting a period of five full months before proceeding to file a Petition of Appeal before the Commissioner.

Finally, the Board asserts that petitioner was *neither dismissed nor suspended* but that she was simply *not reemployed*. The Board maintains that in such instance the Commissioner has no statutory authority to order that petitioner be compensated for the period from September 1973 through February 1974 during which she did not work. Thus, the Board holds as nonapplicable herein the statute *N.J.S.A.* 18A:6-30 which reads:

> "Any person holding *** employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom, shall be entitled to compensation for the period covered by the illegal dismissal or suspension, if such dismissal or suspension shall be finally determined to have been without good cause, upon making written application therefor with the board or body by whom he was employed, within 30 days after such determination."

The hearing examiner finds that petitioner was never given other than favorable evaluations by her supervisors. (Tr. 13) At the grievance hearing before a Board subcommittee, no unfavorable comments were made regarding petitioner's performance as a teacher. (Tr. 20-21, 45)

Petitioner testified at the hearing that she taught through the end of the 1972-73 school year and thereafter on July 19, 1973, gave normal birth to a child. She further testified that her health, both physical and mental, have since been normal (Tr. 24), and that she was prepared to begin teaching on the first day of school in September 1973. This testimony was not challenged at the hearing. She stated that at no time had she requested of anyone that she be granted maternity leave. (Tr. 40) Additionally, she testified that she had no knowledge of the Board's resolution making reference to maternity leave (P-6) until July 22, 1974, four days prior to the hearing. (Tr. 33-34)

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The president of the North Bergen Federation of Teachers testified that when the Superintendent discussed with petitioner the possibility of her reinstatement to a teaching position, no mention was made of petitioner having been on maternity leave. (Tr. 49, 60) She likewise denied that there had been mention made at that time of any corollary agreement to the effect that, if petitioner were rehired, the matter of back pay would be dropped. (Tr. 51) Petitioner also testified that no such corollary agreement existed. (Tr. 38)

The Superintendent testified that he had been directed by the Board to draft the resolution (P-6) and incorporate therein the reference to maternity leave. (Tr. 64, 67) He further testified that at no time did petitioner request maternity leave according to the procedure set forth in the Board's policy. (Tr. 69)

The hearing examiner finds that petitioner did not request the Board to grant her maternity leave, nor did the Board at any time act in an official capacity to grant petitioner maternity leave. There is no evidence within the entire record to support a conclusion that petitioner was physically or mentally unable to resume her teaching duties on September 4, 1973, and the Board took no action to require a physician's examination of petitioner pursuant to *N.J.S.A.* 18A:16-2. It is, accordingly, found that the Board was without competent medical opinion on which to base a conclusion that petitioner was unable to perform her teaching duties in an efficient and thorough fashion.

It is similarly found that petitioner neither initiated nor discussed with the Board or its agents any corollary agreement that she would drop the issue of back pay if she were reinstated to her position. The hearing examiner finds that no corollary understanding ever existed.

The hearing examiner finds that petitioner was properly notified of her employment for the 1973-74 school year pursuant to *N.J.S.A.* 18A:27-10. She accepted the proffered employment thus effecting a binding contract upon the parties. Thereafter, she was given sixty days' notice by letter dated June 30, 1973 (P-5), that she would not be reemployed for the year 1973-74. This notice, the hearing examiner finds, was postmarked July 6, 1973 (P-5), sixty days prior to September 4, 1973, and was received by petitioner on July 7, 1973. (Tr. 27) The hearing examiner finds that, in view of her favorable evaluations and the absence of any meaningful reasons for non-reemployment, the sole reason for the notice of non-reemployment (P-5) was the fact that she was pregnant.

The hearing examiner leaves to the Commissioner to determine within the above context whether petitioner is entitled to salary for the period she did not work from September 1973 through February 1974, and whether she now is a tenured employee of the Board. The hearing examiner recommends to the Commissioner that the Board's argument of laches as an affirmative defense be denied. The record contains ample evidence that petitioner sought only to exhaust those administrative remedies in the form of the grievance procedure available to her before presenting the matter before the Commissioner.

This concludes the report of the hearing examiner.

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* * * *

The Commissioner has reviewed the report of the hearing examiner and the objections thereto filed by the Board. Such objections contain as their principal thrust an argument that Petitioner Prudente had not performed services as a teacher in September 1973 to enable her to claim she had complied with the precise conditions requisite to a tenured entitlement, and an objection to that part of the hearing examiner's report which posed a question with respect to salary for the period September 1, 1973 to February 28, 1974. The objections also contain a statement that Petitioner Prudente resigned her post as a teacher in the Board's employ at a time shortly after her return.

The principal question for determination is concerned with the propriety of the notice given to Petitioner Prudente on June 30, 1973, that her services would be terminated September 1, 1973. The Commissioner has considered this question and determines in the first instance that the Board's notice to Petitioner Prudente (P-5) dated June 30, 1973, which purported to terminate her services on September 1, 1973, was patently illegal and must be set aside. The notice stated that the reasons for such termination were "***efficiency, productivity and proper administration***." When viewed in the context of the Board's resolution of February 18, 1974 (P-6), which reinstated petitioner upon completion of her "maternity leave," it is clear that the Board's reasons are specious and must be categorized as a subterfuge. Petitioner's service was clearly terminated because she was pregnant.

The Commissioner holds that such a condition *per se* cannot, in the absence of competent medical data, be found to constitute an inability by Petitioner Prudente to perform her duties as a teaching staff member during the academic year 1973-74. She averred she could perform them and was ready, willing and able to begin her duties. The record is completely barren of evidence to the contrary. In such circumstances the Commissioner holds that the Board's notice of termination (P-5) must be set aside on the grounds that it was both discriminatory and arbitrary. Such discrimination against an employee of one sex is, in the Commissioner's judgment, expressly prohibited by statutory mandate. *N.J.S.A.* 18A:6-6 provides:

> "No discrimination based on sex shall be made in the formulation of the scale of wages, compensation, appointment, assignment, promotion, transfer, resignation, dismissal, or other matter pertaining to the employment of teachers in any school, state college, college, university, or other educational institution, in this state, supported in whole or in part by public funds unless it is open to members of one sex only, in which case teachers of that sex may be employed exclusively."

In the context of this statute, the Commissioner determines that the contract between Petitioner Prudente and the Board remained in full force and effect during all of the period beginning September 1, 1973 to March 1, 1974, when she resumed her teaching duties.

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It follows then that the Commissioner further determines that all of the terms of that contract must be honored retroactively.

Accordingly, the Commissioner directs the North Bergen Board of Education to afford Petitioner Prudente all the emoluments which are due her, subject only to mitigation of earnings from alternate employment, for the period beginning September 1, 1973 to March 1, 1974, the day she resumed her teaching duties.

Finally, the Commissioner states his concurrence with that section of the hearing examiner's report which recommends that the Board's defense of laches be denied. Petitioner Prudent's claim was promptly advanced and the timeliness of such claim provides no basis for a modification of the determination set forth above. The Commissioner is constrained to state at this juncture that failure to be reemployed is not a grievable issue, but comes within the aegis of the Commissioner's statutory responsibility to determine controversies and disputes that arise under the school laws. *N.J.S.A.* 18A:6-9 *et seq.*

Local boards of education are charged with the responsibility to hire teachers and other employees to operate the public schools. *N.J.S.A.* 18A:11-1; *N.J.S.A.* 18A:27-1 *et seq.* To assist them in selecting those who are best qualified to provide a thorough and efficient program of education, boards employ school administrators and other specialists to recommend who should be employed and who should not be reemployed. When a board of education for proscribed reasons fails to reemploy a teaching staff member, the matter should properly be filed in the form of a Petition of Appeal before the Commissioner in timely fashion. To pursue such a matter in the form of a grievance is a fruitless waste of time and only serves to delay a final determination.

Finally, the Commissioner addresses the issue of whether petitioner achieved a tenure status at the time of her reinstatement to her teaching position on or about March 1, 1974. At the time her employment was terminated for illegal reasons, petitioner had served the Board for an uninterrupted period of three academic years. The Board's improper decision not to reemploy her prevented her from gaining tenure by working on the first day that school convened in September 1973, pursuant to the provisions of *N.J.S.A.* 18A:28-5(b). Being thus prevented from working by the Board's improper act may in no way work to her detriment. Rather, the time which passed in litigation until the period of her reinstatement shall be treated as though it had not passed. Therefore, as of the first day of her reinstatement she acquired a tenure status which could be vacated only by her voluntary resignation, by reduction in staff pursuant to *N.J.S.A.* 18A:28-9 *et seq.*, or by order of the Commissioner upon proof of charges certified by the Board pursuant to *N.J.S.A.* 18A:6-10 *et seq.*

COMMISSIONER OF EDUCATION

February 26, 1975

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Board of Education of the Township of Madison,

Petitioner,

v.

Mayor and Council of the Township of Madison, Middlesex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Wilentz, Goldman & Spitzer (Harold G. Smith, Esq., of Counsel)

For the Respondents, Louis J. Alfonso, Esq.

Petitioner, hereinafter "Board," appeals from the action of respondents, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Middlesex County Board of Taxation a lesser amount for school purposes for the 1974-75 school year than the amount proposed by the Board in its budget which was defeated by the voters.

A hearing in this matter was held on September 26, 1974 and November 1, 1974 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. Supplemental data were filed subsequent to the first day of hearing as required by the hearing examiner. (Tr. I-25, 27, 42, 45, 47, 49, 54, 61, 62, 69, 91, 126, 137) The report of the hearing examiner is as follows:

At the annual school election held February 13, 1974, the Board submitted to the electorate proposals to raise by local taxation $13,258,813 for current expenses and $907,226 for capital outlay of the school district for the 1974-75 school year. These proposals were rejected by the voters and, thereafter, the Board submitted its budget to Council for its determination of the amount of current expense and capital outlay funds necessary to operate a thorough and efficient school system in the Township of Madison, pursuant to the mandatory obligation placed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board and a review of the proposed budget, Council made its determination and certified to the Middlesex County Board of Taxation an amount of $12,880,994 for current expenses and $785,045 for capital outlay for the school district for 1974-75. These amounts represent a total reduction of $500,000 from the amounts originally presented to the voters by the Board.

The Board avers that a reduction of $377,819 in its current expense budget and a reduction of $122,181 in its capital outlay budget are unreasonable and of such magnitude to jeopardize a thorough and efficient educational program for 1974-75.

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Conversely, Council maintains that its determinations were arrived at independently with proper consideration for the educational needs of the school district and in no way threaten a thorough and efficient system of schools. A listing of the reductions suggested by Council is set forth below, followed by an analysis and the recommendations of the hearing examiner:

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J110.02	Bd. Secy. Off. - Sals.	$ 150,217	$ 147,217	$ 3,000
J110.06	Supt. Off. - Sals.	155,741	153,241	2,500
J110.09	Bus. Adm. Off. Sals.	78,680	76,680	2,000
J120.01	Accountant Fees	5,000	4,500	500
J120.04	Other Contr. Servs.	25,000	18,500	6,500
J130.01	Bd. Members - Exps.	7,500	5,600	1,900
J130.02	Bd. Secy. Off. - Exps.	10,000	7,000	3,000
J130.06	Supt. Off. - Exps. *	11,500	10,980	520
J130.11	Purch. Off. - Exps.	12,755	10,755	2,000
J130.13	Prtg. & Publ. *	13,600	13,060	540
J130.14	Misc. Adm. Exps.	14,415	5,415	9,000
J213.01	Teachers - Sals.	10,288,150	10,179,991	108,159
J213.01A	Substitutes-Sals.	290,000	285,000	5,000
J214.01	Librs. - Sals.	252,390	237,390	15,000
J214.02	Guidance-Sals. *	317,523	312,523	5,000
J220.01	Textbooks	125,087	113,087	12,000
J230.01	Library Books	64,275	61,275	3,000
J230.03	A-V Mats.	46,865	41,865	5,000
J230.05	Other Libr. Exps.	11,805	10,305	1,500
J240	Instr. Supls.	312,608	296,608	16,000
J530	Repl. of Veh.	48,300	24,300	24,000
J620.01	Contr. Disp. Serv.*	30,000	29,000	1,000
J650.01	Custodial Supls. *	52,350	50,950	1,400
J650.02	Veh. Operation *	3,500	3,200	300
J660.03	Care of Grounds	35,100	15,600	19,500
J720.01	Contr. Serv.-Grnds.	84,270	72,270	12,000
J720.02	Contr. Serv.-Bldgs.	221,695	191,695	30,000
J730.04	A-V Equip.	15,000	5,000	10,000
J730.05	Instr. Equip. *	91,204	83,704	7,500
J730.09	Other Equip. Purch.	75,000	19,000	56,000
J740.01	Upkeep of Grnds.	28,984	25,984	3,000
J740.02	Repair of Bldgs.	68,033	63,033	5,000
J1110.01	Comm. Serv. - Sals.	15,000	9,000	6,000
SUBTOTAL CURRENT EXPENSE				$377,819
CAPITAL OUTLAY:				
L3220.03	Site Impr.	$ 285,685	$ 225,685	$ 60,000
L3230.03	Remodeling of Bldgs.	621,541	559,360	62,181
SUBTOTAL CAPITAL OUTLAY				$122,181
GRAND TOTAL–REDUCTIONS				$500,000

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*Denotes objections to reductions withdrawn by the Board. Hence no analysis is set forth for these items by the hearing examiner. (Tr. II-5-7)

J110.02 Board Secretary's Office–Salaries *Reduction $3,000*

The Board lists negotiated salaries and other salaries fixed by the Board totaling $144,744 for this line item. To this the Board adds $5,433 to provide for overtime and work-study payments. It is noted that overtime expenditures during 1973-74 totaled $1,914.56. (P-4, at p. 1)

The hearing examiner finds that the Board has failed to fully substantiate its need for the entire amount in this line item; however, reasonable provision must be made for overtime and part-time help. It is therefore recommended that $1,327 be restored to this line item and that the reduction be sustained in the amount of $1,673.

J110.06 Superintendent's Office–Salaries *Reduction $2,500*

The Board sets forth the salaries negotiated and otherwise fixed by the Board totaling $155,859.37 for positions previously approved and filled. (P-2, at p. 1) One assistant superintendent has been omitted from this line item. (Tr. I-34) Since this documentation provides conclusive proof that more than the entire amount budgeted by the Board is necessary, it is recommended that $2,500 be restored to this line item.

J110.09 Business Administrator's Office – Salaries *Reduction $2,000*

In this line item negotiated salaries for positions previously filled total $74,000 for 1974-75, and part-time and overtime payments totaled $3,724.53 in 1973-74. (P-4, at p. 2) It is recognized that some provision should reasonably be made for overtime and part-time assistance. Therefore, it is recommended that $1,300 be restored to this line item and that the reduction be sustained in the amount of $700.

J120.01 Accountant Fees *Reduction $500*

The hearing examiner finds that the Board took bids on the accounting services and that the bidder awarded the contract will be paid a sum in excess of that which was budgeted. (Tr. I-57) Therefore, it is recommended that the Commissioner restore $500 to this line item.

J120.04 Other Contracted Services *Reduction $6,500*

Council asserts that the budgeted amount of $25,000 is excessive and argues that the Board should pay its labor management consultant on a flat rate, rather than by an hourly fee.

The Board states that its average annual cost for these contracted services over recent years has approximated $25,000. The Board further cites the passage of Senate Bill 1087 which it believes will increase the amount of such services.

The amount of $26,670 was expended from this line item in 1972-73 and $17,493 was expended in 1973-74. The Board's current cost of hourly fees for

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its labor management consultant has increased by twenty percent. (Tr. I-58) There appears little likelihood of a reduction of the need for these services. Additionally, the Board budgeted expenditures of $12,000 for architectural and engineering fees in this line item. (P-4, at p. 3) It was testified by the Board Secretary that architectural fees had approached $18,000 by November 1, 1974. (Tr. II-107) Certain of these are attendant upon the acquisition of the 57.3 acre Nike Missile site. (Tr. II-112)

It appears certain that Middle States Association fees and fees of arbitrators, engineers, architects, and the labor management consultant will necessitate the amount originally budgeted by the Board. Therefore, it is recommended that $6,500 be restored to this account.

J130.01 Board Members – Expenses *Reduction $1,900*

The Board enumerates dues in three school boards' associations totaling $2,410. Additional proposed expenditures for conferences and conventions were budgeted at $5,090. (P-4, at p. 4) Council has reduced this line item to the amount budgeted for 1973-74.

During the preceding two school years, expenditures in this line item have exceeded the amounts budgeted. For the 1974-75 school year, the hearing examiner finds no imperative need essential to the thorough and efficient education of children that would be threatened by Council's reduction. Accordingly, it is recommended that the reduction be sustained in full.

J130.02 Board Secretary's Office–Expenses *Reduction $3,000*

The Board cites increased costs of postage and supplies approximating twenty percent for its proposed increase of $2,000 in this line item. Applying this reasonable estimate of increased costs to total 1973-74 expenditures of $6,968 for this line item, and adding a small contingency, indicates the necessity to provide $8,500 for this line item. Accordingly, it is recommended that $1,500 be restored to this line item and the reduction sustained in the amount of $1,500.

J130.11 Purchasing Office – Expenses *Reduction $2,000*

The Board, at the direction of the hearing examiner (Tr. I-69) submitted a detailed breakdown of costs for computer rental and office computer supplies. (P-4, at p. 5) For this line item these costs total $10,600 for 1974-75. Council's suggested appropriation is adequate to provide this amount; therefore, it is recommended that the reduction of $2,000 be sustained.

J130.14 Miscellaneous Administrative Expenses *Reduction $9,000*

The Board has increased its budget in this line item from $6,480 in 1973-74 to $14,415 for 1974-75. Primarily, this was the result of allocating $4,550 of proportionate computer rental costs to this line item as the result of a decision to establish a preventive maintenance and perpetual inventory system. (Tr. I-79-92)

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The evidence discloses that $2,878 was expended from this line item during 1973-74, principally for advertising for personnel and bids for supplies and equipment. Although it is desirable to operate computer-oriented preventive maintenance and perpetual inventory programs in such a large school district with its numerous school buildings, the Board has failed to substantiate its needs for the entire amount of its proposal. Accordingly, it is recommended that $3,500 be restored to this line item and that the reduction be sustained in the amount of $5,500.

J213.01 Teachers–Salaries *Reduction $108,159*

The Board employed in 1973-74 a total of 739 teaching staff members. (P-6) September 1973 pupil enrollment was 13,131. Enrollment increased to 13,141 by November 1, 1974 (Tr. II-121) at which time the Board had increased its teaching staff members to 770. (P-6, at p. 1) This represents thirty-one additional teachers. The total annual cost of 1974-75 salaries for both former and new positions is found to be $10,239,680. (P-6) The Board budgeted a total of $10,288,150 for teachers' salaries and related costs in this line item. Council proposes to reduce this amount to $10,179,991. Consideration of this line item is, therefore, primarily a matter of determining the necessity for the addition of thirty-one teachers whom the Board had already added to its staff prior to the opening of the 1974-75 school year at a cost of $298,594. (P-5, at p. 4)

Council maintains that its proposed appropriation will adequately provide for those teachers needed by the Board, and challenges the Board's additions to staff in the face of a stable pupil enrollment.

The Board cites the following as reasons for its substantial increase in teaching staff:

1. New building developments in progress (Tr. I-100) (P-6)
2. Cutbacks by parochial schools in enrollment (Tr. I-100) (P-6, at p. 4)
3. Continuing increase of enrollment in high school, kindergarten and first grade classes (P-6, at p. 3) (P-7)
4. Increasing numbers of special education pupils (Tr. I-101)
5. Desire to meet needs of pupils more adequately in the areas of music, arts, physical education, remedial reading, speech and supplementary education (P-7)
6. Need to balance and keep reasonable maxima on class sizes (Tr. I-102-117)

The hearing examiner has studied the extensive documentary evidence and testimony offered by the Board in support of its need for thirty-one additional teachers for 1974-75. This alleged need is viewed within the context of a projected increase of five percent in teaching staff compared to an enrollment increase of only ten pupils in a total enrollment exceeding 13,000. While it is apparent that additional teachers are necessary for mandated special education programs and for both regular and specialized instruction in those grades where enrollment is increasing, it is likewise clear that the Board has not commensurately reduced staff in those grades where enrollment is decreasing.

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The hearing examiner finds that Council's appropriation is sufficient to fund all but $59,689 of the salaries presently contracted by the Board. Thus, Council has adequately provided for twenty-four of the controverted positions. Absent convincing proof that the remaining seven teaching positions, however desirable they may be, are necessary to a thorough and efficient system of education, it is recommended that the Commissioner sustain Council's reduction in the full amount of $108,159.

J213.01A Substitutes–Salaries *Reduction $5,000*

The Board states that this line item has been increased from $193,000 in 1972-73 to $290,000 in 1974-75 to adequately provide for the negotiated increase in salaries. Council maintains that its appropriation is adequate to provide for the Board's negotiated per diem salaries and to meet the needs of the school district.

The amount of $267,271 was expended for this purpose during 1972-73 and $228,601 in 1973-74. While it is recognized that budgeting for this line item is difficult at best, it appears that Council's suggested appropriation of an eleven percent increase over the average expenditure during the last two years should prove adequate for the Board's needs. Accordingly, it is recommended that the Commissioner sustain the reduction in full.

J214.01 Librarians–Salaries *Reduction $15,000*

The Board has shown that salaries for its nineteen librarians, established in accord with its salary policies, will necessitate the appropriation of $247,424. (P-2, at p. 3) Allowing an additional $4,000 for salary adjustments and course reimbursements and a small contingency fund would require a total appropriation equal to that which the Board originally budgeted in this line item. Therefore, the hearing examiner recommends restoration of $15,000 to this line item.

J220.01 Textbooks *Reduction $12,000*

The Board budgeted $90,823 for this line item in 1973-74 from which it expended $83,156. (P-3, at p. 4) It was testified by the Assistant Superintendent that textbook costs have increased as much as thirty-five percent during the past year. Applying this percentage increase to the previous year's budgeted figure for textbooks, and allowing for a contingency to provide for the purchase of texts where none are now provided (Tr. II-13) and for the needs of non-English speaking pupils (Tr. II-28) supports the conclusion that $116,087 is needed in this line item. Accordingly, it is recommended that $3,000 be restored to this line item and the reduction be sustained in the amount of $9,000.

J230.01 Library Books *Reduction $3,000*

The amount of $49,902 was expended for library books during 1973-74 from an allocation of $53,148. The Superintendent testified that purchasing was curtailed during 1973-74 because of fiscal problems, thus deferring the purchase of needed books for the libraries of the Board's seventeen schools. (Tr. II-30)

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The hearing examiner has reviewed the respective positions of the Board and Council in the testimony and evidence. Assuming a twenty-five percent increase in the cost of library books, it is shown that the Board is seeking merely to maintain its purchasing power at a level comparable to that provided by its 1973-74 budget for this important educational resource. In keeping with this finding it is recommended that $3,000 be restored to this line item.

J230.03 Audiovisual Materials *Reduction $5,000*

The Board maintains that its collection of film strips totals 9,851, whereas the American Library Association's recommendation for a school system of this size calls for 41,000 filmstrips. (Tr. II-34) The Assistant Superintendent testified that its concept of individualized education in its middle schools requires that additional filmstrips be available for pupils as a learning resource on an individual basis. (Tr. II-36)

Council maintains that a more gradual accumulation of these learning aids is in order.

The hearing examiner finds that the Board's per pupil expenditure in this respect is below the average for New Jersey and Middlesex County. It is further found that the Board places great reliance upon these instructional aids in its curriculum. It is therefore recommended that $4,000 be restored to this line item and that the reduction be sustained in the amount of $1,000, which the Board stated would not be detrimental to its program.

J230.05 Other Library Expenses *Reduction $1,500*

The hearing examiner observes that $7,785 was expended from this line item during 1973-74. (P-3, at p. 7) Allowing for a twenty percent inflationary increase for costs of materials used in the libraries leads to the conclusion that Council's suggestion of $10,305 for this item is adequate to maintain a thorough and efficient operation. It is recommended that the reduction of $1,500 be sustained.

J240 Instructional Supplies *Reduction $16,000*

$232,285 was expended from this line item during 1973-74 from an allocation of $252,816. The Board Secretary testified that the under-expenditure was again the result of a curtailment of purchases arising from fiscal deficits. (Tr. II-40) An analysis of the pertinent testimony and documentation leads to the conclusion that, assuming a twenty percent increase in costs for vocational and academic supplies, $303,380 is necessary to maintain the same services as provided by the Board's 1972-73 budget, prior to the curtailment of purchasing. (P-4, at p. 5) Therefore, it is recommended that $6,772 be restored to this line item and the reduction be sustained in the amount of $9,228.

J530 Replacement of Vehicles *Reduction $24,000*

The Board proposes to replace six school buses with average mileage well in excess of 100,000 miles as a necessary safety precaution. In recognition of this precaution for the safety and welfare of children who are transported, the

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hearing examiner recommends that $24,000 be restored to this line item.

J660.03 Care of Grounds *Reduction $19,500*

The Board proposes to hire six security guards to provide constant patrol of all Board property in an effort to control vandalism which has been generating costs averaging $90,000 per year. This proposal accounts for the increase in this line item from $2,000 in 1973-74 to $35,100 in 1974-75.

The hearing examiner finds that the proposed allocation represents a positive plan of action to reduce mounting Board costs resulting from vandalism and recommends that $19,500 be restored to this line item.

J720.01 Contracted Services – Grounds *Reduction $12,000*

This line item provides contracted services for the Board's 292 acres of land. Playing fields are used not only for school purposes but also are made available to the Township Recreation Commission throughout the year. Additionally, it provides for driveway maintenance and resurfacing.

The hearing examiner has reviewed the considerable testimony and documentary evidence and finds that the 1973-74 curtailment of purchasing has created an unusual backlog of necessary work. He finds that $80,000 is needed to maintain and resurface roadways and walkways, renovate playing fields, and develop school facilities in order that similar facilities be provided for both boys' and girls' athletic programs. It is recommended that $7,730 be restored to this line item and the reduction be sustained in the amount of $4,270.

J720.02 Contracted Services – Buildings *Reduction $30,000*

The Board states that this line item provides for contracted services for roofs, glass, plumbing, auditorium seats, boilers, air conditioners, sewage systems and other similar facilities. The $100,240 budgeted by the Board for this line item during 1973-74 has been increased to $221,695 for the 1974-75 school year. Council's suggested appropriation was $191,695.

Recognizing that Council's recommendation provides for an increase of ninety-one percent and absent proof from the Board of the need for a greater appropriation, the hearing examiner recommends that the reduction be sustained in full.

J730.04 Audiovisual Equipment – Purchases *Reduction $10,000*

The Board budgeted $28,550 for this line item in 1973-74. Of this, $26,829 was expended. (P-3, at p. 21) For 1974-75 the Board budgeted $15,000, a reduction of $13,550. Detailed listings of equipment and costs thereof were submitted at the hearing. (P-8) These proposed purchases to service seventeen schools are in certain instances necessitated by the phasing out of a language laboratory and the use of alternate equipment. (Tr. II-68)

The hearing examiner finds that the Board's allocation of $15,000 for this line item is designed only to maintain the services previously offered in its

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seventeen schools and is reasonable. Accordingly, it is recommended that $10,000 be restored to this line item.

J730.09 Other Equipment – Purchases *Reduction $56,000*

This line item has been increased from $19,000 in 1973-74 to $75,000 in 1974-75, primarily to purchase equipment to expand the Board's satellite lunch program to six additional elementary schools. This expansion would provide an equal opportunity for all children to have a well-balanced lunch on a daily basis.

Council recognizes that this is a desirable goal but asserts that in times of recession and high taxes such worthy, but non-essential, provisions must be deferred. (Statement of Township's Position, at p. 3)

The hearing examiner has weighed the arguments set forth by the respective parties. He recognizes that the provisions of *c.*53, *P.L.*1974 and *N.J.A.C.* 6:79-18 will, in any event, compel school districts to provide lunch programs in 1975-76 in all schools wherein pupils eligible for free or reduced rate lunches exceed five percent of the enrollment. However, there is no showing that the Board is required to do so in 1974-75 in the face of evident desire for economies as expressed by the electorate and Council. It is found that the desired expansion of the satellite lunch program is not a necessity at this time. Therefore, it is recommended that the Commissioner sustain the reduction in the amount of $56,000.

J740.01 Upkeep of Grounds *Reduction $3,000*

The hearing examiner finds that $27,793 was expended from this line item during 1973-74, although the Board had budgeted only $17,500. Testimony of the Board Secretary is convincing that excessive community and school use of existing athletic fields requires extensive efforts to restore and maintain safe and desirable conditions. (Tr. II-75-80) Likewise, it is clear that additional facilities must be maintained for girls' athletic programs. In keeping with these findings, the hearing examiner recommends that $3,000 be restored to this line item.

J740.02 Repair of Buildings *Reduction $5,000*

$105,412 was expended from this line item during 1973-74 of which approximately $80,000 was for glass replacement resulting from vandalism. (Tr. II-84) The Board has reduced its allocation to $68,033 in anticipation of positive results from its proposed surveillance program. In recognition of the necessity for certain repairs occasioned by normal operation of seventeen school buildings, and that the proposed surveillance system is not yet operable, the hearing examiner recommends that $5,000 be restored to this line item.

J1110.01 Community Services – Salaries *Reduction $6,000*

This line item provides for janitorial salaries for non-school community use of the buildings. $3,800 was expended for this purpose in 1973-74, and Council recommended $9,000 in this line item for 1974-75. Absent a showing on the part of the Board that this appropriation is inadequate to maintain a thorough and efficient educational program, the hearing examiner recommends that the reduction be sustained in full.

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L3220.03 Site Improvements *Reduction $60,000*
L3230.03 Remodeling of Buildings *Reduction $62,181*

The Board proposes to make the following improvements from the above-listed line items.

1. Willis Elementary School renovation (Tr. II-102)
2. Carpenter School flood control (Tr. II-103)
3. Memorial School remodeling
4. Madison Township High School heating renovation
5. Madison Township High School sewage system repair
6. Cedar Ridge High School partial heating renovation
7. Memorial School window replacement
8. Cedar Ridge High School bleacher repair
9. Addition of accoustical ceilings in four all-purpose rooms
10. Renovation of Glenn School sewerage lift

Additionally, it was disclosed at the hearing that the Board anticipates being the recipient of 57.3 acres of land of the present Nike base from the federal government. (Tr. II-110) The buildings thereon are in such condition that immediate repairs will be necessary if they are to be saved. (P-1) This valuable acquisition became possible subsequent to the Board's preparation of the 1974-75 school budget.

The hearing examiner has reviewed the testimony and documentation of the respective parties relative to the above line items. It is apparent that the Board has not budgeted a sufficient amount to accomplish all of the ten projects listed. Likewise, the Board was unable to budget for its unexpected acquisition of land and buildings. The listed projects bear great relevance to the safety and thorough and efficient operation of the educational program. Additionally, many of these improvements must be accomplished to prevent further costs that may arise from neglect. In keeping with these findings, the hearing examiner recommends that $60,000 be restored to line item L3220.03 and that $62,181 be restored to line item L3230.03.

The hearing examiner observes that the unappropriated balance remaining in the Board's current expense account as of June 30, 1974, was $93,000, and that the unappropriated balance in the capital outlay account was $42,000. Since these balances represent less than one percent of the annual budget for these accounts, it is recommended that the Commissioner make no appropriation therefrom in his final determination of the controverted line items.

The recommendations of the hearing examiner are summarized as follows:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110.02	Bd. Secy. Off. - Sals.	$ 3,000	$ 1,327	$ 1,673
J110.06	Supt. Off. - Sals.	2,500	2,500	--0--
J110.09	Bus. Adm. Off. - Sals.	2,000	1,300	700

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J120.01	Accountant Fees	500	500	–0–
J120.04	Other Contr. Servs.	6,500	6,500	–0–
J130.01	Bd. Members - Exps.	1,900	–0–	1,900
J130.02	Bd. Secy Off. - Exps.	3,000	1,500	1,500
J130.06	Supt. Off. - Exps.	520	–0–	520
J130.11	Purch. Off. - Exps.	2,000	–0–	2,000
J130.13	Prtg. and Publ.	540	–0–	540
J130.14	Misc. Adm. Exps.	9,000	3,500	5,500
J213.01	Teachers-Sals.	108,159	–0–	108,159
J213.01A	Substitutes - Sals.	5,000	–0–	5,000
J214.01	Librs. - Sals.	15,000	15,000	–0–
J214.02	Guidance - Sals.	5,000	–0–	5,000
J220.01	Textbooks	12,000	3,000	9,000
J230.01	Library Books	3,000	3,000	–0–
J230.03	A-V Mats.	5,000	4,000	1,000
J230.05	Other Libr. Exps.	1,500	–0–	1,500
J240	Instr. Supls.	16,000	6,772	9,228
J530	Repl. of Veh.	24,000	24,000	–0–
J620.01	Contr. Disp. Serv.	1,000	–0–	1,000
J650.01	Custodial Supls.	1,400	–0–	1,400
J650.02	Veh. Operation	300	–0–	300
J660.03	Care of Grnds.	19,500	19,500	–0–
J720.01	Contr. Serv.-Grnds.	12,000	7,730	4,270
J720.02	Contr. Servs.-Bldgs.	30,000	–0–	30,000
J730.04	A-V Equip.	10,000	10,000	–0–
J730.05	Instr. Equip.	7,500	–0–	7,500
J730.09	Other Equip. Purch.	56,000	–0–	56,000
J740.01	Upkeep of Grnds.	3,000	3,000	–0–
J740.02	Repair of Bldgs.	5,000	5,000	–0–
J1110.01	Comm. Serv. - Sals.	6,000	–0–	6,000
SUBTOTAL CURRENT EXPENSE		$377,819	$118,129	$259,690
CAPITAL OUTLAY:				
L3220.03	Site Improvements	$60,000	$60,000	–0–
L3230.03	Remodeling of Bldgs.	62,181	62,181	–0–
SUBTOTAL CAPITAL OUTLAY		$122,181	$122,181	–0–
GRAND TOTAL		$500,000	$240,310	$259,690

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner and the exceptions thereto as filed by respective counsel pursuant to *N.J.A.C.* 6:24-1.16.

It is noted that counsel takes exception to the submission of Exhibits A-F by the Board. These exhibits were not available at the hearing and may not now be considered evidentiary with respect to the final determination of the matter as required of the Commissioner pursuant to *N.J.S.A.* 18A:6-9 *et seq.* The

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Commissioner is not unmindful of the financial problems facing boards of education in this time of spiraling inflation and has reviewed the exhibits but finds no need to delay the matter further by ordering additional cross-examination of these exhibits. Therefore, without being influenced by their contents, he proceeds to the final determination.

It is observed that Council takes exception to the findings and recommendations of the hearing examiner with respect to line items J220.01, J230.01 and J240 concerning the percentage increases applied by the hearing examiner to the previous year's expenditures. A careful examination of the record shows that other important considerations relevant to these line items were the purchase of additional texts where none are now provided (Tr. II-13), needs of non-English speaking pupils (Tr. II-28) and the purchasing curtailment during the 1973-74 school year which affected each of these line items.

The Commissioner accepts the findings and recommendations of the hearing examiner and holds them for his own with respect to the numbered line items herein controverted. Further, he determines that the amount of unappropriated balances of the Board will remain available to the Board in the event it must draw thereon to operate its educational program in this year of increasing costs.

He further determines that the amount of taxes certified by Council is insufficient to maintain a thorough and efficient program of education in the Township of Madison. Therefore, the Commissioner hereby certifies to the Middlesex County Board of Taxation the total additional amount of $240,310 to be raised by public taxation for use by the Board in the 1974-75 school year. Of this total amount, $118,129 is restored to the current expense account and $122,181 is restored to the capital outlay account. In summary, the total amount certified for current expenses as the result of this restoration is $12,999,123 and the total amount for capital outlay is $907,226, for a grand total for all purposes of $13,906,349.

COMMISSIONER OF EDUCATION

February 27, 1975

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Patricia Fallon,

Petitioner,

v.

Board of Education of the Township of Mount Laurel, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Hartman, Schlesinger, Schlosser & Faxon (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Benjamin Marmer, Esq.

Petitioner was employed as a Spanish language teacher in the Mount Laurel Middle School for the three academic years 1971-72, 1972-73, and 1973-74 by the Board of Education of the Township of Mount Laurel, hereinafter "Board." She alleges that her non-reemployment by the Board for the 1974-75 academic year was a violation of her rights pursuant to the education statutes, specifically *N.J.S.A.* 18A:27-10, 11, 12, and 18A:25-7.

The Board denies that its determination not to reemploy petitioner was improper and asserts that it has fulfilled its obligations to petitioner pursuant to the school laws and her contract with the Board.

This matter is submitted to the Commissioner for Summary Judgment on two joint Stipulations of Facts, an affidavit, exhibits, and Briefs. The following facts are not in dispute:

On March 15, 1974, the principal of the Middle School met with petitioner and explained to her that in all probability there would be a change in the foreign language curriculum, and that this change, if adopted, would eliminate her position as a Spanish teacher. The proposed program change contemplated having only one teacher for both French and Spanish classes, and, since petitioner was certified to teach Spanish only, the new program would necessitate the elimination of her position.

On March 26, 1974, the administration presented to the Board a plan to revise the foreign language curriculum. This plan did propose combining the teaching of French and Spanish, which would result in the elimination of one foreign language teacher. Since petitioner was certified to teach Spanish only, she was the teacher whose position would be eliminated. Exhibit A describes the foreign language curriculum in the Middle School as it was taught during school year 1973-74 and the proposed curricular changes for school year 1974-75. At this March 26, 1974 meeting the Board decided to review the proposed curricular change in more detail, and therefore did not take any final action on the proposal. Also at this meeting the Superintendent of Schools presented to

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the Board the names of the teaching staff recommended for reappointment. The Board approved the reemployment of the recommended teaching staff members with one conditional employment, that of petitioner, subject to the Board's final action on the foreign language curriculum.

Under date of March 28, 1974, the Superintendent informed petitioner by letter that the Board was giving serious consideration to adopting a revision of the Middle School foreign language curriculum for the 1974-75 school year, and that as a result her teaching position would probably be eliminated at the close of the 1973-74 school year. He further advised her that, since her employment for the 1974-75 school year was doubtful, he believed she should be made aware of this in order that she might plan accordingly.

At a regular meeting held April 9, 1974, the Board approved the proposed revision in the foreign language curriculum.

On April 11, 1974, the Superintendent sent to each teacher a summary of the results of the Board meeting of April 9, 1974. This document is entitled "School Board Briefs, April 1974." Item 11 states that the "Board approved on a trial basis the recommended changes (exploratory approach) to the Middle School foreign language program." On May 20, 1974, petitioner stated to the Superintendent that she had received the above-mentioned document.

On May 10, 1974, petitioner addressed a letter to the Superintendent stating that she was accepting employment for the 1974-75 academic year with the Mount Laurel Township Board pursuant to *N.J.S.A.* 18A:27-12. This letter was received by the Superintendent on May 13, 1974. On the same day the Superintendent wrote to petitioner stating that he would like to confer with her at her earliest convenience to discuss her letter of May 10, 1974. Petitioner replied to the Superintendent by letter dated May 16, 1974, that she would meet with him on Monday, May 20, 1974 at 3:15 p.m. in the Middle School Conference Room, and further advised him that her selected representatives would accompany her. This letter was received on May 17, 1974. On the same date, the Superintendent wrote to petitioner stating that he would meet with her alone on May 20, 1974 in the Middle School Library.

Article IV, Section D of the 1973-74 Agreement between the Board of Education of Mount Laurel Township and the Mount Laurel Education Association reads as follows:

> "Whenever any teacher is required to appear before the superintendent, Board or any committee, member, representative or agent thereof concerning any matter which could adversely affect the continuation of that teacher 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. If a teacher is not satisfied with the results of the meeting, he shall be entitled to have a representative of the Association present to advise him and represent him during a subsequent meeting."

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Petitioner was advised by the Superintendent that she could have any representative of the Association present during a subsequent meeting.

For the academic year 1973-74 there were no formal contracts of employment between the teaching staff members and the Board. In lieu of a formal contract for the year 1973-74, a letter was forwarded to petitioner notifying her of her reemployment, and advising that a formal contract would be executed upon the finalization of a salary policy. Petitioner was requested to sign this letter indicating her intention to teach for the academic year 1973-74. No formal contract was subsequently signed.

Petitioner is certified to teach Spanish and social studies. There was no vacancy in the Social Studies Department for the academic year 1974-75. It is not disputed that the Board's determination to not reemploy petitioner was due solely to a change in the foreign language curriculum which required only one teacher to teach both Spanish and French.

This recitation of the facts establishes the parameters of the issues in contention. They may be summarized and stated succinctly as follows:

1. Was the notice given to petitioner (Exhibit C) sufficient to meet the statutory requirements of *N.J.S.A.* 18A:27-10, 11, and 12?

2. Did the Superintendent of Schools wrongfully deny petitioner the right to be accompanied by representatives of her choosing pursuant to *N.J.S.A.* 18A:25-7?

The statutes which are pertinent to this dispute are *N.J.S.A.* 18A:27-10, 11, and 12, which became effective September 1, 1972. The primary purpose of these statutes is to give teachers timely notice when they are not to be reemployed in order that they may seek other employment. *N.J.S.A.* 18A:27-10 reads as follows:

> "On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either
>
> > "a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
> >
> > "b. *A written notice that such employment* will not be offered."
> > (*Emphasis supplied.*)

Additionally, *N.J.S.A.* 18A:27-11 reads as follows:

> "Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year *or a notice that such employment will not be offered,* all

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> within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education." (*Emphasis supplied.*)

When the Board adopted the revised foreign language curriculum at its public meeting on April 9, 1974, it notified its entire teaching staff of that action and other relevant Board actions taken at that meeting by distributing to each teacher a statement entitled "School Board Briefs, April 1974." (Exhibit C) That document reads in pertinent part as follows:

> "***11. Board approved on a trial basis the recommended changes (exploratory approach) to the Middle School foreign language program.***"

The joint Stipulations of Facts, *ante,* show that petitioner had warning far in advance of the Board's April 9, 1974 action that her teaching position was in danger of being eliminated; nevertheless, she was never notified in writing pursuant to *N.J.S.A.* 18A:27-10 that she would not be reemployed. The Commissioner finds, therefore, that the Board's "notice" (Exhibit C) was so inadequate that it does not comply with the statutory requirements for notice in writing. *N.J.S.A.* 18A:27-10 It would have been a simple act for the Board to notify petitioner, singly and directly, that she would not be reemployed because of the change in its foreign language curriculum. Its "School Board Briefs" (Exhibit C) was no notice at all. *Burgin v. Board of Education of Avalon,* 1974 *S.L.D.* 396

After petitioner notified the Board in writing pursuant to *N.J.S.A.* 18A:27-12 that she accepted employment for the 1974-75 school year (Exhibit D), the Board met on June 11, 1974, and formally adopted a resolution which reads in pertinent part as follows:

> ***
>
> "WHEREAS Patricia Fallon has heretofore taught Spanish in said school system and because of the change in the foreign language program her services will no longer be required as a Spanish teacher for the school year 1974-75, and the said position formerly occupied by Patricia Fallon is hereby abolished, and
>
> ***
>
> "WHEREAS the Board of Education is desirous of terminating said employment of the said Patricia Fallon for the term September 1, 1974 to June 30, 1975, if said employment exists,
>
> "NOW THEREFORE BE IT RESOLVED by the Board of Education of the Township of Mount Laurel, County of Burlington and State of New Jersey that

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"(1) The Superintendent of Schools immediately notify Patricia Fallon, in writing, that her employment for the year September 1, 1974 to June 30, 1975, if it exists, is terminated as of September 1, 1974, and the said notice of termination as of September 1, 1974 is given immediately, and

"(2) The said Patricia Fallon shall not be permitted to teach in the school system of the Township of Mount Laurel on and after September 1, 1974." (Exhibit I)

Petitioner asserts that she was denied the right to be represented at a meeting with the Superintendent which was called to discuss her employment status. *N.J.S.A.* 18A:25-7 reads as follows:

"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."

That portion of the Board's policy, identified as Article IV, Section D, which provides that a teacher may be required to appear before the "Board or any committee, [or] member *** thereof" without a representative present of his choosing, is clearly violative of the provisions of *N.J.S.A.* 18A:25-7, *ante,* and accordingly is hereby declared a nullity.

The remaining provision which pertains to petitioner's conference with the Superintendent or any other school administrator is valid. Therefore, petitioner was not entitled to have a representative present at the initial conference requested by the Superintendent in response to her letter of May 10, 1974.

Petitioner contends that there is an element of bad faith expressed by the actions of the Board in abolishing her position; however, the record does not support this allegation. The record clearly shows that petitioner received timely warning on March 15 and 18, 1974, that in all probability her position would be abolished, and she was advised to plan accordingly.

It is clear from the record in this matter that the Board's resolution adopted June 11, 1974 (Exhibit I) formally abolished petitioner's position as a teacher of Spanish. Boards of education have the statutory authority to abolish positions for valid reasons. The applicable statute, *N.J.S.A.* 18A:28-9, reads as follows:

"Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of

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change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article."

Petitioner had no employment contract with the Board for the 1973-74 school year because the Board and the teachers' association had not finalized the salary schedule; therefore, petitioner signed a letter of intention to teach for the 1973-74 school year. The offer and acceptance of employment establishes a contractual relationship. *Cossaboon v. Board of Education of the Township of Greenwich, Cumberland County,* 1974 *S.L.D.* 706 The previous year's contract contained a notice of termination clause providing for thirty days' written notice by either party. The Commissioner finds, therefore, that the same provision existed in petitioner's unwritten contracts for the 1973-74 and 1974-75 academic years, and that she was entitled to at least thirty days' written notice that her employment would be terminated as the result of the Board's action abolishing her teaching position for the 1974-75 school year. *N.J.S.A.* 18A:27-11

The Board's June 11, 1974 resolution abolished petitioner's position as a teacher of Spanish effective September 1, 1974. (Exhibit I) Her teaching contract for the 1973-74 academic year expired on June 30, 1974. Therefore petitioner received more than the thirty days' written notice required by the terms of her unwritten contract for the 1974-75 academic year.

It is significant that the Board's action abolishing petitioner's position was not taken in bad faith. On the contrary, the facts are clear that petitioner was made aware on March 15, 1974 of the strong probability that the proposed changes in the foreign language curriculum would necessitate the abolishment of her position for the 1974-75 academic year. It is unfortunate that the Board did not follow precisely the procedures for notification of nontenured teachers set forth in *N.J.S.A.* 18A:27-10.

The Commissioner is constrained to decide this controversy on its legal merits. His determination of this matter should not be interpreted as endorsement or condonation of the Board's failure to adhere precisely to the procedural requirements for written notice as detailed in *N.J.S.A.* 18A:27-10. While the Board's action in this instance must be sustained legally, the Commissioner deplores the laxity which is the root cause of this dispute.

The Commissioner hereby cautions this Board and all other local boards of education to assiduously adhere to the precise requirements of the statute, *N.J.S.A.* 18A:27-10, in each future instance when a nontenured teaching staff member is not to be reemployed for the subsequent academic year. In a previous decision, the Commissioner described the procedural steps he advocates for such adherence. See *Bolger et al. v. Board of Education of Ridgefield Park, Bergen County,* 1975 *S.L.D.* 93 (decided February 27, 1975). The Commissioner is constrained to repeat that, subsequent to its determination, before April 30, not to reemploy a nontenured teaching staff member, each local board must direct its school administrator or board secretary, as the case may be, to notify in writing the affected teaching staff member or members, of such determination, *on or before April 30.* As untimely notice or a purported notice such as was

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utilized in this case, will not suffice. This requirement is not difficult, and it behooves each local board of education to strictly effectuate this statutorily prescribed procedure, in order to guarantee fair play for those affected and to avoid needless litigation.

For the reasons hereinbefore stated, the Commissioner determines that the Board's action abolishing petitioner's position as a teacher of Spanish for the 1974-75 academic year was legal and proper. There being no relief which can be afforded to petitioner, the Petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

February 28, 1975

Patricia Fallon,

Petitioner-Appellant,

v.

Board of Education of the Township of Mount Laurel, Burlington County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 28, 1975

For the Petitioner-Appellant, Hartman, Schlesinger, Schlosser & Faxon (Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Appellee, Benjamin Marmer, Esq.

In accordance with, and for the reasons set forth in, the State Board of Education's decision in *Sarah Armstrong v. Board of Education of the Township of East Brunswick, Middlesex County,* June 4, 1975, we reverse that part of the Commissioner's decision which found;

> "***There being no relief which can be afforded to petitioner, the Petition is accordingly dismissed."

As in *Armstrong,* this case involves inadequate "Notice of Non-Reemployment"; however, we have the additional factors of abolishment of position and an unwritten contract of employment for the 1973-74 academic year. There is no question that a board of education has the right to abolish positions for valid reasons pursuant to *N.J.S.A.* 18A:28-9. However, in view of the State Board's

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decision in *Armstrong,* and in light of these additional factors, we choose to remand this matter for the purposes of definition and clarification of the prevailing contract, in order to determine termination payment.

June 4, 1975

In the Matter of the Tenure Hearing of Steve Masone, School District of the Borough of Rutherford, Bergen County.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Complainant Board, Parisi, Evers, & Greenfield (Irving C. Evers, Esq., of Counsel)

For the Respondent, H. Ronald Levine, Esq.

The Board of Education of the Borough of Rutherford, Bergen County, hereinafter "Board," certified nine written charges of inefficiency, incompetency, and unbecoming conduct to the Commissioner of Education against respondent, a teacher with a tenure status in its employ. Respondent denies all of the allegations, filing a Motion to Dismiss eight of the nine certified charges.

Oral argument on the Motion was heard on October 22, 1974 at the State Department of Education, Trenton, by a representative appointed by the Commissioner. The entire record including the moving papers, the transcript of the argument, and exhibits are now before the Commissioner for adjudication.

The record discloses that on December 7, 1973, the principal of the Rutherford Junior High School, where respondent was assigned, submitted a letter (C-1) to respondent which reads in pertinent part as follows:

> "I am hereby notifying you of inefficiencies I find in your teaching. You have ninety (90) days in which to correct them or I will file formal charges of inefficiency with Dr. Luke Sarsfield, Superintendent of Schools.
>
> "Following is a list of areas in which I expect improvement to the degree it satisfies me:

[Here follows a listing of nine areas in which the principal expects improvement.]

> "Again I expect satisfactory improvement in these areas by the end of ninety (90) days. Towards this end I will be spending time in your classes observing how well you are working on these inefficiencies."

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Subsequently, at a special meeting (P-2) held June 25, 1974, the Board determined, by a majority vote of its full membership, to certify nine charges to the Commissioner. (P-1) The Board's certification of charges reads as follows:

"Pursuant to the provisions of N.J.S.A. 18A:6-10 et seq., the following charges of inefficiency and incompetency and of unbecoming conduct are hereby preferred against Mr. Steve Masone, a teacher under tenure in the Borough of Rutherford School System, to wit:

CHARGE ONE

"That the said Steve Masone having been directed to alter and improve his teaching of Science by resorting to planned laboratory experiences and demonstrations instead of relying predominantly on lectures with questions and answers did nevertheless continue to resort predominantly to lectures and questions and answers thus showing an inability and/or unwillingness to improve his teaching capabilities and techniques.

CHARGE TWO

"That the said Steven Masone, having been directed to improve the evaluation of his pupils did nevertheless fail to improve his evaluation methods.

CHARGE THREE

"That the said Steve Masone having been directed to improve his assignments to pupils failed to make such improvements.

CHARGE FOUR

"That the said Steve Masone having been directed and instructed to improve the upkeep of his plan book and to follow Board Policy in regard thereto did fail to comply with said directives and instructions thereby making the covering of course requirements difficult or impossible.

CHARGE FIVE

"That the said Steve Masone, having been instructed to take directions from and cooperate with the Department Chairman failed to comply with said directions and instructions by failing to administer the second marking period unit test; failing to attend the meeting to develop the third unit test; failing to keep proper lesson plans as directed by the Department Chairman on evaluative criteria; failing to meet with the Science teachers.

CHARGE SIX

"That the said Steve Masone, having been directed and instructed to improve his room housekeeping failed to comply with said instructions and directions.

CHARGE SEVEN

"That the said Steve Masone, having been instructed and directed to

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refrain from and avoid digressions from the subject matter which he was assigned to teach did nevertheless continue to engage in needless digressions and diversions.

CHARGE EIGHT

"That the said Steve Masone did, on or about February 5, 1974, having previously received permission to rent a van to take approximately ten students to the Submarine Ling, did, when unable to obtain a van, instead of cancelling said trip, pile the ten students into a Jeep Scout which had only two seats thereby endangering the safety and lives of said pupils. In addition, the said Steve Masone took said pupils on a Ferry which was not on the approved itinerary.

CHARGE NINE

"That the said Steve Masone did on or about the 14th day of December, 1973, direct to Mr. Donald M. Everitt, his principal, a communication which was abusive and disrespectful in which communication the said Steve Masone made improper threats against the Principal and his Department Chairman.

"The undersigned, DONALD M. EVERITT, hereby prefers the foregoing charges against STEVE MASONE, a teacher in the Borough of Rutherford School System, pursuant to the provisions of the revised Statutes of New Jersey 18A:6-10, et seq., and requests that the Board shall determine whether or not the said charges and the evidence in support thereof is sufficient to justify further proceedings in accordance with the statutes in such cases made and provided.

June 24, 1974 Donald M. Everitt"

The Commissioner determines that Charges Two, Three, Four, that portion of Charge Five which refers to the keeping of lesson plans, and Charge Six are charges of inefficiency.

Respondent argues that the specially called meeting of the Board on June 25, 1974, was illegal for the following reasons: one member of the Board was absent (Tr. 14); and, since the Board's consideration of tenure charges against respondent was not set forth in its agenda (P-3) for the meeting, it could not properly consider or act upon such charges. In this regard, respondent relies upon *Corpus Juris Secundum* and *Robert's Rules of Order*, which is the parliamentary procedure generally used by the Board for the conduct of its meetings since February 27, 1961. (P-4) The Commissioner can find no procedural defect in the conduct of the special meeting.

Secondly, respondent argues that the allegations set forth in the principal's letter (C-1) require an improper standard for improvement. Respondent contends that for the principal to demand improvement "***to the degree it satisfies me***" is nebulous and therefore improper. (Tr. 16)

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Thirdly, respondent contends that the alleged notice of inefficiency (C-1) given him by the principal does not comply with *N.J.S.A.* 18A:6-12 which provides, *inter alia,* as follows:

> "The board shall not forward any charge of inefficiency to the commissioner, unless at least 90 days prior thereto *** *the board or the superintendent of schools of the district* has given to the employee *** written notice of the alleged inefficiency ***." (*Emphasis supplied.*)

Respondent asserts that because neither the Board nor the Superintendent notified him of alleged inefficiencies and then granted him ninety days to overcome them, the letter (C-1) from the principal is a nullity.

Next, respondent contends that the Board failed to comply with the provisions of *N.J.S.A.* 18A:6-13 regarding the charges of inefficiency. The statute reads as follows:

> "If the board does not make such a determination [to certify] within 45 days after receipt of the written charge, or within *45 days after the expiration of the time for correction of the inefficiency,* if the charge is of inefficiency, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon." (*Emphasis supplied.*)

The Commissioner observes that the notice of inefficiency provided respondent is the letter (C-1) from the principal dated December 7, 1973. Ninety days thereafter would be approximately March 7, 1974. Forty-five days thereafter would be approximately April 22, 1974. Clearly, the prescription of "***within 45 days after the expiration of the time for correction of the inefficiency ***" was not adhered to by the Board in certifying the charges of inefficiency. In previous instances when charges of inefficiency against a tenured employee have been certified to the Commissioner and it was subsequently determined that statutory provisions were not met, the Commissioner has dismissed such charges. See *In the Matter of the Tenure Hearing of Robert M. Wagner, School District of the Township of Millburn, Essex County,* 1972 *S.L.D.* 650.

In the instant matter, the Board failed to act within the forty-five day time limitation after the expiration of the time permitted for correction of the inefficiencies. *N.J.S.A.* 18A:6-13 Therefore, the Commissioner grants respondent's Motion to Dismiss the charges of inefficiency, *ante,* certified by the Board. The Commissioner denies respondent's Motion to Dismiss Charge One, all of Charges Five (with the exception of that portion regarding lesson plans), Seven, Eight, and Nine. The Commisssioner directs that these charges be determined on their merits following a plenary hearing for the purpose of fact-finding.

The Commissioner observes that the nine charges were signed on June 24, 1974, *ante,* and were properly certified by the Board at the special meeting held June 25, 1974. The Commissioner finds no procedural defect in regard to the charges which are not dismissed.

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The Commissioner is constrained to point out that nothing in this determination precludes the Board from reactivating the hereinbefore described charges of inefficiency. The Board or the Superintendent may give written notice of these inefficiencies to respondent, specifying the nature thereof with sufficient particulars so that respondent will have an opportunity to correct such inefficiencies within ninety days of the written notice. *N.J.S.A.* 18A:6-12 At the end of the ninety-day period the Board will have forty-five days within which to certify such charges of inefficiency to the Commissioner. *N.J.S.A.* 18A:6-13

COMMISSIONER OF EDUCATION

February 28, 1975

In the Matter of the Tenure Hearing of Steve Masone,
School District of the Borough of Rutherford, Bergen County.

STATE BOARD OF EDUCATION

DECISION

Decision on Motion of the Commissioner of Education, February 28, 1975

For the Petitioner-Appellant Board of Education, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

For the Respondent-Cross-Appellant, H. Ronald Levine, Esq.

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

June 4, 1975

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Sally Klig,

Petitioner,

v.

Board of Education of the Borough of Palisades Park, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris & Oxfeld (Doane Regan, Esq., of Counsel)

For the Respondent, Patrick J. Tansey, Esq.

Petitioner was employed by the Board of Education of the Borough of Palisades Park, hereinafter "Board," as a school psychologist for three consecutive academic years. She alleges that the termination of her third contract on November 15, 1972, pursuant to its sixty day notice clause, was arbitrary, an abuse of discretion by the Board, and a violation of the negotiated agreement, hereinafter "Agreement," between the Board and the Palisades Park Education Association, hereinafter "Association."

Petitioner prays that the Commissioner of Education reinstate her to her previous position with reimbursement of all lost salary.

A hearing in this matter was conducted on July 1, 1974 at the office of the Bergen County Superintendent of Schools, Wood-Ridge, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

The Board asserts that petitioner was lawfully terminated pursuant to the terms of her contract and that the reasons, which were related to her on September 14, 1972, were for economy of operation and administrative reorganization.

Many of the facts in this matter are not in dispute and are set forth as follows:

Petitioner was employed by the Board as a school psychologist for three consecutive academic years; 1970-71, 1971-72, and 1972-73. Her last employment contract was dated April 27, 1972, to be effective September 1, 1972 through June 30, 1973. Petitioner also signed a statement of salary differential for a school psychologist in the amount of $850. (R-3) The duties and functions of her position were enumerated in a memorandum from the Superintendent of Schools dated April 26, 1972. (R-2) Petitioner commenced her third year of employment with the Board on September 5, 1972. (Tr. 9) On September 6,

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1972, petitioner and the members of the guidance staff of the high school received the following directive from the Superintendent.

> "It should be clearly understood that all certified staff in the guidance office at the High School, which includes the psychologist, are expected to fulfill an 8:00 to 4:00 PM day, as a minimal requirement of time for their particular function.
>
> "This has been the time they are to work since the inception of our guidance department and these particular hours form part of the basis for salary differentials for the guidance counselors and psychologists. These individuals do not have regularly assigned classes or duties. Their functions are difference (sic) from classroom teachers and are similar to those of us in other non-classroom functions who daily form a flexible work schedule around understood work hours." (P-7)

Petitioner asserts that the directive, *ante,* was in violation of the Agreement because it unilaterally extended her working day from seven and one-half to eight hours. She testified that she notified the Superintendent on September 7, 1972, that it would be improper for her to comply with the written directive which was, as she described it, contradictory to the Agreement. She also stated that she would continue to work as she had in prior years, whenever she was needed, irrespective of the directive. When the Superintendent told her that she must comply with the directive she replied, "***you leave me no alternative except to file a grievance." (Tr. 19) The Superintendent did not recall this conversation with petitioner on September 7, 1972 about filing a grievance; however, he testified that they may have discussed the subject prior to September 14, 1972. (Tr. 42) The record shows that the day after the September 7 directive was issued the Superintendent met first with the guidance counselors and then with petitioner to explain that the directive was flexible so long as two persons remained daily until at least 4 p.m. to staff the guidance office. (R-1, at p.5)

Nevertheless, on September 14, 1972, the Superintendent advised petitioner that he would recommend to the Board that her position be abolished. (Tr. 46) On that same evening, at a special meeting of the Board called by written notice from the Board Secretary dated September 8, 1972, the following motion was passed:

> "***On motion of Mr. Ross, seconded by Mr. Velten, all ayes on roll call vote except for an abstention vote by Mr. Romano and a 'NO' vote by Mr. Colaneri, the Board authorized that the appointment of Mrs. Sally Klig, High School Psychologist, be rescinded effective November 15, 1972, upon the recommendation of the Superintendent of Schools.***" (P-1, at p. 3)

This special meeting of the Board was called to consider several items of business including "matters of personnel," and the termination of petitioner's contract was only one of several personnel matters acted upon that evening. (P-1)

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Petitioner then received the following notice from the Superintendent on September 15, 1972:

> "This is to inform you that the Board of Education has confirmed rescinding your contract as I had discussed with you yesterday afternoon.
>
> "This is to be effective November 15th, which is 60 days from the mentioned action." (P-2)

Petitioner later questioned the Board's decision at a public meeting and was informed that she was being terminated for reasons of economy and administrative reorganization.

Petitioner testified that she met with the vice-principal in his office on September 12, 1972, prior to her termination and discussed with him her intent to file a grievance regarding the Superintendent's directive. (P-7) (Tr. 20) She testified also that she never had any discussion with any school personnel nor Board members about any pending reorganization plan involving the position of school psychologist. (Tr. 20, 40, 52) Petitioner charges that the Board's argument about a reorganization plan and the abolishment of her position are a guise to improperly terminate her. She alleges that her statements to the Superintendent and the vice-principal that she would file a grievance, and the actual filing of that grievance (P-5) on September 14, 1972, were the factors that led to the Superintendent's recommendation that she be terminated. She asserts that the Superintendent's recommendation and the Board action which followed were violative of her rights under the Agreement, and the United States Constitution.

The Superintendent testified that the Board had directed him to study the personnel needs of the district and that a reorganization plan involving the special educational services of the district, which includes psychologists, had been under study for more than two years. (Tr. 27-28, 47-48) He testified further that the plan was finalized in October 1972 (R-4, Tr. 27), and that the reorganization plan would call for the abolishment of the position of psychologist at the high school. (Tr. 28)

The study to reorganize is entitled "Procedural Guidelines Concerning Special Education & Child Study Team Operations (Including Basic Job Description)." (R-4) This document contains procedures and job descriptions as the title indicates; however, nowhere does it show reorganization of staff from that which previously existed, nor is there any other document in evidence which refers in any way to reorganization of personnel.

The Superintendent testified that reorganization of special services was the reason for abolishing petitioner's position, and although the Board resolution (P-1) did not abolish the position, it remains unfilled because of the new plan. He testified also that he had no communications with petitioner about the pending reorganization between April 1972, when she signed her contract, and September 14, 1972, when he informed her that he would recommend that she be terminated. (Tr. 47-48) He admitted that the high school principal informed

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him concerning petitioner's intention to file a grievance within a week of his conference with her on September 7, and he admitted further that he may have discussed the grievance with her prior to September 14, 1972. (Tr. 42) Petitioner's grievance was filed on September 14, 1972, the date of the special meeting of the Board, when the Superintendent recommended that she be terminated. (P-1)

The record shows that petitioner processed her grievance through arbitration; however, the arbitrator found in favor of the Board and asserted that the Board was not in violation of the Agreement by assigning different working hours for petitioner. The arbitrator stated that the salary differential paid to petitioner (R-3) effectively placed her in a different category than other teaching staff members who received no salary differential. (R-1) The arbitration concluded on April 22, 1973, five months after petitioner's termination by the Board.

A summary of the factual findings and the sequence of material events follows:

Petitioner began her employment in her third academic year on September 5, 1972. She received a directive extending her working hours on September 6, 1972. Petitioner met with the Superintendent on September 7, 1972, and protested the extension of her working hours. Petitioner met with the vice-principal on September 12, 1972, and informed him that she would file a grievance. The vice-principal thereafter notified the Superintendent of petitioner's intention. She filed her grievance on September 14, 1972. The Superintendent notified her on September 14, 1972, that he would recommend to the Board that she be given sixty days notice of termination. The Board formally resolved to terminate her on September 14, 1972, pursuant to the sixty day notice clause in her contract. Petitioner received written notice of her termination on September 15, 1972, effective November 15, 1972. She requested and received a second termination notice on September 22, 1972. (P-3) Petitioner was terminated on November 15, 1972.

The facts in this matter appear to circumstantially indicate that petitioner's termination was based in part on her opposition to the increase in working hours and her filing of a grievance after receiving the Superintendent's directive; however, the record is devoid of clear proof that this was so. The Board discussed her termination after receiving the Superintendent's recommendation, and petitioner later attended a public meeting of the Board to question its decision. The Board again informed her that the reasons for her termination were economy and administrative reorganization as provided for in *N.J.S.A.* 18A:28-9 which reads as follows:

> "Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of

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change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article."

It cannot be denied that the elimination of a position which is not needed is an economic saving in a school district, and although the contested position in this case was never formally abolished, it remains unfilled. (Tr. 38)

The employment of teachers who have not achieved a tenured status in the district is a matter lying wholly within the discretionary authority of the board. *N.J.S.A.* 18A:11-1 reads in part as follows:

***

"c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district *and for the employment, regulation of conduct and discharge of its employees,* subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes[1]; and

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

(*Emphasis added.*)

[1]Section 11:1-1 *et seq.*

A board of education's discretionary authority is not unlimited, however, and it may not act in ways which are arbitrary, unreasonable, capricious or otherwise improper. *Cullum v. North Bergen Board of Education,* 15 *N.J.* 285 (1954)

In *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County,* 1968 *S.L.D.* 7, 10; dismissed State Board of Education, May 1, 1968; affirmed Superior Court (*App. Div.*), 1969 *S.L.D.* 202, the Commissioner commented as follows:

"***The Commissioner agrees that boards of education may not act in an unlawful, unreasonable, frivolous, or arbitrary manner in the exercise of their powers with respect to the employment of personnel. Thus a board of education may not resort to statutorily proscribed discriminatory practices, *i.e.,* race, religion, color, etc., in hiring or dismissing staff. Nor may its employment practices be based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served. Such a *modus operandi* is clearly unacceptable and when it exists it should be brought to light and subjected to scrutiny.***"

But such is not the case in the instant matter. Petitioner admits that she refused to accept a written directive from the Superintendent which she felt was improper and violative of her rights under the Agreement. In *Donaldson v. Board of Education of the City of North Wildwood, Cape May County,* 65 *N.J.* 236 (1974) the Court held as follows:

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"***The Legislature has established a tenure system which contemplates that the local board shall have broad discretionary authority in the granting of tenure and that once tenure is granted there shall be no dismissal except for inefficiency, incapacity, unbecoming conduct or 'other just cause.' *N.J.S.A.* 18A:28-5 *The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board*** may conclude that tenure should not be granted.***" (*Emphasis added.*) (at p. 241)

The hearing examiner finds in the instant matter that the Board did reorganize its guidance staff by eliminating the one position of high school psychologist and assigning some of those functions to its other school psychologist. (R-4) Petitioner's assertion that there was no formal written study with an ongoing dialogue between her and the administration is of no moment. There is no requirement for continuing dialogue between a local board and a teaching staff member when a position is being considered for elimination. The Superintendent testified that he explained to petitioner that the position was tenuous at the time of her original employment in 1970, and that he sent her a letter indicating that the position was not "clearly defined." He testified further that his determination in this regard became finalized toward the end of August 1972. (Tr. 27-28)

The record shows that the Superintendent's directive (P-7), which defined the contested working hours was issued after a request for such a memo was made by one of the guidance counselors. (Tr. 29) The hearing examiner finds, also, that the sequence of events which followed and ultimately led to petitioner's termination was merely coincidental.

The Board meeting of September 14, 1972 (P-1), was called for several items of business, including matters of personnel, and petitioner's termination was only one of several personnel matters acted upon. Petitioner was then given sixty days' notice pursuant to the terms of her contract.

Based upon the above findings of fact, it is recommended that the Commissioner determine that the Board's action terminating petitioner's services as a school psychologist was a legal and proper action taken for reasons of economy and administrative reorganization.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of this entire matter, including the hearing examiner's report, and the objections filed thereto by the parties pursuant to *N.J.A.C.* 6:24-1.16. He accepts the finding of the hearing examiner and determines that the Board's action invoking the sixty day termination clause in petitioner's contract was a legal act taken for reasons of economy and reorganization of staff. Absent conclusive proof of bad faith, arbitrary or capricious action, the Board's reduction of staff is entitled to a presumption of

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correctness. *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, aff'd State Board of Education 15, aff'd 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E. & A.* 1948)

In such cases the Commissioner does not seek to interpose his judgment. Herein the Board has reduced its staff of school psychologists from two to one, which arrangement has continued for a period exceeding two years. This of itself lends credence to the finding of the hearing examiner that the Board's action was neither arbitrary nor unreasonable.

The Commissioner is constrained, however, to comment upon what appears to be an untimely notification to petitioner that she was to be terminated. Simultaneous as it was with the frictional encounter of the grievance dispute, *ante,* the matter quickly became the subject of litigation. While such coincidence cannot in all instances be avoided, matters may frequently be timed so that they will not unnecessarily engender costly litigation which is deleterious both to the public purse and to the smooth functioning of the professional staff so necessary for efficient operation of the public schools. Such confusion of issues should be assiduously avoided whenever possible. As was said in *South Plainfield Independent Voters et al. v. Board of Education of the Borough of South Plainfield, Middlesex County,* 1975 *S.L.D.* 47:

> "***In a deliberation of a local board of education, particularly with respect to disciplinary action against any employee, '***it is of the very essence that justice avoid even the appearance of injustice***.' *James v. State of New Jersey,* 56 *N.J. Super.* 213, 218 (*App. Div.* 1959); *Hoek v. Board of Education of Asbury Park,* 75 *N.J. Super.* 182, 189 (*App. Div.* 1962)***" (at p. 56)

It was said in *John J. Kane v. Board of Education of the City of Hoboken, Hudson County,* 1975 *S.L.D.* 12 that:

> "***[T]he Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious, or unreasonable. See *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County,* 1973 *S.L.D.* 167; *James Mosselle v. Board of Education of the City of Newark, Essex County,* 1973 *S.L.D.* 197; *Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County,* 1973 *S.L.D.* 217, affirmed State Board of Education, March 6, 1974.***" (at p. 16)

The Board's action in the instant matter, bearing no taint, was within the scope of its statutory authority pursuant to *N.J.S.A.* 18A:11-1 *et seq.* and *N.J.S.A.* 18A:28-9, *ante.* Accordingly, petitioner's prayers for relief may not be granted. The Petition of Appeal is without merit and is dismissed.

COMMISSIONER OF EDUCATION

March 4, 1975
Pending before State Board of Education
1-12-79 note - Held in abeyance until dec by U.S. Dist. Ct.

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In the Matter of the Annual School Election Held in the Constituent District of Upper Penns Neck Township, Penns Grove–Upper Penns Neck Regional School District, Salem County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Gerard DiNicola, Esq.

The announced results of the balloting for two seats on the Penns Grove-Upper Penns Neck Regional Board of Education, Salem County, from the constituent district of the Township of Upper Penns Neck, at the annual school election conducted on March 4, 1975, were as follows:

	At Polls	Absentee	Total
Edith Schellinger	421	–0–	421
William Harbeson	284	–0–	284
John F. Franceschini	261	2	263
James H. Haslett	230	2	232
Richard Chatterton	189	–0–	189

On the basis of a letter from the Board Secretary dated March 6, 1975, stating that the electorate of Upper Penns Neck Township had been instructed on the paper ballots to vote for two candidates for an unexpired one-year term rather than to vote for two candidates for full three-year terms, the Commissioner of Education directed that an inquiry be conducted on March 7, 1975 at the State Department of Education, Trenton.

The Penns Grove-Upper Penns Neck Regional School District is comprised of the Borough of Penns Grove and the Township of Upper Penns Neck. In the constituent community of the Borough of Penns Grove, there is no dispute as to the validity and propriety of the paper ballot used (C-3) nor is there any dispute that Candidate Sarah McErlain was elected to a full three-year term, nor that Howard Blyler was elected to an unexpired one-year term of Board membership. Furthermore, there is no dispute that the electorate of the Borough of Penns Grove approved the Board's proposed amount to be raised for current expense by local taxation by the following vote:

Yes – 101
No – 87

In the constituent community of the Township of Upper Penns Neck, the paper ballot used (C-2) contained the following instructions to the voters for selection of candidates for Board membership:

***

"For Membership to Board of Education"

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"Unexpired One-Year Term Vote for Two"
[Here follow the names of three candidates]

***

The instructions to the voters on this ballot should have read:

"Full Three-Year Term Vote for Two"

The remainder of the ballot (C-2) utilized in the Township of Upper Penns Neck contained appropriate directions for voter election as to the proposed amount for current expense to be raised by local taxation. The Upper Penns Neck electorate defeated that proposal by the following tally:

Yes – 290
No – 435

The issues before the Commissioner for determination are three:

1. What effect, if any, do the improper directions contained on the ballot (C-2) utilized in the Township of Upper Penns Neck have on the announced results of the election from this community.

2. What effect, if any, do the improper directions contained on that ballot (C-2) have on the results of the current expense proposal from this community's electorate.

3. What effect, if any, do the improper directions contained on that ballot (C-2) have on the entire election conducted by the Board on March 4, 1975.

In regard to the first issue set forth above, the Commissioner has previously determined a similar matter. *In the Matter of the Annual School Election Held in the School District of Lakeland Regional, Passaic County,* 1973 *S.L.D.* 112, the voters in the constituent district of the Borough of Wanaque had been instructed by ballot strips contained in the voting machines to vote for three, rather than two, candidates for membership on the regional Board. The Commissioner vitiated the results of the election in the Borough of Wanaque because it was impossible to determine which two candidates, of the three for whom votes were registered, the electorate would have chosen.

The instant matter can be distinguished from Wanaque in that the voters from the Township of Upper Penns Neck properly selected two candidates to be their elected representatives on the Penns Grove-Upper Penns Neck Regional Board of Education. The difficulty lies in the length of the term to which they have been elected. In this regard, the Commissioner notes that the provisions of *N.J.S.A.* 18A:14-19, Notice of Election, were adequately carried out, so that there was general knowledge in the community of Upper Penns Neck of the length of the candidates' term of office. However, the irregularity of the ballot (C-2) by virtue of the directions therein is sufficient to set aside that portion of

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the election in regard to Upper Penns Neck representation on the regional Board. Therefore, the Commissioner determines that there is a failure to elect.

In instances such as these, *N.J.S.A.* 18A:12-15 provides, *inter alia,* that where "***a failure to elect a member***" of a board of education is found, appointments to fill such vacancies as occur herein shall be made by the County Superintendent of Schools. The Commissioner is convinced that the will of the electorate in the Township of Upper Penns Neck is to have William Harbeson and Edith Schellinger serve as their representatives to the regional Board and calls this to the attention of the Salem County Superintendent of Schools.

There has not been in the past, and there is not now, any provision in the law for a second " annual election" in any given year; instead the Legislature has provided alternative interim measures in instances where the "annual election" is held to be invalid. These measures provide for a temporary appointment as stated, *ante,* and a subsequent vote at the next succeeding annual election. (See also *In the Matter of the Annual School Election Held in the Township of Fredon, Sussex County,* 1970 *S.L.D.* 131; *In the Matter of the Contested Annual School Election in the City of Rahway, Union County,* 1959-60 *S.L.D.* 138; *In the Matter of the Annual School Election Held in the Borough of Totowa, Passaic County,* 1965 *S.L.D.* 62.)

In regard to the second and third issues in this matter, it has been held that where the will of a voter can be determined on a ballot, even though a portion of that same ballot is set aside, the voters' will is to prevail. (See *In the Matter of the Annual School Election in the School District of Voorhees Township, Camden County,* 1968 *S.L.D.* 70.) Furthermore, Title 19 *Elections,* to which the Commissioner looks for guidance in election matters, provides that when a voter casts a proper vote for a candidate on a ballot, even though the same voter may improperly cast a vote for another candidate on the same ballot, the vote properly cast shall be counted. *N.J.S.A.* 19:16-3c

It is clear to the Commissioner that the proposed amount for current expense to be raised by local taxation was defeated by the electorate and the Commissioner so holds. It is also clear that Sarah McErlain and Howard Blyler were elected to be representatives on the regional Board for a full three-year term and a one-year unexpired term respectively.

Accordingly, having found that that part of the annual election conducted by the Penns Grove-Upper Penns Neck Regional School District in the Township of Upper Penns Neck, Salem County, must be vitiated, the Commissioner directs that the County Superintendent of Schools for Salem County appoint two members to the Board of Education of the Penns Grove-Upper Penns Neck Regional School District from the citizens of the Township of Upper Penns Neck having the qualifications for such office, and within the framework set forth above, who shall serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION

March 12, 1975

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Joseph A. Capella and Leonard D. Fitts,

Petitioners,

v.

Board of Education of the Camden County Vocational and Technical Schools, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

For the Respondent, Hyland, Davis and Reberkenny (William C. Davis, Esq., of Counsel)

Petitioners allege that they were guidance counselors with a tenured status employed by the Board of Education of the Camden County Vocational and Technical Schools, hereinafter "Board," when their employment was improperly terminated by the Board on June 26, 1973. They petition the Commissioner of Education to order the Board to reinstate them to their positions as adult education counselors and to provide such other relief as may be appropriate.

The Board denies that petitioners were employed in positions to which the tenure statutes apply and asserts that their nonrenewal of employment was legal and proper.

Briefs were submitted by the parties and oral argument on a Motion for Summary Judgment by the Board was conducted by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton, on April 30, 1974. It was found that insufficient facts were known to arrive at a determination of the matter and, by Order of the Commissioner dated June 21, 1974, a plenary hearing was conducted by the hearing examiner on September 12, 1974 at the office of the Monmouth County Superintendent of Schools, Freehold. The report of the hearing examiner is as follows:

Petitioner Fitts began his employment for the Board on October 16, 1968, and Petitioner Capella on October 21, 1968. They were both compensated at an hourly rate of pay to serve as adult school guidance counselors three hours per evening, two evenings per week. Thereafter, until their termination in June 1973, they served continuously throughout the intervening academic years, with some additional summer employment, working generally two evenings per week, three hours per evening. (R-1, Exhibits 4A, 4B) No written contracts were executed to cover this employment (Tr. II-7, 29) Their employment was authorized by the Board, as exemplified by the Board minutes of August 21, 1969, as follows:

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"Approved the employment of Mr. Joseph Capella and Mr. Leonard Fitts as Adult Guidance Counselors for the school year 1969-70. Each will work 2 nights per week, 3 hours per night at a rate of $7.00 per hour.***" (Exhibit 2)

Petitioners served in positions for which the Board required certification by the New Jersey State Board of Examiners. (R-1, at p. 6) Petitioner Capella possessed this certification at the time he was employed (P-1, Schedule J) and Petitioner Fitts was awarded an appropriate certificate in March 1969. (P-1, Schedule D)

During the period of their employment with the Board from September 1969 through June 1973, both petitioners held full-time teaching positions in other public school districts, one in New Jersey and one in Pennsylvania. (P-1, Schedules A and I) At the time they were terminated by the Board both were tenured elsewhere in their full-time public school positions.

The Board, acting on a recommendation of its Adult Evening School Supervisor, determined in June 1973 not to renew petitioners' employment. Thereafter, it hired two other counselors from among its day school faculty. (Tr. II-51) One was hired as a guidance counselor with functions precisely identical to those performed by petitioners and was paid at an hourly rate for work performed two evenings per week, three hours per evening. The second was employed as a salaried person for two evenings per week, three hours per evening, to supervise the total evening school guidance program including the work of the hourly counselor. Additionally, he was required to perform the duties of a guidance counselor. (Tr. II-53) The certification required of these two persons was identical to that required of petitioners during their employment with the Board. (Tr. II-58) Petitioners possessed the required certification to carry out these revised functions, *ante,* but petitioners were not offered the opportunity to apply for either of these positions. (Tr. II-50)

The hearing examiner finds that the Board has failed to show that it abolished the former positions. Rather, it is found that one position remained precisely the same and that the second position was altered by the adding of responsibility to coordinate and supervise the guidance functions of the Adult Evening School. For this the Board increased the rate of recompense and paid by salary rather than an hourly basis. In neither instance were these counselors required to counsel Adult Evening School pupils during daytime working hours. However, the present salaried counselor is available to the Adult Evening School supervisor during daytime hours for occasional consultation on a very limited basis. (R-1, at p. 9) (Tr. II-40, 57) There is no clear showing that such daytime working hours were made part of the requirement or job description for the position.

Petitioners allege that they have met the statutory criteria and were tenured employees pursuant to *N.J.S.A.* 18A:28-5 which provides that:

"The services of all teaching staff members including all teachers***and such other employees as are in positions which require them to hold

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appropriate certificates issued by the board of examiners***shall be under tenure during good behavior and efficiency***after employment in such district or by such board for:

"(a) ***

"(b) ***

"(c) The equivalent of more than three academic years within a period of any four consecutive academic years;***"

and pursuant to *N.J.S.A.* 18A:54-22 which directs that:

"All teachers, principals, directors and assistant directors of boards of education of county vocational schools shall have all rights and privileges of teachers, principals, superintendents and assistant superintendents of schools, respectively, in school districts."

In support of this position, petitioners cite *DeSimone v. Board of Education of the Borough of Fairview, Bergen County,* 1966 *S.L.D.* 43 and *Fox v. New Providence Board of Education, Union County,* 1939-49 *S.L.D.* 134 (1938).

Petitioners argue that their termination by the Board was an illegal denial of their tenure rights guaranteed by *N.J.S.A.* 18A:28-5 which provides that tenured employees:

"***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 [18A:6-9 *et seq.*] ***."

Petitioners contend that their positions were not in fact abolished but, with no corollary change in job description or credentials required, were improperly assigned to other persons. In any event, petitioners contend *arguendo* that, if the positions were indeed abolished, their seniority rights as tenured employees entitle them to assignment to the newly-established positions, pursuant to *N.J.S.A.* 18A:28-12 and *N.J.A.C.* 6:3-1.10.

The Board asserts that part-time, hourly evening school employees of a school district are not entitled to the protection of tenure set forth in *N.J.S.A.* 18A:28-5. The Board argues that in *DeSimone, supra,* and *Fox, supra,* both parties worked during regular school hours as contrasted to the hours of the evening worked by petitioners. Additionally, the Board asserts that teachers may be protected by tenure only in their primary employment, not in part-time secondary positions as herein held by petitioners. In further support of this position, the Board quotes from *Nello Dallolio v. Board of Education of the City of Vineland, Cumberland County,* 1965 *S.L.D.* 18 as follows:

"***The Teachers Tenure Act is the enunciation by the Legislature of a public policy with regard to the employment and dismissal of teachers for

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> the primary purpose of insuring the educational welfare of children and only secondarily as a protection to teachers.***" (at p. 21)

Finally, the Board asserts that:

> "***[W]hen an individual is hired on a part-time basis the same opportunity is not afforded the administration to review the quality of work of the individual and to review and evaluate the individual's performance to make a value determination as to whether or not that individual should acquire tenure in the district.***" (Memorandum of Respondent, at p. 7)

The hearing examiner finds that *Dallolio, supra,* is importantly distinguished from the instant matter in that Dallolio sought and was denied tenure in a coaching position which, while it was part-time, did not require a certificate from the New Jersey State Board of Examiners as did those positions held by petitioners herein.

While no written contract was provided petitioners, the hearing examiner finds that a *de facto* contract did exist on the basis of offer and acceptance of employment inseparably welded, following proper consideration. Certainly duties were performed and compensation was provided in accordance with the terms thereof for a period in excess of three academic years within four academic years. A thorough review of the testimony and documentary evidence supports a conclusion that they performed the typical duties of counseling, registration, recording of data, testing, and other duties normally performed by guidance counselors.

The hearing examiner knows of no restriction contained in the statutes, the Administrative Code, nor the decisions of the Commissioner or the Courts concerning those hours of the day or night which may be considered to be "regular" school hours. Certain school districts have found it necessary to operate on extended school day schedules or on double sessions for many years. In such a context, those early hours of the morning and late hours of the afternoon soon become, for those who are scheduled at those times, part of their "regular" hours of education. Similarly, those who are enrolled in approved evening high schools come to look upon the evening hours as their "regular" hours to be educated. The statutes, the Commissioner, and the Courts are silent with regard to any requirement that "regular hours" are required to trigger the tolling of time for tenure.

N.J.S.A. 18A:6-38 requires that the New Jersey Board of Examiners shall:

> "***issue appropriate certificates to teach or to administer, direct or supervise the teaching, instruction or educational guidance of***pupils in public schools operated by boards of education***."

N.J.S.A. 18A:28-14 further provides that:

> "The services of any teaching staff member who is not the holder of an appropriate certificate, in full force and effect, issued by the state board of

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examiners under rules and regulations prescribed by the state board of education may be terminated without charge or trial***."

Petitioners were teaching staff members who were required to hold and did hold appropriate certificates as counselors in the public schools operated by the Board. They served continuously in excess of three academic years within four consecutive academic years during those hours the Board chose to operate its evening school division. Within this context they met the statutory requirements set forth in *N.J.S.A.* 18A:28-5. It is clear that they served the Board in less than full-time positions. The Commissioner in *Fox, supra,* and *DeSimone, supra,* ruled that working for a board in less than a full-time position or for several boards in less than full-time positions does not bar the accrual of tenure when the statutory requisites have been met. In *Fox, supra,* it was stated that:

"***The Commissioner can see nothing incompatible with such tenure rights when teachers are employed for part time in more than one district. A teacher could teach one-third of her time in one district and two-thirds in another and if such employment continued for more than three consecutive academic years, tenure would be acquired.***." (at p. 135)

It is likewise true that petitioners were paid on an hourly rate rather than an annual contractual salary. The Commissioner spoke regarding the method of payment and its effect upon tenure in *Wall v. Board of Education of Jersey City, Hudson County,* 1938 *S.L.D.* 614 (1936), reversed and remanded State Board of Education 618 (1937), affirmed 119 *N.J.L.* 308 (*Sup. Cit.* 1938) wherein he said:

"***The statute is silent as to the rate or method of payment. It simply requires 'employment' for the period stated.*** That she was paid at a per diem rate instead of by the month or the year does not change the fact that she had regular, continuous employment.***" (1938 *S.L.D.* at 621)

Similarly, the Commissioner said in *Nicoletta Biancardi v. Board of Education of the Borough of Waldwick,* 1974 *S.L.D.* 360, aff'd State Board 368:

"***Nomenclature chosen at the convenience of the Board, attendant emoluments connected with employment, or the lack thereof, may in no way deprive petitioner of the statutory cloak of protection provided by tenure resulting from her years of service.

"***As was said by the Court in *Canfield v. Board of Education of the Borough of Pine Hill,* 97 *N.J. Super.* 483, 490 (*App. Div.* 1967); reversed 51 *N.J.* 400 (1968):

'***tenure is statutory and arises only by the passage of the time fixed by the statute***.' (at p. 367)

In recognition of the applicable law, the hearing examiner finds that petitioners have met the statutory requirements for tenure. It remains for the Commissioner to determine whether petitioners, who are tenured employees in

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other full-time public school positions, may also possess a tenure status in their part-time positions as guidance counselors for the Board. The hearing examiner knows of no instance wherein the Commissioner has spoken to this issue.

In the event of an affirmative determination, the Commissioner must likewise determine what relief may properly be provided to petitioners.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter and observes that no exceptions have been filed to the hearing examiner report pursuant to the provisions of *N.J.A.C.* 6:24-1.16.

Petitioners claim tenure by reason of having worked two evenings per week, three hours per evening for an uninterrupted period in excess of three academic years in the Board's accredited adult evening high school in positions requiring certificates issued by the State Board of Examiners. They each possess a tenure status in full-time teaching positions elsewhere.

The Commissioner takes notice that accredited adult evening high schools are necessarily operated on a more flexible basis than are public high schools. This flexibility is mandated by such factors as changing interests of the enrolled adults, varying financial capability of the school districts, changes in total enrollments, fluctuating job opportunities, the availability of qualified instructors, and cyclical changes in the nation's economy. Frequently, those who teach in such accredited evening high schools are also employed in the day school programs of the same school district or other school districts.

An accredited adult evening high school must not be bound by such inflexibility as would be created were tenure to be conferred upon its part-time instructors, if it is to operate efficiently. Such a situation would create a plethora of scheduling problems, and rigid priorities of assignments, critically hamper appropriate staff utilization, and hinder adaptability to changing programs. It would further confront a school district with a welter of tenure considerations that would be counterproductive to desirable staffing practices.

As was said in *Nello Dallolio, supra:*

> "***The Teachers Tenure Act was not enacted for such a purpose as petitioner contends, nor was it intended to fix school personnel practices in as rigid and inflexible a structure***. The Teachers Tenure Act is the enunciation by the Legislature of a public policy with regard to the employment and dismissal of teachers for the primary purpose of insuring the educational welfare of children and only secondarily as a protection to teachers. *Wall v. Jersey City Board of Education,* 1938 *S.L.D.* 614, reversed and remanded State Board of Education 618, affirmed 119 *N.J.L.* 308 (*Sup. Ct.* 1938) The over-protection claimed by petitioner would be a disservice to the schools, in the Commissioner's judgment, and is not in the

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> contemplation of the statute.***There is a middle ground in this respect, and the school administration's hands should be kept free to make those assignments which will most effectively perform the school's functions.***" (1965 *S.L.D.* at 21)

Petitioners are tenured full-time employees in other school districts who seek an order that they be reinstated with tenure protection to their part-time employment with the Board. The Commissioner has carefully researched the statutes and concludes that it was not the intendment of the Legislature to afford such protection to an individual in more than one full-time position. This conclusion is consonant with a previous denial in *Reed and Hills v. Trenton Board of Education,* 1938 *S.L.D.* 437. Therein a principal and a head teacher, having been given responsibility for two schools which were temporarily combined, were paid extra salary for additional supervisory duties. Thereafter, they were relieved of those duties and, when their salaries were correspondingly reduced, they claimed entitlement to salaries at the previous higher rate. In dismissing their appeal, the State Board of Education stated:

> "***The Tenure of Service Act was not passed to fit such a case as this. The prohibition against reduction of salary applies to a permanent scheduled salary and not to a temporary increase given for extra work done.
>
> "***The Appellees were already under tenure by three years or more of service under regularly scheduled salaries. Their status there is not questioned. But they now seek to invoke an extra tenure of service because of three years or more of extra work for which they received extra compensation. We do not believe the law contemplated any such double protection.***" (at pp. 440-441)

Petitioners' employment with the Board was in many points similar to that of the extension faculty member in *Lawrence M. Davidson v. Newark State College and Eugene G. Wilkins,* 1968 *S.L.D.* 12. In that case it was determined that Davidson's extension division teaching could not properly be added to his later years of service as a regular faculty member to establish the seven years of service required for tenure. This determination was based on certain important differences of employment in the extension division of the college as contrasted to requirements made of regular faculty, namely:

1. differing requirements for appointment;
2. difference of salary schedule of the two faculties; and
3. differences in selection, nomination and appointment.

Other differences which closely parallel those arrangements pertaining to petitioners herein are detailed as follows:

> "***The procedures for employment of extension course teachers are carried on largely by administration subordinates with little or none of the active involvement of the College president, the Assistant Commissioner of Education or the Commissioner which is necessary to a regular faculty

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appointment. Extension courses result from a known demand, need, expression of interest or request. Once the course and the location in which it is to be offered are decided, a suitable instructor is sought. Thereafter appointment to teach the particular class is usually *pro forma.* In fact the chairman of the department involved usually suggests instructors for extension courses to a member of the staff of the Division of Higher Education. That staff member then contacts the person suggested and makes the necessary arrangements. Seldom is any correspondence resorted to. Nor are any contracts issued. While some written notice of the assignment may ultimately be transmitted, all arrangements preceding are in most cases made orally and informally. Such a procedure is materially different from the employment of a regular faculty member, whose application must be accompanied by a complete transcript of his training and experience, and who must be nominated by the president of the College, recommended by the Assistant Commissioner of Education, and appointed by the Commissioner of Education subject to the approval of the State Board of Education.

"Nor is there any entitlement on the part of extension course teachers to reappointment for subsequent semesters of courses. While it is true that there is continuing need for certain courses which are offered routinely, many others are given only from time to time and at indefinite intervals depending on interest or demand. Even where the same course is offered again, a different teacher is often assigned, and there has never been any question of the right of the College to change instructors. To any one familiar with the operation of the College it is clearly obvious that instructors in the extension division and the full-time faculty of the College are separate and distinct entities and that statutes and rules applying to one are not applicable to the other.

"The Commissioner cannot conceive of any intent by the Legislature to include other than regularly employed College faculty members under the protection of tenure by its enactment of *R.S.* 18:16-37 (now *N.J.S.A.* 18A:60-1). To hold that the statute is applicable also to persons who have taught a single course in a College evening session for more than three consecutive years would be an illogical and unreasonable conclusion. Under such an assumption literally thousands of persons employed full time in public schools (where many already hold tenure), in other colleges and in various other occupations, would now, as a result of petitioner's argument, be entitled to claim tenure as a member of one or more College staffs. Under such an interpretation it would be well-nigh impossible to administer an extension or evening division with the flexibility essential to the proper operation of the program.

"A statute will not be construed to reach an absurd or anomalous result. *Robson v. Rodriquez,* 26 *N.J.* 517 (1958); *Slocum v. Krupy,* 11 *N.J. Super.* 81 (*App. Div.* 1951) See also *Schumacher v. Board of Education of Manchester Township,* 1961-62 *S.L.D.* 175, affirmed as *Board of Education of Manchester Township v. Raubinger,* 78 *N.J. Super.* 90 (*App. Div.* 1963). In the Commissioner's judgment, petitioner's argument enlarges the

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statute far beyond any intent of the Legislature and would produce untenable and unreasonable results.***" (at pp. 15-16)

Similarly petitioners herein served without written contract, were members of a staff drawn from numerous schools and fields of endeavor, which staff was separate and distinct from the Board's day school staff. They were not afforded benefits of health protection or pension payments, and were supervised by a single professional who was, like them, a part-time employee in the evening school.

The over-protection petitioners seek would be a disservice to the schools, in the Commissioner's judgment, and is not intended by the school laws.

Accordingly, the Commissioner determines that petitioners were not tenured in their part-time positions as guidance counselors at the time they were terminated by the Board. This being so, and absent proof that the Board acted in bad faith or contrary to statutory provision, the Petition of Appeal is without merit and is dismissed.

COMMISSIONER OF EDUCATION

March 14, 1975

Joseph Capella and Leonard D. Fitts,

Petitioners-Appellants,

v.

Board of Education of the Camden County Vocational and Technical Schools, Camden County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 14, 1975

For the Petitioners-Appellants, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

For the Respondent-Appellee, Hyland, Davis and Reberkenny (William C. Davis, Esq., of Counsel)

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

September 10, 1975
Pending before Superior Court of New Jersey

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In the Matter of the Tenure Hearing of Joseph Palinkas, School District of the City of Montclair, Essex County.

COMMISSIONER OF EDUCATION

ORDER

This matter having been brought before the Commissioner of Education by the Board of Education of the City of Montclair, hereinafter "Board," by charges filed against Joseph Palinkas, hereinafter "respondent," for incapacity and unbecoming conduct pursuant to *N.J.S.A.* 18A:6-10 *et seq.*; and

It appearing that respondent is a teacher under tenure in the Board's employ; and

It appearing that such charges would be sufficient if true in fact to warrant his dismissal; and

It appearing that the Board properly certified charges to the Commissioner on December 6, 1974; and

It appearing that the Assistant Commissioner of Education in charge of Controversies and Disputes attempted written notification to respondent of the certification of said charges on December 16, 1974; and

It appearing that said written communication was returned by the United States Post Office marked "unclaimed" on December 18, 1974; and

It appearing that the Assistant Commissioner of Education notified respondent of the certification of said charges again on January 10, 1975; and

It appearing that said charges were delivered and accepted by respondent on January 11, 1975; and

It appearing that since January 11, 1975, respondent has not attempted in any manner to defend himself *pro se* or through counsel before the Commissioner; and

It appearing that attempts to move the matter through respondent's Association representative by telephone requests were made on January 30, February 22, and March 4, 1975; and

It appearing that no request for an extension of time has been made to the Commissioner; and

It further appearing that respondent has expressed no reason for lack of communication with the Commissioner relative to his intentions in this matter; and

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It now appearing that respondent does not intend to defend himself against the charges served upon him by the Board on December 2, 1974; NOW THEREFORE,

IT IS ORDERED on this 14th day of March 1975 that Joseph Palinkas be hereby dismissed as a teacher in the School District of the City of Montclair, effective on the date of his suspension by the Board of Education of the School District of Montclair, Essex County.

COMMISSIONER OF EDUCATION

March 14, 1975

In the Matter of the Tenure Hearing of John Joseph Kane, School District of the City of Bayonne, Hudson County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, John J. Pagano, Esq.

For the Respondent, John Joseph Kane, *Pro Se*

The Board of Education of the City of Bayonne, hereinafter "Board," on December 12, 1974, filed charges of conduct unbecoming a janitor with the Commissioner of Education, certifying that the charges would be sufficient, if true in fact, to warrant a dismissal or reduction in salary of respondent as a janitor in the School District of the City of Bayonne.

The relevant facts are not in dispute. A hearing pursuant to *N.J.S.A.* 18A:6-16 was conducted on March 7, 1975 at the State Department of Education by a hearing examiner appointed by the Commissioner. The parties stated for the record that they waive a hearing examiner report and desire that the matter go directly before the Commissioner on the pleadings and record of the hearing.

On December 10, 1974, the Superintendent of Schools preferred charges before the Board against respondent which stated in pertinent part that:

> "***On or about November 1, 1974, John Joseph Kane, a tenure janitor, pleaded guilty to an indictment charging him with the crime of working for a lottery, and he was sentenced by Judge Larner on said date to sixty (60) days in the County Jail, thirty (30) days of which was immediately suspended by Judge Larner, and he was fined $500.00.***"

Respondent admits that the charges were true in fact, that he was

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sentenced and did serve this term in jail. He pleads that, while he can make no defense, the Commissioner not deal harshly with him. In this vein he avers that he has already been sufficiently punished for his crime, having been incarcerated and without means of support for himself and his wife as a result of being suspended without pay for a period of three months. He prays only that the Commissioner order the Board to restore him to his position.

Petitioner has served the Board since October 1, 1968. The Board attests that his service was in all points dependable and exemplary during that time with not a single complaint from either its professional staff or custodial supervisors. Respondent attests and the Board confirms that respondent's involvement in the aforementioned lottery encompassed neither pupils nor employees in the school district, did not occur on school property and, while clearly illegal, did not result in his personal gain. Nor has the matter been generally a topic of discussion of either pupils or employees.

The Board herein, while recognizing that the Commissioner must determine what penalty, if any, is proper, does not press for his dismissal.

It was said in *Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County,* 1973 *S.L.D.* 217, aff'd State Board of Education 1974 *S.L.D.* 1411:

> "***Some remedy must be available to a local board of education which finds it necessary to terminate an employee whose presence is detrimental to the proper conduct of the public schools within its jurisdiction.***"
> (at p. 227)

Thus, *In the Matter of the Tenure Hearing of Edward R. Chrzan, School District of the Borough of Sayreville, Middlesex County,* 1974 *S.L.D.* 867, the Commissioner ordered the dismissal of a janitor whose insubordinate conduct was so gross as to warrant the forfeiture of his tenure status. Therein he stated:

> "***The janitor in a public school plays an important role in the educational program in addition to maintaining the schoolhouse in a safe, clean, and efficient manner. He must come into regular contact with members of the school staff, and he is expected to comport himself in a manner which will reflect dependability and inspire confidence. The use of rough language and acting in a manner as exhibited herein with respect to teachers are grave offenses, which fall far short of conduct for a janitor in a public school.***" (at p. 889)

Similarly *In the Matter of the Tenure Hearing of Russell A. Fairfax, School District of the Village of Ridgewood, Bergen County,* 1974 *S.L.D.* 1126, it was said:

> "***The Commissioner has previously described the importance of the responsibilities carried by a school janitor. *In the Matter of the Tenure Hearing of Joseph McDougall, School District of the Borough of Northvale, Bergen County,* 1974 *S.L.D.* 170 The Commissioner's comments in

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McDougall, supra, are exactly pertinent to the instant matter and bear repeating as follows:

> '***A school janitor occupies a position of trust and responsibility necessitating high standards of dependability and morality. His functions far exceed opening and closing the schoolhouse and keeping it clean and tidy. The safety and welfare of the children may depend upon the proper discharge of his duties. He must always be in a fit condition to properly tend the heating plant and other potentially dangerous equipment.
>
> 'The janitor in a public school plays an important role in the educational program in addition to maintaining the schoolhouse in a safe, clean, and efficient manner. He has a special kind of relationship to the children for whom he performs his services, and who look to him as an example of a helper and solver of many problems. He, like the teacher and other personnel who regularly come in contact with pupils, must be of exemplary conduct. If his conduct does not set a standard for children to emulate, then he fails to discharge an important aspect of his responsibilities.
>
> 'The janitor also comes into regular contact with members of the school staff who are women, and he is expected to comport himself in a manner which will reflect dependability and inspire confidence.***'

"In this case, respondent's reporting to duty under the influence of alcohol is conduct which falls far short of an acceptable standard of conduct for a janitor in a public school.

"In previous instances, the Commissioner has imposed the penalty of dismissal on a janitor found guilty of being intoxicated and using rough language. *McDougall, supra; In the Matter of the Tenure Hearing of Joseph McDonald,* 1963 *S.L.D.* 213 The Commissioner has also dismissed janitorial employees for insubordination, disregarding orders, and failure to comply with instructions and perform assigned duties. *In the Matter of the Tenure Hearing of Adam Rogalinski,* 1967 *S.L.D.* 110; *In the Matter of the Tenure Hearing of Joseph Fortuna,* 1967 *S.L.D.* 150; *In the Matter of the Tenure Hearing of Theresa Cobb,* 1966 *S.L.D.* 197; *In the Matter of the Tenure Hearing of Joseph McDougall, supra*

"In the instant matter, the Commissioner holds that the conduct of respondent has been so gross as to warrant the forfeiture of his tenure status and his employment with the Board of Education. Accordingly, the Commissioner orders respondent's dismissal as of the date of this decision.***" (at pp. 1130-1131)

The instant matter, however, is importantly distinguished from *Chrzan, supra,* and *Fairfax, supra,* in that respondent herein committed a single statutory violation which in no way involved pupils or employees of the school. It is

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further apparent that his total demeanor and attitude is presently one of both regret and penitence. This gives no reason to believe that he will at any time harm the orderly operation of the schools by continued indiscretion.

The Commissioner, while deploring petitioner's improbity, determines that the penalty of dismissal would be overly severe in this instance. He therefore directs the Board of Education of the School District of the City of Bayonne to restore respondent forthwith to his tenured position without benefit of salary from the date of his suspension in December 1974 until the date he is restored to his position. This denial of salary for a period of approximately three months will constitute sufficient penalty. It is so ordered.

COMMISSIONER OF EDUCATION

March 20, 1975

Elizabeth Rockenstein,

Petitioner,

v.

Board of Education of the Borough of Jamesburg, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris and Oxfeld (Sidney Birnbaum, Esq., of Counsel)

For the Respondent, Brigiani and Cohen (William G. Brigiani, Esq., of Counsel)

On March 13, 1974, the Commissioner of Education issued a decision in *Elizabeth Rockenstein v. Board of Education of the Borough of Jamesburg, Middlesex County,* 1974 *S.L.D.* 260, wherein he ordered petitioner restored to her teaching position because she had been wrongfully denied reemployment. He declined, however, to order restoration of lost earnings on grounds that he found no authority nor precedent to make such an award to a nontenure teacher.

A recapitulation of the chronologic events in *Rockenstein, supra,* is in order at this juncture. Petitioner taught for the Board from September 1968 through June 1971, an uninterrupted period of three academic years. She was notified in March 1971 that her contract would not be renewed for the following academic year, whereupon she filed a grievance which proceeded through the third level.

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The Board refused to provide a fourth level hearing and served notice that it would not participate in fifth level advisory arbitration on grounds that nonrenewal of a nontenured teacher's contract is a management prerogative that is not arbitrable. (Tr. 23) Nevertheless, without participation by the Board, an arbitrator's award was rendered on March 8, 1972, and promptly rejected by the Board.

Thereupon, the Petition was filed with the Commissioner of Education on July 11, 1972. An Answer was filed by the respondent Board on August 15, 1972, and a conference of counsel conducted on September 26, 1972. A hearing scheduled for November 3, 1972, was postponed until November 27, 1972 at the request of petitioner. After an abortive attempt at an amicable settlement, further hearing dates were postponed at the request of respective counsel at various times. The hearing was concluded on June 22, 1973, and Briefs filed on August 10, 1973, and November 26, 1973. The hearing examiner report of January 31, 1973, was followed by exceptions of both parties by February 14, 1974. Thereafter, the Commissioner's decision was rendered on March 13, 1974.

On April 3, 1974, petitioner appealed directly to the Commissioner to reconsider that portion of his decision relative to the award of lost earnings. She further requested that the Commissioner declare that she, having been reinstated to her teaching position, is now tenured and entitled to placement on the sixth step of the Board's salary scale. On April 5, 1974, the Commissioner referred this further Petition of Appeal to the Division of Controversies and Disputes for appropriate action. It was thereafter determined that the Board should be required to answer the Petition within fifteen days.

Both parties to the matter have filed Appeals before the State Board of Education relative to the Commissioner's March 13, 1974 decision in *Rockenstein, supra.* The appeals process is now being held in abeyance pending further consideration and determination by the Commissioner of the matter of the award of lost earnings. Oral argument was conducted on June 7, 1974 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner contends that the Commissioner is clothed with authority to order the restoration of lost earnings denied by the Board for unconstitutional and otherwise improper reasons. It is argued that *N.J.S.A.* 18A:6-9, which establishes the Commissioner's jurisdiction to hear and determine all controversies and disputes arising under the Education Laws, Title 18A, confers the broad authority and power to grant relief and make whole the party to whom a wrong is done, and that to hold otherwise reduces the office of the Commissioner to an empty one. (Tr. 4)

It is further contended that on numerous occasions the Commissioner, absent specified statutory modes of relief, has molded appropriate relief based on valid principles of law and equity to fit the circumstances of the cases. In support of this contention, petitioner cites *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207 wherein the Commissioner, absent specific statutory provision to do so, ordered

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retroactive pay to a nontenured teacher. Similarly cited is *Dianne Nashel v. Board of Education of the Town of West New York et al., Hudson County,* 1968 *S.L.D.* 183, wherein a nontenured teacher, found to have been improperly terminated at the end of her third month of pregnancy, was awarded compensation for her lost earnings covering a period of four months. Additionally cited is *Ronald Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396 wherein the Commissioner ordered the payment of lost earnings to a nontenured teacher whose contract was not renewed contrary to the requirements of *N.J.S.A.* 18A:27-10 *et seq.* Petitioner also makes reference to fifteen federal cases wherein the violation of constitutional rights was rectified at least in part by reinstatement with back pay. (Tr. 10) (Petitioner's Points in Support of Appeal, at pp. 3-4)

Finally, petitioner asserts that:

> "***[I]t is a fundamental rule of Law under our American system of Jurisprudence that: where there is a wrong, there must be a remedy, and any concept contrary to that, is foreign to our system of American Jurisprudence. Traditionally, our Courts *** have held that where there is a wrong, there must be a remedy, and that remedy is normally to make the [wronged] party whole***." (Tr. 9)

Thus, petitioner argues that she should not only be made whole with respect to lost salary, subject merely to mitigation in the amount of other earnings, but should be declared to be tenured in her teaching position and placed on that level of the salary guide which she would otherwise have attained had she not been wrongfully denied renewal of her contract. (Tr. 17-18)

Finally, petitioner cites *Patricia Meyer v. Board of Education of the Borough of Sayreville, Middlesex County,* 1970 *S.L.D.* 188; remanded by State Board of Education, 1970 *S.L.D.* 192; decided by the Commissioner of Education on remand, 1971 *S.L.D.* 183; reversed by State Board of Education, 1972 *S.L.D.* 673, wherein the Commissioner's decision was reversed and a nontenured teacher (in a matter involving union activity) was reinstated. No award of back pay was ordered by the State Board of Education in its decision (1972 *S.L.D.* at 678). Petitioner herein, however, argues that Patricia Meyer was compensated by the Sayreville Board for her lost earnings, and the amount thereof is currently in dispute before the Commissioner. Petitioner asserts that if such compensation to Patricia Meyer were improper, the Commissioner would have the obligation to declare it illegal. (Tr. 32)

The Board maintains that the Commissioner, absent specific statutory authority, cannot order an award of back pay in this matter. It argues that in *Aitken, supra,* and *Burgin, supra,* the Commissioner's awards were made to petitioners who were entitled to relief by virtue of *N.J.S.A.* 18A:27-10, even as *Nashel, supra,* was entitled to relief by the terms of her contract which were violated. Thus, the Board concludes that the instant matter is distinguishable from these cases because petitioner herein has no statutory entitlement nor were the provisions of her contract violated. (Tr. 30)

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The Board further contends that petitioner was properly reinstated at the fourth step of its salary policy on April 15, 1974, having actually worked for the Board only a total of three years. Finally, the Board asserts that petitioner is not entitled to a tenure status because she has not met the statutory requirement by serving the equivalent of more than three academic years within four consecutive academic years. *N.J.S.A.* 18A:28-5

The hearing examiner herewith concludes his resume of the principal arguments of the parties in this matter and observes that there are no further findings of fact required on his part. However, a further matter should properly be set forth in this report relative to arguments concerning the rights of appeal of the parties. (Tr. 39-51)

It is a fact that in response to the Commissioner's decision of March 13, 1974, to restore petitioner to a teaching position, the Board placed her on the fourth step of the salary guide. (Tr. 38) It is likewise a fact that the Board by letter bearing the date of April 10, 1974, and received in the office of the Commissioner on April 15, 1974, made the following statement:

> "***If you find merit in the petitioner's argument with respect to retroactive pay, it would be the Board of Education's position to appeal your decision and I respectfully reserve said right, by this letter, since our time for appeal will shortly expire."

There is controversy with regard to the date of mailing of this letter, but the hearing examiner finds no reason to believe it was not mailed prior to the end of the thirty-day period for filing of appeals. In any event, the Commissioner referred the within Appeal to the Division of Controversies and Disputes for appropriate action. It was determined by the Division to order oral argument. These acts predated the last of the thirty days during which an appeal could be filed. Accordingly, the hearing examiner recommends to the State Board of Education that it determine that the tolling of time for the filing of appeals was interrupted and stayed by these actions of the Commissioner and the Division of Controversies and Disputes. He recommends, in the event the Commissioner in any way modifies his decision of March 13, 1974, that the tolling of time for appeals on the entire matter begin again as of the date of the modification of the decision. He further recommends, in the event that the decision of March 13, 1974, remains unchanged, that the tolling of time begin again as of the twenty-third day, which was the day when the Commissioner interrupted the usual procedures by opening the matter to further arguments of law. Such a determination will guarantee the rights of the parties respective to the entire matter.

Given the above chronology, it remains for the Commissioner to determine whether his jurisdiction in the matter encompasses the authority to order a board of education to restore lost earnings to a nontenured teacher who was denied renewal of contract for unconstitutional and otherwise improper reasons. In the event of an affirmative determination, the Commissioner must likewise determine the extent of such salary and other attendant emoluments which may be justly ordered. The Commissioner is also called upon to determine whether

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petitioner, having been restored to her teaching position, has acquired a tenure status and whether she is entitled to placement at a higher step on the Board's salary scale.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the instant matter, including the Memoranda of Law, the hearing examiner report, and the exceptions thereto filed by counsel pursuant to *N.J.A.C.* 6:24-1.16. He has carefully considered and weighed the respective arguments advanced relative to petitioner's renewed prayer that the Commissioner order the Board to compensate her for her lost earnings which resulted from the Board's nonrenewal of her teaching contract for unconstitutional and otherwise improper reasons. *Elizabeth Rockenstein v. Board of Education of the Township of Jamesburg, Middlesex County,* 1974 *S.L.D.* 260 Additionally, he has researched the statutes of this State and the pronouncements of the courts with respect to the extent of his general remedial powers attendant upon his authority to hear and determine controversies arising under the school laws. *N.J.S.A.* 18A:6-9; *N.J.A.C.* 6:5-1.2(a)1

Certain statutory provisions empower the Commissioner to grant specific relief such as *N.J.S.A.* 18A:6-30.1, which provides that:

> "When the dismissal of any teaching staff member before the expiration of his contract with the board of education shall be decided, upon appeal, to have been without good cause, he shall be entitled to compensation for the full term of the contract***."

Similarly, *N.J.S.A.* 18A:27-10 *et seq.* provide, in the event a nontenured teaching staff member is not notified by a board in writing prior to April 30 of non-reemployment for the next succeeding year, that:

> "***said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."
> (*N.J.S.A.* 18A:27-11)

The inclusion of such specific remedies within the statutes does not, however, deprive the Commissioner of authority to mold appropriate remedies in diverse matters. A conclusion by the Commissioner that he is without such authority would be inconsistent with the New Jersey Supreme Court's description of the Commissioner's broad authority and responsibilities. In *Jenkins et al. v. Township of Morris School District et al.,* 58 *N.J.* 483 (1971), the Court stated:

> "***As the chief executive and administrative officer of the Department, the State Commissioner of Education is vested with broad powers

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including the 'supervision of all schools of the state receiving support or aid from state appropriations' and the enforcement of 'all rules prescribed by the state board.' *N.J.S.A.* 18A:4-23. The Commissioner is *** empowered to hear and determine 'all controversies and disputes' arising under the school laws or under the rules of the State Board or the Commissioner. *N.J.S.A.* 18A:6-9.

"We have from time to time been called upon to reaffirm the breadth of the Commissioner's powers under the State Constitution and the implementing legislation. Thus in *Laba, supra,* 23 *N.J.* 364, we held that the Commissioner's 'primary responsibility is to make certain that the terms and policies of the School Laws are being faithfully effectuated' (23 *N.J.* at 382) and he is empowered to remand controversies and disputes 'for further inquiry' at the local board level when such course appears appropriate. 23 *N.J.* at 383.***" (58 *N.J.* at 494)

"***The Commissioner has been appropriately charged with high responsibilities in the educational field and if he is faithfully to discharge them in furtherance of the State's enlightened policies he must have corresponding powers. The Legislature has here granted them in broad terms and it would disserve the interests of the State to permit their administrative narrowing which in effect represents not only a disavowal of power but also a disavowal of responsibility.***" (58 *N.J.* at 504)

In *Jenkins, supra,* the Commissioner erroneously concluded that *N.J.S.A.* 18A:13-34, which requires voter approval to effectuate a merger of school districts, represented the *exclusive* procedure to effectuate a regionalization. 58 *N.J.* at 504 The Court unequivocally stated that an alternative procedure to voter approval exists in the many broad implementing enactments delegating comprehensive powers to the Commissioner.

Similarly, in *Board of Education of East Brunswick Township v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966) the Court recognized the Commissioner's authority to direct an increase in a school budget, albeit no statutory authority stated specifically that he might do so. Therein, it was determined that his responsibility to insure that State educational policies are fulfilled extends beyond the making of an original certification of taxation when a municipality fails to make any such certification. Thus, it was determined his authority extends to reviewing a certification made by a governing body. The Court concluded that, when the Commissioner determines that the budget fixed by a local governing body is insufficient to satisfy educational requirements, he should forthwith direct that local corrective action be taken or

"***fix the budget on his own within the limits originally proposed by the board of education.***" (48 *N.J.* at 107)

In cases where a right is created by statute, the Commissioner has not declined to devise an appropriate remedy where such remedy is not prescribed by statute. Thus, while *N.J.S.A.* 18A:27-11 provides only that a teaching staff member whose notice of non-reemployment was defective pursuant to *N.J.S.A.*

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18A:27-10 is entitled to be reemployed, the Commissioner has molded appropriate relief encompassing all emoluments attendant thereto, including such salary increases as may be required by board of education policies with payment made retroactive to the beginning of the new contract term. *Aitken, supra; Burgin, supra* Similarly, in *Nashel, supra,* appropriate remedy was molded by the Commissioner, absent specific statutory prescription, to make whole a nontenured teacher whose employment was improperly terminated at the end of her third month of pregnancy in contravention of *N.J.S.A.* 18A:6-30.1. In these cases the Commissioner, acting under the aegis of his broad statutory powers, has remedied the harm caused by the defective actions of boards of education, absent specified forms of relief set forth in the statutes.

In the instant matter, the Board argues that, in each of the foregoing cases, petitioners could rely upon statutory rights, which reliance gave reason to the Commissioner's award of lost compensation. While this is true, petitioner herein has occasion to rely no less upon those fundamental constitutional guarantees which form the very bulwark of our democratic government and which are in no way curbed in the day-to-day operations of the public schools upon which we depend in great part for the inculcation of those same fundamental values in the formative minds of American youth. The Commissioner so holds.

Petitioner is entitled to be made whole for her lost earnings and other benefits of which she was deprived by the Board's improper nonrenewal of her teaching contract. Petitioner should not be required to pursue the matter beyond the established forum of administrative review in order to be made whole. This determination is grounded on the maxim that it is in the interest of the State that there should be an end to litigation and that no one should be vexed twice for the same cause of action. 50 *C.J.S. Judgments,* § 592 Petitioner argues rightly that our system of jurisprudence requires that where there is a wrong there must be a remedy and that the only appropriate remedy is to make the wronged party whole.

Upon further consideration of the legal arguments set forth, a study of the statutory authority wherewith he is clothed, and the pertinent pronouncements of the courts, the Commissioner determines that he has the authority in consonance with the aforementioned precedents to order a local board of education to make whole a nontenured employee who was injured by a faulty action of that board.

Petitioner herein was entitled to reemployment and has now been reinstated to her teaching position. She was in no way responsible for acts of bad faith or improper or impetuous conduct. See *Evaul v. Board of Education of the City of Camden,* 35 *N.J.* 244 (1961) at page 250. Based upon equitable principles, she is therefore entitled to be compensated for the loss of earnings occasioned by the Board's failure to reemploy her in contravention of her constitutional and statutory rights. It remains to determine the extent of her earnings for which the Board is totally responsible.

The record is clear that petitioner persisted during the academic year 1971-72 in unilaterally pressing the matter as a grievance under the negotiated

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agreement which provided for non-binding arbitration. Such action was faulty and led to a fruitless conclusion when the arbitrator's award was summarily rejected by the Board, which upon advice of its counsel, had refused to engage at any time in the non-binding arbitration proceedings.

The Commissioner determines that the untimely delay during the entire 1971-72 academic year is attributable solely to petitioner and that the Board is, therefore, not responsible for the lost earnings of petitioner for this period. Nor is the Board responsible for granting a year of experience on the salary guide for this period of time.

Petitioner, on July 11, 1972, filed the within Appeal and has been no more responsible than the Board for delays that have occurred thereafter until her reinstatement. This being so, the Commissioner directs the Board to pay to petitioner her lost earnings for the 1972-73 school year computed at the fourth step of its then effective salary guide for her appropriate academic level. He further directs that she be paid such sums as she has not received based on the fifth step of the appropriate salary guide for the 1973-74 school year and on the sixth step of the salary guide for the 1974-75 school year. Such sums shall in each instance be mitigated by her earnings in other employment. She shall further be provided any other emoluments to which she is entitled by the Board's salary policies which were in effect during those years.

The Commissioner next addresses the matter of petitioner's tenure status at the time of her reinstatement by the Board. At the end of the 1970-71 academic year she lacked but one day of the service required to attain a tenure status. *N.J.S.A.* 18A:28-5(b)

The Board's improper action prevented her from acquiring tenure on the first day of the 1971-72 academic year. She was entitled to reinstatement during that year and thereafter until she was ordered reinstated on March 13, 1974. The fact that she was improperly prevented from returning may not work to her detriment. Therefore, the Commissioner views this passage of time as no interruption of the required probationary period and determines that as of the date of her reinstatement in March 1974, she met the precise requirements of *N.J.S.A.* 18A:28-5 and attained all benefits and protection afforded by the tenure statutes. The Commissioner so holds.

Finally the Commissioner accepts the findings of the hearing examiner with respect to the rights of the parties to appeal his decision of March 13, 1974. The procedures that have resulted in this determination were set in motion by the Commissioner prior to the elapse of the thirty-day appeal period subsequent to his original March 13, 1974 decision. In recognition of that fact, and because of this substantial modification of the previous decision, the Commissioner recommends that the State Board of Education permit both parties to file appeals on the entire matter within a period of thirty days following the date of this decision.

COMMISSIONER OF EDUCATION

March 20, 1975

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Elizabeth Rockenstein,

Petitioner-Appellant,

v.

Board of Education of the Borough of Jamesburg, Middlesex County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 13, 1974, and March 20, 1975

For the Petitioner-Appellant, Rothbard, Harris and Oxfeld (Sidney Birnbaum, Esq., of Counsel)

For the Respondent-Appellant, Brigiani, Cohen & Weiss (William G. Brigiani, Esq., of Counsel)

The decisions of the Commissioner of Education are affirmed for the reasons expressed in those decisions.

June 26, 1975
Pending before Superior Court of New Jersey

In the Matter of the Annual School Election Held in the Constituent District of the Borough of Woodstown, Woodstown-Pilesgrove Regional School District, Salem County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for two seats on the Woodstown-Pilesgrove Regional School Board of Education, Salem County, from the constituent district of the Borough of Woodstown, at the annual school election conducted on March 4, 1975, were as follows:

	At Polls	Absentee	Total
Thomas P. Haaf	262	2	264
Edith M. Black	207	3	210
James Pope	193	2	195
Barbara Braxton	111	1	112

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On the basis of a letter from Candidate Pope received on March 14, 1975, requesting a recount of the ballots cast, the Commissioner of Education directed that a recount be conducted on March 20, 1975 at the office of the Salem County Superintendent of Schools, Woodstown. The report of the Commissioner's representative is as follows:

With seven ballots (Exhibits A, B, C, D, E, F, and G) referred to the Commissioner for determination, the uncontested tally of the recount of the ballots cast is as follows:

	At Polls
Thomas P. Haaf	260
Edith M. Black	206
James Pope	191
Barbara Braxton	111

The Commissioner's representative reports that apparently at the close of the polls of this election the election workers, in counting the ballots, numbered each ballot on the back in order to be positive of counting each ballot.

All interested persons at the recount had the opportunity to review and examine the ballots referred to the Commissioner for his determination.

* * * *

The Commissioner has reviewed the ballots referred to him for determination and he observes each of these Exhibits has numerical markings on the reverse side as follows:

Ballot	Marking
A	No. 220
B	No. 182
C	No. 381
D	No. 13
E	No. 44
F	No. 331
G	No. 337

While the Commissioner recognizes the need for absolute concentration by election workers in counting votes cast in elections which utilize paper ballots, he is constrained to caution school board election workers not to put any marks on ballots for any reason other than to void a ballot pursuant to law.

In regard to the ballots referred, the Commissioner observes that Exhibit A has a cross (x) mark properly placed in the square to the left of the names of Candidate Black and Candidate Haaf. However, there is also a cross (x) in the square to the left of the blank space in which the voter could have elected to cast a ballot for a person other than the announced candidates whose names appear on the ballot. In the Commissioner's view, the mark in the square to the left of the blank space does not void the votes properly cast for Candidates

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Black and Haaf. Accordingly, one vote each shall be added to their respective tallies.

On Exhibit C, the voter properly cast votes for Candidates Black and Haaf by placing a cross (x) in the squares to the left of their names. However, the voter also placed a cross (x) after the name of Candidate Black. The only basis upon which this ballot would be rejected would be upon a finding that the voter intended to identify his ballot. The Commissioner is satisfied that the cross (x) mark after Candidate Black's name was not intended to identify the ballot. *In the Matter of the Annual School of Election Held in the School District of the Borough of Somerdale, Camden County,* 1969 *S.L.D.* 21 Accordingly, one vote each shall be added to the tallies for Candidates Black and Haaf.

Exhibit F contains no cross (x), check (√), nor plus (+) mark in the square to the left of any candidate's name. However, there is one cross (x) mark to the right of Candidate Haaf's name. In this regard, the election law, Title 19, to which the Commissioner looks for guidance, at *N.J.S.A.* 19:16-3g provides:

> "***No vote shall be counted for any candidate***unless the mark made is*** within the square."

Accordingly, the ballot is set aside.

On Exhibits B, D, E, and G, the voters chose three candidates instead of two candidates as directed on the ballot. Because it would be impossible to determine which two candidates of the three each voter selected, these ballots are set aside. *In the Matter of the Annual School Election held in the School District of Lakeland Regional, Passaic County,* 1973 *S.L.D.* 112

When the votes in Exhibits A and C are added to the previously uncontested totals, the results stand as follows:

	Uncontested	Exhibits A & C		Absentee	Total
Thomas P. Haaf	260	1	1	2	264
Edith M. Black	206	1	1	3	211
James Pope	191			2	193
Barbara Braxton	111			1	112

The Commissioner finds and determines that Edith M. Black and Thomas P. Haaf were elected to full terms of three years each on the Woodstown-Pilesgrove Regional Board of Education from the constituent district of Woodstown, Salem County, at the annual school election held on March 4, 1975.

COMMISSIONER OF EDUCATION

March 27, 1975

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In the Matter of the Annual School Election Held in the School District of the Borough of New Milford, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the voting for three members for full terms of three years each and for one member for a two-year term on the Board of Education of the Borough of New Milford at the annual school election held on March 11, 1975, were as follows:

For Three-year term	**At Polls**	**Absentee**	**Total**
John P. Ryan	1074	50	1124
Eugene V. Finno	1058	55	1113
Edmund J. Mueller	1030	52	1082
For Two-year Term	**At Polls**	**Absentee**	**Total**
Paul B. Noonan	606	4	610
Melvin Ross	421	29	450
Myrna A. Alperin	408	36	444

Pursuant to a letter request dated March 21, 1975 from Candidate Myrna A. Alperin, the Commissioner of Education directed that the ballots cast on two certain machines for candidates for the two-year term be recounted. The recount was conducted on March 21, 1975 at the warehouse of the Bergen County Board of Elections, Carlstadt, by an authorized representative of the Commissioner.

At the conclusion of the recount it was determined that Candidate Noonan had been credited in error by election officials with 62 votes on Machine No. 86958 whereas, in fact, he received only 26 votes. Thus, the final tally for candidates for a two-year term stands:

	At Polls	**Absentee**	**Total**
Paul B. Noonan	570	4	574
Melvin Ross	421	29	450
Myrna A. Alperin	408	36	444

The Commissioner finds and determines that John P. Ryan, Edmund J. Mueller and Eugene V. Finno were elected to seats on the New Milford Board of Education for full terms of three years each and that Paul B. Noonan was elected to a seat for an unexpired term of two years.

COMMISSIONER OF EDUCATION

April 3, 1975

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In the Matter of the Annual School Election Held in the Parsippany-Troy Hills School District, Morris County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full three-year terms each at the annual school election held on March 11, 1975 in the Parsippany-Troy Hills School District, Morris County, were as follows:

	At Polls	Absentee	Total
Paul B. Finby	1,004	5	1,009
Michael J. dePierro	965	4	969
David H. Danson	906	5	911
Roberta Cantor	904	5	909
Kenneth Rothbart	881	6	887
William G. Levine	783	3	786
Eugene F. Kennedy	648	1	649
Oswaldo Escudero	262	–0–	262
Sam Kriegle	2	–0–	2
Ann Klein	1	–0–	1
Patricia Jackson	–0–	1	1
Peter Kuntz	–0–	1	1
Joan Petrucelli	–0–	1	1

Pursuant to two letter requests from Candidate Roberta Cantor dated March 13, 1975, and March 18, 1975, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast and to hold an inquiry to consider a single alleged irregularity in the operation of voting machine number 34038 which was used in the election. The recount and inquiry were conducted at the Morris County voting machine warehouse, Cedar Knolls, on March 27, 1975.

The Commissioner's representative reports that at the conclusion of the recount of the totals on the voting machines, and a review of the report of the canvass of absentee ballots, there was no change in the officially announced tally of votes.

An inquiry was held immediately following the recount pursuant to Candidate Cantor's letter of request that an investigation be made into the operation of machine number 34038. Specifically, she stated that:

> "***[U]pon entering the machine and after turning the initial lever, the curtain did not close. Therefore, if the curtain was inoperative, isn't it also possible that the machine did not properly register the correct votes[?]***" (March 18, 1975 Letter of Inquiry)

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N.J.S.A. 18A:14-42 provides that when voting machines are used in school elections:

> "The voting machines shall be prepared for use and shall be used at such election in the same manner, ***and all election officers of the district shall perform the same duties, as are required when the same are used in elections held pursuant to Title 19, Elections, of the Revised Statutes***."

N.J.S.A. 19:48-1 provides, *inter alia,* that:

> "Any thoroughly tested and reliable voting machines may be adopted, rented, purchased or used, which shall be so constructed as to fulfill the following requirements:
>
> "(a) It shall secure to the voter secrecy in the act of voting***
>
> ***
>
> "All voting machines used in any election shall be provided with a screen, hood or curtain, which shall be so made and adjusted to conceal the voter and his action while voting.***"

The Board Secretary testified at the inquiry that, while on a tour of polling places, he became aware of a malfunction of the curtain on machine number 34038 at the Intervale School at 4:50 p.m. on the day of voting, March 11, 1975. He stated that he directed an assistant to call the voting machine custodian at once. The custodian testified that he received the call and, in turn, directed a technician to inspect the machine.

The technician testified that he inspected machine number 34038 and found that the curtain did not close properly when the control mechanism which closes the curtain was activated. He stated that the cause of malfunction was apparent in that the wire which closes the curtain was broken. He further testified that, when this occurs, his instructions require that he do one of the following to insure the privacy of voters:

1. Pin the curtain closed.

2. Turn the machine to the wall, making sure that voters have access to the machine but that no member of the public may observe how a voter casts his vote.

It was the latter of these two expedients which he employed in this instance. He stated that he then remained while several persons voted and visually checked the protective counter noting that it advanced one digit and only one digit for each person who entered the machine. He further testified that he stood at the side of the voting machine, listened, and heard the distinctive sound which accompanies the movement of the counter mechanism as the voters voted.

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The custodian of voting machines, when asked whether the curtain operating mechanism has any effect upon the counting mechanism, stated that the counting mechanism is totally independent of and in no way influenced by the operation of the curtain mechanism. He further testified that while no visual check of recorded votes for individual candidates was made, he has never known the counter mechanism to fail to operate because of a malfunction in the curtain control mechanism.

The Commissioner's representative has considered the testimony of those present at the inquiry and finds no reason to believe that the counter mechanism for the individual candidates or the public counter or the protective counter in any way malfunctioned on either machine number 34038 or machine number 30790 which, it was revealed at the recount, had precisely the same malfunction of its curtain closing mechanism.

It remains for the Commissioner to determine whether the fact that a number of voters were not afforded complete privacy between 4:50 p.m. and 5:20 p.m., when voting in machine number 34038, is of such moment as to invalidate the election. In this regard the Board Secretary testified that he observed one person vote with the curtain open approximately fourteen inches. The Board President testified that he observed that after this was pointed out to election workers, one worker manually held the curtain closed behind each voter, albeit imperfectly, until 5:20 p.m. when the machine was turned to the wall by the technician, *ante*.

Testimony was not taken at the inquiry on complaints relative to the conduct of a recent general election and the procurement of affidavit ballots on grounds that these are not matters within the jurisdiction of the Commissioner nor the Board. Additional complaints regarding the Board's orientation of its election workers, the counting of and maintenance of signature lists and slips, lack of communication between polling places, and diligence of election workers were not made the subject of testimony at the inquiry. This decision was grounded in the fact that such allegations were not made in the original letter requesting that an inquiry be made. Nor was the request honored of one inquirer who desired to view and count the signature slips of those who had voted, which slips are within the sealed envelopes maintained by the County Superintendent.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner finds herein no sufficient evidence to determine that the will of the people was suppressed or thwarted by the mechanical failure of the curtain mechanisms on voting machines numbers 30790 and 34038. It would be merely speculative to propose that, had these malfunctions not occurred, the results of the election would have been different. School elections in the past have not been set aside absent conclusive proof that irregularities constituted so major a factor as to nullify the expression of the voters. See *In the Matter of the Application of Elmer H. Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1953); *Sharrock v. Keansburg*, 15 *N.J. Super.* 11 (*App. Div.* 1951).

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There are many emergencies that may arise, even as there are numerous advantages attendant upon the use of voting machines. It is encumbent upon boards of education and the election workers whom they employ to make every effort to provide for reasonable and prompt solutions to those emergencies. When reasonable and prompt action is taken, as herein, the Commissioner will not interpose his judgment for that of boards of education. In such instances, the reasonable discretion of local school boards will be relied upon since:

> "***The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal.***" *Kenney v. Board of Education of Montclair,* 1938 *S.L.D.* 647 (1934), affirmed State Board of Education 649 (at p. 653)

The Commissioner's representative correctly refused to broaden the scope of the inquiry beyond that of the single allegation contained in the letter of March 18, 1975. To have broadened it to include matters pertinent to general elections and the issuance of affidavit ballots would be improper for lack of jurisdiction. To take meaningful and complete testimony regarding signature slips, orientation of election workers, and procedures employed by election workers in the Board's eight election districts would necessitate that such election workers be present to testify. It is for precisely this reason that *N.J.S.A.* 18A:14-63.12 provides that allegations be set forth in advance in writing as follows:

> "*Upon written request* within 5 days of the announcement of the result of an election by any defeated candidate, or, in the case of a question, proposition or referendum, upon petition of 10 qualified voters at any school election, *the Commissioner of Education or his authorized representative shall inquire into alleged violations of statutorily prescribed procedures for school elections,* to determine if such violations occurred and if they affected the outcome of the election." (*Emphasis supplied.*)

See *Joseph F. Shanahan v. Norman A. Gathany,* 1971 *S.L.D.* 134.

Such concerns as Candidate Cantor sought to introduce at the inquiry, albeit in untimely fashion, deserve attention. The Commissioner directs, therefore, that they be transmitted to the Morris County Superintendent of Schools who will discuss them and if necessary make recommendation to the Board Secretary in order that uniformity and full statutory compliance in all succeeding school elections may be assured. The Commissioner is constrained to caution all Boards to make unfailing effort to insure full compliance with both the spirit and the letter of the election laws.

Having found no sufficient grounds to void the election herein, the Commissioner declares that its announced results are confirmed and that the recount reaffirms that Paul B. Finby, Michael J. dePierro and David H. Danson

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were elected to full three-year terms on the Parsippany-Troy Hills Board of Education.

COMMISSIONER OF EDUCATION

April 4, 1975

In the Matter of the Annual School Election Held in the School District of East Brunswick, Middlesex County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for candidates for membership on the Board of Education for three full terms of three years each at the annual school election held on March 11, 1975 in the School District of the Township of East Brunswick, Middlesex County, were as follows:

	At Polls	Absentee	Total
Russell B. Walker	2076	32	2108
Edward J. Jablonowski	1968	24	1992
Bertram L. Buckler	1811	35	1846
Edythe D. Gutman	1811	25	1836
Robert E. Van Wagner	1790	31	1821
Gunter M. Lewin	1600	23	1623

Pursuant to a letter request dated March 13, 1975 from Candidate Gutman, the Commissioner of Education directed that the ballots cast for the candidates for Board membership be recounted. The recount was conducted on March 27, 1975 at the Middlesex County voting machine warehouse, Metuchen, by an authorized representative of the Commissioner. The recount was limited to the contested third vacant seat on the Board and, therefore, involved Candidates Gutman and Buckler only. The rechecking of the voting machines confirmed the announced results above.

The Commissioner determines, therefore, that Russell B. Walker, Edward J. Jablonowski, and Bertram L. Buckler were elected to membership on the Board of Education of the Township of East Brunswick for full terms of three years each.

COMMISSIONER OF EDUCATION

April 4, 1975

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In the Matter of the Annual School Election Held in the School District of the Town of Belvidere, Warren County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting at the annual school election held March 11, 1975 in the School District of the Town of Belvidere, Warren County, for three members of the Board of Education for three-year terms were as follows:

	At Polls	Absentee	Total
Charles F. Dewey	216	3	219
Steven H. Porter	200	2	202
Barry Dornich	186	2	188
F. James Jones	185	3	188
Richard E. Wells	147	4	151

Pursuant to a letter request dated March 13, 1975 from Candidate Jones, the Commissioner of Education directed an authorized representative to conduct a recount of the paper ballots cast in this election. The recount, which was limited to a determination of the ballots cast for candidates for full three-year terms, was conducted on March 26, 1975 at the office of the Warren County Superintendent of Schools in Belvidere. The Commissioner's representative reports that at the conclusion of the recount of the uncontested ballots, with four ballots being reserved for referral to the Commissioner, the tally stood as follows:

	At Polls	Absentee	Total
Charles F. Dewey	214	3	217
Steven H. Porter	200	2	202
Barry Dornich	186	2	188
F. James Jones	181	3	184
Richard E. Wells	143	4	147

It is clearly apparent that votes cast on the four contested ballots cannot affect the total votes to such extent as to unseat Candidates Porter and Dewey. Nor can they provide sufficient votes to elect Candidate Wells. This being so, the Commissioner's representative confines the remainder of the report to the votes cast for Candidates Jones and Dornich. This report is as follows:

Exhibit A, consisting of one ballot, shows no marks whatsoever within the boxes at the left of the printed names of Candidates Jones and Dornich. A cross (x) appears to the right after Candidate Jones' name with no mark anywhere in evidence in conjunction with Candidate Dornich's name.

Exhibit B, consisting of one ballot, shows a diagonal mark from the lower left corner to the upper right corner of the box preceding the name of Candidate

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Jones. No mark appears in conjunction with the name of Candidate Dornich.

Exhibit C, consisting of one ballot, shows a diagonal mark from the lower left corner to the upper right corner of the box preceding the name of Candidate Dornich. A cross (x) appears substantially within the box preceding the name of Candidate Jones.

Exhibit D, consisting of one ballot, shows a diagonal line beginning at the center of the box preceding the name of Candidate Jones and extending upward and beyond the right-hand margin of that box. No mark appears in conjunction with the name of Candidate Dornich.

* * * *

The Commissioner has reviewed the report of his representative and notes that the election of a candidate to a third seat for a full three-year term on the Board of Education of the Town of Belvidere depends solely upon the markings placed on the ballots previously described herein as Exhibits A, B, C, and D.

The Commissioner notes that Exhibit A contains no marks in the boxes to the left of the names of either Candidate Jones or Dornich as required by statutory prescription found in *N.J.S.A.* 19:16-3a and 16-3g. *N.J.S.A.* 19:16-3g reads in pertinent part as follows:

> "***No vote shall be counted for any candidate in any column *** unless the mark made is *** substantially within the square.***"

See *In the Matter of the Annual School Election in the District of the Township of White, Warren County,* 1972 *S.L.D.* 132 and *In the Matter of the Annual School Election Held in the School District of the Borough of Bradley Beach, Monmouth County,* 1969 *S.L.D.* 44. There is no mark in the box to the left of the name of any candidate for a full three-year term on the Board. Therefore, the markings in this portion of the ballot may not be counted as legal votes cast.

The diagonal mark in the box at the left of the name of Candidate Jones in Exhibit B is a line without a bulb or hook to distinguish it as a check. It was said in *Bradley Beach, supra,* that:

> "***Previous decisions of the Commissioner and the Courts have held that a single, straight diagonal line cannot be counted as a vote since the mark is not substantially a cross (x), plus (+) or check (√) as required by *R.S.* 19:16-3g. *Petition of Wade,* 39 *N.J. Super.* 520 (*App. Div.* 1956), 121 *A.2d* 552 (1956); *In the Matter of the Annual School Election Held in the Township of Stafford, Ocean County,* decided by the Commissioner of Education, March 26, 1968 in the case of *Keogh-Dwyer,* 45 *N.J.* 117 (1965), however, the Supreme Court held that where the mark in question is adequate to meet the test set forth in sub-section *g* of *R.S.* 19:16-3, *supra,* it is to be counted. Close examination of the two marks on this ballot indicates enough variation in the line at its lower end to be construed as a semblance of a check. It is the Commissioner's judgment,

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therefore, that these two marks meet the requirements of the statute and will be counted.*** See *In the Matter of the Recount of Ballots Cast in the Annual School Election in the Township of Union, Union County, supra; In the Matter of the Annual School Election Held in the Borough of South Belmar, Monmouth County,* 1966 *S.L.D.* 28.***" (at p. 46)

There being no semblance herein that may be construed as a plus (+), cross (x) or a check (√), the Commissioner determines that no vote may be tallied for Candidate Jones from Exhibit B. *White, supra,* at 134

In Exhibit C, a cross (x) appears substantially in the box preceding the name of Candidate Jones and will be tallied for him as one vote. The diagonal mark in the box preceding the name of Candidate Dornich has sufficient variation to distinguish it as a check (√) and will be tallied for him as one vote.

Similarly, in Exhibit D there is sufficient variation in the diagonal line substantially within the box preceding the name of Candidate Jones to distinguish it as a check (√). It will therefore be tallied as a vote for Candidate Jones.

When the votes in Exhibits A, B, C, and D are added to the previous totals, the results stand as follows:

	Uncontested	A	B	C	D	Absentee	Total
Barry Dornich	186	0	0	1	0	2	189
F. James Jones	181	0	0	1	1	3	186

The Commissioner finds and determines that Charles F. Dewey, Steven H. Porter, and Barry Dornich were elected on March 11, 1975 to seats on the Board of Education of the Town of Belvidere for full terms of three years each.

COMMISSIONER OF EDUCATION

April 4, 1975

You are viewing an archived copy from the New Jersey State Library.

"W.B.," an infant, by his guardians, Mr. and Mrs. "E.B.,"

Petitioner,

v.

Board of Education of the Warren Hills Regional School District, Warren County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Meyner, Landis & Verdon (Noel E. Schablik, Esq., of Counsel)

For the Respondent, Schumann & Seybolt (Robert L. Schumann, Esq., of Counsel)

Petitioner, a fifteen year-old pupil, was suspended and placed on home instruction for the remainder of the 1974-75 academic year from the Warren Hills Regional Junior High School on November 18, 1974 for physically assaulting Mr. "A.C.," a teaching staff member in the Warren Hills Regional School District during a disturbance at the high school on that date. Petitioner denies assaulting the teacher and asserts that the punishment imposed by the Board of Education of the Warren Hills Regional School District, hereinafter "Board," is arbitrary, capricious, and unduly punitive. He prays for immediate reinstatement on the grounds that he was denied the right to cross-examine witnesses against him, that the Board acted without sufficient credible evidence against him, and that the punishment is unduly punitive and hence illegal.

Oral argument on a Motion for interim relief was presented on December 20, 1974 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education.

Counsel waived the requirement of the filing of the hearing examiner's report and thereafter the Commissioner rendered his decision and Order on January 20, 1975. That decision concluded as follows:

> "***Prior to any further proceedings in this matter, the Commissioner directs the Board to evaluate W.B. pursuant to the appropriate statutes, using its Child Study Team. When that evaluation is completed, a determination will be made in regard to any further proceedings.
>
> "The Motion for interim relief and immediate reinstatement is denied. W.B. shall continue to receive home instruction or instruction during a modified school day, as directed by the Board, until such time as the Board may modify its determination or, until there is a further ORDER by the Commissioner following continued proceedings in this matter."

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As directed by the Commissioner, the Child Study Team report was forwarded for his inspection. This report is a *Confidential and Privileged* communication for the Commissioner's use only, and was prepared according to his request; therefore, it may be shown only to those school personnel, or others who, in the determination of the Board, have a need for the information contained therein.

Having reviewed the Child Study Team report in its entirety, the Commissioner directs the Board to readmit W.B. as a full-time pupil, contingent upon his complying with the recommendations contained in the report of the Child Study Team while he attends school. The Commissioner further directs the Board to consider and offer, wherever practicable, the programs recommended for W.B. by the Child Study Team.

If W.B. refuses the recommendations or the program offerings, he shall remain on home instruction for the balance of the academic year.

Entered this 14th day of April, 1975.

COMMISSIONER OF EDUCATION

Gwen A. Jacobs,

Petitioner,

v.

Board of Education of the Town of Phillipsburg, Warren County,

Respondent,

and

Nicholas A. Sabatine and Phillipsburg Education Association,

Intervenors.

COMMISSIONER OF EDUCATION

ORDER

This matter having been opened before the Commissioner of Education (Joseph F. Zach, Deputy Assistant Commissioner, Division of Controversies and Disputes) by Lewis Stein, Esq., counsel for the petitioner, by formal Petition of Appeal on February 20, 1975, requesting, *inter alia,* temporary restraint against the Board of Education of the School District of the Town of Phillipsburg, ("Board"), to prevent the performance of the musical play "Jesus Christ Superstar" by the pupils in respondent Board's high school who comprise the school's Troupe No. 849 of the International Thespian Society, on March 13, 14, and 15, 1975, which production was formally approved by the Board at its regular meeting held February 10, 1975, on the grounds that the musical play,

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ante, possesses religious content and has a religious purpose, and therefore its production is in violation of the First Amendment of the Constitution of the United States, and *Article* I, *Pars.* 3 and 4 of the New Jersey Constitution; Boyd Harbourt, Esq., counsel for the School District of the Town of Phillipsburg, and Edward J. Butrym, Esq., counsel for Intervenors, Nicholas A. Sabatine, faculty advisor of the dramatic society, and the Phillipsburg Education Association; and

The arguments of counsel having been heard regarding the allegation by petitioner that irreparable harm may result if Respondent Board is not restrained from permitting its pupils to perform the musical play "Jesus Christ Superstar" pending the final determination by the Commissioner of the merits of the Petition of Appeal; and

The Commissioner having examined: (1) the Briefs filed by the parties and the authorities cited therein; (2) the affidavit of the Board's counsel regarding his advices to the Board (Exhibit R-2); (3) the affidavits of six members of the nine-member Board wherein they state respectively that they had read the script prior to voting approval of the production (Exhibits R-5, 6, 7, 8, 9, 10); (4) the affidavits of the Superintendent of Schools (Exhibit R-3) and the Principal of the high school (Exhibit R-4) setting forth the chronology of factual circumstances in this matter; (5) the affidavits of the faculty advisor (Exhibit R-12) and a pupil member of the Thespian Society (Exhibit R-11) describing the circumstances under which the particular musical play was selected for the annual dramatic performance; and the script (Exhibit R-1) and libretto (Exhibit P-1) having been read, and the recording of the musical play (Exhibit P-2) having been reviewed; and

The Commissioner having considered the criteria set forth by the courts for the exercise of discretion in the issuance of a *pendente lite* restraint, *United States v. Pavenick,* 197 *F. Supp.* 257, 259-60 (*D.N.J.* 1961) and *Communist Party of the United States of America v. McGrath,* 96 *F. Supp.* 47, 48 (*D.D.C.* 1951); and

The Commissioner having balanced the interests of the pupils and parents and community at large against the interests of petitioner, and having considered the narrow legal question in light of the constitutional principles applicable thereto, and having determined that the musical play "Jesus Christ Superstar" is not a religious exercise or promotion; and

The Commissioner having found that no irreparable harm will result by permitting the pupils of the Phillipsburg High School Thespian Society to perform the musical play on March 13, 14, and 15, 1975; therefore

IT IS ORDERED on this 7th day of March 1975 that petitioner's request for interim relief, *pendente lite,* is denied. A more detailed exposition of the contentions of the parties herein will follow publication of this order.

COMMISSIONER OF EDUCATION

March 7, 1975

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Gwen A. Jacobs,

Petitioner,

v.

Board of Education of the Town of Phillipsburg, Warren County,

Respondent,

and

Nicholas A. Sabatine and Phillipsburg Education Association,

Intervenors.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Nusbaum, Stein & Goldstein (Lewis Stein, Esq., of Counsel)

For the Respondent, Boyd Harbourt, Esq.

For the Intervenors, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

Petitioner, a citizen residing in the Phillipsburg School District, alleges that the Board of Education of the Town of Phillipsburg, hereinafter "Board," acted illegally in approving the production of the musical play "Jesus Christ Superstar" (1970 Rock Opera by Webber and Rice) by pupils, enrolled in the Board's high school, who comprise the school's Troupe No. 849 of the International Thespian Society. Petitioner alleges that this musical play has religious content and purpose and therefore its production is violative of the First Amendment of the Constitution of the United States and *Article I, Pars.* 3 and 4 of the New Jersey Constitution.

The Board answers that the musical play does not have religious content and purpose as alleged by petitioner, but rather portrays in music and verse an historical event recognized by history scholars as the life of a man who actually lived.

The Petition of Appeal filed on February 20, 1975, requested, *inter alia,* temporary restraint against the Board to prevent the performance of the musical play on the evenings of March 13, 14, and 15, 1975, which are Thursday, Friday and Saturday respectively. Immediately thereafter, permission to intervene as respondents was sought by the faculty advisor of the dramatic society and the Phillipsburg Education Association and was granted. On Wednesday, March 5, 1975, oral argument was heard, affidavits and other items of evidence were received, certain facts were stipulated, and Briefs were filed by the parties. Thereafter, on Friday, March 7, 1975, the Commissioner of Education issued an order denying the temporary restraint sought by petitioner.

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The essential relevant facts are not in dispute.

The affidavit (Exhibit R-11) of a twelfth grade pupil, R.N., who is a member of the school's Thespian Society, states that he suggested to the faculty advisor during March 1974, that the members of the Society consider the production of the musical play "Jesus Christ Superstar" for the 1974-75 academic year. At that time, the faculty advisor discovered, the rights for production of the play were not available. During September 1974, R.N. again suggested consideration of this musical play as the Thespian Society's major production for the 1974-75 academic year. Thereafter, the faculty advisor ascertained that the rights were available. The group of pupils discussed the possibility of performing the musical play, and the pupils elected to stage it during 1974-75. The affidavit of the faculty advisor (Exhibit R-12) corroborates this chronology of events and relates in some detail the challenging and instructive aspects of such a performance, including the involvement of a cast of forty singers and dancers, plus wide latitude in the selection of staging techniques by the pupils.

The parties agree that on December 13, 1974, petitioner sent a letter to the principal of Phillipsburg High School (with copies to the Superintendent of Schools and the Board President) in which she registered objection to the play. On January 24, 1975, the Superintendent dictated a letter to the high school principal directing that rehearsals of the musical play be stopped. On January 28, 1975, rehearsals were stopped, and petitioner was so informed by the high school principal. (Exhibits R-3, R-4) Subsequently, the Superintendent discussed the matter of the musical play with the Board.

The affidavit of the Board's attorney (Exhibit R-2) states that he advised the Board members to read the words of the musical play. He further advised the Board that if, after reading the script, they concluded from the words and the story as a whole that the play was a dramatic production, literary or historical in nature, purpose and intent, then the Board's sponsorship of the musical play was not improper. If the Board found the musical play to be primarily religious in nature and purpose, he advised, then it would be improper for the Board to sponsor its production.

Six members of the nine-member Board, all of whom were available on short notice, signed affidavits stating they had read the script, determined that it was not primarily religious in nature, but a depiction of an historical event in the form of musical drama which could provide a learning experience for pupils. (Exhibits R-5-10) It was represented at the oral argument that the Board President, who was in attendance, would provide similar testimony if called as a witness. The affidavits of both the Superintendent and the high school principal disclose that their respective judgments regarding the content and purpose of the musical play were similar to those of the Board members. (Exhibits R-3, R-4)

The Board discussed the musical play in a conference session on February 4, 1975, and at its regular meeting held February 10, 1975, the Board, by a unanimous roll call vote, formally approved sponsorship of the production of

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"Jesus Christ Superstar" by the pupils comprising the high school's Thespian Society.

The Board contends that petitioner is required by the doctrine of exhaustion of administrative remedies (*R.* 4:69-5) to pursue her complaint with the Superintendent of Schools and the Board of Education before filing a Petition of Appeal with the Commissioner. The Commissioner does not agree. Although it is sound practice that all disputes be settled at the lowest possible administrative level, and the Commissioner consistently urges parties to seek amelioration through discussion with local school administrators and local boards of education, any citizen or aggrieved party who challenges an action taken by a local board of education may file an appeal with the Commissioner. The rule, *R.* 4:69-5, has consistently been interpreted by the courts of this State to require, with certain exceptions, that parties appear before the Commissioner, rather than first seeking relief in the court system, when the specific controversy arises under the school laws. As the instant matter now stands, it is properly before the Commissioner.

Petitioner alleges that the musical play "Jesus Christ Superstar" falls within the category of those dramatic productions which are defined as "passion plays." Petitioner quotes the *Encyclopedia Britannica* (Vol. 17, p. 435, 1973) which states that:

> "***Musical settings of the Passion of Christ–that is, his redemptive suffering during his last days on earth, and especially his crucifixion–based either on biblical texts or poetic elaborations of them, date from the 4th century onward.***"

It is true that passion plays have been utilized by various Christian sects to depict the last days of the life of Jesus of Nazareth, down through the Middle Ages, the classical and romantic periods, and into the twentieth century. A particularly famous example of a passion play is that which takes place in the Bavarian village of Oberammergau and attracts visitors from all over the world.

Petitioner maintains that "Jesus Christ Superstar" is a twentieth century passion play designed for contemporary audiences, particularly youths, and that the play has no plot independent of the recitation of the Passion of Christ. According to petitioner, the text of the musical play elucidates upon the miracles, salvation, devotion, and the sanctity of prayer. Petitioner asserts that the sponsorship by the Board of this musical play violates the Establishment Clause of the First Amendment of the United States Constitution in that the Board has indirectly established a religious program.

Petitioner relies upon the words of the Court in *State Board of Education et al. v. Board of Education of Netcong et al.*, 108 *N.J. Super.* 564 (*Chan. Div.* 1970), aff'd 57 *N.J.* 172 (1970) that:

> "***Indirect establishment can be condoned where it is the only means of obtaining an absolutely compelling and otherwise unobtainable secular

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goal.***" (108 *N.J. Super.* at 583-584)

The Board maintains that the musical play is not a religious exercise nor religious observance and does not possess a primary religious purpose. According to the Board, the play is a "rock opera" concerned with a portrayal of the historical events surrounding the last seven days of the life of an historical figure, Jesus of Nazareth. The Board asserts that the play does not in any manner deify Jesus nor make any reference to his resurrection, but rather ends with his crucifixion. The Board avers that there is great interest in the life of Jesus of Nazareth as an historical figure. The Board quotes the eminent historian and philosopher, Will Durant,[1] who summarized the argument for an historical Jesus, as follows:

> "***In summary, it is clear that there are many contradictions between one gospel and another, many dubious statements of history, many suspicious resemblances to the legends told of pagan gods, many incidents apparently designed to prove the fulfillment of Old Testament prophecies, many passages possibly aiming to establish [an] historical basis for some later doctrine or ritual of the Church. The evangelists shared with Cicero, Sallust, and Tacitus the conception of history as a vehicle for moral ideas. And presumably the conversations and speeches reported in the Gospels were subject to the frailties of illiterate memories, and the errors or emendations of copyists.
>
> "All this granted, much remains. The contradictions are of minutiae, not substance; in essentials the synoptic gospels agree remarkably well, and form a consistent portrait of Christ. In the enthusiasm of its discoveries the Higher Criticism has applied to the New Testament tests of authenticity so severe that by them a hundred ancient worthies—e.g., Hammurabi, David, Socrates—would fade into legend. Despite the prejudices and theological preconceptions of the evangelists, they record many incidents that mere inventors would have concealed—the competition of the apostles for high places in the Kingdom, their flight after Jesus' arrest, Peter's denial, the failure of Christ to work miracles in Galilee, the references of some auditors to his possible insanity, his early uncertainty as to his mission, his confessions of ignorance as to the future, his moments of bitterness, his despairing cry on the cross; no one reading these scenes can doubt the reality of the figure behind them. That a few simple men should in one generation have invented so powerful and appealing a personality, so lofty an ethic and so inspiring a vision of human brotherhood, would be a miracle far more incredible than any recorded in the Gospels. After two centuries of Higher Criticism the outlines of the life, character, and teaching of Christ, remain reasonably clear, and constitute the most fascinating feature in the history of Western man.***" (at p. 557)

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[1] *The Story of Civilization* by Will Durant, Volume III *Caesar and Christ* (Simon & Schuster, 1944)

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The Board argues that, were the Commissioner to hold that this musical play is not a dramatic production, he would, in essence, be excluding such literary classics as Dante's "Divine Comedy" and Milton's "Paradise Lost" and "Paradise Regained" from recitation in the public schools, as well as plays by William Shakespeare which portray characters praying to a Divine Being.

The Board argues that the decisions of the New Jersey courts in the *Netcong* case, as well as the decisions of the United States Supreme Court in *Engel v. Vitale,* 370 *U.S.* 421, 82 *S. Ct.* 1261, 8 *L. Ed.* 2*d* 601 (1962), and *School District of Abington Township, Pennsylvania v. Schempp,* 374 *U.S.* 203, 83 *S. Ct.* 1560, 10 *L. Ed.* 2*d* 844 (1963) are controlling and support its position.

Intervenors argue that the application of the test set forth in *Engel, supra,* and *School District of Abington, supra,* results in a clear distinction that the musical play, *ante,* does not constitute an activity of a religious character such as those decisions proscribe. The intervenors quote the Opinion of the Attorney General of New Jersey, F.O. 1969-No. 3, that:

> "***what is proscribed is the establishment by the State of a religious or devotional exercise in connection with the operation of a public school system.***"

The musical play in question may be described as a highly stylized, rather simplistic depiction of selected events of the last seven days in the life of Jesus of Nazareth. The musical score is highly contemporary, utilizing forms of modern music ranging from "rock" to some "jazz." Unusual tonal effects are produced by a Moog synthesizer, an electronic instrument which creates a variety of harmonic effects. Much use is made of guitars. The vocabulary contained in the script of the musical play is intentionally simple and includes much basic slang idiom popularized by adolescent youth during the past several years. There is a great deal of repetition of certain lines of verse and song. The authors first produced this work as a musical recording, and subsequently dramatized it as a musical stage play. The authors are laymen, and there is no evidence available to show that this particular play has any connection with a recognized religious group or sect. When a comparison is made of the script of this musical play to the synoptic Gospels as they appear in at least four English language translations of the Scriptures, it must be concluded that the authors did not closely follow any authorized scriptural translation. Great liberties have been taken by the authors, both in selecting events to be depicted in the play, and in the creation of dialogue among the characters of the play, as well as the selection of the idiom of such dialogue. The main characters of the musical play are Jesus, Mary Magdalene, Judas Iscariot, Caiaphas (a priest), Annas, Simon Zealotes, Pontius Pilate, King Herod, Peter, and a maiden.

Taken as a whole, this play is a rather unusual, in the sense of untypical, depiction of a portion of history, treated with great poetic license, in a type of vocabulary, musical form, and presentation which is highly stylized. It may or may not appeal to the individual viewer as a dramatic art form and entertainment, depending upon purely personal aesthetic values.

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Although the subject matter itself may raise the allegation that the play is of a religious nature, there would be no other way to dramatize what little is historically known of the life of Jesus of Nazareth without relying upon the resources found in the recitations of his life as related in the various translations of the synoptic Gospels, and without presenting the drama in relationship to the persons and events of his lifetime. The musical play concludes with the crucifixion of Jesus. This form of execution was extensively utilized throughout the Roman Expire, and was, at that period of time, significant to the populace as a terrible and agonizing form of execution, much as the ax or the gallows was known during later periods of history.

Having considered the various factual aspects of this musical play, the Commissioner must conclude that it is neither a religious exercise nor religious in character. It is a work of dramatic art and music, albeit one which may not be found entertaining by all viewers. Much historical, theological, and literary criticism has been written about this musical play, with the result that opinions spanning the entire spectrum from excellent to poor have been stated by reviewers and critics from diverse disciplines. In the final analysis, personal choice is the sole determining factor of the value of this play as a work of art.

Given this finding regarding the nature of the play, the Commissioner holds that it does not violate the constitutional provisions as described by the previously cited authorities.

In the judgment of the Commissioner, the Board in this instance is permitting its pupils a freedom of dramatic choice, although admittedly that choice is controversial. It has been pointed out by the Supreme Court of the United States in *Tinker v. Des Moines Independent Community School District,* 393 *U.S.* 503, 89 *S. Ct.* 733, 21 *L. Ed.* 2*d* 731 (1969) that a public school pupil:

> "***may express his opinions, even on controversial subjects**if he does so 'without materially and substantially interfering with appropriate discipline in the operation of the school' and without colliding with the rights of others.***But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.***" (21 *L. Ed.* 2*d* at 741)

This case presents, therefore, an interesting aspect of true First Amendment rights.

The test for violation of the Establishment Clause of the First Amendment of the United States Constitution was set forth in *Abington School District v. Schempp, supra,* as follows:

> "***What are the purpose and primary effect*** [of the action under

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attack.] If either is the advancement of inhibition of religion then the***[action] exceeds the scope of***[state power] as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.***"
(374 *U.S.* at 222, 83 *S. Ct.* at 1571)

Even assuming, *arguendo,* that it were held that the musical play "Jesus Christ Superstar" is of religious content and character, which is opposite of the Commissioner's finding, the application of the above test would result, in the Commissioner's judgment, in a determination that the performance of the play serves a secular purpose of participation in drama by the pupils, and that the primary effect of the presentation by the pupils of this play, to a voluntary audience, on these evenings only, would neither advance nor inhibit religion.

It has been pointed out both by the courts of this State and the United State Supreme Court that the study of religion, including the Bible, is worthy for its literary and historic qualities, when presented objectively as part of the secular program of education. *Abington v. Schempp, supra,* at 1573; *State Board of Education v. Netcong, supra,* 108 *N.J. Super.* at 583

In the instant matter, the Commissioner finds and determines that the musical play "Jesus Christ Superstar" is not a religious exercise, that it meets the test of constitutionality set forth by the cited controlling authorities, and that it is a proper historical subject for presentation by the pupils in the form of a musical play. Accordingly, the Board's action approving the presentation as an extra-classroom activity of the school's Thespian Society was a legal and proper action within the Board's discretion.

The Commissioner is constrained to point out that this Board and all other local boards of education in this State are responsible to the Commissioner only for the legality of their actions. They are responsible to their constituents for the wisdom of their actions.

For the reasons stated, the Petition is dismissed.

COMMISSIONER OF EDUCATION

April 14, 1975

"J.F.G.," a minor, and "R.G.," his parent and natural guardian,

Petitioners,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

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COMMISSIONER OF EDUCATION

ORDER

For the Petitioners, Jerrold A. Tenzer, Esq.

For the Respondent, Cerrato, O'Connor, Braelow & Mehr (Dominick A. Cerrato, Esq., of Counsel)

Petitioner, a seventeen-year-old eleventh grade pupil, was expelled by the Board of Education of the Freehold Regional High School District, hereinafter "Board," and appeals for interim relief and immediate reinstatement in Marlboro High School. Oral argument was conducted on December 30, 1974 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The record and transcript are before the Commissioner for his determination in this matter.

The record shows that petitioner and another pupil were expelled by the Board after a full hearing on November 25, 1974, concerning their involvement in three altercations at the high school on the same day. Petitioner neither admits nor denies his participation in the contested incidents. He avers, however, that if it is held he did strike a fellow pupil, expulsion is too harsh a penalty to impose and such behavior, even if true, does not constitute "continuous and willful" acts which would warrant an expulsion pursuant to *N.J.S.A.* 18A:37-2.

Although boards of education have the statutory authority to expel pupils, the Commissioner has commented previously about expulsion actions. In *John Scher v. Board of Education of West Orange,* 1968 *S.L.D.* 92, the Commissioner stated the following:

> "***The Commissioner notes, also, that it is not only within the authority but it is also the duty of a local board of education to administer the procedures for diagnosis and classification of pupils who give evidence of emotional disturbance or social maladjustment. *N.J.S.* 18A:46-6, 8, and 11 Pupils may be refused admission to, or be excluded temporarily from school for a reasonable time pending such examination and classification. *N.J.S.* 18A:46-16 In this case, respondent has taken the position that petitioner's continued presence in the school would constitute a hazard to the physical well-being of himself, his fellow students and the school personnel. The Board asserts also that its psychiatrist, who had examined petitioner previously when he was in sixth grade, had advised that petitioner not be readmitted until a reexamination is made. Under such circumstances the Commissioner holds that respondent's requirement of a mental health evaluation is a proper exercise of its statutory authority.
>
> ***
>
> "Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible. It involves a momentous decision which members

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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. Such advice can be obtained from its staff of educators, from its school physician and school nurse, from its psychologist, psychiatrist, and school social worker, from its counsel, and from other appropriate sources. The recommendations of such experts are an essential ingredient in any determination which has as significant and far-reaching effects on the welfare of a pupil as expulsion from school. It is obvious that a board of education 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. The Commissioner suggests, therefore, that boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see that the child comes under the aegis of another agency able to deal with the problem. The Commissioner urges boards of education, therefore, 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. In the case under review, the Commissioner calls attention to the fact that although the Board ordered an evaluation of petitioner by its mental health team, it made its determination with respect to his status before such an examination and the recommendations emanating therefrom could be accomplished. The Commissioner suggests that the decision should have been left open until after it had received the results of the examinations and the recommendations made by the examiners.***" (at pp. 96-97)

See also *"R.K." v. Board of Education of the Township of Lakewood, Ocean County,* 1974 *S.L.D.* 100.

No classification has been made in this matter; therefore, based on the record herein, the recommendation of the hearing examiner at the oral argument, and prior decisions of the Commissioner, the Board is directed to provide an alternate means of education for petitioner, such as home instruction or a modified school day, and to have petitioner evaluated by its Child Study Team. Any further action regarding petitioner should be grounded on the Board's study of the report of the Child Study Team.

Counsel shall proceed according to the agreements reached at the conference held in this office on December 30, 1974.

Except for the relief granted, the Motion for immediate reinstatement of petitioner is denied.

COMMISSIONER OF EDUCATION

January 13, 1975

You are viewing an archived copy from the New Jersey State Library.

"J.F.G.," a minor, and "R.G.," his parent and natural guardian,

Petitioners,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Jerrold A. Tenzer, Esq.

For the Respondent, Cerrato, O'Connor, Braelow & Mehr (Dominick A. Cerrato, Esq., of Counsel)

Petitioner, a seventeen-year-old eleventh grade pupil, was expelled by the Board of Education of the Freehold Regional High School District, hereinafter "Board," and appealed for interim relief and immediate reinstatement in Marlboro High School.

Petitioner's requested relief was denied by a Commissioner's Order dated January 13, 1975 in which the Commissioner stated that:

> "***the Board is directed to provide an alternate means of education for petitioner, such as home instruction or a modified school day, and to have petitioner evaluated by its Child Study Team. Any further action regarding petitioner should be grounded on the Board's study of the report of the Child Study Team.***"

At the identical time of his expulsion by the Board, another pupil, M.W., involved in the same fracas, was also expelled. M.W. filed a separate Petition of Appeal with the Commissioner requesting reinstatement in school. Subsequent to his plenary hearing before a hearing examiner appointed by the Commissioner in which he made findings of fact and recommendations, the Commissioner reinstated M.W. *"M.W.," a minor v. Board of Education of the Freehold Regional High School District, Monmouth County,* 1975 *S.L.D.* 120 (decided February 26, 1975) In that decision the Commissioner commented in part as follows:

> "***M.W. has been denied the right to attend school for a period exceeding three months, which penalty should be sufficient to impress upon him the seriousness of his offense.***" (at p. 133)

And,

> "***the Commissioner directs that the Board instruct its Child Study Team, and such other consultants as it believes necessary, to examine M.W.

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and determine whether he presents a continuing danger to the orderly and safe operation of the school. Until such time as the Board receives their reports, it may place M.W. under whatever reasonable restriction it believes to be necessary. It may not, however, exclude him from school, absent such a recommendation from its qualified experts, except for further serious violation of the Board's policies or the rules of the school. As was said in *Gustave M. Wermuth and Sylvia Wermuth, as natural parents and guardians for Marsha Wermuth v. Julius C. Bernstein, Principal of Livingston High School, and Board of Education of the Township of Livingston, Essex County,* 1965 *S.L.D.* 121:

> '***An effective school is an orderly one, and to be so it must operate under reasonable rules and regulations for pupil conduct. 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.***' (at p. 129)

> "Petitioner's prayer for reinstatement is granted to the limited extent that he may attend his classes under such restrictions as the Board may reasonably determine to be necessary in order to insure the orderly and safe program of education in its school.***" (at p. 134)

The matter herein is similar; therefore, in full consideration of the decision in *"M.W.," supra,* the Commissioner is constrained to direct the Board to reinstate J.F.G. also, and grant him the same relief, subject to the identical restrictions imposed on M.W. It is so ordered.

COMMISSIONER OF EDUCATION

April 14, 1975

In the Matter of the Annual School Election Held in the School District of the Township of Quinton, Salem County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held March 11, 1975 in the School District of the Township of Quinton, Salem County, were as follows:

	At Polls	Absentee	Total
John H. Kates	383	15	398
John A. Nipe	362	31	393
Bruce M. Lee	374	13	387
Robert Coblentz	350	27	377
Thomas Coates II	348	27	375
C. Allen Patrick	348	16	364

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Pursuant to a letter request from Candidate Coblentz dated March 14, 1975, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast. The recount was conducted on April 1, 1975 at the office of the Salem County Superintendent of Schools, Woodstown. The recount was limited to the ballots cast for Candidates Lee and Coblentz and did not include those cast for the school budget. The candidates or their representatives were present, and each examined every ballot which was recounted.

At the conclusion of the recount the tally of the votes cast for Candidates Lee and Coblentz stood as follows, with three ballots referred to the Commissioner:

	At Polls	Absentee	Total
Bruce M. Lee	374	13	387
Robert Coblentz	351	27	378

The ballots voided by the election officials were examined and it was verified that these were improper ballots. The three ballots found to be questionable were marked as Exhibits E-1, 2 and 3. These three questionable ballots, even if subsequently determined to be counted as votes for Candidate Coblentz, could not alter the results of the election as reported at the recount, *ante*. Therefore, it is not necessary that the Commissioner make a determination regarding the three questionable ballots, E-1, 2 and 3.

The Commissioner finds and determines that John H. Kates, John A. Nipe and Bruce M. Lee were elected to full terms of three years each on the Board of Education of the School District of the Township of Quinton.

COMMISSIONER OF EDUCATION

April 14, 1975

In the Matter of the Annual School Election Held in the School District of Trenton, Mercer County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the voting for membership on the Board of Education of the City of Trenton are not questioned herein. However, pursuant to a letter request dated March 12, 1975 from the Secretary-Business Administrator of the Board of Education, the Commissioner of Education directed a recount of the votes cast on two voting machines because the results thereon, pertaining to the public questions, were incorrectly tabulated on the Return Sheet by the election workers.

The recount was conducted by a representative appointed by the Commissioner and is ripe for the Commissioner's determination. None of the results are contested.

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The incomplete returns tabulated by the Secretary-Business Administrator revealed the following:

	Total Votes Received	
	Yes	**No**
Public Question No. 1		
Current Expenses $10,060,794.00	1992	2555
Public Question No. 2		
Transfer of funds to the new Cook School Project	2127	2117

These results do not include the votes cast for Public Question No. 2 in the North Ward Polling District No. 10, nor do they include the results of either Public Question No. 1 or No. 2 in the West Ward Polling District No. 22.

The recount showed the following results:

Machine No. 20414	**Yes**	**No**
Public Question No. 2	20	7
Machine No. 32912	**Yes**	**No**
Public Question No. 1	49	32
Public Question No. 2	49	29
Totals for Public Question No. 1	**Yes**	**No**
	49	32
Totals for Public Question No. 2	**Yes**	**No**
	69	36

When these totals are added to the incomplete report filed by the Secretary-Business Administrator, the following results are indicated:

Public Question No. 1	**Yes**	**No**
	1992	2555
Recounted votes added	49	32
Totals	2041	2587
Public Question No. 2	**Yes**	**No**
	2127	2117
Recounted votes added	69	36
Totals	2196	2153

* * * *

The Commissioner has examined the report of his representative and determines that Public Question No. 1 was defeated by the voters; however, Public Question No. 2 has been approved.

COMMISSIONER OF EDUCATION

April 14, 1975

You are viewing an archived copy from the New Jersey State Library.

Elizabeth Teachers Union,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Sauer, Boyle, Dwyer and Canellis (George W. Canellis, Esq., of Counsel)

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

The Elizabeth Teachers Union, hereinafter "Union," which is an organization of a minority number of teaching staff members in the school district, alleges that the Board of Education of the City of Elizabeth, hereinafter "Board," has acted illegally, arbitrarily and in violation of the constitutional rights of the Union and all teaching staff members by refusing to provide the names and/or names and addresses of teaching staff members to the Union. Respondent Board denies any wrongdoing on its part.

Petitioner prays for relief in the form of an order of the Commissioner of Education requiring the Board to make available the information it seeks.

There being no dispute over the relevant material facts, this matter is submitted to the Commissioner on the pleadings and Briefs for disposition by Summary Judgment.

The facts are these:

It is not disputed by the Union that it is an organization which represents a minority number of teaching staff members in the Elizabeth School District, and that the recognized unit for collective negotiations with the Board is the Elizabeth Education Association, hereinafter "Association." The issue in this matter centers specifically upon certain actions by the Board.

The Board admits that during several past years the Board and the Association had jointly sponsored a welcoming luncheon for teachers newly-

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appointed for the ensuing academic year. The Board further admits that each year it has furnished the Association the names and addresses of the newly-appointed teachers so that the Association could mail invitations to these teachers for the luncheon. It appears that this annual luncheon has taken place during the summer months prior to the opening of the public schools in September. Therefore, the new teachers would not as yet have had the opportunity to personally meet any of their colleagues.

The Board ceased to cosponsor such a luncheon with the Association prior to the 1972-73 academic year and thereafter, but does not deny that such a luncheon was held or that it furnished the names and addresses of the newly-appointed teachers who were to be invited guests at the luncheon.

The Board maintains that it has no adopted policy in regard to making available the list of names and addresses of newly-appointed teaching staff members. As a matter of practice, however, the Board insists it has been firm in refusing to release addresses of teachers to many civic bodies and state, county and city officials who have requested such information. According to the Board, it does annually prepare and make public a roster of names of all persons employed within the school district.

Petitioner argues that the Board's action constitutes an impairment of the Union's right to organize as guaranteed by the New Jersey Constitution, *Article I, Par.* 19, and the statutes, specifically *N.J.S.A.* 34:13A-5.3, which provides in pertinent part that:

> "***[P]ublic employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization***."

Petitioners point out that the right to organize is also guaranteed by the United States Constitution and is protected by the First Amendment. *Thomas v. Collins,* 323 *U.S.* 516, 65 *S. Ct.* 315, 89 *L. Ed.* 430 (1945); *McLaughlin v. Tilendis,* 398 *F. 2d* 287 (*7th Cir.* 1968) Petitioner asserts that the Board's action is an unjustifiable interference with the right of teachers to associate freely which is a violation of the First and Fourteenth Amendments of the United States Constitution. *Shelton v. Tucker,* 364 *U.S.* 479, 81 *S. Ct.* 247, 5 *L. Ed.* 2*d* 231 (1960); *Keyishian v. Board of Regents,* 385 *U.S.* 589, 87 *S. Ct.* 675, 17 *L. Ed.* 2*d* 629 (1967); *Wieman v. Updegraff,* 344 *U.S.* 183, 73 *S. Ct.* 215, 97 *L. Ed.* 2*d* 216 (1952) Petitioner avers that teachers must have the opportunity to learn about the availability of employee organizations and must have access to information concerning the desirability and effectiveness of the groups which they might join. Petitioner cites the decisions of the New Jersey Supreme Court in *Independent Dairy Workers Union v. Milk Drivers and Dairy Employees Local No. 680,* 23 *N.J.* 85 (1956) wherein the Court pointed out that "freedom of choice" in selecting one's negotiating agent is the very essence of collective negotiations, and in *Blum v. International Association of Machinists,* 42 *N.J.* 389 (1964) which held, *inter alia,* that:

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> "***Employees must be afforded informed opportunity to choose and unions must be afforded fair opportunity to inform and persuade.***" (42 *N.J.* at 403-404)

The Board asserts that the instant matter is strikingly similar to the case of *Jersey City Federation of Teachers, Local 752 v. Jersey City Board of Education and Jersey City Education Association, Hudson County,* 1972 *S.L.D.* 436, a case in which the Commissioner determined that the Board's negotiated policy, making available bulletin board display space and mail space exclusively to the local education association and not to the Union, was legal and proper. In *Jersey City, supra,* the Commissioner relied upon *Local 858 of the American Federation of Teachers v. School District No. 1 in the County of Denver and the State of Colorado,* 314 *F. Supp.* 1069 (*U.S.D.C. Colo.* 1970) and *Delaware Teachers v. De La Warr Board of Education et al.,* 335 *F. Supp.* 385 (*U.S.D.C. Del.* 1971). In the instant matter, the Board argues that the Commissioner's determination in *Jersey City, supra,* should control, particularly in view of the fact that petitioners in *Jersey City* relied upon the same legal arguments and the same authorities as does petitioner in this case.

In the judgment of the Commissioner, the instant matter is distinguishable from *Jersey City, supra,* for two specific reasons. Firstly, the policy attacked in *Jersey City* had been negotiated and formally adopted by the Jersey City Board. In this case the Board has no formal policy which bestows an exclusive right upon the local education association to receive a list of names and addresses of newly-appointed teaching staff members. Secondly, the exclusive rights granted by formal policy to the association in *Jersey City* involved the use of bulletin board display space and mail space within the public schools, and these privileges were intended to enable the recognized negotiating unit, the association, to keep its membership informed and advised of matters vital to the respective interests of the teaching staff members and the association. In the instant matter, the names and addresses in issue are those of teaching staff members who are newly-appointed, and have not had the opportunity to personally meet their colleagues. It follows, therefore, that the newly-appointed teaching staff members would have scant, if any, knowledge of the availability of the two employee organizations, prior to the beginning of their actual employment.

Given the circumstances hereinbefore described, it is the judgment of the Commissioner that fair play and equity require that the Board provide the names and addresses of newly-appointed teaching staff members to the minority organization, whenever the Board makes such information available to the recognized negotiation organization. The controlling principle is that stated by the Supreme Court of this State in *Blum, supra,* that:

> "***Employees must be afforded informed opportunity to choose and unions must be afforded fair opportunity to inform and persuade.***" (42 *N.J.* at 403-404)

This principle is supported by the decision of the New Jersey Supreme Court in the earlier case of *Independent Dairy Workers, supra,* that "***[f]ree-

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dom of choice in selecting one's [negotiating] agent is the very essence of collective [negotiations].***"

The Commissioner accordingly orders the Board of Education of the City of Elizabeth to make available to petitioner the names and addresses of newly-appointed teaching staff members whenever such information is made available to the Association.

COMMISSIONER OF EDUCATION

April 14, 1975

Elizabeth Teachers Union,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent,

And

Elizabeth Education Association,

Intervenor-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 14, 1975

Decision on Motion to Intervene by the Division of Controversies and Disputes, May 14, 1975

For the Intervenor-Appellant, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

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

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

The decision of the Commissioner of Education, as expressed in the letter of May 14, 1975, from the Division of Controversies and Disputes, denying Intervenor-Appellant's Motion to Intervene, is affirmed for the reasons expressed therein. The appeal by the Elizabeth Education Association is, therefore, dismissed.

September 10, 1975
Pending before Superior Court of New Jersey

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In the Matter of the Annual School Election Held in the Borough of Mount Arlington, Morris County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for candidates for membership on the Board of Education for three full terms of three years each at the annual school election held March 11, 1975 in the School District of the Borough of Mount Arlington, Morris County, were as follows:

	At Polls	Absentee	Total
William B. Anderson	173	–0–	173
Ruth Douglas	159	–0–	159
Carol Puzio	148	–0–	148
Robert Usher	146	1	147
Dolores M. Rivinius	133	1	134
Robert Traetta	129	1	130

Pursuant to a letter request from Candidate Usher, the Commissioner of Education directed a representative to conduct a recount of the ballots cast. This recount was conducted April 8, 1975 at the voting machine warehouse of the Morris County Board of Elections, Morris Plains.

At the conclusion of the recount there was no change in the reported machine totals for Candidates Traetta, Usher, and Rivinius whose names had been imprinted on the regular ballot strip. There were, however, significant changes in the recount totals for write-in Candidates Douglas, Anderson, and Puzio. An additional write-in vote for regular Candidate Usher was referred as an exhibit, along with eight other exhibits, to the Commissioner for decision.

At the conclusion of the recount, with all exhibits reserved, but with all other ballots cast by sticker pasters, or in variously written forms, counted toward the totals of each of the write-in candidates, the tally stood as follows:

	At Polls	Absentee	Total
William B. Anderson	181	–0–	181
Ruth Douglas	168	–0–	168
Robert Usher	146	1	147
Carol Puzio	146	–0–	146
Dolores M. Rivinius	133	1	134
Robert Traetta	129	1	130

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Included in such preliminary tally were five ballots cast for "Douglas," six for "Anderson," and three for "Puzio." The Commissioner finds that these ballots were properly recorded and added to the tally for Candidates Douglas, Anderson and Puzio pursuant to the decision of the Commissioner in *Joseph Flach, In re Madison Borough Annual School Election,* 1938 *S.L.D.* 176 (1935).

There remains for consideration the series of exhibits referred to the Commissioner. These exhibits are identified and considered for addition to the tally as follows:

Exhibit A – This exhibit consists of nine separate instances wherein there were three pasters affixed within the first of three appropriate boxes for write-in candidates (or wherein there were three written designations). In each instance the pasters or written designations were for Candidates Douglas, Anderson, and Puzio.

The Commissioner determines that these ballots may not be added to the tally since, in such circumstance, levers for regular Candidates Usher and Rivinius were not locked out but were operable, consequently a vote for five candidates was possible. As the Commissioner said *In the Matter of the Annual School Election Held in the Township of Hillsborough, Somerset County,* 1965 *S.L.D.* 74, 76:

> "***The Commissioner has observed, in his experience in recounting contested elections, that where large slot #1 is not locked out it is often necessary to void a ballot because more than one name has been written in this space. From his experience, the Commissioner would recommend that slot #1 not be used in school elections.***"

(See also Exhibit C, *post.*)

Exhibit B – This exhibit contains the scrawled, unintelligible names of two candidates in the third of three appropriate boxes for write-in candidates. In any event, for the reasons expressed in Exhibit A, *ante,* the Commissioner determines that the ballots may not be added to the tally.

Exhibit C – This exhibit contains a total of twelve ballots for Candidate Anderson, eleven ballots for Candidate Puzio, and nine ballots for Candidate Douglas which were recorded either by paster or in written form in the inappropriate boxes four through fifteen. The boxes were not locked out on the voting machine but their use was nonetheless improper and the Commissioner determines the ballots may not be added to the tally. In considering similar ballots *In the Matter of the Annual School Election Held in the School District of the Borough of Spring Lake, Monmouth County,* 1970 *S.L.D.* 102, the Commissioner said:

> "***Candidates Fay and Thermann filed nominating petitions prior to the election, and their names appeared on the ballot on the voting machines. The votes received by candidate Cannon were irregular ballots cast by

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writing in her name on the paper roll under the slots provided for such purpose on the voting machines.

"Examination of the paper rolls reveals that irregular ballots were cast at the two designated polling places and that the name of Dr. M. Cannon (and sixteen (16) other variations) was written in at *various lines on the rolls.*

"The names of candidates Fay and Thermann appeared on the ballot on each machine at levers 1 and 2 and opposite write-in slots 1 and 2 respectively. To cast a vote for a person whose name did not appear on the ballot, the voter had to open one of the first two slots opposite the names of the candidates which appeared on the ballot and write in the names of the person for whom the ballot was to be cast. *Votes written in on other lines must be ruled invalid. 'An irregular ballot must be cast in its appropriate place on the machine or it shall be void and not counted.' N.J.S.A.* 19:49-5 See also *Application for Recheck of Irregular Ballots, Borough of South River,* 26 *N.J. Super.* 357 (*Law Div.* 1953).

"In conducting the recount, therefore, only single votes appearing on lines one or two were counted; twenty-six votes written in on other lines were voided. *Such votes cannot be counted for the reason that the voter could have voted for more than two persons to be elected.* All variations of the name of candidate Cannon written on lines one and two were counted since the spelling or designation of given name or use of initials were sufficiently clear to reveal the intent of the voter.***"

(*Emphasis supplied.*) (at p. 103)

Exhibit D – The name of "Ruth D---(tom)" was contained on a paster ballot in the third box provided for write-in candidates. The Commissioner determines that this ballot is insufficiently detailed to be counted and may not be added to the tally.

Exhibit E – A write-in vote for Robert Usher is recorded in appropriate box number two as one of a series of three write-in votes in appropriate boxes one, two, and three. The Commissioner determines that this vote may be added to the tally of Robert Usher, a regular candidate whose name also appeared on the ballot strip. The lock-out mechanism of the voting machine precluded duplicate voting-by-lever for regular candidates.

Exhibit F – Two pasters for Candidates Anderson and Puzio respectively are affixed in the second box for write-in candidates. The Commissioner determines for reasons expressed, *ante,* that these ballots may not be added to the tally.

Exhibit G – This exhibit consists of ballots cast in written form for Candidates "Pucio" and "Anerson" in box number three for write-in candidates. The Commissioner determines for reasons expressed, *ante,* that these ballots may not be added to the tally.

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Exhibit H – This exhibit contains the single names "Douglas," "Anderson," and "Puzio" written in box number one of the boxes for write-in candidates. The Commissioner determines for reasons expressed, *ante,* that these ballots may not be added to the tally.

Exhibit I – One written ballot for Candidate Douglas and one paster ballot for Candidate Anderson are included together in box number one of the boxes provided for write-in candidates. The Commissioner determines for reasons expressed, *ante,* that these ballots may not be added to the tally.

The net result of the determinations with respect to the nine exhibits reserved for decision by the Commissioner is that the total vote for Candidate Usher has been increased by one vote and the final tally stands:

	At Polls	Absentee	Total
William B. Anderson	181	–0–	181
Ruth Douglas	168	–0–	168
Robert Usher	147	1	148
Carol Puzio	146	–0–	146
Dolores M. Rivinius	133	1	134
Robert Traetta	129	1	130

Accordingly, the Commissioner finds and determines that William B. Anderson, Ruth Douglas, and Robert Usher were elected on March 11, 1975 to seats on the Board of Education of the Borough of Mount Arlington for full terms of three years each.

COMMISSIONER OF EDUCATION

April 18, 1975

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In the Matter of the Annual School Election Held in the School District of the Township of Hillside, Union County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held March 11, 1975 in the School District of the Township of Hillside, Union County, were as follows:

	At Polls	Absentee	Total
Robert J. Conway	1511	12	1523
Anthony J. Deo	1279	12	1291
Gennaro Messano	1153	3	1156
William L. Taetzsch	1120	23	1143
William F. Lange	859	12	871
Philip R. Nicolaus	683	6	689

Pursuant to a letter request from Candidate Taetzsch dated March 17, 1975, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast, and to examine the poll lists and signature copy registers in order to determine whether nineteen alleged illegal voters cast ballots in the election. The recount was conducted on April 4, 1975 at the voting machine warehouse in Scotch Plains, and was limited to the ballots cast for candidates.

The recount disclosed that the tally of the ballots cast was unchanged from the results announced by the election officials at the close of the polls on March 11, 1975, as listed above.

The sealed packet of election results was obtained from the office of the Union County Superintendent of Schools, and the poll lists were taken to the office of the Union County Board of Elections in Elizabeth for comparison of the nineteen signatures of alleged illegal voters on the poll list with the signature copy register.

This examination disclosed that the nineteen named persons did not vote in the annual school election.

Accordingly, the Commissioner determines that Robert J. Conway, Anthony J. Deo and Gennaro Messano were elected to full terms of three years each on the Board of Education of the School District of Hillside Township.

COMMISSIONER OF EDUCATION

April 18, 1975

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Raymond Winter,

Petitioner,

v.

Board of Education of the Township of North Bergen, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Diamond, Grossman, Pitman, Udine & Anzaldi (Robert Diamond, Esq., of Counsel)

For the Respondent, De Bona, Goldberg & Johnson (Joseph J. Ryglicki, Esq., of Counsel)

Petitioner, a tenured teacher employed by the Board of Education of the Township of North Bergen, hereinafter "Board," appeals an action of the Board's Superintendent of Schools suspending him without pay on March 3, 1972. He charges that the continuation of this suspension without pay, absent the certification of charges pursuant to *N.J.S.A.* 18A:6-10 *et seq.* is violative of his statutory rights as a tenured teacher.

The Board admits that its Superintendent, with concurrence of the Board President, suspended petitioner without pay, but denies that he is entitled to the relief which he seeks.

This matter comes before the Commissioner of Education in the form of a stipulation of facts and Briefs of counsel as agreed upon at a conference of counsel held at the State Department of Education, Trenton, on October 8, 1974.

The relevant stipulated facts show that petitioner had taught for seven and one-half years in the North Bergen High School where he was a faculty member in good standing, having received only favorable evaluations. On February 28, 1972, he was arrested for *allegedly* committing an illegal, indictable offense in a public place in violation of *N.J.S.A.* 2A:115-1. Shortly thereafter the Superintendent asked petitioner to resign. This he declined to do, asserting his innocence of the act with which he was charged. On March 3, 1972, the Superintendent notified him by letter that he was suspended from his teaching duties, to which he responded in writing, through counsel, that he anticipated receipt of all salaries due him pursuant to his employment contract.

The matter of his suspension was never acted upon by the Board, nor were tenure charges certified at any time pursuant to *N.J.S.A.* 18A:6-10 *et seq.* Petitioner, who had no previous criminal record, thereafter received from the Board no compensation by way of salary or other benefits.

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The charge against petitioner was submitted to the Hudson County Grand Jury on or about March 22, 1972, which from that date until February 28, 1974, brought no indictment. On that date the matter was submitted to the Hudson County District Court on a complaint of allegedly violating the disorderly persons act, the alleged single offense being the same incident as that with which he had previously been charged on February 28, 1972.

The matter was brought to trial on July 24, 1974, and petitioner was adjudged not guilty. No further charges are pending against petitioner.

Petitioner recognizes that a superintendent can legally suspend a tenured employee with the approval of the president of the board, pursuant to *N.J.S.A.* 18A:25-6. He denies, however, that such suspension may be without pay. In this regard he cites *In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, Middlesex County,* 1971 *S.L.D.* 566; affirmed State Board of Education 1973 *S.L.D.* 773; affirmed Superior Court of New Jersey, Appellate Division, as *Emma Matecki v. Board of Education of the City of New Brunswick,* 1973 *S.L.D.* 773 wherein it was said that:

> "***The Commissioner takes notice of the fact that during the period of suspension beginning January 25, 1971, respondent received pay only until January 31, 1971. A local board of education has authority to suspend a tenured employee, without pay, only upon the certification of a formal charge to the Commissioner of Education. *N.J.S.A.* 18A:6-14 *** Respondent's suspension without pay prior to the certification of the charge on May 18, 1971, was improper. The Commissioner therefore orders the Board of Education of the City of New Brunswick to restore in full to respondent the amount of salary withheld from February 1, 1971, through May 18, 1971.***" (1971 *S.L.D.* at 573-574)

Petitioner argues that his suspension was improper in the light of *N.J.S.A.* 18A:6-10, which provides that no tenured employee:

> "***shall be dismissed or reduced in compensation, *** except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the Commissioner, *** after a written charge or charges *** shall have been preferred against such person, *** and filed and proceeded upon as in this subarticle provided.***"

In support of this contention, petitioner cites *In re Fulcomer,* 93 *N.J. Super.* 404 (*App. Div.* 1967). He contends that the Board has failed to comply with the statutory guidelines and is obligated to provide him relief as follows:

1. Reinstatement to his teaching position at the salary level he would have attained had no suspension occurred.

2. Payment of lost salaries from March 3, 1972 until the date of reinstatement.

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3. All pension and other emoluments to which he would have been entitled had he not been suspended.

4. Counsel fees and costs of litigation.

5. A public apology by the Respondent Board.

6. Punitive damages for material and substantial injuries resulting from his suspension.

Petitioner, faced with a consistent pattern of cases wherein the Commissioner has denied that he has authority to award punitive damages or legal fees, nevertheless cites *Jackson v. Concord Company,* 54 *N.J.* 113, 253 *A.* 2*d* 793 (1969) as evidence that the Director of Civil Rights has authority to award damages resulting from violations of the Civil Rights Act. By inference he contends that the Commissioner is similarly clothed with legal authority to order such an award.

Petitioner contends that for a period in excess of two years he has been wrongfully labeled and branded as a person of the lowest sort and deprived of his means of livelihood by his wrongful suspension at the hands of the Board and its agents. Having been cleared by the Courts, he now seeks to erase the remaining blight on his professional integrity and reputation.

The Board states that the Superintendent and the Board President acted as they did to protect all parties from a public outcry and thereafter assumed, in view of petitioner's relative inaction, that he had resigned.

The Board advances the doctrine of laches in support of its contention that petitioner is not entitled to the relief which he seeks. Thus, it argues that petitioner is estopped from seeking relief because of the disadvantage which has been worked on the Board by reason of his delay in seeking enforcement of his rights. 30A *C.J.S. Equity* 19 § 112 The Board avers that the public interest demands that when one appeals to the Commissioner for redress, it be done with reasonable promptitude. *Board of Education of Garfield v. State Board of Education,* 130 *N.J.L.* 388 (*Sup. Ct.* 1943); *Blanche Beisswenger et al. v. Board of Education of the City of Englewood, Bergen County,* 1971 *S.L.D.* 489 Thus, the Board argues that it was required to hire and pay a replacement teacher for the period in excess of two years which time petitioner waited before filing the within Petition.

In summary, the Board concludes that the Commissioner may award relief, if at all, for no more than forty-five days, the period of time within which, pursuant to *N.J.S.A.* 18A:6-13, a board must make a determination relative to written charges filed against a tenured employee. The Board reasons that since no determination was made herein within a period of forty-five days, any charges were, by inaction, dismissed and that petitioner was thereafter barred from seeking relief.

The Commissioner has thoroughly reviewed and considered the arguments

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of the parties. The facts of the matter make abundantly clear that the Superintendent, with the concurrence of the Board President, suspended petitioner because of the serious charges made against him and pending before the Court. The original charge under the criminal statutes was later modified to a lesser charge of being a disorderly person. This charge was, in turn, on motion of counsel, dismissed without requiring a defense, presumably for failure to present a *prima facie* case.

Petitioner, thereafter, promptly filed the within Petition on August 22, 1974. He was, while charges were still pending before the Court, without means to clear his name from that of which he stood accused. When he was acquitted, he promptly filed the within Petition, after which the case proceeded without undue delay by either party. Under these circumstances the Commissioner will not invoke the equitable doctrine of laches. Had the Board been under the impression that it allowed a charge or charges against petitioner (of which the Commissioner finds no record) to die from inaction at the end of the forty-five days within which it was required to act to certify such charge(s), it was under obligation to notify petitioner that he was then no longer under suspension and permitted to return to work. This it did not do.

Petitioner argues rightly that his continued suspension was illegal for failure by the Board to certify charges against him pursuant to *N.J.S.A.* 18A:6-10 *et seq.* His contention that the Superintendent was without authority to suspend him *without pay* is likewise correct. *Matecki, supra* It was said *In The Matter of the Tenure Hearing of Russell A. Fairfax, School District of the Village of Ridgewood, Bergen County,* 1974 *S.L.D.* 1126 that:

> "***The Commissioner finds that respondent's suspension without pay, by the Acting Superintendent***was *ultra vires****. The Board alone had the statutory authority to suspend respondent without pay, when it certified the tenure charges to the Commissioner.***" (at p. 1131)

Likewise, *In the Matter of the Tenure Hearing of Joseph McDougall, School District of the Borough of Northvale, Bergen County,* 1974 *S.L.D.* 170 it was determined that a suspension by a board with *partial* pay was wholly *ultra vires.* For a thorough review of suspension cases setting forth the responsibilities of boards of education relative to charges against tenured employees, see *James McCabe v. Board of Education of the Township of Brick, Ocean County,* 1974 *S.L.D.* 299, affirmed State Board of Education 315, affirmed Docket No. A-3192-73, Superior Court of New Jersey, Appellate Division, April 2, 1975.

In any event, the controverted suspension was illegal. The Commissioner so holds. He therefore directs the Board to restore petitioner to his tenured teaching position forthwith with such salary and other benefits as he would otherwise have received and attained from March 3, 1972 to the day of his reinstatement, subject only to mitigation in the amount of any earnings during the period of his suspension.

Petitioner's request that the Board be ordered to make public apology to petitioner is denied. To make such a requirement would serve no useful purpose.

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Controversies before the Commissioner are fully public in nature and the decision herein will appear in print in *New Jersey School Law Decisions* 1975. The dubious device of ordering a public agency to make public apology for an act which, although illegal, may have been the result of nescience, would serve no further function in removing the taint which petitioner understandably seeks to shed.

It remains to consider petitioner's further prayer for punitive damages and reimbursement for costs and legal fees. The Commissioner has consistently denied that he is clothed with authority to grant such prayers for relief. *Jack Noorigian v. Board of Education of Jersey City, Hudson County,* 1972 *S.L.D.* 266, aff'd in part/rev'd in part State Board of Education, 1973 *S.L.D.* 771; *Fred Bartlett, Jr. v. Board of Education of the Township of Wall, Monmouth County,* 1971 *S.L.D.* 163; *John S. Romanowski v. Jersey City Board of Education, Hudson County,* 1966 *S.L.D.* 219; *Celina G. David v. Cliffside Park Board of Education, Bergen County,* 1967 *S.L.D.* 192 *In the Matter of "T" v. Board of Education of the Borough of Tenafly, Bergen County,* 1974 *S.L.D.* 420, aff'd State Board of Education March 5, 1975, it was said:

> "***[T]he Commissioner can find no authority of law whereby *** he could order the Board to pay an award of monetary damages to the parents of 'T' for expenditures for educational services they have privately obtained rather than availing themselves of the instructional program***." (1974 *S.L.D.*, at p. 429)

Petitioner relies upon *Jackson, supra,* in regard to the authority of the Commissioner to order an award of damages. In a lower court decision of this same case, found at 101 *N.J. Super.* 126 (*App. Div.* 1968), the Court stated that:

> "***The award of damages to a person suffering monetary loss as a result of the unlawful action of a third party has traditionally been limited to judicial proceedings. Power to award damages will not be extended to an administrative body unless the legislative purpose to grant such power is plainly indicated.***" (at p. 133)

However, the Supreme Court reversed one aspect of the decision of the Appellate Division of the Superior Court and said:

> "****N.J.S.A.* 10:5-17, dealing with the order the Director may issue upon a finding of unlawful discrimination, authorizes remedies directed to both the private and public aspects of the wrong. It presently provides in pertinent part:
>
> > 'If, upon all evidence at the hearing the director shall find that the respondent has engaged in any unlawful employment practice or unlawful discrimination as defined in this act, the director shall state his findings of fact and conclusions of law and shall issue and cause to be served on such respondent an order requiring such respondent

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> to cease and desist from such unlawful employment practice or unlawful discrimination and to *take such affirmative action, including, but not limited to,* hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership, in any respondent labor organization, or *extending full and equal accommodations, advantages, facilities, and privileges to all persons, as, in the judgment of the director, will effectuate the purpose of this act, and including a requirement for report of the manner of compliance.* The director shall have the power to use reasonably certain bases, including but not limited to list, catalogue or market prices or values, or contract or advertised terms and conditions, in order to determine particulars or performance in giving appropriate remedy.***' (Emphasis supplied). (at p. 124)

***

"Turning finally to the question of the Director's authority to order reimbursement for out-of-pocket loss suffered by an aggrieved individual in a housing accommodation case, we disagree with the Appellate Division and are firmly of the view that the Director has power to order the award he did here.

***

"Basically the question is whether the Legislature intended to give such power to the Director. Although it is not expressly granted in *N.J.S.A.* 10:5-17, heretofore quoted, an omission which the Appellate Division felt was fatal, we believe the implication is plain enough considering the broad language of the section in the light of the overall design of the act previously outlined. After first declaring that the Director's order shall require the respondent to cease and desist from the particular unlawful discrimination involved, section 17 further provides that the order shall additionally require that a respondent 'take such affirmative action***, as, in the judgment of the director, will effectuate the purpose of this act***.'-*i.e.*, positive action not limited simply to an injunction against continuance of the particular unlawful discrimination.

"***We have earlier held, in analogous interpretation situations, under this act, that terms like 'include' are words of enlargement and not of limitation and that examples specified thereafter are merely illustrative. *Fraser v. Robin Dee Day Camp, supra* (44 *N.J.*, at 485-486); *Levitt & Sons, Inc. v. Division Against Discrimination, supra* (31 *N.J.*, at 526). This is especially so here where the word 'including' is followed by the phrase 'but not limited to.'

"That the award of money damages for economic loss was not a remedy unthought of by the Legislature is clearly shown by the specific statutory authorization for 'back pay' in employment discrimination cases. Incidentally, that language, which appears to have been derived from the National Labor Relations Act, has been construed in cases under that statute to sanction an award to a workman of additional economic employment benefits on the thesis that '[M]aking the workers whole for

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losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.' *National Labor Relations Board v. Strong,* 393 *U.S.* 357, 359, 89 *S. Ct.* 541, 543, 21 *L.Ed.* 2*d* 546, 548 (1969).

"Nor are we persuaded by respondents' argument, to which the Appellate Division apparently gave weight (101 *N.J. Super.*, at 132), that where compensatory damages in housing discrimination cases are allowed, as in New York and California, the statutes specifically empower such relief, thus indicating a legislative intention to exclude in the absence thereof. A similar argument in an analogous problem of construction was rejected in *Levitt* (31 *N.J.*, at 527) as unpersuasive, and we think it is no more convincing here.

"No doubt the most forceful argument in support of the Director's power to award damages is found in the fact that the Legislature, by *L.* 1966, *c.* 17, § 7, inserted this sentence in *N.J.S.A.* 10:5-17:

> 'The director shall have the power to use reasonably certain bases, including but not limited to list, catalogue or market prices or values, or contract or advertisement terms and conditions, in order to determine particulars or performance in giving appropriate remedy.'

***

"Finally, it is clear that the judgment reposed in the Director by section 17 to take affirmative action was properly exercised in awarding this complainant the additional rental and traveling expenses he incurred because respondents wrongfully refused to lease him an apartment. Beyond that, we need not go at this time. Most persons in complainant's position are not financially able to pay increased housing costs while a long battle over their rights is being fought. If they are not to be awarded such extra expenses in the discrimination proceedings, they may easily be discouraged in making and pursuing legitimate complaints and, even if they are tenacious, their victory may indeed be an almost pyrrhic one. The Director should now proceed, in accordance with his original order, to ascertain and fix by supplemental order the exact amount of such damages to be paid.***" (at pp. 126-128)

The Commissioner in the matter before him finds within *Jackson, supra,* no reason to reverse his previous position in regard to the awarding of punitive damages. Those damages which the Supreme Court determined to be within the authority of the Director to award in *Jackson* were those which resulted from discriminatory practices beyond the scope of lost wages. They were not, however, such as to inflict punishment or penalty as are herein sought by petitioner who is otherwise made whole regarding his lost salary and attendant emoluments.

Most importantly, the Commissioner finds no comparable language in the

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education laws to that referred to by the Court in *Jackson, supra,* as "words of enlargement and not of limitation," *i.e.,* words such as "including" and "not limited to." *N.J.S.A.* 18A:6-30, 30.1

Jackson, supra, is thus found to be importantly distinguishable or otherwise inapplicable. Petitioner's prayers for an award for punitive damages and legal fees are denied. *Noorigian, supra; Bartlett, supra; Romanski, supra; David, supra; In the Matter of "T," supra*

COMMISSIONER OF EDUCATION

April 18, 1975

Ronald T. Glab,

Petitioner,

v.

Board of Education of the Borough of Belmar, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Joseph Hillman, Jr., Esq.

For the Respondent, Sim, Sinn, Gunning, Serpentelli & Fitzsimmons (Eugene D. Serpentelli, Esq., of Counsel)

For the Intervenor, Pappa, Manna & Kreizman (John C. Manna, Esq., of Counsel)

Petitioner, a resident of the Borough of Belmar and a former member of the Belmar Board of Education, hereinafter "Board," contends that the Board improperly directed that certain records in the office of the Board Secretary, pertaining to the Superintendent of Schools, be removed and destroyed. Petitioner prays that the Commissioner of Education direct the Board to restore the contested records and reimburse him for attorney fees and costs.

The Board denies that it violated any statute or rule pertaining to such records.

The Board and the Intervenor Superintendent of Schools assert that the Commissioner lacks jurisdiction in the instant matter since the records in question are governed by the Right to Know Law (*N.J.S.A.* 47:1A-1) which is not subject to interpretation by the Commissioner; and that the matter is moot because the records have already been destroyed.

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This matter is submitted for adjudication by the Commissioner on the Briefs of counsel.

There are three issues to be determined in this matter as agreed at a conference between the parties. They are:

1. Does the Commissioner have jurisdiction in this matter?
2. If so, is the matter moot because the records in question have been destroyed?
3. Assuming, *arguendo,* that the Commissioner has jurisdiction and the matter is not moot, did the Board violate any statute, State Board of Education rule, or decision of the Commissioner or the Courts, by removing the contested records and directing that they be destroyed?

The parties agreed not to comment about the content or the merits of the records now in dispute. The Superintendent has a tenured status.

At a special meeting of the Board on or about August 3, 1973, the following resolution was adopted:

> "BE IT RESOLVED BY THE BELMAR BOARD OF EDUCATION that the letter presented to Mr. Buller [Superintendent] from the Personnel Committee in reference to the above matter be noted and filed."
>
> (Board's Answer, at p. 1)

Prior to the adoption of this resolution, and because he had been previously presented with a copy thereof, the Superintendent requested, and by resolution of the Board was granted, an extension of time in which to reply to the resolution. That resolution reads in pertinent part as follows:

> "BE IT RESOLVED BY THE BELMAR BOARD OF EDUCATION that the ***request for a 30 day extension over the August 3rd, 1973 date be granted."
>
> (Board's Answer, at p. 2)

On March 21, 1974, the Board whose membership had changed substantially as the result of the February School Board election, adopted the following resolution:

> "In the minutes of the August 3, 1973, meeting of the Belmar Board of Education, it is recorded that the letter presented to Mr. Buller from the personnel committee be noted and filed. After consideration by the Board,
>
> "BE IT RESOLVED BY THE BELMAR BOARD OF EDUCATION THAT the motion of August 3, 1973 be rescinded and that all data concerning the matter be removed from the file and destroyed."
>
> (Petition of Appeal, at p.2)

By letter of March 22, 1974, the Board Secretary mailed the contested

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records and data to the Superintendent for destruction. The Board no longer retains any records regarding this matter. (Board's Brief, at p. 1)

The Commissioner has jurisdiction over controversies and disputes arising under the school laws (*N.J.S.A.* 18A:6-9), and the Board has the statutory authority to make, amend, and repeal rules (resolutions) for its own government and for the regulation and conduct of its employees. *N.J.S.A.* 18A:11-1 Thus, the Commissioner clearly has jurisdiction to examine the propriety and discretion of the Board's actions as represented herein.

N.J.S.A. 18A:11-1 reads as follows:

"The Board shall –

"a. Adopt an official seal;

"b. Enforce the rules of the state board;

"c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service***; 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."

At the August 3, 1973 Board meeting, the Board determined to place the controverted documents in the Superintendent's personnel folder. Petitioner states that the "adoption of the above resolution constituted the official disciplinary action of the ***Board*** in connection with the alleged misconduct of Mr. Buller." (Petitioner's Brief, at p.2) Petitioner asserts, further, that the Board was without authority to dispose of the records in question or to rescind its earlier resolution, and that the record filed with regard to the Superintendent was a public record, the destruction of which is controlled by rules and regulations adopted by the Commissioner. (Petitioner's Brief, at p.3)

The Commissioner does not agree. Executive Order No. 9, promulgated by former Governor Richard J. Hughes on September 30, 1963, reads in pertinent part as follows:

"WHEREAS, Chapter 73, P.L. 1963, finds and declares it to be the public policy of this State that public records shall be readily accessible for examination by the citizens of this State for the protection of the public interest *except as otherwise provided in said law;* and

"WHEREAS, said Chapter 73 provides that *all records which are required*

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by law to be made, maintained or kept on file by State and local governmental agencies are to be deemed to be public records, subject to inspection and examination and available for copying, pursuant to said law;***"

And,

"WHEREAS, *the public interest requires that the public records which are excluded from the application of Chapter 73 be excluded on a uniform and State-wide basis with full regard for the need to balance the right, in a democracy, of the public to know, against the risk of unintentional harm or injustice to individuals that might be occasioned by indiscriminate exposure of certain records containing data of a sensitive or personal nature without regard to the motivation or justification of those seeking to inspect or copy records;* ***"

And,

"NOW, THEREFORE, I, RICHARD J. HUGHES, Governor of the State of New Jersey, by virtue of the authority vested in me by Chapter 73, P.L. 1963, do hereby order and direct:

"1. All records, *other than records set forth in section 3 hereof* or records the subject of a regulation adopted and promulgated pursuant to the provisions of section 2 hereof or otherwise excluded under and pursuant to the provisions of Chapter 73, P.L. 1963, which specifically are required by statute to be made, maintained or kept by any State or local governmental agency shall be public records, subject to inspection and examination and available for copying, pursuant to the provisions of Chapter 73, P.L. 1963.***"

And,

"3. The following records shall not be deemed to be public records subject to inspection and examination and available for copying pursuant to the provisions of Chapter 73, P.L. 1963:

"***(b) *Personnel and pension records which are required to be made, maintained or kept by any State or local governmental agency****."
(*Emphasis supplied.*)

Each local school board is a governmental agency. *East Brunswick Board v. East Brunswick Township,* 48 *N.J.* 94, 108 (1966)

On November 15, 1974, Executive Order No. 11 formally rescinded the above cited Section 3 (b) of Executive Order No. 9. This latter Executive Order also provided a substitute provision for that portion which was rescinded. The pertinent part of Executive Order No. 11 reads as follows:

"***1. Section 3(b) of Executive Order No. 9 of Governor Richard J.

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Hughes is rescinded and any regulations adopted and promulgated thereunder shall be null and void.

"2. Except as otherwise provided by law or when essential to the performance of official duties or when authorized by a person in interest; an instrumentality of government shall not disclose to anyone other than a person duly authorized by this State or the United States to inspect such information in connection with his official duties, personnel or pension records of an individual, except that the following shall be public:

"a. An individual's name, title position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation from government service and the reason therefor; and the amount and type of pension he is receiving;

"b. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released;

"3. This Executive Order shall take effect immediately."

(Executive Order No. 11)

It may be seen that the controverted personnel records in the instant matter are excluded from public scrutiny by Executive Order No. 11. Therefore, the personnel records in question are not public records but are records which were made and subsequently discarded by the Board pursuant to its statutory authority. *N.J.S.A.* 18A:11-1

In *Joseph F. Shanahan v. New Jersey State Board of Education, Carl L. Marburger et al.,* dismissed Docket No. A-1084-71, Superior Court of New Jersey, Appellate Division, January 31, 1972, the Court commented as follows:

"***The Right to Know law, *N.J.S.A.* 47:1A-1 *et seq.*, declares it to be the public policy of this State that public records shall be readily accessible for examination by citizens of this State, with certain exceptions, for the protection of the public interest. One of the exceptions is where the examination of the record is governed by another statute.***"

In the instant matter, the contested records are governed by school law statute *N.J.S.A.* 18A:11-1.

Regarding the rescinding of its resolution dated August 3, 1973, the Board has the discretionary authority to rescind actions taken at earlier meetings where no vested interests accrue. *Marion S. Harris v. 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*

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County, 1964 *S.L.D.* 105; *Leon Gager v. Board of Education of the Lower Camden County Regional High School District No. 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 et al. v. Board of Education of the Borough of Roselle, Union County,* 1973 *S.L.D.* 526

Having determined, therefore, that the matter herein is not governed by *N.J.S.A.* 47:1A-1, that the Board acted within its statutory and discretionary authority, and that the matter is a controversy and dispute under the school laws within the jurisdiction of the Commissioner, the Commissioner further determines that there is no need to discuss its mootness.

The public interest demands that peace and harmony be maintained in the school district. *In re Fulcomer,* 93 *N.J. Super.* 404 (*App. Div.* 1967); *Dunellen Board of Education v. Dunellen Education Association,* 64 *N.J.* 17 (1973) It appears that the destruction of the contested records is an attempt by the Board to create harmony within its school district.

The Commissioner has previously determined that there is no provision in the statutes for payment of interest, costs, or legal fees. *Romanowski v. Jersey City Board of Education, Hudson County,* 1966 *S.L.D.* 219; *Noorigian v. Jersey City Board of Education, Hudson County,* 1972 *S.L.D.* 266, affirmed in part, reversed in part on other grounds, State Board of Education, 1973 *S.L.D.* 777

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

COMMISSIONER OF EDUCATION

April 18, 1975

You are viewing an archived copy from the New Jersey State Library.

In the Matter of the Annual School Election Held in the School District of the Township of Monroe, Gloucester County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on March 11, 1975 in the School District of the Township of Monroe indicated that the successful candidates were Frederick Straub, Jr., Mary Falciani, and Steven R. Ball. At a time subsequent to the election, however, the candidacy and election of Steven R. Ball were challenged by Candidate Sid Simpson who alleged, by letter of March 14, 1975 to the Commissioner of Education, that Mr. Ball had not met the residency requirements pursuant to the statutory mandate. *N.J.S.A.* 18A:12-1 He requested an "immediate action" by the Commissioner.

An inquiry with respect to the allegation was conducted on March 24, 1975 at the State Department of Education, Trenton, by a representative of the Commissioner. The record of this inquiry is directly before the Commissioner for consideration and for Summary Judgment since there are, at this juncture, no facts in dispute. Mr. Ball testified at the inquiry that although he had been a resident of Monroe Township for more than two decades to the month of February 1972, he had moved his residence to the Borough of Lindenwold, Camden County, during that month and had not resumed residency in Monroe Township until *June 15, 1973.* (Tr. 9) The time forward from that latter date to the election of March 11, 1975, comprises a period of approximately one year and nine months. The question for decision herein is whether this period of one year and nine months' residency in Monroe Township, even in the context of Mr. Ball's long residency in the Township prior to February 1972, qualified him for candidacy for the seat on the Board of Education to which he was elected.

The statute of reference with pertinence to this adjudication is *N.J.S.A.* 18A:12-1 which provides in pertinent part:

> "Each member of any board of education shall be a citizen and resident of the district *** and shall have been such for at least two years *immediately preceding* his appointment or election***."
>
> (*Emphasis supplied.*)

In the context of this statutory mandate, it is clear that Mr. Ball was not properly a candidate for the seat he purportedly won since he had not resided in Monroe Township for the requisite two year period "immediately preceding" the election. The Commissioner so holds.

This determination is consistent with a number of prior decisions of the Commissioner and the courts. *Joseph J. Flesch v. Walter P. Pierson, Jr., School District of Bordentown Township, Burlington County,* 1968 *S.L.D.* 133; *Alma Kathleen Beceiro v. John Anderson and Board of Education of the Township of*

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Holmdel, Monmouth County, 1967 *S.L.D.* 198; *Frank H. O'Brien v. Board of Education of the Town of West New York,* 1938 *S.L.D.* 31 (1912) In interpreting the statute, *ante,* in *Flesch, supra,* the Commissioner said:

> "***In at least two decisions the language of *R.S.* 18:7-11 [revised by *Chapter* 148, *Laws* of 1947] requiring a candidate to have been a resident of the district 'for at least two years immediately preceding his *becoming a member of the board,*' has been construed to mean that such qualification must be met at the time of the organization meeting of the new Board. See *Carrig v. Schember,* Docket Number L-3804-48, an unreported case in Lyndhurst, Bergen County, Superior Court, Law Division 1948, and *Lange v. Warren Township Board of Education,* 1949-50 *S.L.D.* 33.
>
> "Such language does not appear, however, in *N.J.S.* 18A:12-1, which states instead that the prospective member must have been a resident of the district 'for at least two years immediately preceding *his appointment or election.*' It is to be assumed that the Legislature is thoroughly conversant with its own legislation and the judicial construction placed thereon. *Barringer v. Miele,* 6 *N.J.* 140 (1951) *Asbury Park Press, Inc. v. City of Asbury Park,* 19 *N.J.* 183 (1955); *Miele v. McGuire,* 31 *N.J.* 339 (1960) Change in language in a statute ordinarily implies purposeful alteration in substance of the law. *Essex County Retail Liquor Stores Association v. Municipal Board of Alcoholic Beverage Control of the City of Newark, et al.,* 77 *N.J. Super.* 70 (*App. Div.* 1962); *Nagy v. Ford Motor Co.,* 6 *N.J.* 341 (1951) Moreover, words of a statute are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them. *U.S. v. Chesbrough,* 176 *F.* 778 (*D.C.N.J.* 1910); *State v. Sperry & Hutchinson Co.,* 23 *N.J.* 38 (1956); *Duke Power Co. v. Patten,* 20 *N.J.* 42 (1955) (*Emphasis in text.*)
>
> "The election of a candidate for board of education membership occurs when the canvass of the votes is tallied and announced following the closing of the polls on the day of the election. *N.J.S.* 18A:14-59 Respondent was elected on February 13, 1968. *He did not qualify for membership at that time by reason of insufficient residence.* The Commissioner finds, therefore, that respondent did not possess the statutorily required qualifications for membership on a board of education and *his election was invalid.****" (*Emphasis supplied.*) (at p. 134)

Thereafter in *Flesch, supra,* the Commissioner determined that the election should be set aside.

The determination herein is the same and, accordingly, the Gloucester County Superintendent of Schools is authorized and directed, pursuant to *N.J.S.A.* 18A:12-15, to appoint a qualified citizen to the vacant seat on the Board of Education of the Township of Monroe to serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION

April 22, 1975

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Jean Warren,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Stout, O'Hagan & Dowd (William F. Dowd, Esq., of Counsel)

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

Petitioner alleges that she was improperly prevented from being seated as a member of the Neptune Township Board of Education, hereinafter "Board," to fill an existing vacancy to which she claims she was properly appointed. Petitioner now seeks an order which would require the Board Secretary to administer to her the qualifying oath of office (*N.J.S.A.* 18A:12-2.1) to which she lays claim. The Board denies the allegations set forth herein and asserts that its refusal to seat petitioner to fill the existing vacancy is in all respects proper and legal.

Upon application, petitioner was granted an Order to Show Cause with Temporary Restraint issued by the New Jersey Superior Court, Law Division, Monmouth County, Honorable Merritt Lane, Jr. presiding, on March 26, 1975. That Order temporarily restrained the Board and the Board Secretary from "***making any appointment, administering any oath, or taking any other action designed or likely to bestow the office or the color of office deemed vacant***." This restraint was conditioned on petitioner "***applying to the Commissioner of Education for a ruling on the dispute, such application to be made within 10 days [of March 26, 1975] ***." Thereafter, a formal Petition of Appeal was filed before the Commissioner on April 3, 1975.

A hearing was conducted in this matter on April 10, 1975 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The parties filed Briefs in support of their respective positions. The report of the hearing examiner is as follows:

The relevant material facts, reported hereafter, are not in dispute.

Petitioner had been elected to the Board for a three-year term of office in February 1972. That term expired subsequent to the March 11, 1975 Board elections. Petitioner, obviously seeking to continue her membership on the Board, filed a nominating petition, but was defeated in her bid for reelection.

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In the meantime, however, a vacancy on the Board was created by the resignation of one of its members at the beginning of February 1975, almost a month and one-half before the election. The Board received eleven inquiries from citizens who sought to be appointed to the vacancy. Three of the eleven interested persons were interviewed by the Board on March 7, 1975, while six more persons were interviewed on March 12, 1975, one day after petitioner lost her bid for reelection. The incumbent Board President, who also sought reelection, was not successful at the polls.

It was at the informal meeting of the Board on March 12, 1975, that the outgoing Board President nominated petitioner to fill the existing vacancy. It appears from petitioner's pleadings (Petition of Appeal, Count Nine) and the Board's Brief, at page two, that individual members of the Board expressed the position that the three newly-elected Board members should be consulted in regard to the selection of a citizen to fill the vacancy. In this regard, petitioner pleads, at Count Nine:

> "After nearly two hours of deliberation by the Board, the President [of the Board] and Petitioner were called back into the room and were told that each member of the Board was to submit a choice of three names for the vacancy to the Board Vice-President by March 14, 1975."

The Board explains in its Brief, at page two, that:

> "***Several members took the position that the newly elected members should be consulted regarding the appointment. It was decided that the names of Mrs. Warren [petitioner] and two (2) of the interested applicants who had been interviewed, be submitted by the Board Vice-President ***to the newly elected members in order for them to indicate their preference.***"

In any event, the reorganization meeting of the Board was scheduled for March 21, 1975. The Board Secretary testified, however, that the Board President had requested him to call a special meeting of the Board for 7:30 p.m. on March 20, 1975, one day before the scheduled reorganization meeting, in order to fill the membership vacancy. Furthermore, the Board Secretary testified that the Vice-President of the Board telephoned him during the morning of March 20, 1975, and, on behalf of the Board President, requested him to prepare a motion to appoint petitioner to fill the Board vacancy that evening. The Board Secretary complied with that request and prepared the following motion: (J-1)

> *"NOMINATION FOR BOARD VACANCY*
>
> "I would like to offer the name of Mrs. Jean W. Warren to be appointed to the vacancy which exists on the Board of Education effective March 21, 1975."

Prior to the commencement of the special meeting conducted on March 20, 1975, the Board Secretary testified he gave the recommended motion, *ante,* to the Board Vice-President. It is apparent, and the Board Secretary so testified,

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that the recommended motion was amended because the Board adopted the following resolution in regard to petitioner's appointment to fill the vacancy: (J-1, Exhibit B)

> "***
>
> "President Kenny called the meeting to order at 7:30 p.m.
>
> "He immediately called for nominations for the vacancy.
>
> "Mr. Morris [the Board Vice-President] offered the nomination of Mrs. Jean Warren to be appointed to the vacancy which exists on the Board of Education *effective at the termination of her present term of office on March 21, 1975;* seconded by Mrs. Schneider.
>
> "There being no other nominations offered, a motion was made by Mr. Morris, seconded by Mrs. Schneider that the nominations be closed.***" (*Emphasis supplied.*)

Five of the eight Board members were present at this special meeting, including petitioner and the Board President. At least one of the three newly-elected members was seated in the audience. Petitioner and the Board President abstained from voting on the above-referenced resolution; the other three members cast affirmative votes. Accordingly, the vote result was three "ayes" and two "abstentions." The meeting was adjourned at 7:32 p.m. (J-1, Exhibit B) The Board member-elect, who was to assume his office the following evening at the scheduled reorganization meeting, testified that he attempted to object to this action of the Board but the President adjourned the meeting.

In regard to the Board's reorganization meeting of March 21, 1975, the Board Secretary testified that since 1970, he had followed the same agenda that had been used by the Board before 1970. (Board Secretary's affidavit, R-1)(See also copies of Board agendas for and minutes of prior reorganization meetings, J-2.)

It appears that prior to the March 21, 1975 reorganization meeting, the procedure was for the outgoing President or Vice-President of the Board to serve as temporary chairman. Then, the swearing in of members-elect occurred followed by an adjournment *sine die* of the 1974 Board. However, for the March 21, 1975 reorganization meeting, the Board adjourned *sine die,* whereupon the members-elect were sworn into office and assumed their seats, thereby creating the 1975 new Board. (J-1, Exhibit C)

After the 1974 Board adjourned for the final time at the 1975 reorganization meeting, the minutes of that meeting (J-1, Exhibit C) reflect that the three members-elect were administered their qualifying oaths of office. Immediately thereafter the minutes reflect that the following occurred:

> "***At this point the Secretary asked the Board Attorney for a legal opinion on the seating of Mrs. Warren, appointed by the Board at the

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March 20, 1975 special meeting [*ante*] to fill the vacancy on the Board for a one year unexpired term.***" (J-1)

In his response, counsel advised that the appointment of petitioner was invalid. Consequently, the Board Secretary did not administer the oath of office to petitioner, thereby giving rise to the instant matter.

In support of its determination not to administer the oath of office to petitioner, the Board argues that a local board of education is a noncontinuous body whose authority to act is limited to its own official life. Thus, the Board asserts, because the appointing board (the 1974 board) did not make petitioner's appointment effective prior to the conclusion of its own official life, such appointing authority is now within the purview of the 1975 board. In support of this argument, the Board cites *Kiamie v. Board of Education of the Township of Cranford,* 1974 *S.L.D.* 218; *Henry S. Cummings v. Board of Education of Pompton Lakes et al.,* 1966 *S.L.D.* 155; *Skladzien v. Bayonne Board of Education,* 12 *N.J. Misc.* 602 (*Sup. Ct.* 1934), affirmed 115 *N.J.L.* 203 (*E. & A.* 1935); *Evans v. Gloucester City Board of Education et al.,* 13 *N.J. Misc.* 506 (*Sup. Ct.* 1935), affirmed 116 *N.J.L.* 448 (*E. & A.* 1936); *Dickinson v. Jersey City et al.,* 68 *N.J.L.* 99 (*Sup. Ct.* 1902); *Fitch v. Smith,* 57 *N.J.L.* 526 (*Sup. Ct.* 1895).

The Board acknowledges that *N.J.S.A.* 18A:12-15 grants authority to local boards of education to fill vacancies in its membership and, in instances where the vacancy occurs within sixty days preceding the annual school election, such an appointment to its membership would bind the succeeding board. The Board argues, however, that the statute of reference does not provide any authority for making an appointment effective after its own official life ceases. The Board asserts that by making the appointment of petitioner effective at the termination of her then-present term of office on March 21, 1975, the 1974 Board would have ceased to exist and, accordingly, the responsibility to appoint would rest with the 1975 Board.

Finally, the Board asserts that the attempted action of the 1974 Board to appoint petitioner to the existing vacancy was an abuse of its discretion, arbitrary, and contrary to public policy. In this regard, the Board points out that the vacancy existed from the beginning of February 1975. During that time, however, the previous Board did exist and function at budget hearings, regular meetings, work sessions, finance meetings, and negotiating sessions. Consequently, the Board argues, the eleventh hour "special" meeting of the previous Board to appoint petitioner, who had been defeated at the polls, to the vacancy was an abuse of its discretion. Furthermore, the Board points out that the determination arrived at during the special meeting was reached by the five members present prior to the meeting and then that determination was presented publicly as a *fait accompli.* Thus, the Board argues, the 1974 Board did not act in good faith; rather, it merely attempted to extend petitioner's membership on the Board. Therefore, its action appointing petitioner to fill the vacancy must be invalidated on these grounds. In support of this argument, the Board relies upon *George I. Thomas v. Board of Education of the Township of*

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Morris, 89 *N.J. Super.* 327 (*App. Div.* 1965); *John E. Cullum v. Board of Education of the Township of North Bergen,* 15 *N.J.* 285 (1954); *Nathan Bernstein v. Donald Krom, et al.,* 108 *N.J. Super.* 176 (*Law Div.* 1969).

Petitioner argues that her appointment by the Board on March 20, 1975 to fill the vacancy on its membership was proper and legal.

Arguing that the *intention* of the 1974 Board was to appoint her to the vacancy, petitioner asserts that, contrary to the Board's position herein, every board of education appointment to fill a vacancy on its membership binds a succeeding board to the extent which an unexpired term spills over into the life of the new board which may be elected at an intervening election.

In regard to the Board's argument that the 1974 Board did not appoint petitioner to fill the vacancy during its lifetime, petitioner avers that this argument fails because, if the wording of the 1974 Board's resolution had been slightly different or, if the motive of that Board was to bind the 1975 Board, the 1974 Board certainly would have appointed her and sworn her into office on the evening of March 20, 1975. Petitioner argues that upon the passage of the appointing resolution to seat her to the vacancy, she believed that she would be sworn in during the reorganization meeting scheduled for the next evening, along with the members-elect.

Petitioner claims the change of established agenda for its reorganization meeting implemented on March 21, 1975, whereby the 1974 Board adjourned *sine die* and then the members-elect were sworn in, was deliberately calculated to frustrate the intention of that Board to appoint her to the vacancy.

Petitioner argues that the cases cited by the Board are not on point with the circumstances herein. Petitioner does cite in support of her position *Gerald Blessing v. Board of Education of the Borough of Palisades Park et al.,* 1974 *S.L.D.* 1133.

This concludes the report of the hearing examiner, the receipt of which is waived by the parties. Accordingly, the matter is referred directly to the Commissioner for adjudication.

* * * *

The Commissioner has reviewed the report of the hearing examiner as set forth above and observes the parties' waiver of its receipt.

The narrow issue to be determined is whether the action of the 1974 Board appointing petitioner to fill the existing vacancy on March 20, 1975, was carried out in a timely fashion to result in a valid and legal appointment.

The Commissioner observes that authority is granted to local boards of education to fill its own vacancies, with certain exceptions, all of which is set forth in *N.J.S.A.* 18A:12-15 as follows:

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"Vacancies in the membership of the Board shall be filled as follows:

> "a. By the county superintendent, if the vacancy is caused by the failure to elect a member, or by the removal of a member because of lack of qualifications, or results from a recount or contested election, or is not filled within 65 days following its occurrence.
>
> "b. By the county superintendent, to a number sufficient to make up a quorum of the board if, by reason of vacancies, a quorum is lacking, or
>
> "c. By the board in all other cases.

"Each member so appointed shall serve until the Monday following the next annual election unless he is apppointed to fill a vacancy occurring within the 60 days immediately preceding such election to fill a term extending beyond such election, in which case he shall serve until the Monday following the second annual election next succeeding the occurrence of the vacancy, and any vacancy for the remainder of the term shall be filled at the annual election or the second annual election next succeeding the occurrence of the vacancy as the case may be."

A group of persons, however, does not *de facto* nor *de jure* become a board of education pursuant to Education Law, Title 18A, until that group is legally constituted as a board of education at its organization meeting. *N.J.S.A.* 18A:10-3, as amended by *c.* 105, *L.* 1974 (See also *In the Matter of the Special School Election Held in the School District of the Borough of Clayton, Gloucester County,* 1960-61 *S.L.D.* 157.) It is firmly established, moreover, that each board of education, duly constituted, is a noncontinuous body whose authority is limited to its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute. *Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County,* 1973 *S.L.D.* 217, affirmed State Board of Education 1974 *S.L.D.* 1411; *Evans, supra*

The official life of each board of education, in the Commissioner's judgment, extends from the time it is formally organized until the succeeding year at the precise time the members-elect are administered their oaths of office and the board reorganizes. *Blessing, supra* The Commissioner observes, in support of this view, that *c.* 191, *L.* 1974, which was signed into law on December 26, 1974, and amends *N.J.S.A.* 18A:14-2, provides *inter alia:*

> "***Present board of education members whose terms expire in 1975 and whose successors shall be elected at the annual school elections to be held in March, 1975 shall continue in office until their successors are elected and qualified."

See also *In re Perrapato,* 1974 *S.L.D.* 525; *Barkus v. Sadloch et al.,* 20 *N.J.* 551 (1956); *Skladzien, supra.*

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Consequently, the Commissioner holds that the official life of the 1974 Board herein expired with its adjournment *sine die* at the opening of the reorganization meeting on March 21, 1975. Thereafter any official action to be taken by the Neptune Township Board of Education became the responsibility of the new Board.

Moreover, the wording of the resolution, *ante,* by which the 1974 Board allegedly appointed petitioner to fill the existing vacancy is fatally defective in this instance. By its own terms, the effective time of the appointment was at the expiration of petitioner's then-existing term of office. When her term expired, so too did the term of office of the 1974 Board itself. Thus, the effect of the nominating resolution passed at the special meeting of that Board was rendered ineffective. While local boards of education have authority to fill vacancies in their membership (*N.J.S.A.* 18A:12-15), no authority exists for an outgoing board of education to adopt a resolution, as herein, whereby an incoming board of education would be compelled to implement that resolution. The Commissioner so holds.

The Commissioner observes that the vacancy herein had existed for more than sixty-five days. Therefore, the Board, by not filling the vacancy in a timely fashion, lost its authority to appoint. Accordingly, the Monmouth County Superintendent of Schools is hereby ordered to select a person from among the qualified citizens of the Township of Neptune and appoint that person to the unexpired term of office on the Neptune Township Board of Education.

In regard to the agenda utilized by the Board for the reorganization meeting whereby the 1974 Board adjourned *sine die,* or, for the final time, no defect is found therein.

The Commissioner having found no basis to grant the relief requested, the Petition is hereby dismissed.

COMMISSIONER OF EDUCATION

April 22, 1975

You are viewing an archived copy from the New Jersey State Library.

Frank Giandomenico,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Samuel A. Curcio, Esq.

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

Petitioner was employed as a school janitor by the Board of Education of the Township of Winslow, hereinafter "Board," and was discharged on October 16, 1972. He asserts that he has a tenured status and, therefore, is entitled to a hearing pursuant to the Tenure Employees Hearing Law. *N.J.S.A.* 18A:6-10 *et seq.*

The Board denies that petitioner has tenure and asserts that he was terminated for just cause.

This matter is submitted to the Commissioner for adjudication on statements of facts, pleadings, exhibits, and Briefs. There is no issue of material fact in dispute. The main issue to be resolved is a question of law; that is, whether or not petitioner had acquired a tenure status prior to his termination. The relevant facts are set forth as follows:

Petitioner was employed by the Board as a full-time janitor under the following specific written contracts:

January 15, 1968 to June 30, 1968, at a salary of $316.66 monthly.

July 1, 1968 to June 30, 1969, at a salary of $4,400 per year.

July 1, 1969 to June 30, 1970, at a salary of $5,000 per year.

July 1, 1970 to June 30, 1971, at a salary of $5,250 per year.

July 1, 1971 to June 30, 1972, at a salary of $5,800. 12345

Petitioner sustained injuries in an automobile accident on January 9, 1972, and was unable to work for the remainder of his 1971-72 contract which terminated on June 30, 1972. The Board voted at its public meeting on September 11, 1972, to reemploy petitioner as a "***full-time night custodian—School #1, for the 1972-73 school year annual pro-rated salary of

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$6,300.00.***" (Petitioner's Brief, at p. 2) Petitioner was not tendered a written contract to sign for this employment, so none was signed. (Petitioner's Brief, at p. 3)

Between September 11, 1972, and October 16, 1972, the date on which he was terminated, petitioner asserts that he missed certain days when he should have been working because of the aggravation of his automobile injuries. The Board disagrees with petitioner's recollection of the events during this period of time and asserts that he was observed sleeping on the first evening back at work; that he was transferred to another school as a disciplinary measure; that he reported he was ill and left work early on September 18, 1972; that he was requested, by letter, to furnish a medical certificate explaining this absence; and that he did not comply with the Board's request. Thereafter, the Board voted to terminate him on October 16, 1972. (Exhibit B)

Petitioner asserts, also, that *N.J.S.A.* 18A:17-3 (Janitors Tenure Law) is unconstitutional in that it denies petitioner equal protection of the laws and due process of law under the Fourteenth Amendment to the United States Constitution and Article I of the New Jersey Constitution. This argument is based on the rationale that other school employees, for example teachers and/or secretaries, are afforded greater protection in their employment.

This brief recitation of the facts, *ante,* is sufficient to decide the question of petitioner's tenure.

N.J.S.A. 18A:17-3, regarding tenure of janitorial employees, reads as follows:

> "Every public school janitor of a school district shall, *unless he is appointed for a fixed term,* hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.***" (*Emphasis supplied.*)

Petitioner's claim to a tenure status is contrary to a long series of decisions rendered by the Commissioner, the State Board of Education, and the New Jersey Courts. Without exception, the decisions hold that tenure for janitors, unlike professional employees, is a matter of personal privilege which may be waived by the acceptance of employment for a definite term. Janitors may be employed without term, in which case they may not be dismissed without a showing of good cause. If, however, as in this instance, a janitor is appointed for a specific term, and he accepts the employment on that basis, no rights survive the expiration of the fixed term. See *Horan v. Orange Board of Education,* 58 *N.J.L.* 533 (*Sup. Ct.* 1895); *Hardy v. City of Orange,* 61 *N.J.L.* 620 (*E. & A.* 1898); *Lynch v. Irvington Board of Education,* 1938 *S.L.D.* 703, affirmed State Board of Education 705 (1934); *Calverley et al. v. Landis Township Board of*

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Education, 1938 *S.L.D.* 706 (1931), affirmed State Board of Education 709 (1932); *Ratajczak v. Perth Amboy Board of Education,* 1938 *S.L.D.* 709 (1934), affirmed State Board of Education 711, affirmed 114 *N.J.L.* 577 (*Sup. Ct.* 1935), affirmed 116 *N.J.L.* 162 (*E. & A.* 1936); *Williams et als. v. West Orange Board of Education,* 1938 *S.L.D.* 714, affirmed State Board of Education 718 (1933); *McGarry et als. v. Paterson Board of Education,* 1938 *S.L.D.* 732 (1925), affirmed State Board of Education 735 (1926); *Shepherd v. Seaside Heights Board of Education,* 1938 *S.L.D.* 737 (1935), affirmed State Board of Education 739 (1936), affirmed New Jersey Supreme Court as *Board of Education of Seaside Heights v. Shepherd,* 15 *N.J. Misc. R.* 394, affirmed 119 *N.J.L.* 413 (*E. & A.* 1937); *Kriser, Clark et al. v. Trenton Board of Education,* 1939-49 *S.L.D.* 61 (1937), affirmed State Board of Education 64 (1938), modified on other grounds, 122 *N.J.L.* 323 (*Sup. Ct.* 1939); *Whitehead v. Morristown Board of Education,* 1949-50 *S.L.D.* 65; *Mignone v. West Orange Board of Education,* 1965 *S.L.D.* 104; *Olley v. Board of Education of Southern Regional High School District,* 1968 *S.L.D.* 20; *Gilliam v. Board of Education of the Toms River Regional School District,* 1974 *S.L.D.* 540.

In view of the fact that petitioner was appointed in each instance as a janitor by separate actions of the Board for a specific period of time, the last four appointments being for one school year respectively, the Commissioner finds that by accepting such employment for a specific period of time petitioner waived any rights to the acquisition of tenure. The Board's formal resolution appointing petitioner for the 1972-73 school year did not contain a termination clause; therefore, petitioner is entitled to his full salary for the remainder of the 1972-73 academic year, mitigated by gross earnings received in other employment during the period October 16, 1972 through June 30, 1973. *Leonard V. Moore v. Board of Education of the Borough of Roselle, Union County,* 1973 *S.L.D.* 526; *Adam Martin v. Board of Education of the City of South Amboy, Middlesex County,* 1973 *S.L.D.* 496, affirmed State Board of Education 1974 *S.L.D.* 1412

The Commissioner determines also that the authority to decide the constitutionality of a statute is the exclusive function of the judiciary; therefore, the constitutional issue raised by petitioner, which was not discussed at the conference of counsel, need not be addressed. Except for the relief of back pay as directed, *ante,* the Petition of Appeal is otherwise dismissed.

COMMISSIONER OF EDUCATION

April 22, 1975
Pending before Superior Court of New Jersey

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Arthur Ringele,

Petitioner,

v.

Board of Education of the City of Garfield, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Arthur Ringele, *Pro Se*

For the Respondent, Michael J. Mella, Esq.

Petitioner, an attendance officer employed continuously since October 1, 1966 by the Garfield Board of Education, hereinafter "Board," alleges that he acquired a tenure status as Head Attendance Officer on December 21, 1972, when he was appointed to that position by the Board. Petitioner claims that his tenure status as Head Attendance Officer is protected by *N.J.S.A.* 38:16-1, known as the Veterans Tenure Act, and that the Board violated the provisions of this Act on April 12, 1973, when it relieved him of said position and appointed another person to succeed him. Petitioner avers that the Board's actions on April 12, 1973 in this regard are *ultra vires* and should be rendered a nullity.

The Board denies that petitioner has acquired a tenure status as Head Attendance Officer and that its actions of April 12, 1973, were improper or illegal in any way. The Board contends that the Petition of Appeal in the instant matter is untimely and should be barred by laches.

This matter is submitted for Summary Judgment by the Commissioner of Education on the pleadings, stipulations, and Memoranda of Law.

The undisputed facts are set forth as follows:

Petitioner was first employed as attendance officer by the Board on October 1, 1966 at a salary of $6,200. (PR-31) Petitioner continued to serve in this position until December 2, 1972, when the Board appointed him to the position of Head Attendance Officer without additional compensation. (PR-5) On April 12, 1973, the Board rescinded its previous appointment (PR-5) and reassigned petitioner as attendance officer. Another attendance officer was then appointed to succeed petitioner as Head Attendance Officer without additional compensation. (PR-6)

This other attendance officer was initially employed by the Board on December 22, 1959 at a beginning salary of $3,800. (PR-1) During the 1973-74 school year, petitioner and the other attendance officer each received salaries of $7,713 in their respective positions. (PR-2; PR-4) Petitioner and the other

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attendance officer are classified as "Attendance Officer[s]" in the job description approved by the Board. (PR-7)

The narrow issues to be decided in this matter are:

(a) Does petitioner enjoy a tenure status as Head Attendance Officer pursuant to the Veterans Tenure Act by virtue of his appointment to that position by the Board on December 21, 1972? (PR-5)

(b) Is petitioner's Appeal in the instant matter barred by laches?

Petitioner argues that *N.J.S.A.* 18A:38-33, which protects his tenure status as attendance officer, is without force and effect regarding his claim to tenure as Head Attendance Officer. Petitioner maintains that the attendance officer's tenure statute does not speak to the title of Head Attendance Officer, nor does it provide tenure protection for persons who are appointed to such positions without a "fixed" term. Accordingly, petitioner claims a tenure status as Head Attendance Officer pursuant to the statutory prescription of the Veterans Tenure Act by virtue of the fact that he is an honorably discharged veteran. (P-1) In support of this claim, petitioner cites several court decisions considered to be pertinent in this matter. *Maxwell v. Board of Commissioners of the City of Wildwood,* 111 *N.J.L.* 181 (*Sup. Ct.* 1933); *Gill v. Board of Education of Hamilton Township, Mercer County,* 44 *N.J. Super.* 79 (*App. Div.* 1957); *Greene v. Hudson County Board of Health and Vital Statistics,* 19 *N.J. Super.* 453 (*Law Div.* 1952)

Therefore, petitioner prays that the Board's appointment of his successor to the position of Head Attendance Officer be set aside by the Commissioner, and that the Board be directed to reinstate him to said position.

The Board admits that petitioner enjoys tenure as an attendance officer pursuant to *N.J.S.A.* 18A:38-33. It is also admitted by the Board that the attendance officer's tenure statute is silent with respect to the position of Head Attendance Officer.

The Board asserts that the absence of such specific statutory language in the instant matter does not render the statute a nullity, but, rather, permits the Board to use its own discretion in creating the title of "Head Attendance Officer" with identical functions as those it has already established for the position classified within the general category of "attendance officer." The applicable statute, *N.J.S.A.* 18A:38-33, reads as follows:

> "The services of all attendance officers of the public schools of a city district shall, after employment in such district for one year, be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, conduct unbecoming an officer, or other just cause, and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title."

Additionally, the Board rejects petitioner's claim to a tenure status as

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Head Attendance Officer pursuant to the Veterans Tenure Act. The Board asserts that petitioner was not compensated in such position, and therefore, the statutory prescription does not apply.

The applicable statute, *N.J.S.A.* 38:16-1, is quoted as follows:

> "No person now holding any employment position or office under the government of this State, or the government of any county or municipality, including any person employed by a school board or board of education, or who may hereafter be appointed to any such employment, office or position, whose term of employment, office or position is not now fixed by law, and receiving a salary from such State, county or municipality, including any person employed by a school board or board of education, who has served as a soldier, sailor, marine or nurse, in any war of the United States, or in the New Jersey State militia during the period of the World War, and has been honorably discharged from the service of the United States or from such militia, prior to or during such employment in or occupancy of such position or office, shall be removed from such employment, position or office except for good cause shown after a fair and impartial hearing, but such person shall hold his employment, position or office during good behavior, and shall not be removed for political reasons.
>
> "For the purposes of this section no term of office, position or employment of any person shall be deemed to be fixed by law or coterminous with that of the employing or appointing board or body by reason of the fact that such person was or is appointed or employed by a noncontinuous board or body; *provided, however,* that in no event is it intended that this act shall apply to appointments made for a fixed or stated period of time." (*Emphasis in text.*)

In support of this assertion, the Board relies on *Carluccio v. Ferber,* 18 *N.J. Super.* 473 (*App. Div.* 1952). Moreover, the Board avers that it has the statutory authority, as well as the responsibility according to *N.J.S.A.* 18A:16-1, to hire employees and assign them to various positions within the district for the purpose of facilitating the management functions and the internal operation of its school system.

Finally, the Board argues that petitioner's Appeal in the instant matter should be barred by laches. It is alleged by the Board that it did not receive petitioner's Petition of Appeal until April 4, 1974, approximately one year after the Board's action occurred, which is challenged herein by petitioner. The Board relies on *Marjon v. Altman,* 120 *N.J.L.* 16 (*Sup. Ct.* 1938) in support of its position. Accordingly, the Board requests that petitioner's prayer for relief be denied for the reasons previously set forth herein.

The Commissioner cannot agree with the petitioner's contentions and finds to the contrary that the facts, as well as the applicable law, indicate that petitioner is not entitled to a tenure status as Head Attendance Officer.

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Therefore, the statute under which petitioner claims tenure protection in such position, namely *N.J.S.A.* 38:16-1, known as the Veterans Tenure Act, is without force and effect in this instance.

To hold otherwise, in the Commissioner's judgment, would serve to frustrate the legislative intent of *N.J.S.A.* 18A:38-33, with respect to the manner in which tenure may be acquired by attendance officers. The Commissioner determines that the legislative intent of *N.J.S.A.* 18A:38-33 is to specifically extend tenure protection to only those persons employed in the category of "attendance officers" serving in "a city district" after their employment in such district for "one year."

The Commissioner holds that the Board has the power to assign or reassign the title of Head Attendance Officer to one of its attendance personnel in addition to the regular duties performed by such person as attendance officer.

The Commissioner also acknowledges that the Board may pay additional compensation as is appropriate for such assignment. However, the Commissioner is constrained to point out that, absent specific statutory authority, no tenure status accrues to such assignment other than that of attendance officer.

A similar matter was adjudicated by the Commissioner with respect to the statutory authority of local boards of education to make certain coaching and other assignments to non-certificated positions of regular teaching staff members in addition to their regular classroom duties. *Nello Dallolio v. Board of Education of the City of Vineland, Cumberland County,* 1965 *S.L.D.* 18; *Henry R. Boney v. Board of Education of Pleasantville, Atlantic County,* 1971 *S.L.D.* 579

The Commissioner has considered the issue of laches asserted by the Board with respect to the amount of time which has elapsed subsequent to the time of the Board's action on April 12, 1973 (PR-6), contested by petitioner in his Appeal filed April 4, 1974. It has been held by the Commissioner on previous occasions that laches is an inexcusable delay in acting. The passage of time alone is not sufficient to constitute laches. Material prejudice to one party's interest as a result of the delay is a necessary element. Thus, it is stated in *Fischer et al. v. Board of Education of Woodbridge Township, Middlesex County,* 1965 *S.L.D.* 40:

> "*** 'Laches ordinarily connotes 'delay that works detriment to another.' *** For laches to operate as a bar to relief otherwise available, in the words of Mr. Justice Heher, 'the delay must be for a length of time which, unexplained and unexcused, is altogether unreasonable under the circumstances and has been prejudicial to the party asserting it or renders it very doubtful that the truth can be ascertained and justice administered.' *Stroebel v. Jefferson Trucking and Rigging Co.*, 125 *N.J.L.* 484; 15 *Atl. Rep.* (2*d*) 805.' *Board of Education of Garfield v. State Board of Education,* 130 *N.J.L.* 388, 393 (*Sup. Ct.* 1943)***" (at pp. 42-43)

Laches is also an affirmative defense and respondent in this case has the

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burden of proof. *John Hancock Co. v. Cronin,* 139 *N.J.Eq.* 392, 398 (*E. & A.* 1946) The validity of such a defense rests on the facts in the particular case. *Donnelly v. Ritzendollar,* 14 *N.J.* 96, 107 (*Sup. Ct.* 1953)

The Board has failed to establish that petitioner's delay was inexcusable and that its interests have been prejudiced as a result of the time which has elapsed. Accordingly, in the Commissioner's judgment, the evidence herein fails to support a finding of laches.

For the reasons expressed herein, the Petition is dismissed.

COMMISSIONER OF EDUCATION

May 1, 1975

Brick Township Education Association,

Petitioner,

v.

Board of Education of the Township of Brick, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, Anton & Ward (Donald H. Ward, Esq., of Counsel)

The Brick Township Education Association, hereinafter "Association," alleges that the Brick Township Board of Education, hereinafter "Board," has violated the terms of an agreement between the parties, as well as the provisions of *N.J.A.C.* 6:29-6.3, by permitting Jack Roberts to be employed as an athletic coach in the Brick Township School District.

This matter is submitted for adjudication by the Commissioner of Education on the pleadings, a joint statement of facts and a Motion for Summary Judgment filed by the Association.

The relevant facts concerning Jack Roberts, subject of these proceedings, are jointly stipulated as follows:

"***

1. He is not an employee of the Board of Education of the Township of Brick.

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2. He has assisted the athletic department as a 'trainer' for the last ten years. He receives no salary from the Board of Education.

3. The Board of Education of the Township of Brick has never taken any official action designating him as a trainer.

4. His services are performed on a voluntary basis."

(Joint Statement of Facts)

The Association alleges in its Motion for Summary Judgment that its objection to the Board's employment of Mr. Roberts as athletic coach and/or trainer was initially instituted as a grievance which the Board refused to discuss. It was this action, the Association asserts, which prompted it to file a Petition of Appeal with the Commissioner.

The Association further alleges that the applicable provisions of the New Jersey Administrative Code, *N.J.A.C.* 6:29-6.3 which have been promulgated by the New Jersey State Board of Education are controlling in this instant matter and are quoted as follows:

> "(a) No person not certified as a teacher and not in the employ of a board of education shall be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction; or coaching or for conducting games, events, or contests in physical education or athletics.
>
> "(b) Every person appointed subsequent to June 1, 1960, to coach, teach or train individual pupils or school teams for interschool athletic competition shall be a certified member of a school faculty in that same school district and shall be employed full-time during the regular school day when classes are in session. He shall be officially designated by the district board of education for the duties for which he is to be held responsible.
>
> "(c) School districts shall be permitted to employ certified, full-time employees of their constituent or sending districts, to work on a part-time basis in the interscholastic program, providing the superintendent of schools of the receiving district certifies an emergency exists to the county superintendent, upon whose approval the individual may be employed for one year."

Accordingly, the Association prays that the Commissioner enter a judgment:

> (1) declaring the employment of Jack Roberts by the Board as athletic coach and/or trainer to be illegal and invalid, and
>
> (2) directing the Board to terminate such employment.

The Board denies that the facts, *ante*, justify such a conclusion.

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In the Board's view, the Order issued on December 5, 1973 by the New Jersey Superior Court, Chancery Division, enjoining the Association from proceeding with its grievance to binding arbitration (Exhibit A), supports its contention that the matter was not subject to the terms of the negotiated agreement.

The Board further maintains that the provisions of *N.J.A.C.* 6:29-6.3 are without force and effect in view of the fact that said Jack Roberts is not an employee of the Board and that his services are rendered voluntarily without compensation.

The Commissioner has reviewed all the facts and contentions of both parties as set forth herein.

For the purpose of this discussion the Commissioner accepts the joint statement of the parties, *ante,* that the title attributed to the person who assisted the athletic department [coaching staff] in performing its official functions was that of "trainer" in the school athletic program.

In the Commissioner's judgment, a board of education lacks the authority to permit a person to assist the coaching staff with its responsibilities in the school athletic program who is not qualified pursuant to the provisions of *N.J.A.C.* 6:29-6.3.

The Commissioner so holds in the instant matter, notwithstanding the fact that these functions are currently being performed on a voluntary basis by a person who is neither employed nor compensated by the Board.

The Commissioner has previously pointed out in *Point Pleasant Beach Teachers Association v. Board of Education of the Borough of Point Pleasant Beach et al., Ocean County,* 1974 *S.L.D.* 241, that the purposes of *N.J.A.C.* 6:29-6.3 are twofold. These are: (1) to avoid the evil of having local boards of education employ professional athletes or other uniquely qualified persons on a minimal part-time basis as a guise for securing their coaching talents, and (2) to insure that boys and girls in the public schools will be coached and trained by teachers who have been trained to foster the development of the mind, body, and character of each pupil as the foremost goal.

Accordingly, for the reasons stated above, the Commissioner directs the Board of Education of the Township of Brick to adhere to the rules found in *N.J.A.C.* 6:29-6.3, if the services of a person for the position previously described herein are to be continued as an integral part of the organization and operation of the school athletic program.

COMMISSIONER OF EDUCATION

May 1, 1975

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Brick Township Education Association,

Petitioner-Appellee,

v.

Board of Education of the Township of Brick, Ocean County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 1, 1975

For the Petitioner-Appellee, Joseph Dempsey, Esq.

For the Respondent-Appellant, Anton and Ward (Donald H. Ward, Esq., of Counsel)

This matter is remanded to the Commissioner of Education for the purposes of: (1) clarification of the exact nature of the volunteer services performed by Mr. Roberts; (2) enumeration and description of the duties of a trainer within the meaning and scope of *N.J.A.C.* 6:29-6.3; (3) determination, on the basis of (1) and (2), *ante,* as to whether Mr. Roberts' volunteer services fall within the meaning and intent of *N.J.A.C.* 6:29-6.3.

November 5, 1975

In the Matter of the Annual School Election Held in the School District of the Borough of Hopatcong, Sussex County.

COMMISSIONER OF EDUCATION

DECISION

This matter is before the Commissioner of Education as the result of several letter requests by candidates to conduct an inquiry into alleged irregularities by one successful candidate in the annual school election conducted by the Hopatcong Board of Education, hereinafter "Board," on March 11, 1975.

The Commissioner directed his representative to conduct an inquiry into the allegations on April 7, 1975 at the office of the Sussex County Superintendent of Schools. The report of the representative is as follows:

Four of the five persons who submitted written requests (P-1, 2, 3, 4, 5) for an inquiry into the alleged irregularities testified in support of their complaints. Their collective testimony is that Douglas Hughes, Jr., a successful

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candidate for Board membership at the election, was electioneering, both inside and outside the polling place, contrary to the provisions of *N.J.S.A.* 18A:14-72 which states:

> "If a person shall on any day fixed for any election tamper, deface or interfere with any polling booth or obstruct the entrance to any polling place, or obstruct or interfere with any voter, or loiter, or do any electioneering within any polling place or within 100 feet thereof, he shall be a disorderly person and shall be punished by a fine not exceeding $500.00 or by imprisonment not exceeding one year, or both."

In regard to the allegation that Mr. Hughes electioneered outside the polling place, complainants testified that during the conduct of the annual school election, Douglas Hughes, Jr. had a campaign poster on the side of his automobile which was parked outside the Board's polling place. Complainants also testified that, in their judgment, Mr. Hughes' automobile was parked less than 100 feet from the polling place.

In this regard, Mr. Hughes testified that he was requested by a policeman, because of a complaint received, to move his automobile, which he did. Mr. Hughes neither admitted nor denied that his automobile was at any time parked within 100 feet of the polling place.

The Board Secretary, however, testified that she, in fact, measured the distance between Mr. Hughes' parked automobile and the entrance to the polling place. The Board Secretary testified that the distance was at least 117 feet.

The hearing examiner finds that complainants have failed to substantiate their allegation that Douglas Hughes, Jr. was electioneering outside the polling place in violation of *N.J.S.A.* 18A:14-72 by having a campaign poster on the side of his automobile within 100 feet of the polling place. Accordingly, it is recommended that this portion of the complaint be dismissed.

In regard to the allegation that Douglas Hughes, Jr. was electioneering inside the polling place, complainants testified that during the election he was wearing a large circular button on his lapel with his name printed thereon. Mr. Hughes testified that he did, in fact, have such a button on his person during the election. However, he testified that it was simply a matter of wearing that button which, in his judgment, identified him as a candidate so that he might challenge persons claiming their right to vote.

The Commissioner's representative observes that each candidate for board membership at a school election may "***act as a challenger***." *N.J.S.A.* 18A:14-15 The statute, *N.J.S.A.* 18A:14-17, requires that:

> "Each challenger shall wear a mark of identification as a challenger which shall be furnished to him by the secretary of the board."

The Board Secretary testified that she did issue a "mark of identification"

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to candidates to act as challengers. This identification tag (C-1), approximately two and one-half inches by five inches contained the following information:

"CANDIDATE
[Candidate's Name],
"School District: Hopatcong
"DATE OF ELECTION: March 11, 1975"

In issuing these identification tags to persons who were to act as challengers, the Board Secretary issued the following instructions: (C-2)

"Please wear badge at polls.***"

Mr. Hughes testified that the button he wore during the election served the same purpose as did the "mark of identification." Furthermore, no one complained of his button until near the close of the polls. At that time, Mr. Hughes testified that the judge of elections told him to remove the button from his person which he promptly did. The button worn by Mr. Hughes during the election contained his name only.

The Commissioner's representative finds that complainants failed to substantiate the allegation that Douglas Hughes, Jr. violated the provisions of *N.J.S.A.* 18A:14-72 by wearing a button with his name printed thereon.

It is recommended, however, that for future annual school elections the Board Secretary meet with the election workers appointed by the Board so that their responsibilities for conducting the election may be clearly understood.

Finally, the Commissioner's representative points out that a "mark of identification" as set forth in *N.J.S.A.* 18A:14-17 is to identify the wearer as a "challenger"—not as a "candidate," as was the case herein.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner adopts the findings of his representative and, accordingly, dismisses the allegations herein as being without merit.

The Commissioner does, however, direct the Board Secretary to henceforth meet with Board-appointed election workers to set forth their duties and responsibilities pursuant to *N.J.S.A.* 18A:14 *et seq.*

Finally, the Commissioner directs that marks of identification for purposes of identifying challengers at annual school elections are to be limited to that purpose.

COMMISSIONER OF EDUCATION

May 1, 1975

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Irene Cummins,

Petitioner,

v.

Board of Education of the Township of North Bergen, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Victor P. Mullica, Esq.

For the Respondent, Joseph V. Cullum, Esq.

Petitioner claims to have obtained a tenure status in the position of clerk-attendance officer in the employ of the North Bergen Board of Education, Hudson County, hereinafter "Board," and alleges that her termination of employment by the Board was therefore illegal. Petitioner seeks reinstatement to her position. The Board denies the allegations set forth in the Petition and avers that petitioner has no claim to employment with the Board.

Hearings were conducted in this matter on July 11 and August 28, 1974 at the office of the Hudson County Superintendent of Schools, Jersey City, by a hearing examiner appointed by the Commissioner. Subsequent to the last day of hearing, petitioner filed a Motion for Summary Judgment in her favor on the record established thus far. Thereafter, petitioner filed a Memorandum of Law in support of her position and the parties filed a joint Stipulation of Facts. The report of the hearing examiner is as follows:

The parties stipulate the following facts:

1. Petitioner began her employment with the Board on October 5, 1959, and continued in such employment until June 1973.

2. At the commencement of the 1973-74 academic year, petitioner reported for work on September 4, 1973, and was informed that there were no assignments available for her. Petitioner also reported for work on September 5 and 6, when she again was so informed.

3. It is agreed by the parties that petitioner was informed that no assignments were available for her because the Board had not reappointed her.

At this juncture, a review of petitioner's employment with the Board since October 5, 1959, is in order.

By Board resolution (P-1) dated October 8, 1959, petitioner was appointed "***a Principal's Clerk in the Public School system of the Township of

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North Bergen, in the County of Hudson, New Jersey at an annual salary of $2,600. payable in equal semi-monthly installments. Said appointment effective as of October 5, 1959.***"

Petitioner testified that upon her initial appointment she was assigned to the office of the Superintendent of Schools located in the Board of Education building. (Tr. I-12) There, until January 1, 1965 (Tr. I-21; Stipulation of Facts, at page 2; P-1B) petitioner was assigned duties such as: arranging for substitute teachers when regular staff teachers called in ill or were going to be absent (Tr. I-12); keeping a record of daily substitutes for payroll purposes and keeping records of teacher absences (Tr. I-12-14); handling milk orders and arranging for the daily delivery of milk for the Board's elementary schools, as well as maintaining the necessary financial accounts for the milk program (Tr. I-15); maintaining the daily figures for pupil transportation reimbursement for those pupils who resided in North Bergen but attended private school (Tr. I-16); assisting in preparing payroll checks for regular Board employees, professional and nonprofessional (Tr. I-17); answering telephone calls which came through the school's switchboard and private lines of the Superintendent and Board Secretary (Tr. I-19); acting as receptionist for the Superintendent; assisting in compilation of figures for use in the New Jersey School Register (*N.J.A.C.* 6:20-1.1); and using an adding machine and a typewriter in carrying out her assigned duties. (Tr. I-19-21)

Petitioner testified that during the period of time between her initial appointment by the Board effective October 5, 1959 and September 1965, she performed no attendance duties whatever. (Tr. I-22)

A Board resolution (P-1A) dated December 10, 1964, provided that petitioner "***is hereby appointed as an attendance officer in the North Bergen Public Schools at the per annum salary of $4500., effective December 15, 1964." Three weeks thereafter on January 7, 1965, the Board adopted the following resolution (P-1B):

> "RESOLVED, by the North Bergen Board of Education that the previous resolution [P-1A] dated December 10, 1964, and effective December 15, 1964, appointing Irene Cummins [petitioner] as an attendance officer in the North Bergen Public Schools, at a per annum salary of $4,500 is hereby rescinded.
>
> "BE IT FURTHER RESOLVED, by the North Bergen Board of Education that Irene Cummins is hereby appointed as a clerk-attendance officer in the North Bergen Public Schools at the per annum salary of $4,500., effective January 1, 1965."

Petitioner's testimony, however, that she performed no attendance duties until September 1965, stands unrefuted.

Petitioner testified that from September 1965 through June 1966, she was assigned as an attendance officer at the McKinley School (Tr. I-24), which was

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the first time since her original appointment she was assigned anywhere other than the Board of Education building. (Tr. I-25) While assigned as an attendance officer at the McKinley School, petitioner performed the duties of an attendance officer by checking attendance, looking for possible truants, and investigating possible truancy at the pupils' homes. (Tr. I-25)

Petitioner testified (Tr. I-25) that as of July 1966 the Board assigned her as a clerk in the McKinley School, where the year before she had been assigned as the attendance officer. The Board, on June 24, 1966, adopted the following resolution (P-1C):

> "RESOLVED, That the position of Clerk-Attendance Officer held by Irene Cummins be and it is hereby abolished for reasons of Economy and the services of the said Irene Cummins as attendance officer be and they are hereby terminated effective June 30, 1966, and she is hereby redesignated as a clerk, on an employment basis of eleven months per year at such salary as she was receiving prior to January 1, 1965, namely $4,000. per annum."

The Board admits (Tr. I-25) that between July 1, 1966 and September 1967 petitioner performed the duties of a clerk, and petitioner testified that during that same period:

> "I kept the records of the teachers' absences, tardiness[es] for the payroll, I did the register*** typed all correspondence for the Principal, inter-office correspondence, and any letters that had to be sent out and mailed; I kept the filing cabinet, all the files on every student, I registered all the new students, transferred students to other schools; I mimeographed all the tests for teachers and I did the list for graduation, honor rolls, report cards; I typed up all the monthly reports, abstracts and summaries, fire drills, the Principal's report; I did all invoices for repairs; I typed up all the inventory for each–for the next year's supply, janitorial supplies, books, art supplies; I took messages; I answered the phone and whatever was assigned to me by the Principal I did.***" (Tr. I-26)

Petitioner testified that as of September 1967, she was assigned to the high school. Specifically, her assignment was in the office of the high school vice-principal (Tr. I-28) where she remained until June 1973. During this period of time, petitioner explained that she performed duties in the vice-principal's office, or in the hearing examiner's judgment related thereto, from 8:15 a.m. to approximately 11:30 a.m. after which time she commenced duties related to the attendance office (Tr. I-28-32) until 2:30 p.m. when her day was completed.

According to the unrefuted testimony of petitioner, during the time between September 1967 and June 1973, she would begin her day by reporting to the guidance office to issue late passes to pupils who were tardy in reporting to class. (Tr. I-29) From there, petitioner testified, she would then report to the vice-principal's office at approximately 9:00 a.m. where she performed such duties as typing, answering telephone calls, processing pupils who cut classes, compiling locker lists, and distributing football tickets weekly during the season.

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Petitioner testified that at approximately 11:30 a.m., when she received the absentee list for the day, she would proceed to the attendance office, approximately 200 feet from the vice-principal's office (Tr. I-34), where the attendance records, as well as telephone numbers, of all pupils were kept. (Tr. I-36) There she would telephone the homes of absent pupils and, perhaps, make three to four visits to pupils' homes. (Tr. I-36)

In addition to the above-described duties, petitioner was also requested by her superiors to deliver certain reports to the Hudson County Superintendent of Schools' office. (Tr. I-38)

The hearing examiner observes that during this period of time, September 1967 through June 30, 1973, the Board, on May 22, 1971, adopted the following resolution (P-1D):

> "RESOLVED, by the North Bergen Board of Education, that the position of Clerk-attendance officer, held by Irene Cummins since September 1, 1967 was a misnomer in title inasmuch as she performed only the duties of attendance officer, thereby nullifying the hyphenated title, and
>
> "THEREFORE, BE IT FURTHER RESOLVED, that this position be and is hereby abolished for reasons of economy and the services of said Irene Cummins be and they are hereby terminated effective immediately."

Subsequent to that action, however, the Board adopted the following resolution (P-1E-1F) which reversed its immediately prior resolution (P-1D):

> "BE IT RESOLVED that Irene Cummins *** is hereby reinstated as a Clerk-Attendance Officer at the annual salary of $6,150.00 effective as of the 14th day of June, 1971."

As reported earlier, petitioner, who was assigned to the high school until June 30, 1973, reported for work on September 4, 5, and 6, 1973, when she was informed that no assignment was available for her. There is nothing in the record to demonstrate that the Board, in any fashion, acted to terminate petitioner's employment as of September 1973. Petitioner, a ten-month employee, has not been compensated since June 1973, and her pension contributions, that part of the obligation which is the Board's, ceased as of June 30, 1973, as did her Blue Cross and Blue Shield (Rider J) insurance protection. (Tr. I-41-42)

Petitioner's enrollment application to the New Jersey Public Employees Retirement System (P-3), certified by the Board and dated January 11, 1960, records her permanent appointment as "Principal Clerk," effective October 8, 1959.

The hearing examiner has reported the direct testimony of petitioner; he has carefully reviewed her testimony on cross-examination (Tr. I-120-177; Tr. II-47-114) and finds no significant inconsistency. Accordingly, the hearing

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examiner finds as fact the events as enunciated thus far. For the period of time between October 5, 1959 until September 1965, petitioner was a clerk in the employ of the Board. Thereafter, for the year beginning September 1965 through June 1966, she performed the duties of an attendance officer at the McKinley School. Subsequently, petitioner was assigned duties as a clerk at the McKinley School and then at the high school, although she did perform peripheral duties checking attendance while at the high school until June 1973.

The fact remains that from October 5, 1959 through June 30, 1973, petitioner was steadily employed by the North Bergen Board of Education as a clerk, notwithstanding her alleged dismissal, *ante.* (P-1D) Accordingly, she had every right to expect the privileges of tenure in her position, pursuant to *N.J.S.A.* 18A:17-2 which in pertinent part provides a tenure status for:

***

"b. Any person holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof, after

***

2. Employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year***."

Having achieved a tenure status, petitioner may not be dismissed or reduced in compensation unless and until charges against her are certified to the Commissioner and then only after such charges are proven to be true in fact, whereupon any penalty to be imposed is solely within the jurisdiction of the Commissioner. *In re Fulcomer,* 93 *N.J. Super.* 404 (*App. Div.* 1967)

In summary, it is the finding of the hearing examiner that petitioner has enjoyed the benefits of a tenure status since October 6, 1962, and any action by the Board since that time tampering with her position is null and void.

Given this finding of fact, it is unnecessary to set forth petitioner's arguments recited in her Memorandum which fortify her claim to a tenure status.

The hearing examiner recommends that petitioner be reinstated to her position as clerk in the employ of the North Bergen Board of Education with all back pay and benefits accruing to that position since the effective date of her illegal dismissal on September 1, 1973.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in this matter and observes that no exceptions to the hearing examiner's report have been filed pursuant to the provisions of *N.J.A.C.* 6:24-1.16.

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The facts educed clearly show that petitioner has met the statutory requirements needed to obtain a tenure status. *N.J.S.A.* 18A:17-2 Petitioner has acquired tenure as a clerk in the School District of North Bergen. Therefore, petitioner's termination by the Board was illegal, and it is hereby declared null and void.

Accordingly, the Commissioner directs the Board of Education of the School District of North Bergen to reinstate petitioner in an employment status commensurate with clerk's duties and/or those duties to which she was previously assigned. The Commissioner further directs the Board to pay petitioner all back pay and privileges accrued from the date of her illegal termination to the date of her reinstatement. Such back pay shall include pension contributions and all other fringe benefits to which she is entitled mitigated only by moneys earned by her in other employment since the date of her termination.

COMMISSIONER OF EDUCATION

May 1, 1975

In the Matter of the Annual School Election Held in the School District of the Township of Lower Alloways Creek, Salem County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for candidates for three full terms of three years each on the Board of Education of the Township of Lower Alloways Creek, Salem County, hereinafter "Board," at the annual school election held on March 11, 1975, were as follows:

	At Polls	Absentee	Total
Jack A. Nestor	216	–0–	216
Richard A. Jorgensen	194	–0–	194
W. Dave Strong	189	–0–	189
Clayton F. Sheets	183	–0–	183

[Here follows a list of names of persons receiving write-in votes. No one of these persons received sufficient votes to warrant consideration as being a remotely successful candidate.]

Pursuant to a letter complaint received from Candidate Sheets on March 13, 1975, followed by another letter from him on March 17, 1975, the Commissioner of Education directed his representative to conduct an inquiry into, and a recount of, the ballots cast at this election.

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The inquiry and recount were conducted on March 27, 1975 at the office of the Salem County Superintendent of Schools, Mannington.

The Commissioner's representative reports that of the 412 paper ballots recounted, seven of that total were not counted for purposes of the election of these candidates to three full-year terms. Six of the seven were not counted because while the instructions of the ballot state:

"Full Term Three Years (Vote for Three)"

each of the six voters cast votes for four or more candidates. Accordingly, it would be impossible to determine which three candidates were intended to have been selected. *In the Matter of the Annual School Election Held in the Constituent District of the Borough of Woodstown, Woodstown-Pilesgrove Regional School District, Salem County*, 1975 *S.L.D.* 199 (decided March 27, 1975); *In the Matter of the Annual School Election Held in the School District of Lakeland Regional, Passaic County,* 1973 *S.L.D.* 112 See also *N.J.S.A.* 19:16-4.

In regard to the seventh ballot which was not counted by the Commissioner's representative, this ballot still had the coupon attached to the upper portion of the ballot itself. Title 18A, Education Law, provides the following description of paper ballots to be utilized at school elections:

N.J.S.A. 18A:14-34

> "Each paper ballot shall have at the top thereof a coupon at least one inch deep extending across the ballot above a perforated line. The coupons shall be numbered consecutively from one to the number of ballots prepared for use in such election district. Upon the coupon and above the perforated line shall be the words 'To be torn off by the judge of election' and 'Fold to this line.' ***"

N.J.S.A. 18A:14-50 provides, in pertinent part:

> "The voter shall *** sign his name *** in *** the poll list and the election officer in charge of the poll list shall record therein opposite the voter's name, the number of the official ballot furnished to the voter for voting."

Finally, *N.J.S.A.* 18A:14-53 provides, in pertinent part, the procedure to be utilized in balloting by paper ballots as follows:

> "In all school districts using paper ballots after the election officers shall have ascertained that a voter is properly registered and qualified to vote, the election officers shall furnish to the voter one official ballot numbered to correspond with the number entered opposite the voter's name in the poll list ***."

It becomes obvious that if a ballot is deposited in the ballot box with the coupon still attached thereto, that ballot becomes identifiable with the voter. It

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is well established that where one ballot is distinguishable from another, that ballot shall not be counted. *N.J.S.A.* 19:16-4

The Commissioner's representative reports that all of the ballots not counted at the recount have numerical markings on the backs identical to the markings reported *In re Woodstown, supra.* Here, as in *Woodstown,* the election officials made the markings in order to be certain of their total count at the close of the election.

The results of the recount, excluding those ballots not counted, *ante,* are as follows:

	At Polls	Absentee	Total
Jack A. Nestor	217	–0–	217
Richard A. Jorgensen	193	–0–	193
W. Dave Strong	190	–0–	190
Clayton F. Sheets	182	–0–	182

In regard to the conduct of the election, the principal complaints raised by Candidate Sheets are two: (1) a person who lost his right to vote through disfranchisement did, in fact, vote in this election; and (2) the election workers did not compare the signatures of persons signing the poll list with the signature copy register.

In support of his first complaint, Candidate Sheets produced a letter dated March 26, 1975 from the Deputy Registrar of the Salem County Board of Elections which states:

> "According to our records, Donald Lee Hemple, residing at Buttonwood Avenue, Hancock's Bridge, New Jersey was disenfranchised on May 2, 1973." (C-1)

The Commissioner's representative reports that the poll list which was developed during this election contains the signature of a voter who claimed his right to vote by virtue of the following name and address:

> "317. ***
> "318. Donald Lee Hemple Hancock's Bridge
> "319. ***

It is observed, however, that there has been no proof offered by Candidate Sheets that the voter who claimed his right to vote by signing "Donald Lee Hemple" is, in fact, the same person who, according to the letter (C-1) from the Deputy Registrar of the Salem County Board of Elections, had been "disenfranchised on May 2, 1973."

In regard to Candidate Sheets' second complaint, an election official who was on duty during the whole of the election testified that the signature copy register was present and available for comparison of the signatures of persons

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claiming their right to vote by signing the poll lists. However, at no time did she ever open the signature copy register to compare the signatures with the signatures written in the poll list by persons claiming their right to vote, nor did she observe any other assigned election officers do so. This election officer explained that because of the relatively small size of this community she was personally acquainted with the large majority of voters. The Board Secretary, who was also present during the election, testified that she, too, did not observe any election officer at any time using the signature copy register to compare signatures.

* * * *

The Commissioner has reviewed the results of the recount of the ballots set forth above. It is clear and the Commissioner so holds that Candidates Nestor, Jorgensen, and Strong were elected to full terms of three years each on the Lower Alloways Creek Board of Education by the electorate at the school election conducted on March 11, 1975.

In regard to Candidate Sheets' first complaint set forth herein, the Commissioner points out that a person who has been "disfranchised" according to law, loses his right to vote in any election held pursuant to the provisions of Title 18A, Education Law. In fact, *N.J.S.A.* 18A:14-70 unequivocally states:

> "If a person convicted of a crime which disfranchises him shall vote at any election, unless he shall have been pardoned or restored by law to the right of suffrage, he shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding $200.00 or imprisonment at hard labor not exceeding two years, or both."

It is clear to the Commissioner that the Legislature intended only for those persons to vote in public elections who are, in all respects, qualified to vote. Suffrage is too critical to ignore the circumstances of this first complaint. However, the Commissioner is also cognizant that the person writing the signature of "Donald Lee Hemple" set forth in the poll list has not been proven to be, in fact, the same person referred to as "Donald Lee Hemple" in the letter of the Salem County Deputy Registrar. (C-1)

The Commissioner, considering the right to vote as a cornerstone of our free society, will however refer this matter to the Attorney General for whatever action he deems appropriate.

In regard to the election officers' failure to compare the signatures of those persons claiming their right to vote by signing the poll lists to the registered voters' signatures in the signature copy register, the Commissioner deplores such violations of law. The provisions of *N.J.S.A.* 18A:14-51 are explicit wherein that law states:

> "After the voter shall have so signed [the poll list] and before an official ballot shall be given to him, one of the election officers *shall compare the signature made in the poll list with the signature theretofore made by the*

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voter in the signature copy register, and if the signature thus written in the poll list is the same or sufficiently similar to the signature in the signature copy register, the voter shall be eligible to receive a ballot."

(*Emphasis supplied.*)

This statute is not permissive; it is mandatory for election officers to compare signatures. Furthermore, a person claiming the right to vote does not become eligible to vote until such comparison is made.

This failure to compare signatures is worsened by the possibility that at least *prima facie* one person perhaps not eligible to vote allegedly did vote. Accordingly, the Commissioner will grant Candidate Sheets an opportunity to review the 412 signatures on the poll list with the signature copy register under the supervision of the Commissioner's representative who will make the necessary arrangements with the Salem County Board of Elections. Thereafter, Candidate Sheets may bring forward proofs that persons not eligible to vote in the school election conducted by the Board on March 11, 1975, did, in fact, vote.

In regard to the election officers numbering the ballots during their efforts to tally the votes for accuracy, the Commissioner hereby orders that this practice cease immediately. *In re Woodstown, supra*

Finally, in anticipation of the 1976 school elections, the Commissioner of Education hereby directs the Salem County Superintendent of Schools to instruct the board secretaries under his jurisdiction to meet with appointed election officials and discuss with them their responsibilities during school elections.

The Commissioner retains jurisdiction as to Candidate Sheets' second complaint.

COMMISSIONER OF EDUCATION

May 1, 1975

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In the Matter of the Annual School Election Held in the School District of the Township of Lower Alloways Creek, Salem County.

COMMISSIONER OF EDUCATION

ORDER

This matter having been previously opened before the Commissioner of Education through a letter request from Clayton F. Sheets, hereinafter "petitioner," for a recount of the ballots cast at and an inquiry into the conduct of the annual school election conducted on March 11, 1975 by the Board of Education of the Township of Lower Alloways Creek, Salem County, hereinafter "Board"; and

It appearing that petitioner was defeated in his candidacy for Board membership by a total of eight votes as determined by the recount (*In the Matter of the Annual School Election Held in the School District of the Township of Lower Alloways Creek, Salem County,* 1975 *S.L.D.* 276 ; and

It appearing that testimony received at the inquiry established that the election workers appointed by the Board failed to compare the voters' signatures as set forth in the poll lists with those recorded in the signature copy register; and

It appearing that at least, *prima facie,* one voter who had been disfranchised did vote which matter has since been referred to the Salem County Prosecutor's Office; and

It appearing that by virtue of the testimony received during the inquiry in regard to the failure of the election workers to compare the voters' signatures may have led to other irregularities; and

It appearing that petitioner herein was granted leave by the Commissioner to review the 412 signatures on the poll lists with the signature copy register, which review was in fact undertaken on May 16, 1975 at the Salem County Board of Elections and under the supervision of the Commissioner's representative; and

It appearing that Faye Latham, William Lush, Edward Law, and Cheryl Plummer did in fact vote in the election conducted on March 11, 1975 by the Board of Education of the Township of Lower Alloways Creek but were not in fact properly registered;

NOW THEREFORE, the Commissioner of Education finds and determines that the four persons hereinbefore named and, in addition, one person who was apparently disfranchised did cast ballots in this election although not properly registered, for a total of five irregular votes. The Commissioner further finds that petitioner lost his bid for election to membership on the Board by a total of six votes; therefore, the four, possibly five, improper votes discovered by petitioner

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have no effect on the outcome of the election. The Commissioner, considering the right to vote as a cornerstone of our free society, will refer the matter of the four named persons who cast ballots but who were not properly registered to the Salem County Prosecutor's Office for whatever action he deems appropriate.

In all other respects the letter request of Clayton F. Sheets for a recount of and an inquiry into the ballots cast at the school election conducted by the Board of Education of Lower Alloways Creek is hereby dismissed this 29th day of July 1975.

COMMISSIONER OF EDUCATION

"J.D.," by her guardian *ad litem*, "W.D.,"

Petitioner,

v.

Board of Education of the Borough of Hawthorne, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Dominic Cavaliere, Esq.

For the Respondent, Jeffer, Walter, Tierney, Hopkinson & Vogel (Reginald F. Hopkinson, Esq., of Counsel)

Petitioner, hereinafter "J.D.," is a seventeen-year-old twelfth grade girl in Hawthorne High School who was suspended from school and later expelled by the Board of Education of the Borough of Hawthorne, hereinafter "Board," for setting a fire in the girls' lavatory room. She filed a Motion for Interim Relief and immediate reinstatement in school, asserting that expulsion was too harsh a penalty for her wrongful act.

Oral argument on the Motion was presented to a hearing examiner on April 4, 1975 at the State Department of Education, Trenton. A transcript of J.D.'s hearing before the Board prior to her expulsion and two other documents were admitted as evidence. Conflicting affidavits are also part of the record. The report of the hearing examiner follows:

There is no basic issue of material fact in dispute regarding the events in which J.D. was involved which culminated in her suspension and expulsion. The conflicting affidavits concern procedural due process leading to the suspension and expulsion of J.D. from school. A recapitulation of those events reveals that on February 24, 1975, J.D. boasted to some girl friends during lunch period that

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she "***was going to blow up the girls room." (Board Tr. 20) She said her friends didn't take her seriously at first so she set out to "make it look good." (Board Tr. 20) J.D. took a paper bag into the art room in which she poured some rubber cement, and then carried that package to the girl's lavatory room where her friends were waiting for her. She avers that she placed the bag of glue in a toilet bowl and lighted it on a dare. She testified before the Board that she knew the glue was flammable but did not know whether or not it would explode. She testified further that she lighted it as a prank and thought the water in the toilet bowl would extinguish any flames from the paper bag. (Board Tr. 23)

The record shows that the girls left the lavatory and the bag continued to burn, necessitating the evacuation of the high school because of fire and considerable smoke which had to be extinguished by the local fire department. The school was closed for the remainder of the day. Fire and smoke damage was estimated at $266.98.

J.D. admits that she set fire to the bag of glue and that her act was foolish, but she said she did not think it would burn, nor did she consider it dangerous at that time.

On March 12, 1975, after a hearing before the Board, J.D. was expelled from school because of her actions. She has been out of school since February 25, 1975.

Petitioner asserts that she has attended the Hawthorne schools for eleven and one-half years without serious incident, and that she has never been a behavioral or disciplinary problem for anyone. This incident represents her first serious problem in her entire educational experience; therefore, she asserts that expulsion is too harsh a penalty for her infraction.

The Board states that J.D.'s act was serious, dangerous, and represented the kind of act that threatened the lives of pupils in its care.

J.D. was tested by a school psychologist at the request of school administrators and that report reveals, *inter alia,* that J.D. should have further psychological examination.

Because of the serious nature of J.D.'s act, it is recommended that her request for reinstatement in school be denied; however, the Commissioner has addressed the question of a school's responsibility to its recalcitrant pupils, and those needing special attention, in several decisions. In *John Scher v. Board of Education of the Borough of West Orange, Essex County,* 1968 *S.L.D.* 92, the Commissioner commented as follows:

> "***Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible. It involves a momentous decision which members of a board of education, most of whom have had little specific training in education, psychology, or medicine are called upon to make.

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> The board's decision should be grounded, therefore, on competent advice. Such advice can be obtained from its staff of educators, from its school physician and school nurse, from its psychologist, psychiatrist, and school social worker, from its counsel, and from other appropriate sources. The recommendations of such experts are an essential ingredient in any determination which has as significant and far-reaching effects on the welfare of a pupil as expulsion from school. It is obvious that a board of education 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. The Commissioner suggests, therefore, that boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see that the child comes under the aegis of another agency able to deal with the problem.***" (at pp. 96-97)

See also *"R.K." v. Board of Education of Lakewood, Ocean County,* 1973 *S.L.D.* 343; *"M.W." v. Board of Education of the Freehold Regional High School District, Monmouth County,* 1975 *S.L.D.* 120 (decided February 26, 1975); *"J.F.G." v. Board of Education of the Freehold Regional High School District, Monmouth County,* 1975 *S.L.D.* 220.

Consistent with the Commissioner's language in *Scher, supra,* the hearing examiner recommends that the Commissioner direct the Board to place J.D. on home instruction and have her evaluated by its Child Study Team. This recommended relief will allow J.D. an opportunity to complete the required twelfth grade school work and graduate with her class. The hearing examiner recommends, also, that the Child Study Team report be strictly confidential and available only to the Board, the Commissioner, and to those persons designated by the Board who need this information.

These recommendations were made orally to the litigants by the hearing examiner and they have waived the filing of a hearing examiner's report by telephone message on April 7, 1975, so long as the oral recommendations remain unchanged. The written recommendations are the same as the oral recommendations.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and observes that the litigants have waived the requirement of a report, so long as the oral recommendations to them have not or will not be changed.

The Motion for Interim Relief and reinstatement is denied. The Commissioner is satisfied from a review of the record that J.D.'s act was an extremely serious one and she was rightfully removed from the school. Such acts cannot be tolerated nor taken lightly.

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In this case, J.D. was tested by a school psychologist, and the results indicate the need for additional psychological examination. The hearing examiner's report discloses that his recommendation that J.D. receive an evaluation by the Board's Child Study Team was accepted by the parties at the time of oral argument. Accordingly, the Commissioner directs the Board of Education of the Borough of Hawthorne to expeditiously complete an evaluation of J.D. by the Child Study Team and to implement the resultant recommendations to the fullest possible extent.

The Commissioner observes that J.D. is a twelfth grade pupil who will be eligible for graduation during June 1975, a period of time less than two months distant. Although the Commissioner does not require that every local board of education provide home instruction for every pupil expelled from school enrollment, in the total circumstances of this case home instruction is clearly warranted to afford J.D. the opportunity to graduate from high school. Therefore, the Commissioner directs the Hawthorne Board of Education to provide home instruction to J.D. during the remaining weeks of the current academic year.

COMMISSIONER OF EDUCATION

May 1, 1975

George Mazawey,

Petitioner,

v.

Board of Education of the City of Union City, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Scipio L. Africano, Esq.

Petitioner is a teacher who was employed by the Board of Education of the City of Union City, Hudson County, hereinafter "Board," for two consecutive academic years and was not reemployed for a third. Petitioner prays for reinstatement in his former position, together with any back pay to which he is entitled, on the grounds that the Board's action concerning his non-reemployment is procedurally and statutorily defective in that written notice was not given him by the Board, and that the Board's actions, taken at a nonpublic meeting, are illegal.

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A hearing was conducted in the office of the Somerset County Superintendent of Schools, Somerville, on December 12, 1974 by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner follows:

Petitioner was employed for the 1972-73 and 1973-74 academic years but was not reemployed for 1974-75. (J-1, Tr. 4) The Superintendent of Schools and the President of the Board testified that they attended a private conference session conducted by the Board on April 29, 1974 at which time the reemployment of petitioner was discussed, and that eight of nine Board members were present and decided by a consensus of six affirmative, one negative and one absention not to offer a reemployment contract to petitioner. (Tr. 24-26, 28-33, 36-40) The President thereafter directed the Superintendent to so notify petitioner "the following day." (Tr. 34) The Superintendent thereafter notified petitioner in writing as follows:

"April 30, 1974

***

"I regret to inform you that your teaching contract will not be renewed for the 1974-75 school year.

"If I can be of assistance to you in making future plans, please feel free to call my office for an appointment at your convenience."

[Signed, Superintendent]
(Exhibit A)

The minutes of the Board, at page 445, reflect that an action was taken at its public meeting on May 29, 1974, not to reemploy petitioner at the end of the 1973-74 school year. Petitioner alleges that this action, taken after April 30, is untimely and should be declared a nullity.

In the hearing examiner's judgment, the proofs are adequate through the testimony of the Superintendent and the President that petitioner's reemployment was considered on April 29, 1974 in a private work session of the Board. At that time, the Board decided not to reemploy petitioner and directed its Superintendent to notify petitioner of its determination. There is nothing in the record to contradict this testimony.

This is another Petition of Appeal among many challenging the method used by local boards of education in effectuating the statutes regarding reemployment. *N.J.S.A.* 18A:27-10, 11, 12, the statutes in question, read as follows:

"On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

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> "a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> "b. A written notice that such employment will not be offered." (*N.J.S.A.* 18A:27-10)

> "Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education." (*N.J.S.A.* 18A:27-11)

> "If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable." (*N.J.S.A.* 18A:27-12)

The Board denies that its notice to petitioner was defective (Exhibit A) citing *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207 and *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396, and asserts that it has met its statutory and contractual obligations to petitioner which terminated on June 30, 1974. Wherefore, the Board requests that the Commissioner enter a judgment in favor of the Board on the grounds that the Petition of Appeal is false in fact and insufficient in law.

The only issue to be determined in this matter is whether or not the notice sent to petitioner is adequate and proper pursuant to the relevant statutes.

The hearing examiner finds that the issue herein is *stare decisis. Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park, Bergen County,* 1975 *S.L.D.* 93 (decided February 27, 1975) In that decision the Commissioner quoted *Aitken, supra,* and *Burgin, supra,* as follows:

> "***It is clear, that it is the local board of education which must decide the status of its nontenured employees each year, and it must do so on or before April 30. It is equally clear that *subsequent to such decision,* but within the same time parameter, the *decision* must be transmitted by the Board through its administrative agents in 'written form' to such employees.***" (*Emphasis in text.*) (*Aitken* at 209)

In *Burgin, supra,* the Commissioner determined that *N.J.S.A.* 18A:17-20 read *in pari materia* with *N.J.S.A.* 18A:27-10 clearly permits that written notice can be

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"***given by any designated school administrator or board secretary, *after the board has made its decision* [not to renew contracts] *in public or private* [sessions] ***." (*Emphasis in text.*) (*Burgin* at 400)

The hearing examiner finds further that the Board has met the minimum requirements of the relevant statutes as interpreted by the Commissioner in *Bolger, supra.* The hearing examiner also finds that no legitimate complaint can be made against the public action of the Board on May 29, 1974, not to reemploy petitioner. This is merely an action to record in the permanent official minutes a previous determination, and does not negate nor diminish that earlier determination made in a conference session.

The hearing examiner recommends, therefore, that the Petition of Appeal be dismissed.

* * * *

The Commissioner has examined the record of the instant matter, including the report of the hearing examiner and the Memoranda of Law submitted by the respective parties. He observes that no exceptions to the report of the hearing examiner were filed by either party pursuant to *N.J.A.C.* 6:24-1.16.

Petitioner argues that the Board's determination not to renew his contract, decided at a nonpublic meeting, was invalid and must be set aside.

The Commissioner has at various times stated that such determination does not require formal action recorded in the minutes of a public meeting. In *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County,* 1968 *S.L.D.* 7, it was stated:

"The Commissioner knows of no statute or rule which requires a board of education to take some formal action with regard to the nonrenewal of a probationary contract which has expired. The employment of teachers who have not achieved tenure status in the district is a matter lying wholly within the discretionary authority of the board.*** *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962) Respondent was under no obligation to renew its agreement with petitioner, and in failing to take any action with respect to his reemployment it did not more than exercise the discretionary powers accorded it by statute.***" (at p. 9)

The Legislature, however, by passage of *N.J.S.A.* 18A:27-10 *et seq.*, effective September 1, 1972, required that a board of education notify in writing its nontenure teaching staff members by April 30 of its intention either to reemploy or not to reemploy them for the forthcoming academic year. Additionally, the Supreme Court of New Jersey in *Donaldson v. Board of Education of the City of North Wildwood, Cape May County,* 65 *N.J.* 236 (1974) determined that elemental fairness requires that a board give a statement of reasons for nonrenewal and an informal audience when such are requested.

Both the Legislature and the Courts have remained silent with respect to

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any requirement that a board be required to take affirmative action in a public meeting relative to non-reemployment of nontenured teachers. The Commissioner determines that this issue is *stare decisis.* The controlling law is set forth in *Bolger, supra.* Therein, it was said that:

> "***It is the Commissioner's considered opinion that problems regarding staff personnel should not be discussed by local boards of education in public sessions. Likewise, when a board discusses recommendations concerning the performance of nontenured teaching staff members with the purpose of determining who shall be offered reemployment, it is in the best interest of the teaching staff members, the board and the entire school system that such deliberations not be public. Conversely, when such final determinations have been made, the Commissioner strongly recommends that each local board of education inscribe in the minutes of a special or regular meeting, prior to April 30, that it has made a determination as to which nontenured teaching staff members will not be reemployed for the subsequent year, and that the school administrator or board secretary, as the case may be, has been directed to give a written notice of such determination to each affected teaching staff member prior to April 30. This procedure will ensure that a permanent record exists of the Board's efforts to comply with the statutory requirements. The names of the teaching staff members who will not be reemployed need not be inscribed in the minutes, if the board deems that this might be harmful to the individuals in their efforts to secure employment elsewhere. In any event, a list of the names of those teaching staff members who will not be reemployed, containing the date upon which the board made its determination, should be retained in the files of the board or the school administrator, although not in the official board minutes.
>
> "The Commissioner believes that adherence to the procedures described above will deter numerous instances of litigation in regard to the efforts of local boards of education to comply with the provisions of *N.J.S.A.* 18A:27-10, and will also insure fair play for the affected teaching staff members.***" (at pp. 96-97)

The Board's determination not to reemploy petitioner was legal and may not be set aside. The Board President directed the Superintendent to notify petitioner of the Board's decision not to reemploy him. This was done in full compliance with *N.J.S.A.* 18A:27-10 *et seq.* That the Board saw fit to again notify petitioner of his non-reemployment on May 29, 1974, is of no consequence. While this act was patently unnecessary for full statutory compliance, it was within the discretionary powers of the Board to do so and in no way negates the Board's earlier action. The Commissioner so holds.

Having thus determined that the Board's actions were in full statutory compliance and absent any showing of bad faith or arbitrary or unreasonable action, the Commissioner finds that the Petition is without merit. Accordingly, it is dismissed.

COMMISSIONER OF EDUCATION

May 1, 1975

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William J. Moore, as guardian of Desiree Moore,

Petitioner,

v.

Board of Education of the City of Vineland and Vineland High School Chapter of the National Honor Society, Cumberland County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Bruce M. Gorman, Esq.

For the Respondent, Adamo & Pagliughi (Joseph Adamo, Esq., of Counsel)

Petitioner is the father of a pupil, hereinafter "Desiree," formerly enrolled at the Vineland High School. Petitioner alleges that the Vineland Board of Education, hereinafter "Board," and agents thereof, acted arbitrarily, capriciously, and unreasonably in precluding Desiree from being invited to join the Vineland Chapter of the National Honor Society. Petitioner now demands judgment in the form of an order from the Commissioner of Education to compel the Board to induct her as a member of the Vineland Chapter with all rights and privileges pertaining thereto, retroactive to September 1973. The Board denies the allegations and avers that Desiree, by her own actions, disqualified herself from membership. The Board requests dismissal of the Petition.

A hearing was conducted in this matter on July 9, 1974 at the office of the Cumberland County Superintendent of Schools, Bridgeton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Although a review of the organization of the National Honor Society and its local chapters is set forth in *Tiffany v. Board of Education of the Township of Cinnaminson et al.*, 1974 *S.L.D.* 87, it is necessary to reproduce that review in order to place this dispute in its proper context.

> "***[T]he National Honor Society was organized by the National Association of Secondary School Principals in 1921 to counteract, at that time, a prevalent tendency among secondary schools to place undue emphasis upon individual performance in various athletic events. Thus, the National Honor Society was formed to promote and encourage the fundamental virtues of character, leadership, scholarship, and service,*** the attainment of those four virtues being requisite for individual membership. At the present time, should any secondary school wish to establish a local chapter of the National Honor Society (provided the school itself is approved by its own individual State Department of Education, or by a

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> regional accrediting association), all it need do is file an application, accompanied by the proposed local constitution formulated after a model suggested by the National Honor Society, by which the local chapter agrees to operate, and the registration fee. Upon recognition by the National Honor Society, the local chapter is granted all privileges of membership including the right to elect members, to secure the official insignia, and to secure other materials of the Society, which are available only through the national office.***" (at pp. 87-88)

Vineland High School has a local chapter of the National Honor Society, entitled by its local constitution (J-2) as the "Vineland Chapter of the National Honor Society," hereinafter "Society."

During the 1971-72 academic year, when Desiree was in the tenth grade at Vineland High School, she was required to elect the schedule of classes she desired for the subsequent academic year. Desiree testified that although she was required to take four major subjects in the eleventh grade, she actually enrolled for five major subjects. (Tr. 9) The fifth course, she explained, was an option of taking a regular course or an advanced course. Desiree chose the latter and enrolled in P.S.S.C. Physics. (Tr. 10)

Subsequent to the commencement of school in September 1972, Desiree attended the P.S.S.C. Physics class for approximately one month at which time she realized she was not comprehending the subject matter. She also was not satisfied with the manner in which the class was being conducted. (Tr. 16) Desiree testified that she initially discussed these concerns with the physics teacher who afforded "***no help that I thought could help me in the [physics] course***." (Tr. 18) She then spoke with her guidance counselor who advised her to discuss her problem again with the physics teacher and also reminded Desiree that pupils may not drop a course with a failing average at Vineland High School until midyear. (Tr. 18) Both Desiree and the physics teacher testified that, at that time, Desiree was not failing the P.S.S.C. Physics Course. (Tr. 18, 102)

In any event, Desiree returned to the physics teacher and once again discussed her problem with him. Desiree testified that the physics teacher denied her permission to drop the course. Subsequent to the second conference with the physics teacher, Desiree testified she consulted another teacher who advised her to drop the course. (Tr. 19) Thereafter, Desiree informed her parents (Tr. 19) of her misgivings and they, in turn, met with school officials. Petitioner testified that he visited with the guidance counselor and expressed his concern for his daughter's problems with the P.S.S.C. Physics course and the way it was being conducted. (Tr. 47)

The teacher of physics testified that the character of the course was "self-paced" (Tr. 92); that is, each pupil progressed through assigned material at his/her own rate while the teacher would provide assistance when necessary. (Tr. 93-94) Lectures were not a significant factor in the teacher's methodology. (Tr. 94) The teacher testified that two standard physics textbooks were utilized and,

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in addition, a manual he developed (J-3) for use in conjunction with the two texts. (Tr. 92) Desiree's testimony reflects her rejection of the course being taught on a "self-paced" basis (Tr. 8-42) and the use of the teacher's manual (J-3) which shall be discussed later. Petitioner testified that Desiree told him "***she would much rather have a teacher that would talk and lecture along with working at***[her] own pace and to me it sounded logical.***" (Tr. 46)

After expressing his concerns to the guidance counselor, petitioner testified that he discussed the question of Desiree dropping the course. Petitioner averred that the guidance counselor stated: "If Desiree does get out [drop the course], it may keep her off the National Honor Society." (Tr. 49) Petitioner testified that he objected to Desiree being punished in such a manner for a course which had not been described as being "self-paced" when she had first enrolled. (Tr. 49)

Although the guidance counselor was not called as a witness, she did submit the following report (J-5) to the principal:

> "Mr. Moore, Desiree's father, came in to request that his daughter be dropped from P.S.S.C. [the physics course].***
>
> "I explained to Mr. Moore that, according to school policy, the student must stay with the course until January unless there is a most unusual reason for dropping it. He indicated that he will see you [the principal] about this matter.
>
> "I mentioned to him, as I had to Desiree, that dropping this course probably will disqualify her for the National Honor Society." (Tr. 66-67)

The next day, petitioner and his wife met with the school principal and the P.S.S.C. Physics teacher. It appears from petitioner's testimony that as a result of this meeting Desiree was dropped from the course. (Tr. 54) Petitioner testified that the principal stated Desiree would not be excluded from the Society for dropping the course. (Tr. 54) The Principal, however, denies making such a statement (Tr. 148), and the teacher who was also present at the meeting does not recall the Society being mentioned. (Tr. 107) Petitioner asserts the principal made the statement after the teacher left the meeting. (Tr. 56) It is the testimony of the principal and of the physics teacher that this meeting degenerated into a verbal assault upon the teacher by petitioner's wife. (Tr. 107, 148)

Subsequent to petitioner and his wife meeting with the principal and the physics teacher, Desiree testified that she met with the principal who informed her she would be dropped from the P.S.S.C. Physics course, but that this matter would not affect her entrance into the Society the following year because of her "good record." (Tr. 21) The principal denies ever having made a representation or guarantee to anyone that Desiree would not be barred from the Society for dropping the course. (Tr. 148)

During the next academic year, which was Desiree's twelfth grade year at

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Vineland High School, she discovered that her name was not on the list of inductees into the Society. (Tr. 21) Desiree testified that she immediately went to the principal who subsequently informed her that she was not invited to join the Society because she had dropped the P.S.S.C. Physics course during her eleventh grade year. (Tr. 22)

Consistent with the Society's constitution (J-2), the election of members is made by a "***chapter council, consisting of the principal and members of the faculty***" (Constitution, Art. III, Section 1) based on the applicant's scholarship, service, leadership, and character. (Constitution, Art. II, Section 1) The Vineland Chapter has such a Council. (Tr. 151) In its consideration of each applicant for membership, the Council utilizes its own guidelines (J-4) for rating each applicant against the four criteria requisite for societal membership. It is agreed between the parties herein that the only question as to whether Desiree met the four criteria rests on "scholarship," as determined by the Vineland Council. Specifically, the Council's guidelines (J-4), set forth the following under the criteria "scholarship":

> "B. *Scholarship*
>
> "Candidates must have a scholastic average of not less than 85% with no subject below a general average of 80%.
>
> "Any student dropping a subject shall be ineligible for the National Honor Society. When a student wishes to drop a subject, his counselor shall remind him of this penalty.***"

When this dispute was developing, the principal sent a copy of the Council's guidelines (J-4) to the National Association of Secondary School Principals under whose aegis the National Honor Society functions. The director of that Association informed the principal by letter dated January 21, 1974 (J-1), that "***All of the guidelines stated [as developed by the Vineland Chapter] are acceptable under past regulations established by the National Council.***"

When petitioner was informed by Desiree during October or early November 1973 that she was not invited to join the Society, he and his wife again met with the principal. (Tr. 39) Petitioner testified that two persons, later identified by the principal as members of the Society Council (Tr. 168), were present, along with the guidance counselor, the principal, petitioner and his wife. (Tr. 59) Petitioner testified that he reminded the principal of what was allegedly said at the first meeting regarding Desiree's prospective membership in the Society not being affected by dropping the course, with the principal denying ever having said that. Petitioner testified the meeting concluded by his informing the principal that he, petitioner, would "***consult legal counsel against [him].***" (Tr. 65)

Petitioner bases his claim herein on three points: (1) that the teacher's use of the teaching manual (J-3) violates *N.J.S.A.* 18A:33-1 and 18A:34-1 (Tr. 197)

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and, accordingly, Desiree simply dropped a course which was being conducted illegally; (2) the guidelines (J-4) utilized by the Vineland Council are improper because no allowance is made for pupils to drop a course if they decide they do not like the course (Tr. 203); and (3) because petitioner was misled by the principal into believing that Desiree could drop the P.S.S.C. Physics course without being excluded from membership in the Society. (Tr. 194)

In regard to the teacher's use of the manual (J-3), *N.J.S.A.* 18A:33-1 provides in pertinent part that:

> "***[No] course of study shall be adopted or altered except by the recorded roll call majority vote of the full membership of the board of education of the district."

Likewise, in pertinent part, *N.J.S.A.* 18A:34-1 provides that:

> "Textbooks shall be selected by the recorded roll call majority vote of the full membership of the board of education of the district***."

Notwithstanding petitioner's assertion that the manual (J-3) constitutes a textbook and as such comes under the purview of the above-referenced statutes, the teacher testified that he has been teaching at Vineland High School for six years (Tr. 92), and that along with two standard textbooks (Tr. 92, 98), he developed the manual (J-3) to be used by pupils as a study guide for the P.S.S.C. Physics course. (Tr. 95-96) The teacher testified that his teaching experience led him to conclude that such a guide would assist his pupils to learn more effectively and efficiently. (Tr. 100) After he discussed the study guide with his department chairman, the teacher was informed that the Board would provide him funds for such a project. (Tr. 100) Subsequent to the development of the study manual (J-3), it was submitted to school authorities for review and approval prior to its use by the physics teacher in the classroom. (Tr. 100)

The hearing examiner finds that the manual (J-3) is, as described by the teacher, a guide to be used by pupils in support of the two textbooks used in the P.S.S.C. Physics course. In fact, a review of the introductory page of the manual (J-3) makes this quite clear where it is stated, *inter alia*:

> "***I [the teacher] have compiled this manual with the intent of providing you with a guide to use in progressing through your course in physics.*** The Directory [which is the first of three sections contained within the manual] will refer you to several sources. Among them are two books you will receive: *Terms, Tables, and Skills for the Physical Sciences,* by Bobby Woodruff, and *Physics,* by the PSSC. The latter book will be your primary source of information and will be referred to in the Directory as the textbook.***"

The guide utilized by the physics teacher does not constitute the adoption of a course of study, nor does the guide constitute an alteration of the P.S.S.C. Physics course. Rather, the manual (J-3) does constitute an effort on the part of the teacher to facilitate the learning of physics by his pupils. The hearing

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examiner does not find the manual (J-3) to be a textbook requiring Board adoption. Instead, it is found to be a teaching aid in conjunction with regular textbooks utilized during the P.S.S.C. Physics course for the benefit of pupils.

Accordingly, the hearing examiner finds that the use of the manual (J-3) by the teacher in the P.S.S.C. Physics course is not a violation of either *N.J.S.A.* 18A:33-1 or *N.J.S.A.* 18A:34-1.

In regard to petitioner's allegation that the National Honor Society guidelines (J-4) adopted by the Vineland Council are improper, no such finding may be made on the basis of the record herein. While the guidelines may be considered stringent, there has been no showing that they are improper.

Finally, in regard to petitioner's claim that he was misled by the principal into believing that even if Desiree dropped the course, she would still be eligible for membership in the Society, the hearing examiner observes that petitioner himself testified that the guidance counselor had informed him of the school policy the day before the first meeting occurred with the principal. The principal testified that he did not recall ever making such a statement to anyone. Even if the principal did make such a statement, such a decision could not be supported in light of the existence of the guidelines (J-4), without equal application to all pupils similarly situated.

For the foregoing reasons and absent any finding of merit to the allegations raised herein, the hearing examiner recommends that the Petition be dismissed.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions filed by petitioner in accord with *N.J.A.C.* 6:24-1.16.

Sponsorship of a local chapter of the National Honor Society is clearly voluntary on the part of the Board; further, there are no statutory provisions or rules of the State Board of Education which mandate specific modes of adoption of the rules of the National Honor Society by local high school chapters. The guidelines adopted by the Vineland High School Chapter of the National Honor Society have been accepted by the National Council (J-1), and there is no showing that the Board's guidelines for the election of pupils to membership in the National Honor Society are improper as suggested by petitioner.

Although petitioner may disagree with the methods of instruction used by the physics teacher, the supervision and evaluation of teaching techniques is a matter lying wholly within the control and discretion of local boards of education, as delegated to their administrative and supervisory staffs. Petitioner has no authority to make substantive determinations regarding the propriety of the methodology and the effectiveness of the physics teacher's instructional techniques. In this matter, petitioner reached a conclusion that the teacher's techniques were improper, relying solely on the negative reports from his

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daughter. Indeed, if a teacher's effectiveness were to be judged by parents primarily on the basis of reports made to them by their children, teachers would be subject to secondhand evaluations which could be based solely on personality, frivolous and fanciful concerns, or other considerations having no educational basis.

Regarding the manual (J-3) described herein, the hearing examiner stated correctly that it did not constitute the adoption of a course of study, nor did it constitute the alteration of the P.S.S.C. Physics course. The manual was used as an adjunct to the adopted text. Such innovations and supplemental instructional devices are commonplace in education. Good teachers have always supplemented their teaching with other materials, homemade models, self-constructed experiments, and guidelines to support their textbooks. To hold that the physics teacher's supplemental guidelines, as described, *ante,* must be formally adopted by the Board would place unreasonable and unnecessary demands on this and other local boards of education and unrealistic restraints on teachers.

Finally, the record amply supports the fact that petitioner's daughter was warned by the guidance counselor that she could be refused membership in the National Honor Society if she dropped a subject course. Petitioner relies on the principal's testimony that he could not recall advising petitioner's daughter that dropping the subject course would not affect her chances to be inducted in the National Honor Society. The record, however, reflects that the principal denied making such a statement. (Tr. 148) The record also shows that the meeting with the pupil's parents degenerated into a verbal assault upon the teacher by petitioner's wife. (Tr. 107, 148) The Commissioner cannot find as a fact that the principal made any promise to petitioner's daughter; therefore, no reliance can be placed on the doctrine of estoppel.

Finding no grounds on which any relief may be granted, the Commissioner determines, for the reasons expressed herein, that the Petition of Appeal be and hereby is dismissed.

COMMISSIONER OF EDUCATION

May 1, 1975

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Louis Alfonsetti and Lakewood Education Association,

Petitioners,

v.

Board of Education of the Township of Lakewood, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Starkey, Turnbach, White & Kelly (Edward J. Turnbach, Esq., of Counsel)

For the Respondent, Rothstein, Mandell & Strohm (Edward M. Rothstein, Esq., of Counsel)

Petitioner Alfonsetti, hereinafter "petitioner," is joined by the Lakewood Education Association in his claim to entitlement to two years of credit for military service on the salary scale administered by the Board of Education of the Township of Lakewood, hereinafter "Board." The Board denies that such entitlement exists.

This case is jointly submitted for Summary Judgment by the Commissioner of Education on the pleadings, stipulation of facts, and Briefs as agreed upon at a conference of counsel held at the State Department of Education, Trenton, October 4, 1974.

Petitioner was employed at the first level of the Board's master's degree salary scale for the school year 1973-74 at the salary of $9,355. He claims entitlement to a salary of $10,130, at the third level of the master's salary scale, by reason of his active military service from September 7, 1966 through November 8, 1968. He grounds his claim on *N.J.S.A.* 18A:29-11 which provides, *inter alia,* that:

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

Petitioners argue that statutory use of the word "shall" obviates its treatment as optional, thus preventing any limiting proviso not incorporated by the Legislature. They aver that the Board is required to extend to petitioner year-for-year equivalent employment credit on its 1973-74 salary scale for his two years of active military service. Petitioners cite in support of this contention

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a recent unpublished decision of the Court in *Westwood Education Association v. Board of Education of the Westwood Regional School District,* Docket A-261-73, Superior Court of New Jersey, Appellate Division, June 21, 1974, wherein it was said:

> "***Appellant, relying on 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, petitioners assert that the negotiated agreement between the Lakewood Education Association and the Board requires payment of the additional compensation, in that Article XXXI D states:

> "***[T]here shall be no discrimination in the hiring, training, assignment, promotion, transfer, or discipline of teachers***."

Petitioners allege that the Board is discriminating in arbitrarily granting equivalent military service to some employees it hires, while denying this benefit to petitioner. For these reasons, they pray for an order from the Commissioner directing the Board to compensate petitioner at the higher level, *ante.*

Conversely, the Board denies that petitioner is entitled to any military service credit on its salary scale and cites in support of this contention *N.J.S.A.* 18A:29-9 which provides that:

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

The Board argues it could legally negotiate a beginning salary at a point on the salary schedule provided for in *N.J.S.A.* 18A:29-7 acceptable to the contracting parties and thereafter make appropriate adjustments in accord with *N.J.S.A.* 18A:29-10 which provides that:

> "Any member covered by this subarticle who is below his place on the salary schedule according to the appropriate training level column and years of employment shall receive on September 1 of each year an adjustment increment until he shall have attained his place on the schedule according to his appropriate training level column and years of employment but any such member who is under contract for any year of employment at a salary of less than the amount provided for the first year of employment in the appropriate training level column of section 18A:29-7 shall receive an increase in his salary to the amount provided for the first year of employment in the appropriate training level column in

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lieu of his adjustment increment unless such adjustment increment is greater."

Thus, the Board contends that it is obligated, only after petitioner's first year of teaching, to adjust his salary upward in recognition of his years of military service.

The Board asserts that *N.J.S.A.* 18A:29-11, *ante,* relates only to the minimum salaries set forth in *N.J.S.A.* 18A:29-7, and that petitioner's salary, being several thousand dollars greater than that provided for therein, is in full compliance with *N.J.S.A.* 18A:29-4.1 which provides that a board of education may adopt salary schedules and policies *which shall not be less than those required by law.*

The Board refutes petitioner's argument relative to *Westwood, supra,* contending that it deals only with the withholding of increments and in no way relates to the establishment of petitioner's first-year salary.

Additionally, the Board argues that both its policy and the negotiated agreement are silent with respect to the granting of credit for military service. It therefore denies that its admitted practice of granting credit for military service to some but not to others is discriminatory, but lies within its discretionary powers in evaluating the talents of prospective candidates.

The Commissioner has considered and carefully weighed the respective arguments of the parties with respect to the controverted two years of military service credit to which petitioner makes claim. Since the Board's policy and its negotiated agreement are silent with respect to such entitlement, the matter is fundamentally one of statutory interpretion. The Courts have said that:

> "***In every case involving the interpretion 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 Commissioner finds the wording of *N.J.S.A.* 18A:29-11, *ante,* to be explicit, clear and unambiguous. The statute must be construed in accord with the express intentions of the Legislature. As was said by the Court:

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"***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 (1953) (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)

The Board's argument, if allowed to prevail and to be carried to its ultimate conclusion, would support a determination that a board of education could legally employ a first-year teacher with a master's degree and two years of military service at a salary of $5,500, the third level of column D of the schedule of minimum salaries set forth in *N.J.S.A.* 18A:29-7. Such a conclusion would be implausible in view of the inflationary spiral experienced since the scale was adopted by the Legislature in 1963. More importantly, such a construction would defeat the purpose of *N.J.S.A.* 18A:29-11, *ante,* which provides that a person who has served in the military forces "***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 ***school in this *** state***." To support the interpretation advanced by the Board, herein, would defeat the legislative intent which was to allow a teacher who has spent a given number of years in the service of his country a chance to be compensated, in recognition of those years of service, similarly as those who have not chosen to or have not been required to render military service.

The Commissioner in the similar case of *Dominick F. Colangelo v. Board of Education of the City of Camden,* 1957 *S.L.D.* 62, aff'd State Board of Education 66, held that a teacher who had not taught prior to his military service was not barred from the benefits of this law. Therein he said:

"***On the contrary, it is the opinion of the Commissioner that the Legislature intended section 6, Chapter 249 *** to apply to persons who had served in the military service and who are teachers, whether they become teachers before or after entering into such military service. Accordingly, the petition is granted and the respondent Board of Education is hereby directed to adjust the salary of the petitioner in accordance with the provisions of Chapter 249, P.L. 1954.***" (at p. 66)

The Board argues that petitioner must wait until succeeding years to receive the benefit of *N.J.S.A.* 18A:29-11, *ante,* in the form of adjustment increments. The Commissioner perceives no such legislative intent to delay the receipt of the benefits provided by the statute. Nor may the statute be limited in application to the salary schedule set forth in *N.J.S.A.* 18A:29-7. It is apparent that the application of *N.J.S.A.* 18A:29-11, *ante,* is broad wherein it states that:

"***Nothing contained in this section shall be construed to reduce the

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number of employment or adjustment increments to which any member may be entitled under the terms of *any law, or regulation, or action of any employing board* or officer, of this state, relating to leaves of absence."
(*Emphasis supplied.*)

Nor is the wording of the statute indicative that the Legislature intended that certain veterans working for the Board should receive benefits that were denied to others who had completed similar military service. Such benefits must be provided equally to all who have so served. The Commissioner so holds. Accordingly, it is directed that the Board of Education of the Township of Lakewood compensate petitioner in the amount of $775 which represents the difference between the third level of the Board's master's degree salary scale and the first level of that scale at which he was paid during the 1973-74 school year, and to maintain petitioner's position on such scale in succeeding years by including his military service as part of his total years of experience.

COMMISSIONER OF EDUCATION

May 1, 1975

John Gilliam,

Petitioner-Appellee,

v.

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

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 14, 1974

For the Petitioner-Appellee, Schneider, Solomon & Aronson (David Solomon, Esq., of Counsel)

For the Respondent-Appellant, Hiering, Grasso, Gelzer & Kelaher (Milton H. Gelzer, Esq., of Counsel)

This matter is remanded to the Commissioner of Education for clarification with particular reference to the following excerpt from his Decision of May 14, 1974:

"***It is further ordered that John Gilliam be deprived of the benefit of his salary from the date of his *improper* dismissal by the Board on December 4, 1972 through June 30, 1973.***" (*Emphasis ours.*)

March 5, 1975

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John Gilliam,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

For the Petitioner, Schneider, Solomon & Aronson (David Solomon, Esq., of Counsel)

For the Respondent, Hiering, Grasso, Gelzer & Kelaher (Milton H. Gelzer, Esq., of Counsel)

This matter has been remanded to the Commissioner of Education by the State Board of Education by its Decision of March 5, 1975, requiring clarification of that portion of the Commissioner's decision of May 14, 1974, which sets forth the penalty imposed upon petitioner. It is hereby clarified as follows:

The decision of May 14, 1974, remains unchanged except for the final two sentences thereof which are modified and shall hereafter be as follows:

> It is further ordered that John Gilliam be deprived of the benefit of his salary from December 4, 1972 through June 30, 1973. It is further ordered that the Board pay John Gilliam his salary less mitigation in the amount of his earnings, if any, for the period from July 1, 1973, until the date of his reinstatement.

COMMISSIONER OF EDUCATION

May 1, 1975

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Marilyn Frignoca,

Petitioner,

v.

Board of Education of the Northern Highlands Regional High School District, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Scafuro & Gianni, (Albert O. Scafuro, Esq., of Counsel)

Petitioner is a teacher who was employed for three academic years by the Board of Education of the Northern Highlands Regional High School District, hereinafter "Board," and was not reemployed for a fourth academic year. She asserts that the notice given her by the Board stating that she would not be reemployed was statutorily defective. Petitioner prays for reinstatement in her teaching position together with any back pay to which she is entitled.

The Board asserts that petitioner was notified orally and in writing prior to April 30, 1974, that she would not be reemployed for the 1974-75 academic year, in compliance with the statutory mandate.

This matter is submitted to the Commissioner for adjudication on affidavits, one exhibit, and Briefs. There are no facts in dispute.

An analysis of the overall performance of nontenured teachers was made by the high school supervisory and administrative personnel during March 1974, and petitioner was one of several teachers not recommended for reemployment for the 1974-75 academic year. Petitioner was notified personally by the high school principal that she would not be recommended for reemployment. She then requested a conference with the Superintendent of Schools to discuss her employment status and they conferred twice, once on March 29 and again on April 1, 1974. At those conferences petitioner was given reasons why she would not receive a recommendation for reemployment.

Thereafter, the Superintendent met with the Board on or about April 9, 1974 in a conference session to review the names of nontenured teachers submitted by him who were not recommended for reemployment. The Board decided not to reemploy petitioner and several other teachers who were likewise not recommended. The Superintendent was directed to notify petitioner in writing of the Board's decision. (Superintendent's Affidavit)

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On April 26, 1974, the Superintendent mailed petitioner the following letter:

> Please accept this note as official notification that we will not be offering you employment for the 1974-75 school year." (Exhibit A)

Although admitting all of the facts as set forth, *ante,* petitioner takes exception to the Board's decision not to reemploy her, which decision she avers was made improperly at a private conference session in contravention of the pertinent statutes.

Thus, the issue to be decided herein is whether or not the Board can decide in a private conference session that it will not renew specific teachers' contracts, or stated another way: Is the Board compelled by statutory prescription to take affirmative action at a public meeting not to reemploy certain nontenured teachers?

N.J.S.A. 18A:27-10 reads as follows:

> "On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either
>
> > "a. A written offer of a contract for employment for the next succeeding year*** or
> >
> > "b. A written notice that such employment will not be offered."

Prior to the enactment of this statute, the Commissioner commented on the non-reemployment of nontenured teachers in *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County,* 1968 *S.L.D.* 7; dismissed State Board of Education, 1968 *S.L.D.* 11; aff'd New Jersey Superior Court, Appellate Division, 1969 *S.L.D.* 202, as follows:

> "***Respondent took no action with respect to petitioner's third contract nor was any called for. It simply fulfilled its obligations under the contract and took no action to continue the relationship. The Commissioner knows of no statute or rule which requires a board of education to take some formal action with regard to the nonrenewal of a probationary contract which has expired. The employment of teachers who have not achieved tenure status in the district is a matter lying wholly within the discretionary authority of the board. *N.J.S.* 18A:11-1c, 18A:16-1, 18A:27-4 See also *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962). Respondent was under no obligation to renew its agreement with petitioner, and in failing to take any action with respect to his reemployment it did no more than exercise the discretionary powers accorded it by statute.***" (at pp. 8-9)

Subsequently, however, *N.J.S.A.* 18A:27-10 *et seq.* were enacted and the

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Commissioner decided *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207 and *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396 in which he held that written notice of nonrenewal may be given to a teacher by the school administrator or board secretary, after the board has made its decision in public or private and has directed him/her to do so.

In this case, petitioner does not deny that she was given timely written notice of her non-reemployment, nor does she deny that the Board made its decision and directed the Superintendent to so notify her. The essence of her complaint is that the Board's decision not to renew her contract was improperly made in a private conference session. She states:

> "***It is not suggested that the board of education must deliberate in public on their decision to reemploy or not to reemploy a non-tenure teacher, it is contended, however, that the decision not to reemploy must be made at a public session prior to April 30 of the year in question. For only if a decision is made in public is the public aware of it with a right to comment thereon.***" (Petitioner's Brief, at p. 7)

Petitioner cites *Cullum v. Board of Education of North Bergen, Hudson County,* 15 *N.J.* 285 (1954) at pages 292-294, and *Garrison v. Commercial Township Board of Education, Cumberland County,* 1971 *S.L.D.* 13, to support her argument for public meetings when nonrenewal decisions are made.

In the judgment of the Commissioner, the issue raised by petitioner has been previously determined and is therefore *stare decisis.* In *Burgin v. Board of Education of the Borough of Avalon, supra,* the Commissioner determined that a local board of education could discuss a teacher's performance and decide in a private conference session not to offer reemployment for the succeeding academic year. Subsequently, in *Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park,* 1975 *S.L.D.* 93 (decided February 27, 1975), the Commissioner reviewed his previous decisions in *Aitken, supra,* and *Burgin, supra,* and the applicable statutes, *N.J.S.A.* 18A:27-10 *et seq.* and held as follows:

> "***[T]he requirements of the statute are met when local boards of education decide in public session or executive conference session that reemployment will not be offered to certain teaching staff members and directs the school administrator or board secretary to give notification to such teaching staff members in writing of this determination on or before April 30.***" (1975 *S.L.D.* at p. 96)

For the guidance of all local boards of education the Commissioner provided the following instructions regarding the implementation of *N.J.S.A.* 18A:27-10 *et seq.* in *Bolger and Feller v. Board of Education of Ridgefield Park, supra:*

> "***It is the Commissioner's considered opinion that problems regarding staff personnel should not be discussed by local boards of education in

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public sessions. Likewise, when a board discusses recommendations concerning the performance of nontenured teaching staff members with the purpose of determining who shall be offered reemployment, it is in the best interest of the teaching staff members, the board and the entire school system that such deliberations not be public. Conversely, when such final determinations have been made, the Commissioner strongly recommends that each local board of education inscribe in the minutes of a special or regular meeting, prior to April 30, that it has made a determination as to which nontenured teaching staff members will not be reemployed for the subsequent year, and that the school administrator or board secretary, as the case may be, has been directed to give a written notice of such determination to each affected teaching staff member prior to April 30. This procedure will ensure that a permanent record exists of the board's efforts to comply with the statutory requirements. The names of the teaching staff members who will not be reemployed need not be inscribed in the minutes, if the board deems that this might be harmful to the individuals in their efforts to secure employment elsewhere. In any event, a list of the names of those teaching staff members who will not be reemployed, containing the date upon which the board made its determination, should be retained in the files of the board or the school administrator, although not in the official board minutes.

"The Commissioner believes that adherence to the procedures described above will deter numerous instances of litigation in regard to the efforts of local boards of education to comply with the provisions of *N.J.S.A.* 18A:27-10, and will also insure fair play for the affected teaching staff members.***" (1975 *S.L.D.* at p. 97)

In the instant matter, the Commissioner finds and determines that the Board's decision not to reemploy petitioner for the 1974-75 academic year was properly made in accordance with the statutory requirements, and the written notice mailed to petitioner by the Superintendent of Schools was correct and timely.

The Petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

May 2, 1975

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In the Matter of the Annual School Election Held in the School District of the Township of Mannington, Salem County,

COMMISSIONER OF EDUCATION

DECISION

For the Respondent, Warren W. Homan (Frank J. Hoerst, Esq., of Counsel)

The Board of Education of the Township of Mannington, Salem County, hereinafter "Board," conducted its annual school election on March 11, 1975. Thereafter, two unsuccessful candidates for Board membership requested that the Commissioner of Education conduct an inquiry into the legal qualifications possessed by one successful candidate to assume Board office.

Pursuant to this letter request, an inquiry was conducted into the matter by an authorized representative of the Commissioner on March 27, 1975 at the office of the Salem County Superintendent of Schools, Mannington. The report of the representative is as follows:

The two unsuccessful candidates, Betty Norman and Charles W. Porter, Jr., hereinafter "petitioners," allege that one candidate, T. Richard King, hereinafter "respondent," who was successful in his bid for Board membership at the annual school election, is not a resident of the Township of Mannington. They allege that the home in which Mr. King was residing with his family is now vacant and that his mailing address is listed as Woodstown, a neighboring community. (Tr. 6, 7, 9, 11)

Petitioners seek an order from the Commissioner which would remove Mr. King from membership on the Board.

Respondent testified that he moved into the community of Mannington from Newark, Delaware, during August 1970. Upon his arrival in Mannington, respondent testified, he and his family rented a home initially on a two-year lease basis. (Tr. 44) Thereafter, respondent rented the premises on a month-to-month basis with sixty days' notice therein to vacate to be provided either party. (Tr. 43)

Respondent testified that, during the time he was renting, he also purchased fourteen acres of land during November 1974, in order to build a home for his family. (Tr. 20-21) Although percolation tests have been taken on the property, respondent testified, he has not yet engaged a builder for construction. (Tr. 21)

In any event, on or about late November 1974, respondent was given sixty days' notice by his landlord to vacate the premises he was renting. Although he attempted to secure living quarters in Mannington, his efforts were unsuccessful. Consequently, respondent testified, he and his family are now living with his parents in Woodstown. (Tr. 25) Respondent asserts that he has every intention

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of moving "***into the house we are planning to build in Mannington.***" (Tr. 26) Furthermore, respondent, in furthering his claim to a Mannington residence, testified that his household furniture is being stored in Mannington (Tr. 26); that he still is a member of the Mannington PTA (Tr. 27); that he is registered to vote in Mannington Township (Tr. 18); that his son attends the Mannington schools (Tr. 25); that his driver's license still retains his address as Mannington (Tr. 32); and that his house in Mannington will be constructed by the fall of 1975. (Tr. 43)

The Commissioner's representative observes that respondent's move from Mannington to Woodstown occurred prior to the annual school election at which he was elected to Board membership. (Tr. 35) Finally, the Commissioner's representative points out that respondent had been appointed by the Board to fill a membership vacancy during the end of November 1974, after which he then ran for a three-year term of office at the March 11, 1975 annual school election.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his representative as set forth above.

Firstly, the Commissioner points out that the qualifications for a person to be a member of a board of education are set forth at *N.J.S.A.* 18A:12-1 which requires, *inter alia,*

> "Each member of any board of education shall be a citizen and resident of the district***."

The issue posed for determination herein is whether or not respondent may still lay claim to a Mannington residence while living with his parents in Woodstown.

On prior occasions the Commissioner has dealt with similar issues in *Beceiro v. Anderson and Board of Education of the Township of Holmdel, Monmouth County,* 1967 *S.L.D.* 198 *and Frank P. Hegyi v. Lorraine Tyler and the Board of Education of the Borough of Fieldsboro, Burlington County*, 1974 *S.L.D.* 1000 (decided November 6, 1974). In *Beceiro, supra,* the Monmouth County Commissioner of Registration determined that Anderson, the Board member whose residence was challenged, did not reside in the community of Holmdel. This determination was confirmed by Order of the Monmouth County Court. Accordingly, the Commissioner held that the *Beceiro* matter was rendered *res judicata* by the Courts.

In *Hegyi, supra,* Lorraine Tyler, the Board member whose residence was challenged, was found to have been involuntarily forced to seek other living arrangements by virtue of a fire that partially destroyed her home. The Commissioner concluded in *Hegyi, supra,* that Lorraine Tyler's move from the

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Borough of Fieldsboro was for a five-month period for the special and temporary purpose of remodeling her damaged home. Consequently, it was determined that Lorraine Tyler was a resident of Fieldsboro.

In the matter *sub judice,* however, the Commissioner finds and determines that T. Richard King is not, for purposes of Board membership, domiciled in the School District of Mannington. In the Commissioner's judgment, respondent voluntarily changed his domicile from Mannington to Woodstown when he ceased to reside in his rented house. The Commissioner holds that respondent's ownership of a parcel of land in Mannington upon which he intends to build a house is not sufficient to establish domicile within the Mannington School District.

Accordingly, the Commissioner finds and determines that T. Richard King did not at the time of the annual school election, and does not now, possess the residency qualification to remain a member of the Mannington Board of Education. Having found thusly, the Commissioner declares a failure to elect at the March 11, 1975 school election for one three-year term. Accordingly, the Salem County Superintendent of Schools is hereby directed to select a qualified resident of the School District of Mannington and appoint that person to the vacancy on the Board created by the failure to elect. Such person shall serve until the next annual school election at which time the electorate shall determine who shall complete the then unexpired three-year term of office.

COMMISSIONER OF EDUCATION

May 2, 1975

In the Matter of the Tenure Hearing of Elinor Larson,
Regional School District of Scotch Plains-Fanwood, Union County.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioner, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, Johnstone & O'Dwyer, (Jeremiah D. O'Dwyer, Esq., of Counsel)

Petitioner, the Board of Education of Scotch Plains-Fanwood, Union County, hereinafter "Board," has certified a series of charges of inefficiency

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against respondent, a tenured teacher in the Board's employ. A hearing with respect to such charges before a hearing examiner appointed by the Commissioner began on July 25, 1972, and was continued on July 31 and November 13, 1972. However, a series of delays and postponements then ensued until on April 11, 1973, the hearing was reconvened again at the office of the Union County Superintendent of Schools, Westfield.

On this latter date, respondent advanced a Motion for dismissal of all charges against her on the principal grounds that an interim decision of the Commissioner of Education *In the Matter of the Tenure Hearing of Robert M. Wagner, School District of the Township of Millburn, Essex County,* 1972 *S.L.D.* 650 (December 22, 1972) had rendered the certification of the instant charges as *ultra vires* and a nullity.

The report of the hearing examiner on the facts pertinent to the Motion for dismissal is as follows:

By stipulation it is agreed that the Board served notice of charges of inefficiency against respondent on March 24, 1971. Thereafter, schools were in session for pupils up to and including the day of June 23, 1971, which was the 91st day forward from the date of notice.

However, it is also a stipulated fact that the last day of regular classes was June 15, 1971. The remaining days of the regular term—namely, the school days included in the period June 16-23, 1971 inclusive—were days set aside for final examinations and review.

On June 24, 1971, the Board approved a resolution which certified charges of inefficiency to the Commissioner of Education. The certification (P-42) alleges, *inter alia*, that respondent

> "*** has failed to correct and overcome the deficiencies set forth in the written notice ***."

It is noted by the hearing examiner that the pertinent statute herein is *N.J.S.A.* 18A:6-12. This statute stands as the sole procedural authority which governs the matter of the certification of charges of inefficient performance to the Commissioner. It provides:

> "18A:6-12. The board shall not forward any charge of inefficiency to the commissioner, unless at least 90 days prior thereto and within the current or preceding school year, the board or the superintendent of schools of the district has given to the employee, against whom such charge is made, written notice of the alleged inefficiency, specifying the nature thereof with such particulars as to furnish the employee an opportunity to correct and overcome the same."

Respondent maintains, in the context of this statute and of the Commissioner's decision in *Wagner, supra,* that the Board did not afford respondent the

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"90 days" which the statute mandates to "correct and overcome" her alleged inefficiency since the last day of regular classes–exclusive of final exams–was on June 15, 1971. (This date was the 83rd day forward from the date of the Board's notice to respondent, which was served on March 24, 1971.) In this view, the "90 days" provision of the statute, *ante,* represents a minimum legislative enactment which must receive a strict interpretation.

Respondent further avers that the number of observation visits or reports concerned with respondent's teaching performance during this 90-day period is not of consequence, if the minimum time requirement established by the statute has not been met.

The Board, on the other hand, advances an offer of proof that four members of its supervisory staff observed respondent's teaching performance on 31 occasions during the period March 24–June 23, 1971, and it argues that this fact attests to the thoroughness of the Board's review. In the Board's judgment, the intent of the statute (*N.J.S.A.* 18A:6-12) is to guard against whimsical hasty conduct by local boards of education and the Board avers that it is in compliance with such intent regardless of a "numbers game" which, the Board avers, respondent is attempting to play.

Both parties to the dispute *sub judice* argue the facts of the matter herein, as set forth *ante* in the context of *Wagner, supra.* On the one hand respondent argues that the facts of the instant matter are so similar to *Wagner* as to require the same conclusion the Commissioner reached on that occasion; namely, that the Board had not complied with the provisions of the law as set forth by statute. (*N.J.S.A.* 18A:6-12) On the other hand, the Board avers that *Wagner* is distinguished from the matter herein on its facts and particularly because the Board in this case exercised care to spread a great number of observations of petitioner's work over all of the period provided for her to correct her alleged inefficiencies.

The only issue posed for the Commissioner's determination at this juncture is whether or not the Board proceeded properly in the certification of charges against respondent on June 24, 1971. If it did not, the charges should be dismissed forthwith. If it did, the hearing should be immediately resumed and set down for an expeditious completion on the merits of the charges against respondent.

* * * *

The Commissioner has reviewed the report of the hearing examiner and it is noted that the parties to the dispute *sub judice* ground their arguments on both statutory prescription and a prior decision of the Commissioner in *Wagner.* However, the Commissioner finds *Wagner* to be distinguished from the instant matter for one important factual reason; namely, respondent in *Wagner* was not afforded a total period of "90 days" (*N.J.S.A.* 18A:6-12) during which school was in session with pupils in attendance to "correct and overcome" the inefficiencies with which he was charged. Accordingly, the Commissioner dismissed the charges against him.

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A review of the facts of *Wagner* is therefore in order to serve as the context for a decision in the instant matter.

In *Wagner,* respondent was served notice of charges of inefficiency on March 28, 1972, and from that point forward to the last day of school on June 22, 1972, there was a total elapsed time of only 86 days. This was a total period four days shorter than that prescribed as the minimum time for respondent to "correct and overcome" his inefficiencies and was further shortened in the Commissioner's judgment to a period of 80 days because of the facts incidental to the closing of school in respondent's district.

Such facts are not identical to those herein, since Respondent Larson was served with notice of inefficiency on March 24, 1971, and had an opportunity for a total period of 91 days forward from that date (through June 23rd, 1971) to correct the inefficiency with which she was charged. During all of this period, schools were in session according to the prescription of the regular school calendar and pupils were in attendance as required.

This principal fact is not diminished in importance in the Commissioner's judgment, by any contention that "final exams" occupied a part of the total period since such exams are a part of the school's overall curriculum, and the days which are used for their administration are no less a part of the school year, than are other days, when instruction is of a different nature.

Accordingly, the Commissioner finds no comparable circumstances herein to those in *Wagner* and he determines that the hearing should now proceed with dispatch. The Motion to Dismiss is denied.

COMMISSIONER OF EDUCATION

May 3, 1973

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**In the Matter of the Tenure Hearing of Elinor Larson,
Regional School District of Scotch Plains-Fanwood, Union County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, Johnstone & O'Dwyer (Jeremiah D. O'Dwyer, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

On June 24, 1971, the Scotch Plains-Fanwood Regional Board of Education, hereinafter "Board," certified to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, a series of fifty-three charges against respondent, a tenured teacher in the employ of the Board. The gravamen of such charges is that respondent was inefficient, inept, and incompetent with respect to her performance of teaching duties. Respondent has denied all charges against her.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner on July 25, 1972, and was continued on thirteen other dates during the years 1972, 1973 and 1974. The hearing concluded on April 24, 1974. Thereafter, the Board and respondent, respectively, submitted Briefs on the dates of November 15, 1974 and January 2, 1975. Case submission was complete as of this latter date. The report of the hearing examiner is as follows:

This matter has proceeded slowly to final submission and its adjudication has been impeded and delayed by a long series of circumstances. The initial hearing date, July 25, 1972, was set down after a delay of more than one year from the certification of charges by the Board (June 24, 1971). This delay was occasioned by the need of respective counsel to exchange interrogatory questions and answers and by the serious illness of one of the Board's principal witnesses, a high school principal.

Subsequently, delays and postponements of scheduled hearing dates were required on at least five occasions because of unexpected court appearances required of respective counsel (July 25, 1972, October 5, 1972, August 17, 1973, November 20, 1973, February 1, 1974), by the illness of respondent (February 1, 1974) and the Board's counsel (December 28, 1974), and by extensive scheduling conflicts. Additionally, the hearing was adjourned from April 11, 1973 to May 3, 1973 in order that the Commissioner might consider a substantive Motion by respondent for dismissal of the charges against her. The thrust of this Motion was that respondent had not been afforded the ninety days which the statute, *N.J.S.A.* 18A:6-12, prescribes to correct the inefficiencies with which she was charged. This Motion was rejected by the Commissioner in a decision on that latter date, and he directed that the hearing should proceed "with dispatch." (Respondent, in her Brief, renews that Motion at this juncture.)

The hearing examiner proposes to group the fifty-three charges against

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respondent into one general category and to set forth the principal evidence pertinent thereto. It is necessary, however, to provide a contextual background of information with respect to respondent's employment.

Respondent was first employed by the Board as a teacher of the French language in September 1963. (Tr. XII-7) From that 1963-64 academic year through the year 1969 her assignments included all levels of the language and some "honor" groups. (Tr. XII-7-8) During that period she achieved a tenure status as an employee of the Board and she states that the evaluation reports concerning her work were all favorable with the exception of a report in the fall of 1968. This report was submitted by her high school principal and she avers that it contained a "*** slight lowering *** from previous high levels." (Tr. XII-9)

In a period which began in 1965 and continued through the month of June 1971, respondent also served as the teacher in charge of her school's language laboratory facility. (Tr. XII-26) This service included supervision of repair work, the ordering of spare parts, organization of a pupil crew to perform maintenance chores, etc. (Tr. XII-31-39)

Additionally, respondent avers she conducted teacher orientation periods in use of the laboratory (Tr. XII-48), scheduled pupils with technical knowledge of the laboratory's operation to be present when it was in use (Tr. XII-43), and scheduled classes to use the laboratory. (Tr. XII-44) (See also Tr. II-92; Tr. III-32-33.)

The charges by the Board against respondent herein are, in general, concerned with her efficiency as a classroom teacher and with her performance of duties in the language laboratory assignment during the school years 1969-70 and 1970-71. There are fifty-three counts or charges in the Board's listing, and this great number precludes a specific finding with respect to each. The hearing examiner concludes, however, that such findings are not required, since the gravamen of the charges is that, prior to and during the ninety day period provided by the Board for the correction of alleged deficiency, respondent was an inefficient teacher. In the summary of specific charges the Board avers:

> "***This teacher is charged with inefficiency, ineptness and incompetency in the performance of her duties as a teacher to a degree warranting dismissal or reduction in compensation.***"

(For a discussion of a consolidation of charges see Tr. II-64 *et seq.*)

It is this general categorization of the charges against respondent by the Board which the hearing examiner proposes to consider as a charge of inefficiency in the performance of teaching duties. The principal testimony in support of the charges was offered by respondent's school principal and subject supervisors.

The school principal testified that he assumed his administrative responsibility in 1966 in respondent's school and observed her on only one occasion

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during the 1966-67 academic year. (Tr. I-6) His written report of this observation was favorable to respondent. (P-1) Succeeding summary reports with respect to respondent's performance as a teacher were likewise favorable for the academic year 1967-68 (P-2, 3, 4) and for the academic year 1968-69. (P-5) Each of these reports contains a check mark in a box to the left of a sentence which reads:

> "A teacher who is clearly effective and efficient who has our unqualified confidence in his continuing professional contribution."

Additionally, each of these five reports contains a checklist recital of approximately eighteen areas in which respondent was said to show "continued growth" or demonstrate "effectiveness." In fact, the only tempering of the favorable reports is found in a written comment by the principal in the 1968-69 report. (P-5) This comment was:

> "I would like to make sure that Elinor does not become self-satisfied to the extent that there appears to be little room for improvement. I invite her special attention to a reevaluation of the teaching-learning process to see if there aren't new and creative teaching techniques to be used in stimulating and inspiring students. Student-teacher relationships need to be constantly evaluated and methods revised if we are to provide the best learning experiences for students."

The principal stated that the comment was made, in part, because of pupil complaint about respondent's teaching. (Tr. I-29) A conference concerning the comment was held between the principal and respondent and it was marked by disagreement. (Tr. I-36)

Other disagreements subsequently ensued and culminated in the filing of a formal grievance by respondent against the principal with the Superintendent of Schools. (See P-13, 15, 20.) The Superintendent rejected the complaints of respondent on April 14, 1969 (P-21), and such complaints were also found to be without merit by the Board on June 12, 1969. (P-23) (See also Tr. I-39-45 and P-6, 22.) The principal testified that his "***confidence in her [respondent] as a member of the staff was badly shaken by the manner in which she handled what I felt was a relatively minor problem***." (Tr. I-48)

Subsequently, the evaluations of respondent by the principal were increasingly negative. In the "Statement of Teacher Effectiveness" dated January 7, 1970 (P-26), the principal stated he had consolidated the opinions of supervisors with his own (Tr. I-57) and concluded:

1. "It is my judgment that Elinor's lack of enthusiasm, initiative, resourcefulness and interest in teaching is at a low point. Her attitudes and actions do not instill confidence in her leadership as a classroom teacher. I encourage Elinor to search for an immediate solution to this problem and design a plan to regain her zeal for teaching.

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2. "I recommend that she embark on a genuine analysis of the learning process and the teacher's role. Her style of teaching needs to be revised so that students are more highly motivated and stimulated. Special efforts are needed to build a better teacher-student rapport. Mutual confidence and respect by students and teachers are not evident through classroom observations."

The principal on that occasion checked only four areas in which respondent was stated to be demonstrating teaching effectiveness and seven areas where growth was said to be needed. (P-26)

A subsequent report of April 29, 1970 (P-28) reiterated the views expressed in P-26, *ante,* and there followed, in November 1970, a report which was even more negative in general tone. (P-29) In that report the principal said:

"***We are most displeased with Elinor's efforts***. Unless we can see immediate improvement in these areas we cannot justify recommendation for salary increment.***"

He also stated in a separate part of the report that:

"***It is our general conclusion that since Elinor finds herself in such conflict with our educational goals, philosophy, and judgments both she and the school would be helped if she were to seek employment elsewhere." (P-29)

Respondent wrote a reply to these statements in which she stated she did not "agree" with them and she declined to sign the report.

There followed on March 24, 1971, a letter from the Superintendent of Schools to respondent (P-60) which charged her with inefficiency as a teacher and specific allegations pertinent thereto. (Tr. II-6) (See also P-31.) This letter is recited in its entirety as follows:

"You are hereby notified that in accordance with *R.S. 18A:6-10 et seq.*, you are charged with inefficiency in the performance of your duties as a teacher in the Scotch Plains-Fanwood School District. The statutes provide a period of ninety (90) days in which you may seek to correct your inefficiencies.

"The purpose of this written notice is to specify the particular nature of the inefficiencies and give you the opportunity to correct them. Your immediate supervisors will continue to provide specific guidance on ways to correct the inefficiencies.

"The specific inefficiencies which constitute the basis for the charge are attached hereto as Appendix A.

"To insure adequate opportunities for supervisors to observe your efforts

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to correct the specified inefficiencies, you can expect increased classroom observations during the next ninety days. Because of the frequency of classroom visits and the number of supervisors involved, you may not expect a written report or a follow-up conference following each observation. Instead, there will be a composite written report and follow-up conference near the end of each month (April, May, June). However, it is to be clearly understood that we are available to provide assistance at your request any time between the end-of-the-month reports."

The specific question in the instant matter is whether or not respondent's teaching prior to March 24, 1971, was inefficient, and if so, was it corrected during the subsequent ninety day period. The evidence of any inefficiency prior to that date is limited in scope. However, subsequent to that date, it was testified, school administrators or supervisors observed respondent's classes on thirty-one occasions and their reports are a matter of record. (Tr. II-64)

With respect to his observations of respondent during the ninety day period, the principal cited both favorable and negative factors. In fact, a close examination of the transcript of testimony and other evidence in this regard indicates there are almost as many favorable comments as there were comments which were adverse. (Tr. II-10-25, 52 *et seq.*; P-32-40, 55) The principal stated respondent had:

(a) provided an opportunity for work by her with individual pupils; (P-32, Tr. II-9)

(b) secured a "***little relaxation, a little pep***" in the classroom situation; (P-32, Tr. II-11)

(c) commendably managed the behavior of pupils (His indication here was that she "always" did well in this regard.); (P-32, Tr. II-11)

(d) introduced a television production project which pleased him; (P-33, Tr. II-12)

(e) tried to get "***student opinion and to involve them***"; (P-34, Tr. II-19) (He classified this as a step in the "right direction.")

(f) seated herself informally with pupils and reviewed assignments with them; (P-37, Tr. II-21)

(g) required pupils to bring pictures to class which was a "good idea"; (P-38, Tr. II-23)

(h) improved her procedures in pupil evaluation; (P-38, Tr. II-24) and

(i) initiated discussion of a "good idea" about a food festival. (P-38, Tr. II-25)

He also indicated his opinion, however, that a number of inefficiencies remained. He testified that his "biggest question" with respect to respondent's teaching was concerned with the interaction in her classes between pupils and

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teacher and in the relationships among pupils. (Tr. II-25) He also stated that respondent had:

(a) "wasted" class time; (P-32, Tr. II-10)

(b) secured poor pupil response in the French language; (P-32, Tr. II-10)

(c) failed to evoke pupil enthusiasm; (P-32, Tr. II-10)

(d) failed to organize the television production properly; (P-33, Tr. II-12)

(e) been unable to secure a desirable interaction among pupils; (P-34-37, Tr. II-18, 21-22)

(f) neglected to make her classroom "appealing"; (P-34, Tr. II-18-19)

(g) failed to properly organize pupil reaction to a survey; (P-34, Tr. II-19)

(h) been unable to involve pupils in class activities; (P-38, Tr. II-24)

(i) not prepared pupils properly for their work; (P-38), Tr. II-24) and

(j) made no effort to test pupils' understanding of what other pupils had said. (P-38, Tr. II-24)

As a result of his own observations and the comments of other supervisors with whom he conferred, the school principal prepared two summary evaluations during the ninety day period March 24, 1974 through the end of school in June 1974. (P-39, P-41) (His statements with respect to the basis for these summary evaluations is found at Tr. II-52 *et seq.*) These evaluations represent, according to the school principal, a composite opinion of respondent's performance as a teacher during the period. Both documents state in a foreword that the opinions are based on "both informal and formal observations of your [respondent's] work." (P-39)

The document P-39 lists eleven specific areas in which the supervisors judged that respondent had made improvements. It also lists twenty-nine "continuing major inefficiencies." In summary, P-39 states:

> "*** we find the observable improvement during the past month very minor. Most of the major inefficiencies still persist and your overall contributions in our school are well below our expectations.***"

The report also recommended an immediate appointment for a "follow-up conference." This conference was held (Tr. II-41) with respondent and all those who had evaluated her. (Tr. II-42)

Subsequently, a second summary evaluation report (P-41) was compiled by the principal on June 1, 1971, and submitted to respondent. (Tr. II-44) This report was similar to P-39. It listed a total of six favorable improvements with

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respect to respondent's teaching and thirty-nine "continuing major inefficiencies." It also contained these more general comments:

> "You are falling well below our expectations in providing purposeful and meaningful learning experiences for students. Your instructional leadership is ineffective." (at p. 1)

> "In summary, we find the observable improvement during the month of May very minor. Most of the serious inefficiencies still persist and your overall contributions in our school are well below our expectations." (at p. 4)

The report also contained a series of thirteen suggestions for improvement. Subsequent to its issuance another conference was held. (Tr. II-50)

Contrary to the statement contained in the Superintendent's letter to respondent dated March 24, 1971 (P-60), *ante,* there was no third composite written report at the end of June 1971 and thus no conference with respect to it.

On cross-examination the principal testified with respect to a number of activities in which respondent had voluntarily engaged during the years 1967-71. He testified that she had submitted a proposal for a "mini-grant" from the State for a project in food preparation in conjunction with use of the French language. (Tr. II-90) He also testified that respondent was an elected member of the school's instructional council (Tr. III-44), the advisor to the school's French Club (Tr. III-77), and had supervised use of the language laboratory. (Tr. II-90) On specific occasions, he testified, she had made a written suggestion with respect to study hall location which was later accepted (R-5, Tr. III-69), and had submitted a written report of a meeting she had attended in Philadelphia. (Tr. III-43) The principal admitted that these voluntary assignments were not the subject of favorable comment in written evaluations. (Tr. II-90, Tr. III-46)

Additionally, the principal testified that respondent's attendance record in school was "very good" (Tr. III-38) and that she fulfilled her commitments to faculty meetings and other in-school conferences. (Tr. III-38) He testified, with respect to his observation of respondent's class at the time of the television production (the subject of adverse comment, *ante*), that he had not known the location of the class had to be changed immediately prior to the class meeting. (Tr. III-54)

The principal denied, however, that he had ever threatened respondent as the result of the grievance she proffered against him (Tr. II-104, 124) and listed the change in her class assignment schedule, a change in which honors classes were removed, which followed the adjudication of the grievance as a "purely fortuitous" circumstance. (Tr. II-136) He voiced no criticism of her written lesson plans and, in fact, stated he had not reviewed them (Tr. III-87), but voiced the opinion that the effectiveness of a teacher's planning could be judged "by the result." (Tr. III-87)

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The Board's second witness at the hearing was the chairman of the school system's language department. She testified that she had been a teacher in the school system for six years and chairman of the department for three, but had never directly observed respondent's teaching (Tr. V-64, 113) and had almost no contact with respondent during the period March 24, 1971 through the end of the academic year, except in department meetings. (Tr. V-124) The chairman's testimony was principally concerned with what she regarded as an "undermining" or subversion of her authority by respondent (Tr. V-71), although some parts of the testimony may be categorized in a relationship to the Board's charge that respondent was inefficient, inept, and incompetent.

The hearing examiner can find no element of this testimony, however, which is specifically applicable to a finding whether or not respondent had corrected alleged inefficiencies during the ninety day period mandated by law. *N.J.S.A.* 18A:6-12 The chairman's limited contact with respondent during that specific period provided no basis for such testimony. (See Tr. V-124-125.)

The chairman did detail certain incidents prior to the ninety day period, which in her opinion tended to undermine her authority. These incidents were concerned with respondent's objections to the continuance of a required "progress report," to a curriculum proposal described by the chairman as that of the department, and to alleged extraneous remarks made by respondent in department meetings.

The chairman said that progress reports from each teacher, to assist with curricular articulation, were first required during the 1969-70 school year. The practice was later questioned by respondent and this questioning led to a balloting of all language teachers concerned with continuance of the practice. The ballot was favorable to the practice but respondent questioned ballot format since teachers were required to sign their names. Cross-examination of the chairman elicited a statement that such questioning was "***not unreasonable from her [respondent's] point of view." (Tr. V-135)

The controversy with respect to the curriculum proposal, *ante,* was occasioned by a memorandum (P-43) developed by the chairman and the language coordinator, which was submitted to another school curricular group. The memorandum contains these words of introduction:

> "We, *in the foreign language Department,* feel that we could function within the framework of a modular program.***"
>
> (*Emphasis supplied.*) (P-43)

Respondent objected to the implication that the "foreign language department" had discussed or approved the matter under review and she evidently circulated a copy of the memorandum to other department personnel with this addendum affixed:

> "This portion of the proposal has not been discussed with the language teachers. While we feel it may have merit, it doesn't necessarily represent the viewpoint of the department–at this time." (P-43)

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A total of six teachers signed their names in an expression of agreement with the addendum and respondent took it directly to the chairman. The chairman stated at the hearing that at the time it was presented to her she got "***very angry." (Tr. V-79) She said she thought the matter should have been "handled differently" by respondent although the chairman did admit that the memorandum she had developed was not an expression of the department's point of view. She later apologized for it. (Tr. V-77-78)

As a further example of respondent's alleged lack of cooperation with her, the chairman stated that respondent, in department meetings, "***constantly tried to keep us off the topics we were trying to discuss by bringing up other extraneous matters." (Tr. V-71) She could not, however, on cross-examination, give a concrete example of such alleged "extraneous matters." (Tr. V-105)

The chairman also stated certain conclusions with respect to respondent's competency as a teacher. She testified that the atmosphere in respondent's classes was "dull" (Tr. V-57) and that on one occasion the language laboratory was noisy. (Tr. V-70) She further testified that respondent spoke the French language with an "American accent" (Tr. V-50), but did not speak it fluently or well. (Tr. V-59) As examples in this regard, she referred to one incident in a French restaurant where respondent's reply to a waiter was in English (Tr. V-48), and to an alleged avoidance by respondent of the use of the "target language" in her classes. (Tr. V-59)

The chairman did admit, with respect to her role of leadership of the department, and specifically with respect to the curriculum proposal, *ante,* that she, as chairman, was "totally inexperienced." (Tr. V-71)

The principal observations of respondent's teaching by a person with knowledge of the French language during all the period from 1968-69 through 1970-71 were by the language coordinator. The coordinator had served nine years in the Scotch Plains-Fanwood School System as a teacher and had begun her duties as coordinator in 1969. (Tr. V-142) She listed her primary duties in the coordinator's position as "***assisting teachers as much as possible and participating or assisting in the evaluation process.***" (Tr. V-142) However, her only certification during all the period from 1969-70 through 1970-71 was that of a teacher. She did not possess a certificate to supervise instruction. (Tr. VI-59)

The coordinator stated she had first observed respondent's teaching in 1969 and at that time had made several suggestions to her (Tr. V-144, 149) which had been received by respondent with a generally negative attitude. (See Tr. V-151-154.) A categorization of respondent's response to suggestion was that it was defensive in nature and not receptive to suggestion or change. There were arguments that ensued between the coordinator and respondent over teaching methods and materials. (Tr. VI-4, 45-46)

In later observations in 1970 the coordinator also testified with respect to the details of respondent's teaching. She said respondent mispronounced French words, had little variety in her teaching techniques, and had no bulletin board

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materials on display. (Tr. VI-16) The coordinator further stated that one of respondent's classes in January 1971 used "little French" and that respondent's teaching on another occasion provoked an "unenthusiastic response on the part of the students." (Tr. VI-23) Such response was attributed in part at least by the coordinator to the fact that respondent "sat down" while teaching. (Tr. VI-22)

As a result of such observations, the coordinator participated in the conference of school administrators which resulted in the charges of inefficiency against respondent (P-31, 60) which were served on respondent in a letter from the Superintendent on March 24, 1971. (Tr. VI-25)

Thereafter, the coordinator observed respondent's teaching and her classes on a number of occasions; on March 24, April 1, 7, 22, May 20, 27, June 3, 9 and 15, 1971. The reports which were developed by the coordinator on those occasions may be generally characterized as negative.

She indicated that there was evidence of poor pupil attention and interest (Tr. VI-24-30), mispronunciation by respondent (Tr. VI-31), little real continuity (Tr. VI-31), and that on April 22, 1971 "***nothing really too much of value took place.***" (Tr. VI-32) She also testified that a mimeographed sheet distributed by respondent contained "serious" errors (Tr. VI-33), and that certain other assignments were meaningless and devoid of apparent purpose. (Tr. VI-38-40)

In summation of her views with respect to respondent's teaching technique and effectiveness in the period from March 24 through June 15, 1971, the coordinator testified:

> "I think that there were some feeble efforts to improve but generally, I would say that the improvement was negligible." (Tr. VI-49)

The criteria on which such judgment was based received an elaboration by the coordinator on cross-examination. (Tr. VI-105) She indicated she looked for evidences of rapport between teacher and pupil, "***enthusiastic students and enthusiastic teacher***," pupil participation in class, a questioning and answering attitude. (Tr. VI-105)

On the other hand, the coordinator admitted on cross-examination that in a September 24, 1970 report she had stated that respondent had enjoyed a "generally good" rapport with pupils. (Tr. VI-65, 133) She also testified that while she had criticized respondent's pronunciation it had not, at least on many occasions, been a major factor of inefficiency. (Tr. VI-87) Further, the coordinator stated, respondent had involved pupils in class projects on many occasions (Tr. VI-116), and there was at least some evidence of continuity with respect to subject matter progression. (Tr. VI-116) Additionally, the coordinator agreed that, prior to 1970, the criticisms she had made of respondent's teaching were all contained in the principal's evaluation but that none of the "favorable comments" were so contained. (Tr. VI-72)

The vice-principal of respondent's school was the fourth witness for the

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Board at the hearing. He testified with respect to two observations he made of respondent's teaching during the period September 1, 1969 through January 1971, and on other occasions during the period March 1, 1971 through June 1971.

The first of the vice-principal's reports was written subsequent to his visit to respondent's class on October 3, 1969. The report (P-51) indicates the class had spoken in French and that the class, generally, had been involved by respondent in the work of the day. While the report contains some questions the vice-principal evidently later addressed to respondent, there are no critical remarks *per se*. (See also Tr. VII-8-9.)

For a period of more than a year thereafter the vice-principal did not formally observe respondent. In fact his next observation was on January 22, 1971, and the report he made concerning it (P-52) was similar to the one he made in October 1969. There were favorable comments, questions, and a comment that the class of five pupils was "average" because of size but could be "good."

The observations of the vice-principal during the ninety day period subsequent to March 24, 1971, were made on the dates of March 31, 1971, and on April 8, May 18, May 28, and June 14. (See P-53-59.) Subsequent to observations on those days the vice-principal commented unfavorably on some aspects of respondent's work. He thought that on April 8, 1971 "too much" was attempted (Tr. VII-27), and on May 18, 1971, pupils were not responsive or were engaged in an "undercurrent" of conversation. (Tr. VII-29, 31) This latter comment was also made with respect to a class he observed on June 14, 1971. (Tr. VII-44-45)

He also testified, however, to improvements respondent had made on these occasions. He stated that on May 18, 1971, he was "happy" to see pupils working on a bulletin board (Tr. VII-29), and in another class on the same day he noted that there was "quite a bit of French exchanged." (Tr. VII-31) This same type comment was made in his report of the visit he made to respondent's class on May 28, 1971 (P-57), and subsequent to his visit of June 14, 1971, he indicated in his report and in testimony (P-58, Tr. VII-41) that there was "good group participation." (Tr. VII-41)

A considerable part of the vice-principal's testimony was devoted to objections respondent had raised with respect to progress reports (Tr. VII-54) mentioned *ante*, the rescheduling of French classes from five to four periods per week (Tr. VII-65, 66, 70), and an alleged conflict of interest involving the department chairman who was the Board's second witness. (Tr. VII-56) The vice-principal testified, however, that respondent had complied with the progress report decision. (Tr. VII-58) He thought she had employed improper channels to voice complaints about the scheduling change. (Tr. VII-64-65)

The Board's last witness, a guidance director, gave "limited" testimony with respect to respondent's work as a teacher. (See Tr. VIII-28.) He testified

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that as guidance director he had had "numerous" pupils who requested transfers from respondent's classes (Tr. VIII-4) during the academic year 1968-69, but that no such lateral changes had been made. (Tr. VII-10) He had never observed respondent's classes (Tr. VIII-13) and gave no testimony from personal knowledge of her efficiency or lack of it.

At the conclusion of the Board's case, counsel for the Board again renewed a Motion for an examination of respondent by an expert "of the Commissioner's choosing" with respect to her "proficiency and competency" in the French language. (Tr. VIII-36) The hearing examiner, as he had prior to the hearing, rejected the request.

Respondent's defense with respect to the charges against her consisted of the testimony of seven witnesses, her own testimony, and the submission of twenty-two exhibits. This defense was both specific and general in its import but responsive to the broad categorizations of charges that she had performed as a teacher in an inefficient, inept and incompetent manner.

The primary testimony in this regard, other than respondent's own, was elicited from a witness who had been her school principal when she first was employed in the district (Tr. IX-40), by a former district coordinator of foreign languages (Tr. IX-70), and by a former department chairman of foreign languages in respondent's school. (Tr. X-34) While none of this testimony can be held to be specifically pertinent to whether or not in 1971 respondent was performing efficiently as a teacher, it must be reviewed and considered for contextual significance with respect to a general charge of inefficiency and specifically considered with respect to competency. (See Tr. IX-135.) Generally, all three witnesses testified that respondent had been a competent teacher, and performed efficiently during the period from 1963-64 through 1967-68.

The former principal, who retired in 1966, stated that he had observed respondent as a teacher. He testified as follows with respect to her teaching:

> "***My evaluations of Mrs. Larson as a teacher was that she had a great knowledge of her subject. She had strong empathy with students, she had the personal qualifications and personality to create a very positive and instructive classroom situation.***" (Tr. IX-43-44)

He also testified that pupils responded warmly to her (Tr. IX-44) and that his evaluations of respondent were "all very positive." (Tr. IX-44) He stated he had never had complaints from pupils about her teaching. (Tr. IX-44)

When cross-examined the former principal admitted he had no proficiency in the French language to use as the basis for a judgment that respondent had a "great knowledge" of her subject but maintained his favorable evaluation was well-grounded in many factors: casual observation of respondent in her relationships with pupils and with school officials, classroom visits by him and other administrators, and in respondent's willingness to volunteer for extracurricular assignments, etc. (Tr. IX-58-60)

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The former school district coordinator of foreign languages stated she had observed respondent formally on two occasions and had talked to her on many occasions about her teaching. (Tr. IX-71)

She testified that in her opinion respondent had an "average" accent for an American teacher of the French language although "***it's not a native accent." (Tr. IX-71) She also testified that she and respondent had cooperated in the introduction of a fourth year program in French and that in conjunction with such introduction they had selected texts, films and library books. (Tr. IX-73-75) Further, she testified that she had had occasion to teach some pupils in French IV who had been enrolled in respondent's classes in French III, and it was her opinion that they were "well prepared." (Tr. IX-76)

The former coordinator also testified that the company which manufactured the school's language lab "***complimented the school on how well it had been maintained***" (Tr. IX-76) and she detailed three occasions when she and respondent had engaged in field trip programs. (Tr. IX-77) The coordinator listed two of respondent's extracurricular assignments as advisor to the Advanced French Club and as co-sponsor of the French National Honor Society (Tr. IX-78), and she detailed the professional associations to which respondent belonged to include the National Language Laboratory Directors Association and the American Association of Teachers of French. (Tr. IX-79) At meetings of the language department respondent was said by the coordinator to be "very alert" and "interested" and she testified respondent had never attempted to "***divert the group's attention***" by the introduction of "extraneous material." (Tr. IX-93) (See also Tr. IX-130.)

The testimony of the former chairman of the language department in respondent's school was similarly favorable to respondent. This witness had been chairman of the department when respondent began her work as an employee of the Board in 1963 and she continued as chairman in the post until the 1969-70 school year when she took a sabbatical leave. (Tr. X-35) When she returned to the district, however, in 1970 she did not return as a department chairman. The post had been given to the chairman whose testimony was reported, *ante,* as the Board's third witness. (Tr. X-38)

The former department chairman testified that she had never observed respondent formally in the classroom (Tr. X-55), and in this respect her knowledge of respondent's ability and performance as a teacher is parallel to that of the department chairman subsequent to 1969. However, the former chairman said that her contacts with respondent were extensive, although informal, and that she believed pupils were "enthusiastic and glad to be in her [respondent's] class." (Tr. X-64) When asked to elaborate on this she said:

> A. "Well, there were girls always with her, cheerful, talking to her on a friendly basis. Wherever she would go, they would be stopping or calling out to her, likewise with the boys who worked in the lab. And she had some particular success with poor students.***" (Tr. X-64)

The former chairman also indicated that in her experience respondent had

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had "***very good lessons going on," displayed material on bulletin boards, maintained good order and discipline in her room, and contributed constructively to departmental meetings. (Tr. X-39-40, 47) In this latter regard, the former chairman testified of respondent's ideas:

> A. "They were of the best. She had many good ideas to contribute; very positive contributions to make, more so than some of the other members.***" (Tr. X-47)

With respect to respondent's use of French the former chairman testified that she had observed respondent's work with candidates for a prize being offered in French and that she was successful in obtaining pupil response. (Tr. X-48) In fact, the former chairman testified, respondent, along with other teachers, asked various questions of the candidates and "***was able to get them to talk more than anybody else." (Tr. X-48)

The former chairman also testified with respect to respondent's work as a language laboratory director. Her testimony in this regard was that respondent was not relieved from a teaching assignment to work with the laboratory but that such work was "***over and above her teaching load, which was as heavy as [anyone's].***" (Tr. X-78) Additionally, the former chairman testified that respondent reported early to school each day and worked in the language lab "***long before homeroom started." (Tr. X-41)

The former chairman further testified that she believed her own position was in jeopardy because of her testimony at the hearing (Tr. X-130), and she maintained she had been told by the present language coordinator that certain school administrators "***hated that woman [respondent]***" (Tr. X-111) and they hoped she wouldn't return the following year. (Tr. X-54)

Respondent's own testimony, with respect to the charges against her, was extensive and detailed. (Tr. XII-XIII) In general it may be characterized and categorized as a rebuttal of charges that she was inept, incompetent, and inefficient in the specific ways alleged by the Board and that, to the contrary, a review of her total record of service justified an opposite conclusion.

She detailed a substantial number of activities, programs and extracurricular projects as affirmative factors in this review. These may be succinctly set forth from her testimony in which she testified that she had:

1. helped to inaugurate the school's French National Honor Society and had full responsibility at one time for the Advanced French Club; (Tr. XII-13)

2. been elected to, and served on, both the school's Instructional Council, a group concerned with the improvement of educational programs, and the Representative Council, a policy group of the local education association; (Tr. XII-17-18)

3. initiated a mini-grant proposal in 1969; (Tr. XII-67, 86)

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4. served on a school committee which planned the introduction of a program of television instruction; (Tr. XII-69)

5. made a written suggestion in 1968 with respect to final examinations; (Tr. XII-71, R-6)

6. submitted to the language department in 1971 a summary of a talk she had heard on the individualization of learning through cassettes; (Tr. XII-73)

7. been asked to write and did write a newspaper article in 1969 on the work of the language laboratory; (Tr. XII-78, R-19)

8. planned for many years the film schedule for the school's French department; (Tr. XIII-29) and

9. served as a bedside instructor on many occasions when no other teacher of French volunteered. (Tr. XIII-34)

Respondent also testified with respect to her work within the parameters of the school day. She said that she had:

1. served as director of the school's language laboratory from 1965 through the 1970-71 school year (as noted *ante*); (Tr. XII-26)

2. maintained her bulletin boards and displayed material; (Tr. XII-33, 35) (See also Tr. XIII-13, 15, 19, R-4.)

3. supervised the preparation of nineteen French language tapes, together with written English translations; (Tr. XII-50, 51, 83; R-15)

4. tried to involve pupils in self-evaluations through the development and use of a written instrument (Tr. XII-79, R-20) and sat down with them to discuss it; (Tr. XII-81)

5. employed a new method of instruction in French during the 1970-71 school year as a pilot project assigned to her by the coordinator; (Tr. XIII-6)

6. planned field trips; (Tr. XIII-10) and

7. sponsored a French food festival. (Tr. XIII-12)

She testified also that during the ninety day period provided by the statute for the correction of inefficiencies she had "intensified" her efforts to "***give the best possible quality instruction***" to the pupils in her classes. (Tr. XIII-40)

Respondent further testified with respect to specific protests she had made which resulted in controversies between her and school administrators in the academic years 1969-70 and 1970-71. These controversies involved the continuance of progress reports (Tr. XII-93, R-22), a proposed field trip to see a film in

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French (Tr. XII-91) which respondent deemed inappropriate, a curriculum change (Tr. XII-100), the collection of money during school hours for a summer trip to France (Tr. XII-104), and one incident involving a noisy language laboratory group. (Tr. XII-31) The hearing examiner does not conclude that a detailed recital of respondent's contentions with respect to such controversies is required at this juncture. Suffice it to say that respondent maintained her own protests were reasonably based and that she had channeled them correctly.

Finally, in this summary of testimony by respondent there is a charge by her that she was threatened by the school principal as the result of a grievance she filed against an action of his in 1969. In fact she testified that there were threats or implied threats on three occasions. (Tr. XII-111 *et seq.*) She testified that on the first occasion the principal:

> "***indicated to me that he had felt, all along, that I had intended to continue the matter of the grievance to the level of the Board of Education. He further indicated that if I were to do so I would deeply regret it. That is an exact quote. *** I asked him if he were threatening me. He said you may take it any way you like.***" (Tr. XII-111)

On a second occasion, in 1969, respondent testified, the principal had said he did not know how he and respondent could continue "***to work together as two professional people***." (Tr. XII-112) At a later time, she testified, the principal said "***you may have won this battle, but I will guarantee you you will not win the war.***" (Tr. XII-113)

This testimony received a measure of corroboration from the testimony of representatives from the New Jersey Education Association (Tr. IX-7), but the Superintendent of Schools testified he heard no such threats and the school principal flatly denied them. (Tr. XIV-76)

This concludes a summary review of the testimony and evidence pertinent to the principal charges in the instant matter.

The Board avers that the sum total of the evidence it produced clearly indicates that respondent was an incompetent, inept, and inefficient teacher both before and during the ninety day period afforded her for the correction of inefficiency. It states further that there is no need to analyze each of the incidents described by its witnesses to support such a judgment since it is the "total impression" which is important. In support of this view, the Board cites *In the Matter of the Tenure Hearing of Francis M. Starego, Borough of Sayreville, Middlesex County,* 1967 *S.L.D.* 271, wherein the Commissioner said:

> "***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.***" (at p. 272)

The Board further maintains that respondent's defense of bias or prejudice is a specious argument and it avers that the evidence warrants her dismissal.

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Respondent, on the other hand, avers that the countercharge of threats and reprisals against her by the school principal are deeply supported by the testimony at the hearing and, in effect, that the Board's prosecution herein is the effective implementation of such threats. Furthermore, respondent argues that the portion of Exhibit P-29, quoted *ante,* which indicates that both respondent and the school would be better served if respondent sought employment elsewhere, is evidence that the Board had prejudged her subsequent performance and that completion of the ninety day period was a mere formality. In any event, respondent avers that the total record supports a judgment that she was an enthusiastic, interested teacher who performed a variety of services to the school both efficiently and competently. She requests dismissal of the complaints against her.

The hearing examiner has carefully reviewed the record in this matter and sets forth the following observations with respect to it:

1. There is a disparity between the evaluations by school administrators of respondent's work as a teacher before September 1969 and evaluations subsequent to that date which can only be labeled as extraordinary. If observation reports and testimony are to be believed, respondent, before that date, was an excellent, interested, contributing member of the school staff who became, rather suddenly, inept, incompetent, and inefficient. The question is whether the record supports such a judgment.

2. The most potentially damaging evidence in this regard is the testimony of the present language coordinator. This witness was the only one with fluency in the French language who observed respondent during the ninety day period in 1971 and, if given full weight, such testimony might be found compelling. However, the hearing examiner cannot make such a finding. As was previously stated, the coordinator was not certified by the State Board of Examiners to supervise instruction. (Tr. VI-59) (See also Tr. XI-9.) Her experience as a coordinator was of relatively short duration.

3. The other evidence against respondent, in the form of testimony by school administrators and in documentary form, is also less than completely compelling. On the one hand, they noted evidences of inefficiency in the practical result evidenced by respondent's teaching. In contrary fashion, they noted a variety of improvements and favorable factors which, in the hearing examiner's judgment, were not weighed in the balance or sufficiently combined with other factors favorable to respondent in the summary evaluations. (P-39, P-41)

4. In opposition to such evidence, there is the testimony of respondent and that of school administrators who served during the academic years 1963-64 through 1968-69. The school administrators during that period can only be judged as equally competent in their fields as those who succeeded them. Respondent's own testimony is classified

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by the hearing examiner as a clear and creditable rebuttal of the charges against her.

5. Respondent's testimony, reported *ante*, with respect to extracurricular assignments was supplemented by other testimony concerned with specific evidences of diligence in the performance of school duties. She testified she was punctual in reporting practices, completed lesson plans as required, and that in all the years 1963-64 through 1968-69 she had enjoyed cordial relationships with the rest of the school staff. Such testimony was, in the judgment of the hearing examiner, not refuted.

A review of this evidence leads inescapably to questions concerned with the reasons for the precipitous change in respondent's status in the academic years subsequent to September 1969. What actions by respondent precipitated it? What circumstances are noteworthy?

In this regard it must be observed that the academic year 1969-70 was one of change in respondent's school. A new language coordinator and a new school department chairman assumed responsibility, and as noted *ante*, they were inexperienced in their new roles. Respondent challenged their procedures, their plans, their conduct, and conflict inevitably resulted. Although respondent may have been too aggressive in her readiness to criticize and although she may have been anathema to her new superiors, the hearing examiner can find no evidence that she acted other than professionally to make her grievances, complaints, and criticisms known. She confined and channelized them.

Nevertheless, respondent in turn began to be challenged and charges against her then ensued. The instant controversy was begun.

The hearing examiner has measured such circumstances, testimony, and evidence against the charges herein propounded by the Board, and he finds the charges have not been conclusively sustained. In fact the "total impression" of the available evidence scrutinized by the hearing examiner leads to a contrary conclusion with respect to respondent's competence, to her creativity as a teacher, and attests to a positive and not a negative contribution by her to school affairs. In any event, the hearing examiner finds no evidence against her sufficient to warrant a finding that her tenure as a teacher in the Board's employ should be set aside.

Accordingly, the hearing examiner recommends that the Petition be dismissed.

* * * *

The Commissioner has reviewed the report of the hearing examiner and has considered the objections, exceptions, and replies thereto as filed by the Board pursuant to *N.J.A.C.* 6:24-1.16. The Commissioner observes that the reference in the report of the hearing examiner to two summary evaluations prepared by the school principal during the ninety day period "March 24, 1974

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through the end of school in June 1974" is inaccurate and should read instead "March 24, 1971 through the end of school in June 1971." (See page 318.)

In regard to respondent renewing her Motion to Dismiss, the Commissioner relies on his original determination to deny the Motion for the reasons expressed in his written opinion. (See *In the Matter of the Tenure Hearing of Elinor Larson, Regional School District of Scotch Plains-Fanwood, Union County,* Decision on Motion, May 3, 1973.)

In its exceptions filed, the Board takes strong issue with the findings and recommendations of the hearing examiner as set forth above and argues that its proofs in the form of testimony and documentary evidence provide ample evidence that respondent is inefficient in her duties as a teacher in its employ.

The Commissioner is constrained to take notice of respondent's positive performance in the employ of the Board from 1963 until the 1968-69 academic year. It appears that this controversy occurred as the result of respondent's evaluation (P-5) which was prepared by the principal during 1968-69. From that precise point, followed by respondent questioning the principal concerning that evaluation and ultimately utilizing the Board's adopted grievance procedure, relationships between and among the parties of interest herein deteriorated. Strained relationships between administrators and teaching staff members are not conducive to a creative educational atmosphere.

The Commissioner is convinced that respondent herein has not been proven to be an inefficient nor inept teacher. The weight of the evidence as recited in the report of the hearing examiner and the record before the Commissioner amply support the hearing examiner's findings and conclusions which the Commissioner adopts as his own.

Accordingly, the Commissioner of Education hereby dismisses each and every tenure charge against Elinor Larson as certified by the Scotch Plains-Fanwood Regional Board of Education and orders her reinstatement to her former position with all rights, privileges, and salary withheld from her, less mitigation, from the date of her suspension.

COMMISSIONER OF EDUCATION

May 6, 1975

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Barbara Hicks,

Petitioner,

v.

Board of Education of the Township of Pemberton, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Hartman, Schlesinger, Schlosser & Faxon (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Sever & Hardt (Ernest N. Sever, Esq., of Counsel)

Petitioner, a teacher formerly employed by the Board of Education of the Township of Pemberton, Burlington County, hereinafter "Board," for the 1973-74 academic year, was not reemployed for 1974-75. She alleges that the Board has denied her the right of due process by refusing to give her reasons for her non-reemployment. Petitioner prays for an order from the Commissioner of Education directing the Board to provide her with reasons for her non-reemployment, and such other relief as the Commissioner shall deem necessary.

This matter is submitted to the Commissioner for Summary Judgment on stipulations of facts, exhibits marked in evidence, and Briefs. There is no disputed issue of material fact.

Petitioner was notified by letter dated March 15, 1974 from the Assistant Superintendent of Schools that she would not be recommended to the Board for reemployment. (Exhibit A) By letter under date of April 9, 1974, she requested a conference with a representative of the Board to discuss the unfavorable recommendation. (Exhibit B) At a public meeting held on April 22, 1974, the Board adopted a resolution not to reemploy petitioner and so notified her in writing by letter dated April 23, 1974 from the Assistant Superintendent. (Exhibit D) The Board also acknowledged petitioner's request for an appearance and invited her to confer with the Board on May 13, 1974. Petitioner and her husband appeared for the conference with the Board on the evening of May 13, 1974 at which time the Board asked whether she wished to make a statement. Petitioner replied to the Board that she had filed a Petition of Appeal with the Commissioner of Education and upon advice of counsel she could say nothing, but she stated her willingness to listen to anything the Superintendent of Schools or the Board members wished to say to her. At that point the Board's solicitor stated that there appeared to be nothing further to discuss and the meeting ended. (Joint Statement of Facts) Petitioner cites *Donaldson v. Board of Education of the City of North Wildwood, Cape May County*, 65 *N.J.* 236 (1974) as the authority for her demand for a statement of reasons from the Board for her non-reemployment.

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The Board argues that *Donaldson, supra,* is not retroactive and assumes, *arguendo,* that even if it were, petitioner waived her right to a statement of reasons by refusing to participate in the meeting to which she was invited.

The narrow issue in this matter is whether or not petitioner is entitled to a statement of reasons from the Board.

In the case of *Joan Sherman v. Malcolm Connor, individually and as Acting Superintendent of Schools of the Borough of Spotswood,* 1973 *S.L.D.* 51, aff'd State Board of Education, 1974 *S.L.D.* 1433; aff'd New Jersey Superior Court, Appellate Division, Docket No. A-2122-73, January 28, 1975, the Court held that:

> "***We consider the foregoing as an indication that *Donaldson* be given only prospective application. To give it retrospective application so as to impose an obligation on Boards of Education as to terminations, prior to *Donaldson,* which neither law, administrative policy nor labor contracts imposed on them would, in our opinion, be unwise. We therefore conclude that *Donaldson* is to be applied only prospectively and petitioner, in this case, is not entitled to a statement of reasons. Since that is so, we do not reach the question as to whether she is entitled to a hearing.***"

See also *Nicholas Karamessinis v. Board of Education of the City of Wildwood,* 1973 *S.L.D.* 351, aff'd State Board of Education 360; aff'd Docket No. A-1403-73, New Jersey Superior Court, Appellate Division, March 24, 1975.

In *Sherman, supra,* petitioner's employment as a teaching staff member terminated on October 21, 1970. Since the Court determined that *Donaldson supra,* was to be applied prospectively, it clearly followed that Petitioner Sherman was not entitled to a statement of reasons.

The instant matter presents an entirely different factual situation. In this case petitioner requested a statement of reasons as early as April 9, 1974 (Exhibit B), after she was notified that she would not be recommended for reemployment. (Exhibit A) Her employment for the 1973-74 academic year terminated, by the terms of her contract, on June 30, 1974. Prior to the expiration of her contract, the New Jersey Supreme Court issued its decision in *Donaldson, supra,* on June 10, 1974. In the judgment of the Commissioner, petitioner had a pending request before the Board for reasons for her non-reemployment when the June 10 decision of the Court was rendered in *Donaldson,* while she was still employed by the Board. The *Donaldson* decision triggered the requirement that petitioner be given the previously requested statement of reasons for her non-reemployment. Accordingly, the Commissioner holds that the Board is required to provide petitioner with a written statement of reasons for her non-reemployment for the 1974-75 academic year.

For the purpose of providing guidance for this Board and all other local boards of education in this State, the Commissioner will review the Board's argument that petitioner waived her right to a statement of reasons by her

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refusal to participate in the meeting with the Board to which she had been invited.

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

> "***a *timely request for informal appearance before the board* should ordinarily be granted even though no formal hearing is undertaken.***" (*Emphasis ours.*) (65 *N.J.* at 246)

The Court stated in the preceding part of the same sentence that "***we assume that no such [formal] hearing was required***."

The purpose of granting a private, "informal appearance" before a board to a nontenured teaching staff member is expressly to provide an opportunity for the teaching staff member to dissuade the board from its determination not to offer reemployment. It is essential that the written statement of reasons, if requested, be furnished prior to the requested appearance before the board. This is so because the affected teaching staff member will undoubtedly desire to offer a refutation of those reasons. If no statement of reasons is requested by the teaching staff member, then an appearance before the board would be a futile and almost useless exercise. A timely written request must be made by the teaching staff member for the written statement of reasons. In the Commissioner's judgment, a teaching staff member must make such request within thirty calendar days from the receipt of the Board's written notification of non-reemployment. Subsequently, the local board of education must present the written statement of reasons to the teaching staff member within fifteen calendar days of its receipt of the formal request.

The teaching staff member, having requested and received a written statement of reasons, must make a timely request for an appearance before a local board of education. The Commissioner interprets the term "timely" under these circumstances, to mean that the request must be made within ten calendar days and the appearance scheduled within thirty calendar days from receipt of the requested statement of reasons. This will permit ample time for the teaching staff member to prepare his/her presentation which will be made to the board.

In the judgment of the Commissioner, the nontenured teaching staff member's informal appearance before the board is definitely not an adversary proceeding. The purpose is not for the board to prove its reasons. Instead, the purpose is to permit the affected individual to convince the members of the board that they have made an incorrect determination by not offering reemployment. The teaching staff member will doubtless desire to refute the board's reasons and possibly present an assessment of his/her value to the school system. While the Commissioner is of the opinion that some latitude must be permitted to the affected staff member in the attempt to be persuasive to the board, he must caution that the proceeding is not intended to be protracted. Local education boards will find it necessary to exercise discretion regarding the reasonable length of time of the proceeding, depending upon specific circumstances in each instance.

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The procedure whereby a teaching staff member is entitled to an informal appearance before a local board of education is not unfamiliar. In the case of *John Gish v. Board of Education of the Borough of Paramus,* 1974 *S.L.D.* 1150, the Commissioner described the procedures which must be followed when a teaching staff member requests an appearance before a local board as the result of the board's determination that such individual submit to a physical and/or psychiatric examination pursuant to *N.J.S.A.* 18A:16-2. In the Commissioner's judgment, the procedures recited in *Gish* are essentially suitable to the situation wherein a nontenured teaching staff member makes a timely request for an informal appearance before the board after receiving written notice of non-reemployment, and requesting a written statement of reasons. The individual must receive adequate written notice of the date and time when the informal appearance is scheduled. The teaching staff member may be represented by counsel or an individual of his own choice before the board and may present witnesses on his behalf. Such witnesses need not present testimony under oath and should not be cross-examined by the board. Witnesses should be called into the meeting to address the board one at a time and should be excused from the meeting after making their statements. This procedure is not intended to cast aspersions upon the credibility of such witnesses, but to avoid confrontations and insure an orderly and proper proceeding.

In previous decisions, the Commissioner has consistently held that matters involving teaching staff members or other staff personnel should not be discussed by local boards of education in public sessions. *Gish, supra; Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park, Bergen County,* 1975 *S.L.D.* 93 (decided February 27, 1975) In *Donaldson, supra,* the Court discussed the purpose of the statement of reasons in the following language:

> "***Perhaps the statement of reasons will disclose correctible deficiencies and be of service in guiding his future conduct; perhaps it will disclose that the nonretention was due to factors unrelated to his professional or classroom performance and its availability may aid him in obtaining future teaching employment; perhaps it will serve other purposes fairly helpful to him as suggested in *Drown* (435 *F.* 2*d* at 1184-1185); and perhaps the very requirement that reasons be stated would, as suggested in *Monks* (58 *N.J.* at 249), serve as a significant discipline on the board itself against arbitrary or abusive exercise of its broad discretionary powers.***" (65 *N.J.* at 245)

It may be concluded from the above-cited passage that the statement of reasons is essentially for the benefit of the teaching staff member, and the affected individual must be assured of a private informal appearance before the board to discuss such reasons. The Commissioner has also stated previously that the best interests of the pupils, the teaching staff members, the entire school system, and the community at large require that any discussion of staff personnel matters by a local board of education must not be held in public. This is so even when a staff member expresses the desire to speak to the board on such matters at a public session. The interests of the pupils served, as well as the interests of the total school district, must be paramount; therefore, local boards

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are required not to engage in such public discussion regarding personnel matters. *Bolger and Feller, supra*

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

In the instant matter, for the reasons stated, the Commissioner orders the Board of Education of the Township of Pemberton to forthwith furnish to petitioner a written statement of reasons for her non-reemployment as a teaching staff member for the 1974-75 academic year. Petitioner shall have ten days from the receipt of such statement to request an informal, private appearance before the Board, which shall be conducted within thirty days from her receipt of such reasons in accordance with the guidelines hereinbefore described.

COMMISSIONER OF EDUCATION

May 6, 1975

Robert Longo,

Petitioner.

v.

Board of Education of the City of Absecon, Atlantic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Perksie and Callinan (Marvin D. Perksie, Esq., of Counsel)

For the Respondent, Walter S. Jeffries, Esq.

Petitioner, a tenured Superintendent of Schools in the employ of the Board of Education of the City of Absecon, hereinafter "Board," avers the Board's action of June 27, 1974, withholding his salary increment for 1974-75

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school year was illegal and improper. The Board denies that he has valid claim to the increment which it withheld or to any increase in salary.

The matter is jointly submitted for Summary Judgment by the Commissioner of Education on the pleadings, stipulation of facts, and Memoranda of Law.

Petitioner was paid $19,778 for the school year 1973-74. This salary was computed at the ratio of 1.5 percent of the comparable placement on the teachers' salary guide in compliance with the non-teaching personnel salary guide adopted by the Board on January 9, 1973. (J-1) This guide provided in pertinent part the following:

"*SALARY GUIDE-NON-TEACHING PERSONNEL*

"A. All increases are not to be automatic, but subject to recommendation of the Superintendent and approval by the Board of Education.

***

"C. The guide may be adjusted annually

***

"ADMINISTRATIVE PERSONNEL

	73/74	74/75
***		
"Superintendent	1.5	1.6
***"		

On February 26, 1974, the Board adopted a resolution fixing petitioner's salary for 1974-75 at $19,788. (J-2) At the time the Board adopted the resolution, petitioner informed the Board that he believed such action to be improper and that he would seek counsel in the matter. Thereafter, on March 25, 1974, petitioner was provided by the Board President (with the signed concurrence of four other members of the Board) with a written evaluation of his services as Superintendent. Therein he was charged with inefficiency in administering the school system as the result of alleged errors, inconsistencies, lack of diplomacy in communicating with the public, failure to improve curriculum, provide new programs, and apply for federal grants. Petitioner was notified as follows:

"***It is the responsibility of the Absecon Board of Education to provide the taxpayers with an efficient administration, therefore, you shall be given an opportunity to make the necessary improvements. At the end of ninety (90) days, your performance shall be re-evaluated prior to any action by the Board.***" (J-3)

A subsequent written evaluation dated June 26, 1974 (J-4), detailed

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numerous alleged weaknesses of petitioner in matters involving both teachers and the Board. This document further charged petitioner with taking action regarding the school's testing program, admission of pupils, and the school dress code without first having a thorough understanding of the matters. Additionally, this document commends petitioner for decisive action taken in regard to receipt of two State grants and transportation rescheduling as the result of a pupil disturbance. The Board concluded, however, that petitioner's overall performance was unsatisfactory and stated:

> "***It is a decision of the Board to offer you a contract for the 1974-75 school year and freeze your salary at $19,778 for that period. You shall be evaluated quarterly and the evaluation shall be discussed with you at the end of each quarter. If at the end of the third quarter, the Board decides you do not have the ability to perform satisfactorily, you shall be notified at that time that your employment is to be terminated at the close of the 1974-1975 school year.
>
> ***
>
> "The Board is prepared to provide any assistance and guidance necessary for you to achieve the level of competence that is expected." (J-4)

Thereafter, by letter dated June 28, 1974, petitioner was notified by the Board Secretary that the Board had on June 27, 1974, authorized his reappointment as Superintendent for the 1974-75 school year at the annual salary of $19,778, which amount was unchanged from that of the 1973-74 school year.

Petitioner argues that, when a board of education adopts a policy for the withholding of increments, it must comply with the provisions of *N.J.S.A.* 18A:29-14 which statute makes no provision for the withholding of a portion or fraction of an increment. *Charles Coniglio v. Board of Education of the Township of Teaneck, Bergen County,* 1973 *S.L.D.* 449

Petitioner further contends that the Board's salary guide adopted January 9, 1973, was binding upon the Board for two full years and that the provisions thereof could not be diminished by the Board's action of February 26, 1974. In support of this contention petitioner cites *N.J.S.A.* 18A:29-4.1 which reads, in pertinent part:

> "A board of education***may adopt a salary policy, including salary schedules***. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules***."

Additionally, 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:

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> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all the members of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned.***"

Petitioner avers that the Board had no existing policy relative to the withholding of salary increments at the time action was taken on February 26, 1974, and on June 27, 1974. He concludes, therefore, that the resolutions denying the increment were *ultra vires*, unconstitutional, and violative of his due process rights. In this regard he cites *J. Michael Fitzpatrick v. Board of Education of the Borough of Montvale, Bergen County*, 1969 *S.L.D.* 4, wherein the Commissioner said:

> "***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.*** [T]he 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***on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak on his own behalf. ***[A]ny 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.***" (at p. 7)

For these reasons petitioner prays for a directive ordering the Board to establish his 1974-75 salary computed at a ratio 1.6 times the corresponding level of the teachers' salary scale.

Conversely, the Board denies that petitioner is entitled to the relief he seeks. It admits voting on February 26, 1974 to fix the Superintendent's salary for 1974-75 at a figure less than that which would include the increment specified by its policy adopted January 9, 1973, *ante*. However, the Board asserts that it did not then enter into a contractual relationship with petitioner by notifying him that this would be his 1974-75 salary. Rather, the Board contends that it acted on advice of counsel to provide petitioner with an evaluation (J-3) and a three-month period during which he was given opportunity to correct his deficiencies.

The Board avers that its second evaluation covering the period March 5, 1974 through June 5, 1974, showing petitioner's performance for that period to be still unsatisfactory, provided a reasonable basis for its action of June 27, 1974, which denied the controverted increment and fixed petitioner's salary for 1974-75 at the precise level of $19,778 which he was being paid for the 1973-74 school year.

The Board contends that it thus complied fully with the requirements of *N.J.S.A.* 18A:29-14 in providing the required notice and evaluations prior to

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ultimately withholding the Superintendent's increment. It further relies upon *Westwood Education Association v. Board of Education of the Westwood Regional School District,* Docket No. C 3373-72, Superior Court of New Jersey, Chancery Division, August 22, 1973, affirmed Docket No. A-261-73 Appellate Division, June 21, 1974, considered *post,* and upon *Association of N.J. State College Faculties, Inc. v. Dungan,* 64 *N.J.* 338 (1974). Thus, the Board contends that its action was legal and within the scope of its authority, both under statute and its own adopted policy.

The Commissioner has considered the entire record and the respective arguments of law set forth therein. He finds no merit in petitioner's contention that the Board was without policy regarding the withholding of salary increment from its Superintendent.

The controlling law is found in the decision of the Appellate Division of the New Jersey Superior Court in *Westwood, supra,* which is set forth in its entirety as follows:

> "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.
>
> "Affirmed."

In the instant matter, the Board legally exercised its discretion pursuant to *N.J.S.A.* 18A:29-14. The record is unclear as to whether petitioner was afforded opportunity prior to February 26, 1974 to refute the charges of inefficiency which prompted the Board to consider denying an increment for the 1974-75 school year. However, by its evaluation dated March 25, 1974, petitioner was adequately notified in writing of his alleged deficiencies and granted a ninety-day period to correct them, which period afforded him ample opportunity to advise the Board of his views concerning its complaints. Finally, the Board, when it acted on June 27, 1974 to set petitioner's 1974-75 salary without inclusion of

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an increment, complied with the provision of *N.J.S.A.* 18A:29-14 to provide written reasons for its action to petitioner within ten days following such action. (R-5)

Accordingly, the Commissioner finds no ultimate unfairness, procedural defect, nor denial of petitioner's due process rights by the Board. Petitioner's contention that his salary for 1974-75 was unalterably fixed at the time the Board adopted the resolution of January 9, 1973, is contrary to the provisions of *N.J.S.A.* 18A:29-14 and the interpretation of that statute by the Appellate Division of the New Jersey Superior Court in *Westwood, supra.* The Commissioner so holds.

It remains to consider petitioner's contention that the Board by its action of February 26, 1974, illegally withheld a fraction of an increment. Therein petitioner relies upon *Coniglio, supra,* wherein the Commissioner stated:

> "***[T]he Board's action withholding one half of a salary increment for petitioner for 1971-72 was outside the authority of its policy and the authority granted it by *N.J.S.A.* 18A:29-14 for the adoption of such a policy, and was therefore *ultra vires.*
>
> ***
>
> "Nothing in this decision is to be construed to prohibit the Board from withholding a full salary increment, or adjustment increment, or both, from any teaching staff member under a policy such as described in this decision, and for appropriate reasons." (at pp. 459-460)

Petitioner further relies upon a stipulation of facts (entered in accord with the agreement at a conference of counsel on December 18, 1974) which states that:

> "***On February 26, 1974 the Board of Education passed a resolution fixing the Superintendent's salary for the 1974-1975 school year at $19,800.***" (Statement of Facts)

A careful scrutiny of the Board's minutes reveals that the original motion to fix the salary of the Superintendent at $19,800 was passed only in amended form. The minutes state that:

> "***Mr. Adkisson amended the motion to fix the Superintendent's salary for the 1974-75 school year at $19,788.00***." (J-2)

It is noted that the figure of $19,788 is $10.00 higher than the Superintendent's previous annual salary. However, further scrutiny of the Board's official records reveals that in a communication to the Superintendent dated June 26, 1974, the Board President notified the Superintendent that:

> "***It is a decision of the Board to offer you a contract for the

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> 1974-1975 school year and freeze your salary at $19,778 for that period.***" (J-4)

Thereafter, on June 28, 1974, the Board Secretary informed the Superintendent by letter that:

> "This will confirm action taken by the Board of Education at the June 27 meeting, authorizing your reappointment *** at the annual salary of $19,778.00.***" (J-5)

The Commissioner concludes that the Board did not, in fact, authorize at any time an increment or adjustment or portion thereof, and that the February 26, 1974 minutes should be corrected to reflect the accurate figure of $19,778 as the salary authorized by the Board for its Superintendent.

The Commissioner is constrained at this juncture to caution boards of education to be certain, prior to adopting and implementing salary schedules and salary policy regarding withholding of increments, that their contemplated action comports with the requirements of the emerging body of statutory and case law. A review of applicable case law may be found in the Commissioner's determination of *Coniglio, supra,* which must now be viewed in the light of the Court decisions in *Westwood, supra.* The Court in *Westwood, supra,* overturned the Commissioner's prior determinations which limited the application of *N.J.S.A.* 18A:29-14.

The Commissioner, herein, is not called upon to consider the merits of the Board's evaluation of petitioner's service nor does he find it necessary to do so. In such matters the Commissioner does not seek to interpose his judgment for that of a board of education which is by statute empowered and required to make such judgments. *Boult and Harris v. Board of Education of Passaic,* 135 *N.J.L.* 329 (*Sup.Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1947)

Absent a finding that the Board denied due process rights to petitioner, acted contrary to requirements of law, or in an arbitrary manner, the Commissioner dismisses the Petition of Appeal.

COMMISSIONER OF EDUCATION

May 6, 1975

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Kenneth Diffenderfer,

Petitioner,

v.

Board of Education of the Borough of Washington, Warren County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Lawrence F. Costill, Jr., Esq.

For the Respondent, Harry K. Seybolt, Esq.

Petitioner, a teaching staff member who had acquired a tenure status in the employ of the Board of Education of the Borough of Washington, Warren County, hereinafter "Board," alleges that he was illegally deprived of a requested military leave of absence by the Board. He now seeks an order by which the Board would be directed to grant the requested leave pursuant to *N.J.S.A.* 18A:6-33. The Board denies the allegations set forth herein and asserts that petitioner, by his own determination, abandoned his position with the Board. Accordingly, the Board seeks dismissal of the instant matter.

The parties agreed to refer the matter for adjudication by the Commissioner of Education on the pleadings, a joint stipulation of facts, Briefs, and the transcript of oral argument.

The following constitutes the stipulated facts in this matter:

"***1. The petitioner, Kenneth W. Diffenderfer, has been employed by the respondent [Board] as principal of one of its two elementary schools for over seven years.

"2. During the month of February 1972, the petitioner, an officer of the United States Army Reserves, voluntarily applied for active duty service with the United States Army.

"3. On April 10, 1972, the petitioner signed a teacher's agreement with respondent declaring his intention to serve as principal for the school year 1972-73 at an annual salary of $16,669.00.***

"4. The petitioner at no time advised the respondent of his intentions until approximately August 9, 1972 when the petitioner advised Mr. Sidney Effross, Superintendent***that he had applied for active military service and had received an acceptance. [It is noted that counsel for the Board suggested at oral argument that the Superintendent was not notified by petitioner until August 16, 1972. (Tr. 19)]

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"5. On August 28, 1972, for the first time, petitioner advised respondent by a letter to the Board Secretary, dated August 28, 1972*** advising the respondent that he was commencing his active military service on September 1, 1972 and by the same letter requested a four-year leave of absence from September 1, 1972 to August 30, 1976.

"6. Petitioner's [military] orders were dated August 24, 1972 and apparently received by petitioner on or about August 28, 1972.***

"7. On October 17, 1972, the attorney for the respondent advised the petitioner by letter of said date that the respondent had denied petitioner's request for a leave of absence.***"

(Joint Stipulation of Facts, unp)

During the tenure of his employment with the Board, and for years prior, petitioner had maintained active status in the United States Army Reserve. It appears that sometime near the close of 1973 or the beginning of 1974, petitioner was promoted to the rank of Lieutenant Colonel in the Transportation Corps, a combat support service, as opposed to the combat arms, such as the infantry, armor or artillery branches.

Petitioner avers that during the latter part of February or early March 1972, he received an invitation to apply for a vacancy which existed in the Office of the Deputy Chief of Staff for Military Operations and Reserve Forces. The successful applicant would be assigned to Headquarters, Continental Army Command, Fort Monroe, Virginia. (HQ CONARC) The invitation (P-1) to apply for this vacancy set forth the following pertinent requirements:

***

"2. Requirements are:

"a. Grade: Lieutenant Colonel***

***

"c. Must be able to complete four year tour ***

"d. Education:

"(1) Civilian: Bachelor Degree (mandatory). Masters Degree (desirable). Education and/or Social Sciences background (desirable).

"(2) Military: [Here are set forth military courses the applicants are required to possess.]

"e. Previous experience in military organizations***

"f. Security Clearance: TOP SECRET***

"g. Must be outstanding officer with broad vision, common sense, calm temperament, pleasing personality, capable of effecting coordination throughout Army staff.

"h. Possess above average ability to express himself orally and in writing.

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"3. Officer [who is the successful applicant] will be assigned to HQ CONARC***

***

"5. Applicant must be available for AD on or after 1 June 1972.***"

Petitioner states that he submitted his application for the announced vacancy on March 9, 1972, "*** realizing at the time that the chances of being selected for this one position in a nationwide competition were certainly not very good.***" (Petitioner's Brief, at p. 2)

Petitioner explains that because he had heard nothing from the Army in regard to his application, he did sign an agreement (P-2) on April 10, 1972 in which he declared his intention to remain in the Board's employ for the 1972-73 school year.

On June 19, 1972, petitioner was summoned to HQ CONARC, at Fort Monroe, Virginia, for a period of five days. There he underwent interviews, tests, and a trial period of situations the selected officer would expect to encounter. (Petitioner's Brief, at p. 2) It was during this five-day period, petitioner states, when he learned that, of forty-two applications received, four applicants (for combat support service) were summoned to Virginia for the five-day proceeding. He also learned that one of the four applicants would be selected within a period of thirty to forty-five days following June 30, 1972. (Petitioner's Brief, at p. 2)

Petitioner avers that he visited HQ CONARC on July 27, 1972 to determine whether he would be the applicant chosen. Petitioner states: "***During this visit he received a rather evasive and cold reception and left with the feeling that he was not among the final selectees.***" (Petitioner's Brief, at p. 3)

On August 6, 1972, petitioner received the following letter (P-3) in regard to his application:

"The purpose of this letter is to informally pass on the rumor that you were one of the two officers selected by CONARC to fill vacancies***.

"The CONARC letter to DA recommending your selection requested you be ordered to active duty on 15 August if possible, but not later than 5 September. Once again, please consider this an informal bit of information on which to base some tentative plans. Don't do anything hasty until your formal notification by Department of the Army."

Petitioner avers that on August 8 or 9, 1972, he received a telephone call from the Department of the Army confirming his selection as the successful applicant. Petitioner alleges that on August 9, 1972, he advised the Superintendent of his selection. The Board suggests that the Superintendent was not notified until August 16, 1972, and then petitioner only notified him that he "*** had applied for a position with the military service and that he might be getting that position.***" (Tr. 19)

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In any event, petitioner, on August 28, 1972, notified the Board in writing (P-4) that "I have been ordered into the active military service by the United States Army for a four-year period starting September 1, 1972. *** Thus, I am requesting a military leave of absence from September 1, 1972 to August 31, 1976.***"

Between August 28 and September 1, 1972, petitioner had left for HQ CONARC in Virginia. His orders (P-5) were delivered to his home on September 1 whereupon his wife delivered a copy to the Superintendent. (Petitioner's Brief, at p. 3) The orders specified an active duty commitment for forty-eight months, with an expiration date of August 31, 1976, and a reporting date of September 1, 1972.

Petitioner was advised by the Board on October 17, 1972 (P-6) that his request for a military leave of absence had been denied. That letter is reproduced here in full:

> "The Washington Borough Board of Education has instructed me to advise you that it considers your voluntary election to enter the military service in the United States Army on a fulltime basis as an abandonment of your position as a principal in the employ of the Washington Borough Board of Education and that, since your services are not mandatorily required by the military and your services were not absolutely necessary in the national interests, that your request for a leave of absence, pursuant to N.J.S.A. 38:23-4, is not justified, and is, therefore, denied.
>
> "It might be well for you to appreciate the fact that the Board was very much upset at the rather precipitous manner in which you gave it notice of your intentions. It is said that you were applying for this fulltime service with the military back in the late spring and that throughout the summer months you apparently had it in mind, but did not even suggest the possibility that you would be making the change until sometime in middle August, when you indicated your intentions to Mr. Effross. It was late August when you advised Mr. Effross that you had a commitment, and the copy of the orders that you received were not received until September 1st. It considered this lack of notice and the covert manner in which you conducted your own negotiations with the United States Army as violative of not only your professional obligation, but the contract terms themselves.
>
> "In order to resolve the question in a mutually satisfactory manner, may we suggest that you submit a written resignation." (P-6)

On November 1, 1972, petitioner advised the Board in writing (P-8) that he disagreed with its interpretation of the statutes. On November 13, 1972, the Board reaffirmed its determination to deny the requested military leave of absence and so informed petitioner. (P-9)

Petitioner asserts that by virtue of *N.J.S.A.* 38:23-4 he is entitled to a military leave of absence as requested of the Board. That statute provides as follows:

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> "Every person holding office, position or employment, other than for a fixed term or period, under the government***of any ***school district ***, who after July first, one thousand nine hundred and forty, has entered, or hereafter shall enter, the active military or naval service of the United States or of this State, 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, or who, after July first, one thousand nine hundred and forty, has entered or hereafter, in time of war, shall enter the active service of the United States Merchant Marine, or the active service of the Women's Army Auxiliary 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, shall be granted leave of absence for the period of such service and for a further period of three months after receiving his discharge from such service. ***
>
> "In no case shall such person be discharged or separated from his office, position or employment during such period of leave of absence because of his entry into such service. During the period of such leave of absence such person shall be entitled to all the rights, privileges and benefits that he would have had or acquired if he had actually served in such office, position or employment during such period of leave of absence except, unless otherwise provided by law, the right to compensation. Such leave of absence may be granted with or without pay as provided by law. Such person shall be entitled to resume the office, position or employment held by him at the time of his entrance into such service, provided he shall apply therefor before the expiration of his said leave of absence. Upon resumption of his office, position or employment, the service in such office, position or employment of the person temporarily filling the same shall immediately cease.***"

The term "emergency" as used in the statute of reference is defined in *N.J.S.A.* 38:23-4.1 as follows:

> "As used in the act to which this act is a supplement,*** the term 'emergency' shall include, but shall not be limited to, any period of time after June twenty-third, one thousand nine hundred and fifty, and prior to the termination, suspension or revocation of the proclamation of the existence of a national emergency issued by the President of the United States on December sixteenth, one thousand nine hundred and fifty, or termination of the existence of such national emergency by appropriate action of the President or Congress of the United States."

Petitioner, in support of his position that a "state of emergency" exists, points out that Proclamation No. 2914 issued by President Truman on December 16, 1950, has never been revoked; rather, it has been repeatedly and recently reaffirmed by the following executive orders: Executive Order No. 10986, 25 *F.R.* 12281 (1960); Executive Order No. 10905, 26 *F.R.* 321 (1961); Executive Order No. 11037, 27 *F.R.* 6967 (1962). Furthermore, petitioner asserts that on August 1, 1972, President Nixon issued Executive Order No.

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11677 in which reference is made to a continued existence of the national emergencies declared by Proclamation No. 2914, *ante*.

Petitioner, in support of his claim for the right to a military leave of absence, also cites *N.J.S.A.* 38:23A-35 which provides as follows:

> "It has been nationally recognized that because of the emergent conditions which are threatening the peace and imperiling the security of the nation, there is imperative need to augment and strengthen the national defense. It is further recognized that the emergent conditions which endanger the national well-being likewise constitute an imminent threat and hazard to the peace and security of the people of the State. Moreover, it is acknowledged that the exigencies of national defense require that the people of the State, in large numbers, be called into military service, and as a consequence, the health, prosperity and welfare of all the people of the State is inevitably affected.
>
> "In these circumstances, and in order to promote and to assist the national defense, and thereby to protect the peace, prosperity and health of the people of the State, it is necessary that citizens and residents of the State in the military service as well as those who are members of the organized militia or of a reserve component of the Armed Forces of the United States should be free to devote their entire energy and effort to the defense needs of the nation and of the State. To assist in this end, it is essential to provide in certain cases for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in the military service. It is further essential in the interests of the prosperity and well-being of the people of the State, that such persons, upon completion of military service, be restored to their former employment.
>
> "In the interpretation and application of this act, it is hereby declared to be the public policy of the State to maintain, secure and protect the civil and property rights of persons in the military service, as hereinafter defined, and of employees who are members of the organized militia or members of a reserve component of the Armed Forces of the United States.
>
> "The Legislature hereby declares the existence of a public emergency affecting the health, safety and comfort of the people, requiring the enactment of the provisions of this act to protect the vital interests of the State.
>
> "All the provisions of this act shall be liberally construed for the accomplishment of this purpose.
>
> "This act shall be deemed an exercise of the police power of the State, for the protection of the public welfare, prosperity, health and peace of the people of the State."

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Petitioner also cites *N.J.S.A.* 18A:6-33 as support for his claim that his tenure status, pension rights, and other employment benefits normally accruing to teaching staff members employed by this Board are protected and may not be tampered with. The statute, *N.J.S.A.* 18A:6-33, provides as follows:

> "L. 1944, c.226, p. 765 [C. 18:4A-1], entitled 'An act concerning persons holding certain offices, positions and employments in the public school system of this state who, after July 1, 1940, have entered or hereafter shall enter the active military or naval service of the United States or of this state, in time of war or emergency, or for or during any period of training or pursuant to or in connection with the operation of any system of selective service or who, after July 1, 1940, have entered or hereafter, in time of war or emergency, shall enter the active service of 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, and to provide for and protect their rights to employment, reemployment and tenure in such offices, positions and employments and the rights, privileges and benefits of certain of them in any pension, retirement or annuity fund of which they were or are members in good standing at the time of entering such service, and repealing 'An act concerning the holders of offices, positions and employments, in the public schools of this state, concerning reemployment, acquisition of tenure and protecting pension rights when the holders of such offices, positions or employments enter the military or naval services of the United States, and supplementing Title 18 of the Revised Statutes,' approved May 19, 1941 (P.L. 1941, c. 134), as said title was amended by chapter 119 of the Laws of 1942 (P.L. 1942, c. 119),' approved April 21, 1944 (P.L. 1944, c. 226), as said title was amended by chapter 91 of the Laws of 1951, and L. 1951, c. 91, is saved from repeal. [This act provides for leave of absence to join military or naval service of the United States after July 1, 1940 and saves their tenure, pension and other employment rights.]"

Petitioner asserts that the federal law on reemployment rights of veterans who are federal employees or employees of private employers is mandatory and cites 50 *U.S.C.A. App.*, Section 459. In regard to federal employees, petitioner cites 50 *U.S.C.A. App.*, Section 459 (a)(2)(A) which holds:

> "Any person who, after entering the employment to which he claims restoration enters upon active duty (other than for the purpose of determining his physical fitness and other than for training), whether or not voluntarily, in the Armed Services of the United States*** in response to an order or call to active duty shall, upon his relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided by this section***if the total of such active duty performed *** after August 1, 1961, does not exceed four years.***"

In urging that the Commissioner consider the intent of Congress with the State laws already cited, petitioner cites *Donald P. Boublis v. Board of Education of the Borough of Hawthorne, Passaic County,* 1973 *S.L.D.* 417, wherein it was held:

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"***The similarity of the legislation enacted by the New Jersey Legislature to that of the U.S. Congress is clear and unambiguous***."
(at p. 426)

And,

"***The legislative intent in New Jersey to protect the veteran is thus clearly expressed and unambiguous and a direct parallel to the expressed intent of the U.S. Congress." (at p. 426)

And,

"***It is noted here by the Commissioner that the legislation enacted by both State and Federal governments omits entirely any distinction between those who enter service voluntarily (enlist), or those who enter as the result of selective service induction.***" (at p. 427)

The Board denies the validity of petitioner's claim as set forth above and argues that he effectively abandoned his position of employment. In this regard, the Board points to the personal negotiations engaged in by petitioner with the Army between late February or early March 1972, and the time he first indicated to the Superintendent (August 9 or 16, 1972) or to the Board (August 28, 1972) that he applied for active military status. The Board avers, therefore, that petitioner's precipitous conduct left the Board in a quandary for a principal on September 1, 1972, and, if his requested relief is granted, until August 30, 1976. Such conditions, the Board argues, do not allow for a thorough and efficient educational system.

While conceding that a precise definition of abandonment does not exist, the Board relies upon *State Highway Department v. Civil Service Commission,* 35 *N.J.* 320 (1961) wherein the Court held:

"***The purpose of the statute [N.J.S.A. 38:23-4] as above noted is to protect a State employee while serving the nation in time of war or an emergency, whether such service was originally undertaken voluntarily or involuntarily. While it is recognized that it is the citizen's duty to serve his Nation in time of national need, it is as well the duty of such a citizen who is a State employee to resume the discharge of the duties of the State position, for the public good, as soon as his services are no longer absolutely required by the military. It follows that absence from State service due to presence in the military service may constitute an abandonment of the former when he voluntarily continues it beyond the time when he can have his release from the Armed Services***."
(at pp. 326-327)

Elsewhere, in the same decision, the Court quoted *Vanderbach v. Hudson County Board of Taxation,* 133 *N.J.L.* 126, 128 (*E.&A.* 1945) wherein it was held:

"***The acts relied upon to show abandonment and nonuser of a public

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> office are to be assayed in the light of the principle that such an office is a public trust which imposes upon the incumbent the performance of certain duties for the common good. It is requisite that the abandonment be intentional, although the intention may be inferred from the officer's conduct and overt acts.***" (35 *N.J.* at 327)

The Board avers that petitioner's actions herein constitute his efforts toward obtaining full-time employment with the United States Army. Also, the Board cites Formal Opinions 15 and 17 of the Attorney General of New Jersey to buttress its claim that petitioner has abandoned his position and therefore has no claim against it.

In reviewing the circumstances as described herein, the Board alleges that petitioner violated all concepts of fair play by his nondisclosure of his intention to seek active military duty until two days before the opening of school. The Board argues that he should not now be rewarded for such disregard of the pupils of the community.

Finally, the Board argues that even if his actions are determined not to be an abandonment of his position, his violation of *N.J.S.A.* 18A:28-8 clearly constitutes unprofessional conduct. In this regard, *N.J.S.A.* 18A:28-8 provides that any teaching staff member, under tenure, who desires to relinquish his employment, shall give the Board at least sixty days' notice. Petitioner's failure to do this, the Board asserts, manifests unprofessional conduct. It is observed, however, that petitioner asserts he did not and does not "desire to relinquish his employment."

The Commissioner observes that the circumstances hereinbefore set forth have not been addressed by him on prior occasions. However, in *Thomas J. Commins v. Board of Education of the Township of Woodbridge, Middlesex County,* 1967 *S.L.D.* 11, petitioner, after a three-year period, attempted to reclaim his tenured position which he voluntarily left. The Commissioner determined that:

> "***[P]etitioner voluntarily quit his teaching job *** and *** such action and his subsequent lack of protest, claim, or communication with respondent for almost three years constituted abandonment of any rights he may have had to tenure or continued employment.***" (at p. 14)

In the instant matter, however, petitioner has pressed his claim to a leave of absence since September 1972. The Commissioner, nonetheless, has carefully reviewed the factual circumstances herein, as well as the arguments of the parties, and finds that petitioner did, in fact, abandon his position with the Board for the following reasons:

1. During late February or early March 1972, petitioner was on Reserve status. By his own action, he extended the amount of time which would have been required of him to meet his military obligations.

2. With knowledge aforethought, petitioner sought the nomination to the

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vacancy announced, without first consulting with the Superintendent or the Board *vis-a-vis* an extended military leave of absence, which constitutes, in the Commissioner's judgment, a deliberate attempt to misuse his tenured position with the Board.

That petitioner was successful in his candidacy for a highly-competitive position with the Department of the Army is clear; however, such military service is not such as contemplated in the statutes protecting veterans. The Commissioner so holds.

Accordingly, the Commissioner of Education finds no basis for the relief requested, and the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

May 9, 1975
~~Pending before~~ State Board of Education 1976 SLD 1137
affd
affd Superior Court June 21, 1977

In the Matter of the Tenure Hearing of Peter J. Romanoli, School District of the Township of Willingboro, Burlington County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Sidney W. Bookbinder, Esq.

For the Respondent, Hartman, Schlesinger, Schlosser & Faxon (Francis J. Hartman, Esq., of Counsel)

The Board of Education of the Township of Willingboro, hereinafter "Board," has certified a charge against respondent, its Superintendent of Schools, alleging that he exhibited conduct unbecoming a teaching staff member while engaged in a conversation with a member of the Board. In its certification of the charge to the Commissioner of Education, the Board states its determination that the charge, if found true in fact, warrants dismissal of respondent from his position or a salary reduction. Respondent avers that the consideration and filing of the charge by the Board was procedurally defective and that, even if found true in fact, the substance of the charge is not sufficient to justify the imposition of any of the penalties prescribed in law. *N.J.S.A.* 18A:6-10 Accordingly, respondent has filed a Motion to dismiss the charge.

An oral argument on the Motion was conducted by a hearing examiner appointed by the Commissioner on April 7, 1975 at the State Department of Education, Trenton. Prior thereto, each of the parties had filed a Brief and Reply Brief. Receipt of the hearing examiner's report was waived and the total record is now before the Commissioner for a decision with respect to the Motion.

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The specific charge by the Board against respondent is recited in its entirety as follows:

> "Subsequent to a Conference Meeting of the Board of Education on January 31, 1975 at approximately 12:15 A.M. at the parking lot of the Garden Plaza Building, Route 130, Willingboro, New Jersey, Superintendent of Schools, Peter J. Romanoli, was guilty of conduct unbecoming a Superintendent of Schools and a teaching staff member in that he used foul and abusive language against George M. Richardson, a member of the Board of Education. The Superintendent of Schools had previously agreed to discontinue using abusive language against Board Members at conferences with Board President, Maurice S. Miller, Jr., Vice-President, Dolores Gross, and Board Member, Patricia Harper."

In support of the charge with respect to the alleged incident of January 31, 1975, the Board has filed an affidavit of Board member Richardson. Three other affidavits from other Board members have also been filed with respect to the allegation that respondent had previously agreed to "discontinue using abusive language." Such affidavits allege other incidents wherein respondent was said to be guilty of using insulting language and displaying abusive conduct to members of the Board. These incidents purportedly occurred on May 28, 1974, June 10, 1974, and August 26, 1974. However, the allegations of these affidavits comprise no direct relationship with the principal charge against respondent and need not be summarized for purposes of a consideration of the instant Motion for dismissal. The Commissioner so holds.

The affidavit of Board member Richardson contains the capstone of the charge against respondent. The allegations contained therein are the primary ones for consideration at this juncture.

Such allegations are, succinctly stated, that on January 31, 1975 at approximately 12:30 a.m. and following an adjournment of a meeting of the Board, respondent was engaged in conversation by Board member Richardson. The conversation is alleged to have taken place outside the school building in or near a school parking lot at a time subsequent to a discussion respondent had been having with two other school administrators.

The subject of the conversation between the Board member and respondent was initially concerned with respondent's possible attendance at a convention in Miami Beach. It is alleged by Board member Richardson that after an initial question he posed in this regard respondent replied with a series of epithets and four-letter obscenities addressed to the Board member and proceeded to "stomp around." It is then alleged that the conversation turned to other subjects which were similarly marked by the use of epithets and obscenities which were said to characterize the initial conversation. Board member Richardson describes the total conversation as constituting "***an incredible attack upon a school board member by the superintendent of schools." (Affidavit of Board Member Richardson, at p. 2)

At the conclusion of the conversation, Board member Richardson states,

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he reentered the school building and told four other Board members of the incident which had occurred.

There followed on February 1, 1975, a special caucus meeting of the entire Board at which time the incident of January 31, 1975, was discussed and during which the Board consulted its solicitor. On February 3, 1975, a majority of the Board voted, without further debate, and without public discussion, in favor of a resolution to certify the charge, *ante,* to the Commissioner. It is stipulated that the Superintendent was not asked to respond to the charge prior to the time on February 3, 1975, when the Board voted to certify it.

Immediately thereafter on February 4, 1975, counsel for respondent forwarded a letter to the Commissioner in which he stated "***that there will be no argument about the facts." (at p.2) He also indicated that he was "***willing to concede for the sake of this argument that the conversation constituted verbal abuse, an obscene attack, or a tirade, as the Board member has variously chosen to characterize it in his letter to various Board members, which letter found its way into the public press. There was definitely no physical action by either party to the conversation.***" (at p. 2)

Thus the truth of the principal allegation of the charge with respect to foul and abusive language, or obscenity, is not specifically denied by respondent and, at least for purposes of argument, is substantially admitted. The Commissioner determines, therefore, that the principal issue for consideration herein is whether or not the charge, *per se,* against respondent is sufficient, even if true in fact, to warrant the imposition by the Commissioner of one of the penalties prescribed in the statutes. *N.J.S.A.* 18A:6-10 *et seq.* This issue was set forth as issue (h) in the conference of counsel in this matter held February 24, 1975, and was one of five issues to be addressed by counsel with respect to the instant Motion. The Commissioner finds no reason, however, to address the other issues at this juncture or to set forth the arguments of the parties pertinent thereto.

Respondent avers that the principal charge against him by Board member Richardson is insufficient as a matter of law to warrant his dismissal or a reduction in salary in the context of the constitutional protection afforded to all citizens by the First Amendment to the United States Constitution. In support of this avowal he cites a number of Court decisions: *Cohen v. California,* 403 *U.S.* 15 (1971); *Pickering v. Board of Education of Township High School District 205,* 391 *U.S.* 563 (1968); *Perry v. Sindermann,* 408 *U.S.* 593 (1972); *New York Times v. Sullivan,* 376 *U.S.* 254 (1964); *Gooding v. Wilson,* 405 *U.S.* 518 (1972); *Roth v. United States,* 354 *U.S.* 476 (1957); *South Plainfield Education Association and Marilyn Winston v. Board of Education of the Borough of South Plainfield, Middlesex County,* 1972 *S.L.D.* 323, aff'd State Board of Education 327, reversed and remanded 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974), dismissed with prejudice Commissioner of Education November 1, 1974; *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962); *State v. Rosenfeld,* 62 *N.J.* 594 (1973). Furthermore, respondent asserts:

"***What is sought to be punished herein is speech which is uttered in the

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> context of an essentially private nature, between public officials, regarding actions taken in their official capacities; the only basis for imposing punishment in this atmosphere, absent any ulterior motives, is that the words chosen were offensive to the sensibilities of the hearer. Denying First Amendment protection to language which solely affects one's sensibilities is *** no longer valid.***" (Brief for Respondent, at p. 25)

Thus in respondent's argument the essentially private nature of the controverted incident of January 31, 1975, is an important reason which bars a punishment by the Commissioner and in this respect respondent differentiates that circumstance from those in *Pietrunti v. Board of Education of Brick Township,* affirmed and reversed in part 128 *N.J. Super.* 149 (*App. Div.* 1974), *cert. den.* 65 *N.J.* 573 (1974), *cert. den.* United States Supreme Court December 9, 1974. Respondent also observes that there is an absence herein of any allegation that his language or actions on January 31, 1975, were premeditated or that he or the Board was in any way impeded in the performance of administrative duties.

The Board agrees with respondent that an exercise of free speech cannot ordinarily stand as the basis for the dismissal of a tenured employee, but it avers that the language of respondent was not protected free speech but an abuse of it and an example of conduct unbecoming a Superintendent of Schools. In the Board's determination the words allegedly used by respondent in his conversation with Board member Richardson were "fighting words" which are not covered by a shield of constitutional privilege. In support of this determination, the Board cites *Cohen v. California, supra,* and *Chaplinsky v. New Hampshire,* 315 *U.S.* 568 (1942). Further, the Board avers that the alleged incident of January 31, 1975, was the culmination of a series of incidents as evidenced by its four affidavits and, thus, a demonstration of "unfitness" in the context of the Court's decision 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).

In the Board's view the alleged statements of respondent to Board member Richardson on January 31, 1975 "*** *were* directed to a person with whom Respondent has daily contact and the question of continued harmony and discipline *is* crucial as an *effect* of Respondent's abuse of the right of freedom of speech.***" (Reply Brief of Board, at p. 42) (*Emphasis in text.*) The Board finds further support for the argument that such alleged abuse is not protected free speech in the decision of the Superior Court of New Jersey in *Pietrunti, supra,* wherein the Court said:

> "***Free speech *** do[es] not endow a teacher, as a school district employee, with a license to vilify superiors publicly.***"
>
> (128 *N.J. Super.*, at p. 151)

Additionally, the Board finds support in a number of decisions of the Commissioner for the view that respondent's language and actions of January 31, 1975, were unacceptable. In particular it cites *In the Matter of the Tenure Hearing of Frank Marmo,* 1966 *S.L.D.* 112; *In the Matter of the Tenure Hearing of Francis Bacon,* 1971 *S.L.D.* 387, aff'd State Board of Education 1972 *S.L.D.*

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663; *In the Matter of the Tenure Hearing of John H. Stokes,* 1971 *S.L.D.* 623; *In the Matter of the Tenure Hearing of Emma Matecki,* 1971 *S.L.D.* 566, aff'd State Board of Education 1973 *S.L.D.* 773, aff'd New Jersey Superior Court (Appellate Division) 1973 S.L.D. 773; *Edwin Oliver v. Board of Education of the City of Hoboken,* 1938 *S.L.D.* 339 (1917).

Finally the Board avers that respondent "*** has exceeded those limits [of free speech] and by so doing his unprotected speech has not only infringed upon the addressee's similar right to free speech but has breached his obligation of loyalty and cooperation owed to his employer and impaired the proper functioning of the Board of Education and the District. Such conduct cannot be excused on any grounds, for it is indeed unbecoming conduct warranting the penalties imposed by the Tenure Hearing Act.***" (Reply Brief of Board, at p. 55) The Board requests the Commissioner to dismiss the Motion and to proceed to a plenary hearing to examine the "***merits of this pattern of unbecoming conduct on the part of the Superintendent of Schools." (Reply Brief of Board, at p. 56)

The Commissioner has reviewed such arguments and has noted the singularly uncomplicated nature of the principal charge against respondent. Succinctly stated this charge is, in effect, that at the end of a long working day respondent lost his temper and verbally abused a member of the Board in the parking lot of the school in which they had both been working. Such abuse was allegedly comprised of a series of epithets and four-letter words generally classified as obscenities. The only possible witnesses to the incident are represented to be two other school administrators. Is such an incident properly the subject of a charge before the Commissioner or a controversy under the school law of the kind that confers jurisdiction on him for decision pursuant to the statutory authority? *N.J.S.A.* 18A:6-9 If it is, was respondent's conduct and language in the circumstance, even if true in fact, so reprehensible as to justify either respondent's dismissal from his tenured employment or a reduction in his salary--the penalties which the Commissioner may invoke? *N.J.S.A.* 18A:6-11

The Commissioner has considered such questions and the total pattern of recrimination which is evidenced herein. He states at the outset that he abhors the pattern and cannot condone the use of language such as that allegedly used by respondent which is nowhere specifically denied.

The Commissioner does not conclude, however, that the principal allegation with respect to respondent's use of "foul and abusive language," which serves as the capstone of the instant charge in its totality, is sufficient in the circumstances, even if true in fact, to warrant a disciplinary penalty by the Commissioner. Respondent's alleged actions and words occurred or were spoken at the end of a long and, it may be supposed, arduous working day. There is no allegation of premeditation in what he said or did. The incident was essentially private in nature and limited in scope to an exchange betwen respondent and a member of the Board with whom, to at least some extent, he has a peer relationship. By law, a superintendent of schools is entitled to "*** a seat on the board *** employing him and the right to speak on all educational matters***" although he has no right to vote. *N.J.S.A.* 18A:17-20

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Such facts and circumstances confer no automatic authority for jurisdictional review upon the Commissioner who is limited to deciding controversies and disputes under the school law. *N.J.S.A.* 18A:6-9 Indeed, the Commissioner finds the private nature of the incident herein is a bar to the exercise of any authority by him, and he opines that a decision to the contrary would mandate the formulation of a graduated set of moral, ethical, and legal standards applicable to the use of language by public school employees in private situations for which he finds no jurisdiction. As the Superior Court of New Jersey said in *Marilyn Winston, supra,* citing the United States Supreme Court in *Tinker v. Des Moines Independent School District,* 393 *U.S.* 503, 506 (1969), teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Neither, the Commissioner holds, are they, nor superintendents of schools, divested of such rights when in the role of private citizens they engage in essentially private, personal conversation–albeit other than that used in a polite exchange–at midnight in a school parking lot. This determination is limited to the specific factual circumstances in this case. It does not negate numerous prior decisions of the Commissioner and the courts that private conduct may, in other circumstances, properly be the subject of a charge before the Commissioner. *In the Matter of the Tenure Hearing of John Stokes,* 1971 *S.L.D.* 623; *Ruth Schroeder v. Board of Education of the Township of Lakewood,* 1960-61 *S.L.D.* 37; *In the Matter of the Tenure Hearing of Thomas Appleby,* 1969 *S.L.D.* 159, aff'd State Board of Education 1970 *S.L.D.* 443, aff'd New Jersey Superior Court, Appellate Division, 1972 *S.L.D.* 662

Thus, in essence, the Commissioner holds that a superintendent of schools is not, under all circumstances, a public person but that he is possessed also of private privilege and that on January 31, 1975, respondent acted pursuant to such privilege. It follows then that the Commissioner finds no jurisdiction to examine for possible censure what respondent did or said on that occasion and that the charge herein fails in its sufficiency. This finding precludes the necessity to consider the merits of the controverted alleged expressions, *per se,* or the remaining element of the charge concerned with an alleged prior "agreement" respondent had with the Board. Such purported "agreement" is clearly a peripheral element of support for the principal allegations of Board member Richardson, and the Commissioner's decision, *ante,* with respect to these allegations negates the necessity to further examine or consider other elements of the charge as a whole. (See *N.J.S.A.* 18A:6-16.)

Accordingly, the Motion to Dismiss is granted. The Petition is dismissed. The Commissioner hereby reinstates Peter J. Romanoli to his position as Superintendent of Schools with full restoration of all salary and benefits withheld as the result of his suspension, less mitigation of any other earnings during such period of time.

COMMISSIONER OF EDUCATION

May 14, 1975

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Agnes D. Galop,

Petitioner,

v.

Board of Education of the Township of Hanover, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Riker, Danzig, Scherer & Brown (Thomas H. Sullivan, Esq., of Counsel)

Petitioner, a curriculum coordinator with a tenured status in the employ of the Board of Education of the Township of Hanover, hereinafter "Board," alleges that the Board on March 21, 1974, reduced her salary in contravention of her tenure rights. She prays for an order of the Commissioner of Education declaring the Board's action of March 21, 1974, a nullity and directing the restoration of the moneys to which she claims entitlement.

The Board admits its action of March 21, 1974, and that it thereafter withheld certain moneys from petitioner. It asserts, however, that these were legal and reasonable acts taken to correct an administrative error which resulted in fixing petitioner's salary at a level higher than that to which she was entitled.

A hearing in this matter was held on September 10, 1974 at the office of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Certain facts are not in dispute. Petitioner, who works eleven months per year, was by Board action of October 15, 1973, placed on the sixteenth step of the MA+45 column of the salary scale for the 1973-74 school year and was thereafter paid at the annual rate of $19,525 until February 22, 1974.(P-3) On that date petitioner received a copy of a communication addressed to the Board Secretary by the Superintendent of Schools which stated:

> "This will confirm that Mrs. Galop's status on the salary guide should appropriately be listed as 'MA+30' as approved by this office on June 8, 1972 in Mrs. Galop's request for evaluation of transcripts under the 'old' system.
>
> "The Board of Education Policy on Recognition of Advanced Course Work for Salary Guide Placement Purposes (4141.1) adopted on June 19, 1972, clearly states that 'Course work taken prior to completion of ***the Master's degree will not be applicable for salary guide purposes beyond the

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'MA' guide level'. Therefore, although it was assumed through inadvertent administrative error that Mrs. Galop was entitled to movement to the new MA+45 level, and such was indeed administered effective with the November payroll, this is a violation of existing Board policy and the corrected placement must be made. The recovery of these funds, according to our Board Attorney, is the proper administrative procedure at this point.

"I have discussed this matter by phone with Mrs. Galop this afternoon, and she has advised me that she would prefer to have the adjustment made by payroll deduction for the rest of the year, rather than by direct return by check.

"Please make the proper payroll adjustments accordingly." (P-5)

Petitioner responded to this directive in writing stating, *inter alia,* the following:

"***In no way am I in agreement with this memo for a deduction from my salary. Therefore, no authorization is granted for said deduction.

"My present salary for 1973-74 was granted at a public meeting on October 15, 1973 and should be fulfilled by the Board of Education." (P-6)

The Board, however, passed the following motion on March 21, 1974:

"***That, upon the recommendation of the Superintendent, the Board correct the salary of Mrs. Agnes Galop to $18,975 for the 1973-74 school year, retroactive to July 1, 1973, at the correct step of M.A.+30, Step 16, for 11 months' service.***" (P-8)

A review of Board policy applicable to salary benefits for graduate credits reveals that, prior to the 1973-74 school year, the highest scale of teachers' salaries in effect was the MA+30 scale. The Board's Policy on Recognition of Advanced Course Work for Salary Guide Placement Purposes, No. 4141.1, adopted June 19, 1972, provides that:

"***only graduate work *** shall be considered applicable. In unusual circumstances, upon prior formal approval of the Superintendent and Board of Education, an undergraduate course may be used toward the total number of credits applicable for advanced salary guide placement.

***

"Course work taken prior to completion of requirements of the Master's degree will not be applicable for salary guide purposes beyond the 'MA' guide level.***" (R-1)

This policy makes no provision for the validation of any course work

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taken prior to the award of a master's degree toward placement on the MA+45 level on the salary scale. Prior to the Board's adoption of Policy No. 4141.1, petitioner's graduate credits were evaluated at her request under the then-existing policy. (Tr. 55, 125) It was determined that she was entitled to placement on the MA+30 scale which at that time was the highest scale on the teachers' salary guide. (R-2; Tr. 61) Since that evaluation, petitioner has acquired six additional graduate level credits. (R-4)

An examination of petitioner's transcripts reveals that she was awarded the Master of Arts degree by Paterson State College on May 22, 1974. (R-3-E) During the spring semester of 1971, she also completed six graduate level credits at Montclair State College where she thereafter completed eighteen additional graduate level credits in education. (R-4) Further examination of petitioner's transcripts shows that she had completed a total of nineteen graduate education and library science credits at Newark State College [Kean College] prior to the time she began work on her master's degree program. (R-3-D)

The hearing examiner has considered extensive documentation and testimony presented at the hearing relative to petitioner's graduate credits and finds the following facts:

Petitioner's academic credits were evaluated by the Superintendent in June 1972 in accordance with the Board's salary policy which existed prior to the adoption of Policy No. 4141.1. This former policy was less restrictive than Policy No. 4141.1. The Superintendent recommended that petitioner be placed on the MA+30 salary guide at that time, and both he and the Board have since felt bound by that placement, although petitioner has completed fewer than thirty graduate credits since she was awarded her master's degree. (Tr. 92, 135)

Policy No. 4141.1, enacted subsequent to this evaluation, is more restrictive than the Board's previous policy on academic credits and has reduced the Superintendent's discretionary power concerning which credits may be validated. (Tr. 129; R-1; R-6)

Petitioner successfully completed a total of eighteen graduate credits subsequent to the time her master's degree was conferred. To this may reasonably be added those six graduate credits earned at Montclair State College for the spring semester concurrent with her completion of the requirements for the master's degree at Paterson State College.

Petitioner's total number of graduate level credits, exclusive of those taken in satisfaction of the master's degree requirements, but including certain graduate courses in library science, is forty-three. (R-3-D; R-4)

The Superintendent inadvertently and in error caused petitioner's name to be recommended to the Board for placement on the MA+45 salary scale. (Tr. 65-66) This error was in no way attributable to petitioner. (Tr. 116)

The Board paid petitioner until March 1974 according to the MA+45 scale. Thereafter, she was paid on the MA+30 scale. The Board did not take action to

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recover the additional amounts paid petitioner beyond the MA+30 scale from July 1, 1973 through March 1974. (Tr. 71)

Petitioner asserts that she was rightfully entitled to placement on the MA+45 scale in recognition of her graduate credits and that, since she was placed thereon, the Board's action to remove her therefrom constituted a reduction in salary and is invalid in the light of *N.J.S.A.* 18A:6-10 which provides that persons under tenure shall not be reduced in compensation except for just cause:

> "***and then only after a hearing *** by the commissioner *** after a written charge or charges *** shall have been preferred against such person***."

In support of this assertion petitioner sets forth the Commissioner's statements in *Albert De Renzo v. Board of Education of the City of Passaic, Passaic County,* 1973 *S.L.D.* 236 as follows:

> "***In regard to the Board's action, *ante,* the Commissioner held in *Anson et al. v. Board of Education of the City of Bridgeton, Cumberland County,* 1972 *S.L.D.* 638, 640, that when a board establishes a teacher's salary, it cannot at a later date reduce that amount because of an error it originally made. More specifically, the Commissioner noted:
>
> '***If there had been a mistake in the placement of petitioners on the salary guide, it was not of their making and they cannot, as teachers under tenure, be deprived of a right they had acquired by the action of the Board in fixing their salaries for the 1970-71 school year.***'***" (at p. 245)

Petitioner further cites *James Docherty v. Board of Education of the Borough of West Paterson, Passaic County,* 1967 *S.L.D.* 297, 300, wherein the Commissioner reaffirmed that which had been previously stated in *Harris v. Board of Education of Pemberton Township,* 1939-49 *S.L.D.* 164 as follows:

> "***If a teacher is under tenure, a board of education is authorized to increase her pay, but cannot reduce it except under the procedure set forth in the tenure statute***."

And,

> "***An acquired right through the adoption of a resolution by a board of education cannot be invalidated by a rescinding of the resolution at a subsequent meeting.***" (*Docherty, supra,* at p. 300)

Additionally, petitioner argues that a recent opinion in *Kawaida Towers v. City of Newark,* Superior Court, Essex County, February 23, 1973, by Judge Kimmelman, which was affirmed by the Appellate Division based on the Court's argument, deals with the conclusion to be placed upon mistakes by public officials. In *Kawaida Towers,* the Court said:

> "***In effect, we have an admission by elected officials that when they

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voted they were not in possession of all the facts–facts which they now deem material to the proper consideration of the issue.

"Unfortunately, a government, whether it be a City Council, State Legislature or Congress, is not permitted to function in a loose or cavalier fashion. *** They are bound to investigate, know, appreciate and understand matters which come before them and which require their vote.***

"Once they have cast their vote upon a particular matter and vested rights of parties have materialized they are powerless to undo their deed.***"

Finally, petitioner states that the Board is bound by its action, because petitioner in good faith relied on the Board's action and she has the right to have it honored. Petitioner avers that a commitment should not be lightly or cavalierly made, but once it has been made, it must be respected. She concludes that the Board is now precluded from reversing its action.

The Board, for its part, while contending that petitioner does not have as many as thirty credits taken after receipt of her master's degree, expresses willingness to compensate petitioner on the MA+30 scale in recognition of the Superintendent's previous evaluation of her credits. (R-2)

The Board asserts that while it may not unilaterally alter the terms of its negotiated policy, it is obligated to correct any erroneous interpretation of the salary guide, as in the instant matter. The Board states that the salary policy is binding upon the adopting Board and establishes the precise terms and conditions under which teachers are eligible to receive the salary amounts named therein for the various levels of training and experience. *Norman A. Ross v. Board of Education of the City of Rahway,* 1968 *S.L.D.* 26

According to the Board, the October 15, 1973 resolution, which merely fixed the amount of petitioner's salary erroneously thought to be in accord with the salary guide, did not vest any additional rights in petitioner. The Board asserts that the salary rights of staff members are vested and controlled by the guide. The Board argues that it was without authority to authorize payment to petitioner of any amount other than that to which she was entitled under the salary guide. Therefore, its resolution mistakenly authorizing payment to her of a greater amount was of no effect. This being the case, says the Board, its subsequent March 1974 resolution was merely a reaffirmation of its obligations pursuant to the salary guide.

Finally, the Board argues that its correction of the error, *ante,* was not in violation of petitioner's tenure rights, since she had no right to be compensated other than in accordance with the salary guide. In this regard, the Board states that by accepting the guide on her own behalf and expressing satisfaction with its provisions on behalf of the Hanover Township Education Association, petitioner has clearly indicated that this was the pay rate she was willing to accept. The Board argues that petitioner is claiming a right to be paid on the MA+45 scale when she has insufficient credits for such a position on the guide.

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Therefore, according to the Board, she is in effect claiming a salary to which she has not accrued a right and her tenured position does not afford her any protection in this instance.

The Board concludes that tenure does not confer upon its recipient any right to a windfall, the effect of which is to undermine the integrity of the salary guide which must be implemented fairly and impartially according to its terms.

In keeping with the above arguments, the Board requests that the Commissioner affirm its action in correcting petitioner's salary and instruct as to the manner in which the Board may recoup moneys paid to petitioner in error to the extent of $412.50.

The hearing examiner finds that the salary policy negotiated between the Association and the Board for the years July 1, 1973 to June 30, 1975, is silent with respect to who may be properly paid according to the MA+45 scale. Certain provisions therein pertain as follows:

"***

1. The Board, under law, has the final responsibility of establishing policies for the district.

"2. The Superintendent and his staff have the responsibility of carrying out the policies established. ***" (P-1, at p. 16.1)

The hearing examiner observes the contention of petitioner that Policy No. 4141.1 was adopted unilaterally by the Board, should properly have been negotiated, and is therefore illegal. This stands, however as a naked allegation without proof advanced in support thereof. Nor was it raised in the pleadings nor agreed upon in the pre-hearing conference of counsel as an issue. The hearing examiner recommends that the Commissioner disregard it with respect to a final determination of the matter.

The hearing examiner further observes that the Court, in *Board of Education of Passaic et al. v. Board of Education of Township of Wayne et al.*, 120 *N.J. Super.* 155, 163-164, (*Law Div.* 1972) has stated:

"***The general rule is that such payments made by municipal corporations or agents thereof under mistake of law are recoverable.

***

"In dealing with the issue of whether the government could recover erroneous refunds, the court in *United States v. Hart*, 12 *F. Supp.* 596, 597 (E.D. Pa. 1935), aff'd 90 *F. 2d* 987 (3 Cir. 1937), held that 'it is well settled that in case of the government, states, and even municipalities, money paid by mistake may be recovered.'

***

"The reasoning behind such a decision is that this court does not feel that

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a municipality or subdivision thereof, as the instrument of the people, should be bound by a misinterpretation of the law by the authorities in charge.***"

In summary, the hearing examiner finds that petitioner, absent proof that she has sufficiently complied with the requirements of the Board's Policy No. 4141.1 or otherwise completed a total of forty-five graduate level credits in addition to those taken to satisfy the requirements for her master's degree, is not entitled to placement on the MA+45 salary scale.

It remains for the Commissioner to determine the remaining narrow issue of whether petitioner is entitled to the salary of $19,525 which the Board by resolution of October 15, 1973, established as the result of inadvertent administrative error. In the alternative, the Commissioner must determine whether the Board's action of March 21, 1974, reducing petitioner's salary to $18,975 in an effort to correct its previous action, is valid and legal.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter, the hearing examiner report, and the exceptions thereto filed by the parties pursuant to *N.J.A.C.* 6:24-1.16. The inadvertent error in the hearing examiner report, stating that petitioner was awarded a Master of Arts degree on May 22, 1974, is herewith corrected to accurately state that this degree was awarded on May 22, 1971.

A careful review of petitioner's academic transcripts in evidence confirms the hearing examiner's finding that she does not possess the required number of graduate level credits to entitle her to placement on the Board's MA+45 salary guide. Nor has she completed fifteen graduate level credits since she was placed on the MA+30 salary guide. She did not, therefore, meet the requirements of the Board's Policy No. 4141.1, nor otherwise present forty-five graduate level credits. She was nevertheless voted a salary of $19,525 for the school year 1973-74 upon the faulty, though inadvertent, recommendation of the Superintendent. Petitioner was in no way responsible for this unfortunate error and, having received notice thereof and payment for a period of several months, had reason to rely upon the Board's official act establishing her salary at that level for the period of *one school year. N.J.S.A.* 18A:6-10; *De Renzo, supra; Docherty, supra; Harris, supra; Kawaida Towers, supra* Therefore, the Board is not entitled to recover any portion of the salary paid to petitioner during the months of July 1973 through February 1974. Nor was it legally entitled to reduce her monthly rate of payment thereafter through June 1974. The Commissioner so holds and directs the Board of Education of the Township of Hanover to compensate petitioner the appropriate sum of moneys in accordance with this determination.

Petitioner has no residual entitlement to such a favored position beyond the end of her 1973-74 contract and is to be paid for the 1974-75 school year,

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and thereafter, as provided by her proper step and level on the Board's negotiated salary guide and authorized by the Board's official action.

The Commissioner is constrained to caution all local boards of education and their administrative officers to examine in minute detail those documents which are submitted for official resolution authorizing contractual salaries of the numerous employees of school districts. In every instance such matters should be thoroughly scrutinized prior to official action. By so doing, boards will avoid the payment of unnecessary sums, as herein, and avoid the disharmony and unnecessary litigation occasioned by careless and inadvertent error.

The Commissioner is further constrained to state that, while relatively small sums, as herein, may be decided in keeping with those precedents established in past school law decisions, he will in no way support any errors which might conceivably bestow unearned salary benefits of windfall proportions or in such amounts as to threaten the thorough and efficient operation of a local school district. *Board of Education of Passaic et al., supra; United States v. Hart, supra*

Finally, the Commissioner observes respondent's exception relative to the hearing examiner's comment on the admissibility of six graduate credits acquired by petitioner at Montclair State College concurrently with the completion of her master's degree at another institution. The Commissioner finds it unnecessary at this time to determine whether these graduate level credits may be counted to satisfy the MA+45 salary guide requirements. Such determination is properly within the discretion of the Board and should be made in accord with its Policy No. 4141.1 and other existing salary policies extant at the time such review again becomes necessary.

COMMISSIONER OF EDUCATION

May 16, 1975

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Agnes D. Galop,

Petitioner-Appellant,

v.

Board of Education of the Township of Hanover, Morris County,

Respondent-Cross Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 16, 1975

For the Petitioner-Appellant, Saul R. Alexander, Esq.

For the Respondent-Cross Appellant, Riker, Danzig, Scherer & Debevoise (Thomas H. Sullivan, Esq., of Counsel)

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

Mrs. Ruth Mancuso and Mr. Daniel Gaby dissented in this matter.
September 10, 1975

**In the Matter of the Tenure Hearing of Walter Campbell,
School District of the Borough of Manasquan, Monmouth County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, Anton and Ward (Donald H. Ward, Esq., of Counsel)

For the Respondent, Morgan & Falvo (Peter S. Falvo, Esq., of Counsel)

Charges of unbecoming conduct were filed with the Commissioner of Education by the Manasquan Board of Education, hereinafter "Board," against Walter Campbell, hereinafter "respondent," a teaching staff member in its employ. Respondent was suspended without pay on April 16, 1974 after certification by the Board that the charges would be sufficient, if proven true in fact, to warrant his dismissal or reduction in salary.

A hearing in this matter was conducted on August 6, 1974 at the office of the Monmouth County Superintendent of Schools by a hearing examiner appointed by the Commissioner. Upon the completion of the Board's case (Tr.

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112), respondent moved to dismiss the charges for failure of the Board to carry the burden of proof. The parties agreed to have the Commissioner rule on the Motions (Tr. 140) prior to respondent presenting his defense, if required. Thereafter, the parties filed Briefs in support of their respective positions on the Motions. The report of the hearing examiner in regard to the evidence adduced by the Board in support of its charges is as follows:

On April 16, 1974, the Board certified the following charges against respondent to the Commissioner:

> "***_CHARGE 1:_ On April 9, 1974, you absented yourself and failed to perform your professional teaching duties by attempting to improperly use a sick day for personal business when, in fact, you had used all of your personal days up and you were not, in fact, sick.
>
> "_CHARGE 2:_ You were late to school and left your first class (sixth period) unattended which necessitated another teacher taking charge of your class, and further compounded said unauthorized absence by stating an untruth as to the actual time of arrival, characterizing said lateness as ten minutes when it was, in fact, one hour.
>
> "_CHARGE 3:_ You are further guilty of conduct unbecoming a teacher inasmuch as your characterized your students as 'rotten kids' which was given to a response to an interrogation concerning your frequent absences.***"

The origination of the above charges occurred on April 8, 1974, when respondent informed his department chairman that he was not feeling well and was doubtful whether he would feel well enough the next day to report for school. (Tr. 6) In the event that he was not feeling well enough to report for work the next day, respondent provided the department chairman with lesson plans to be used by a substitute teacher. Respondent did not report for work on April 9, 1974. (Tr. 6)

The Superintendent testified that the high school principal informed him that he, the principal, had "***heard that he [respondent] was possibly home working [at Zuber's Boat Works] ***" (Tr. 49-50) on April 9, 1974. It appears that respondent purchased the Boat Works as a business venture. (P-2) Accordingly, the Superintendent advised respondent by memo dated April 10, 1974, to "***[p]lease see me tomorrow before classes concerning your absence on April 9th." (P-1) The Superintendent testified that no other instructions or advice as to the purpose of the requested conference was afforded respondent. (Tr. 45)

On April 11, 1974, the day the Superintendent requested the conference with respondent before his classes began, the department chairman testified he was informed that respondent's sixth period class, which began at 11:25 a.m., was unattended. The department chairman checked respondent's classroom at 11:30 a.m., found two pupils there (Tr. 12), and confirmed that respondent was not present. (Tr. 7) After placing the two pupils with another teacher, the department chairman testified he went to the high school principal's office and

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telephoned respondent's home, and Zuber's Boat Works, and the Superintendent's office in an unsuccessful effort to locate respondent. Finally, between approximately 11:45 a.m. and 12 noon, the department chairman testified he heard the high school principal state: "Mr. Campbell is coming in now. He is in the hall." (Tr. 9)

Although the department chairman testified that he did not know exactly how late respondent was for class on April 11, 1974 (Tr. 19), he did testify respondent was to have reported to school at 10:30 a.m. (Tr. 20), and that respondent did not inform him he intended to be late for his sixth period class on April 11, 1974. (Tr. 17)

In regard to respondent's appearance for duty on April 11, the Superintendent testified that he telephoned the high school at 10 a.m. to locate respondent to have a conference (P-1) regarding his absence of April 9, 1974. The Superintendent testified that respondent had not yet reported in. The Superintendent telephoned the high school again at 10:30 a.m. and 11:45 a.m., or 11:30 a.m. (Tr. 63) and was informed that respondent had not yet signed in. Finally, the Superintendent testified, he was informed that respondent had not met his sixth period class. At noon, the Superintendent testified, he left his office and went to the high school (Tr. 28), a two-minute drive. (Tr. 63) Upon arriving at the high school, the Superintendent met the high school principal in the corridor and requested his presence in the conference to be held with respondent. At that moment, respondent was walking down the hall, apparently toward the principal's office. (Tr. 29)

Subsequent to the conference of April 11, 1974 between respondent, the Superintendent, and the high school principal, the Superintendent prepared a compilation (P-2) of notes he had taken during the conference. That compilation reads as follows:

> "Superintendent Miller had asked that Walter Campbell see him on April 11 to explain his absence of April 9. The superintendent had received information that he was working at his private business on the day he claimed to be sick.
>
> "Superintendent Miller had asked to see him before classes began at 10:30 a.m. [It is noted that while respondent was to have reported to school at 10:30 a.m., his first class began at 11:25 a.m.] He did not report and at 11:45 the superintendent ascertained from the high school that he had not reported for work and had missed his first (sixth) period class.
>
> "At noon the superintendent went to the high school and as he approached the office [he] saw Campbell coming down the hall.
>
> "Campbell greeted the superintendent by asking, 'You wanted to see me?' The Superintendent answered in the affirmative and asked him to come into Mr. Morris's [high school principal] office. Mr. Morris was asked to join them.

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Superintendent: 'I want to know why you were not in school on Tuesday [April 9, 1974].'
"Campbell: 'Isn't this a departure from normal procedure?'
"S: You were to have come and seen me this morning.
"C: I was in yesterday and you were not there. I got your letter [P-1] yesterday.
"S: You didn't read your letter properly and did not note the date. You were to have seen me this morning before school.
"S: Why were you out on Tuesday.
"C: I took one of my sick days.
"S: Were you sick?
"C: I am entitled to my sick days.
"S: Only if you are sick. If you are sick you have to be confined. Were you confined?
"C: (No answer)
"S: Why did you take a sick day?
"C: Because I had used up all my personal days.
"S: Someone told me you (sic) working at Zubers. (The person was on our staff) (Campbell had just bought Zubers)
"C: I know who told you that (Campbell then proceeded to castigate someone who apparently keeps checking on things in a red pick up truck) or so he claimed
"S: Were you working?
"C: (There was no answer)

[The Superintendent continued in narrative form:]

"Campbell had been late for school. He had not met his first (6th period) class. He did not call or report that he would be late. The superintendent inquired after him at 10 o'clock, 10:30 and 11:45. The high school office had called and indicated that he had not checked in nor met his first class.

"Superintendent Miller asked Campbell:

"S: Were you late?
"C: I was 10 minutes late.
"S: You did not call and say you would be late.
"C: (No response)
"S: What time are you suppose (sic) to report for school?
"C: 10:30.
"S: What time did you get here?
"C: Ten minutes after my first class began (This would have been 11:25, one hour late.)
"S: Why didn't you meet your class?
"C: I was there but the class wasn't there (Department Chairman Bitsko had transferred the class***)
"S: Did you check on them? Did you try to find them?
"C: (No answer)
"S: When do you plan to leave our employment?

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"C: I was going to ask for a leave of absence for a year but I guess I've blown it.
"S: I guess you did (have).
"S: You have been absent quite a few days.
"C: Yes, I guess I have some rotten kids (This statement was not understood by the superintendent but apparently referred to difficulties encountered by substitutes handling his classes).***" (P-2)

The hearing examiner observes that the last quote above attributable to respondent constitutes the extent of the evidence in support of Charge No. 3 that respondent is "***guilty of conduct unbecoming a teacher inasmuch as you characterized your students as 'rotten kids.'***"

The Superintendent's compilation (P-2) concluded by stating in pertinent part:

"Mr. Morris made some remarks about his [respondent's] not doing things in a proper manner. Campbell showed some remorse and indicated he was sorry. He [Campbell] offered his hand (which seemed to indicate he was quitting or something.) His hand was accepted.***"

Subsequent to this conference, the Superintendent testified, he informed the Board President regarding the purpose of the conference before it occurred and, again, after the conference had been held. (Tr. 67) The Superintendent testified that he reported to the Board President because "***I ran into him and I told him where I was going and then I reported back to him***." (Tr. 67)

The Superintendent testified that when the high school principal informed him that respondent was working at Zuber's Boat Works on April 9, 1974, he did inquire of the principal where he received that information. In this regard, the principal testified that he informed the Superintendent during an otherwise general conversation on April 9, 1974 ,'***that it was widely rumored that [respondent] was working at Zuber's at various times.***" (Tr. 109) However, the principal is adamant in his testimony that he did not report to the Superintendent that respondent was, in fact, working at Zuber's on April 9, 1974. (Tr. 109)

It should be pointed out at this juncture that respondent was first employed by the Board during September 1964. Since that time, until September 1973, he had accumulated ninety sick days, in addition to which he had five personal days at his disposal. (Tr. 59-60) Between September 1973 and April 16, 1974, the date of his suspension, respondent had used twelve sick days and four personal days. Contrary to the information contained within the Superintendent's compilation of notes (P-2) in regard to the conference of April 11, 1974, respondent did have one unused personal day.

In this light, then, the Superintendent and the principal both testified that it was unusual to have the Superintendent look into a matter of a sick day taken by a teacher. (Tr. 50, 110) The Superintendent explained that respondent had a good attendance record in his employment with the Board, but respondent's absences were becoming frequent and he wanted to know the reason.

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The Superintendent explained that the conference of April 11, 1974, which he requested of respondent on April 10 (P-1), began merely as an inquiry with no disciplinary action contemplated in regard to respondent. (Tr. 51-54)

In regard to respondent's appearance at school on April 11, 1974, counsel for respondent stipulated that respondent did not check the appropriate space on the teacher's attendance sheet (P-3), nor did he indicate his actual arrival time as required by administrative policy. (Tr. 91, 96) Finally, in regard to the conference of April 11, the principal testified that respondent was in his office "prior to noon."

Respondent argues in his Brief that the Board failed to sustain the burden of proof of Charge No. 1 either by *prima facie* evidence or by a preponderance of the credible evidence. Respondent points to the fact that he was not feeling well the day prior to April 9 and so informed his department chairman. He relies on *N.J.S.A.* 18A:30-1 and 30-2 for his claimed right to sick days. Respondent argues that his alleged silence as to several questions asked of him by the Superintendent at the conference held April 11, 1974, is not an admission of any wrongdoing as asserted by the Board. In this regard, respondent relies on *State v. Garcia,* 83 *N.J. Super.* 345 (*App. Div.* 1964) and 29 *Am.Jur.2d Evidence* § 633 (1966).

Arguing that the weight of credible evidence brought forward by the Board does not support Charge No. 1, respondent relies on *In the Matter of the Tenure Hearing of Fred Brown,* 1970 *S.L.D.* 239, wherein the Commissioner held that:

> "***The quantum of proof required herein does not extend beyond a preponderance of the credible evidence. After careful examination and study of all the testimony, the Commissioner concludes that the credible evidence is insufficient to support the charge against the teacher.***"
>
> (at p. 242)

Respondent also cites *Atkinson v. Parsekian,* 37 *N.J.* 143 (1962); *In re Darcy,* 114 *N.J. Super.* 454 (*App. Div.* 1971); *Department of Health v. Owens-Corning Fiberglas Corporation,* 100 *N.J. Super.* 366 (*App. Div.* 1968), affirmed 53 *N.J.* 248 (1969).

Respondent also alleges that the Board violated *N.J.S.A.* 18A:25-7 which provides, *inter alia*:

> "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***then he shall be given prior written notice of the reasons for such meeting***and***be entitled to have a person***represent him***."

In support of this claim, respondent relies upon *Cordano v. Board of Education of the City of Weehawken, Hudson County,* 1974 *S.L.D.* 316 and

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Schultz v. State Board of Education, 132 *N.J.L.* 345 (*E. & A.* 1944) wherein the Court of Errors and Appeals condemned the evasion by boards of education of the protection of the tenure statutes. Finally, respondent relies upon *In the Matter of the Tenure Hearing of Thomas Appleby,* 1969 *S.L.D.* 159, aff'd State Board of Education 1970 *S.L.D.* 448, aff'd N.J. Superior Court, Appellate Division, 1972 *S.L.D.* 662.

In conclusion and in support of his claim that the Board is required to bring forward a preponderance of credible evidence to prove the charge, respondent cites *Cvelich v. Erie Railroad Company,* 120 *N.J.L.* 414 (*Sup. Ct.* 1938), affirmed 122 *N.J.L.* 26 (*E. & A.* 1938); *Sivak v. New Brunswick,* 122 *N.J.L.* 197 (*E. & A.* 1938).

The Board, to the contrary, argues that it has established *prima facie* evidence in support of all its charges against respondent.

In regard to Charge No. 1, the Board points to respondent's alleged evasiveness of answers when queried by the Superintendent as to whether he had, in fact, been sick on April 9, 1974. Citing *McCormick, Evidence* §270 (2*d* ed. 1972), the Board argues that if a person, party to an action, declines to respond to an interrogation when he is afforded the opportunity, then his refusals and evasions, according to the long-standing rule, will be received as an admission in evidence as part of the credible testimony to be weighed by the trier of fact. It is pointed out, however, by the hearing examiner that there was no "action" at the time of the April 11 conference when respondent allegedly was evasive. The Board instituted the present action on April 16, 1974, when it certified the charges to the Commissioner.

The Board argues that respondent's alleged failure to respond to the Superintendent's questions constitutes the basis upon which a justifiable inference that respondent admits the truth of Charge No. 1 may be made.

The hearing examiner observes that Charge No. 1 alleges that respondent improperly used a sick day for personal business when, in fact, he had used up all of his personal days and he was not, in fact, sick.

Firstly, that portion of the charge wherein respondent allegedly used all his personal days is, according to the Superintendent's own testimony, inaccurate. Secondly, there is nothing in the record before the hearing examiner to substantiate that respondent was (1) involved in personal business, or (2) was not, in fact, ill on April 9, 1974. Circumstantially, the Board may, if respondent is required to defend against this charge, prove that he was not confined to his home on April 9, 1974. At this juncture, the hearing examiner finds that the Board failed to prove that respondent was not ill on April 9, 1974, nor did it prove that he was on personal business that day in contravention of the sick leave statutes. *N.J.S.A.* 18A:30-1, 30-2 Accordingly, the hearing examiner recommends that Charge No. 1 be dismissed.

In regard to Charge No. 2, the Board argues that it did prove that respondent was, in fact, late according to the testimony of the department

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chairman, the principal, and the Superintendent. Furthermore, the Board argues that it did not violate *N.J.S.A.* 18A:25-7. The hearing examiner agrees with the Board that it did establish, *prima facie,* that respondent was not present to assume his duties and responsibilities on April 11, 1974 at 10:30 a.m., nor was he present at the commencement of his first teaching period, or 11:25 a.m. The hearing examiner observes that Charge No. 2 did not originate until the conference of April 11, 1974. Consequently, *N.J.S.A.* 18A:25-7 cannot be used as an estoppel against the processing of Charge No. 2, even if the provisions of that statute were applicable in this instance. Accordingly, the hearing examiner recommends the denial of respondent's Motion to Dismiss Charge No. 2.

In regard to Charge No. 3 that respondent characterized his pupils as "rotten kids," the Board argues that it is not as important to whom the remark was uttered as to what character traits in a leader of children the comment may represent. In support of this position, the Board relies on *In the Matter of the Tenure Hearing of Emma Matecki,* 1971 *S.L.D.* 566; *In re Fulcomer,* 93 *N.J. Super.* 404 (*App. Div.* 1967); *In the Matter of the Tenure Hearing of Jacque L. Sammons,* 1972 *S.L.D.* 302.

While the hearing examiner does not condone the adjective allegedly used by respondent in describing his pupils during the conference of April 11, 1974, it is his finding that that phrase, admittedly not understood by the Superintendent and allegedly made in a closed-door conference, does not, under the circumstances, even if admitted, rise to the level of charges to be considered by the Commissioner pursuant to *N.J.S.A.* 18A:6-10. Accordingly, the hearing examiner recommends that Charge No. 3 be dismissed.

In summary, the hearing examiner recommends that Charges Nos. 1 and 3 be dismissed; that Charge No. 2 be subject to respondent's defense.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of this controverted matter and the report of the hearing examiner. He observes the exceptions expressed in the Board's letter of April 17, 1975. He is, herein, called upon to rule upon respondent's Motion to dismiss the three tenure charges certified against him by the Board.

A review of the testimony at the hearing regarding Charge No. 1 reveals a lack of preponderant credible evidence to prove that this charge is true. The inaccuracy of the charge relative to respondent having used all of his sick days prior to April 9, 1975, is apparent from the finding of the hearing examiner that he did have one unused personal day at that time. While the Commissioner in no way condones evasiveness on the part of professional employees when questioned by their superiors about such important matters as the use of sick leave time, the fact remains that respondent in the Answer to tenure charges denied them. The burden of proof, therefore, rests upon the Board. Absent sufficient proof that the charge is in fact true, and in view of the conflicting testimony of

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the Superintendent and the principal, the Commissioner determines that a *prima facie* case has not been presented by the Board relative to Charge No. 1; accordingly, it is dismissed.

Similarly, the Commissioner determines that, for the reasons set forth by the hearing examiner, Charge No. 3, consisting of a single, alleged improper utterance of respondent, merits no further consideration. It is, therefore, dismissed.

The Commissioner determines that a *prima facie* case was presented by the Board in support of Charge No. 2 which will require a defense by respondent. The Commissioner recognizes the concern of the Board expressed in its letter of April 17, 1975, relative to the costly nature of the extended litigation herein and directs that an early date be established to continue the hearing.

Respondent's Motion is, therefore, granted to the extent that Charges Nos. 1 and 3 are dismissed. The Motion is denied with respect to Charge No. 2.

COMMISSIONER OF EDUCATION

May 16, 1975

Hazlet Teachers Association and Joseph Oxley,

Petitioners,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Morgan & Falvo (Peter S. Falvo, Jr., Esq., of Counsel)

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

Petitioners in this matter demand judgment that the Board of Education of the Township of Hazlet, hereinafter "Board," acted improperly and illegally when in May 1974, it appointed a varsity football coach for the 1974-75 school year. They allege that the failure to reappoint Petitioner Oxley to the position was an arbitrary, capricious, and unreasonable exercise of the Board's discretion. The Board denies any impropriety or illegality with respect to the appointment and advances a Motion at this juncture for Summary Judgment by the Commissioner of Education.

Oral argument on the Motion was conducted on November 7, 1974 at the

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State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner Oxley is a tenured teaching staff member in the Board's employ. He has also served in recent years as a department chairman for the social studies curriculum of his school and as head football coach. On May 6, 1974, the Board met in official session and appointed a teaching staff member other than Petitioner Oxley to the position of head football coach for the 1974-75 school year. Petitioners do not contest the Board's entitlement to make such an appointment in ordinary circumstances, but they aver that in this instance the Board "***overstepped its ground,*** and ordered and otherwise coerced various administrators and members of the administrative staff of Hazlet Township to accede to its demands that Mr. Oxley not be recommended for reappointment.***" (Petition of Appeal, at p.3) In support of this avowal, petitioners also allege that prior to the date of May 6, 1974, one member of the Board threatened Petitioner Oxley by saying on one occasion, "I will have your job for this." (Petition of Appeal, at p.3)

At this juncture, petitioners, by Amended Petition of Appeal, request the Commissioner to declare the Board's action in replacing Petitioner Oxley a nullity. They further request reinstatement of Petitioner Oxley to the position of head football coach with compensation for the "***period of time that he was wrongfully deprived***" of the position. (Amended Petition of Appeal, at p.2)

The Board's Motion for Summary Judgment and to Dismiss the Petition is grounded on an avowal that no material factual dispute exists and that the Board has an absolute right to appoint or refuse to appoint school personnel to supplementary positions. In the Board's view, there is no issue of constitutional dimensions herein and thus no right of Petitioner Oxley to a hearing before a representative of the Commissioner. In support of these positions, the Board cites a number of decisions by the Commissioner, the State Board of Education and the Courts. *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966); *Nello Dallolio v. Board of Education of the City of Vineland,* 1965 *S.L.D.* 18; *In the Matter of the Tenure Hearing of Norman Lanchart,* 1974 *S.L.D.* 573; *Joseph J. Dignan v. Board of Education of the Rumson-Fair Haven Regional High School,* 1971 *S.L.D.* 336; aff'd State Board of Education 1974 *S.L.D.* 1376 The Board cites with special approval this latter decision of the State Board since it was handed down at a time subsequent to the decision of the New Jersey Supreme Court in *Mary Donaldson v. Board of Education of the City of North Wildwood, Cape May County,* 65 *N.J.* 236 (1974) and since the State Board clearly indicated that the decision of the Court in *Donaldson* had no applicability to the assignment or non-assignment of a tenured teacher to an extracurricular activity. Further, the Board states, without contradiction by petitioners, that in the instant dispute it did give Petitioner Oxley an opportunity to be heard by the Board although such a hearing was not required. (Tr. 9-10) The Board also states that its action appointing a teaching staff member other than Petitioner Oxley to the position of head football coach was by a vote of seven or eight to one and that the

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alleged remark of one member of the Board cited by petitioner would not, standing alone, be conclusive even if it were found to be improper.

Petitioners contend that Petitioner Oxley's replacement as head football coach was arbitrary, unreasonable, capricious, and punitive and that the Board's reason for not re-hiring him—that his performance was not in conformity with the Board's philosophy—was a subterfuge. Therefore, petitioners contend, the Commissioner must determine whether such actions were taken in good faith or were irresponsible. In support of this argument, petitioners cite *Joseph J. Dignan, supra; Frank Monaco, supra; Ruth Ann Singer, by her parent and guardian ad litem, Nathan A. Singer v. Board of Education of the Borough of Collingswood, Camden County, et als.*, 1971 *S.L.D.* 594; and *Thomas, supra.* Accordingly, petitioners aver the Motion should be rejected and the matter should proceed to a plenary hearing.

This completes a report by the hearing examiner with respect to the limited factual presentation and legal arguments of the parties. The hearing examiner has reviewed such facts and arguments and concludes that the Petition of Appeal poses no reason for intervention by the Commissioner. The offers of proof that one Board member made a remark that might be considered a threat against Petitioner Oxley is insufficient, standing alone, to interfere with the determination of the whole Board, even if found to be true in fact. The allegation that somehow school administrators were coerced into making recommendations adverse to Petitioner Oxley could not be determinative in petitioner's favor even if found to be accurate, since school administrators are not the employers of football coaches. This is a responsibility of local boards of education (*N.J.S.A.* 18A:27-1 *et seq.*). In exercising its obligation as an employer, the Board herein had a responsibility similar to that enunciated by the Commissioner of Education in *Leroy Lynch and Essex County Vocational and Technical Teachers' Association et al. v. Board of Education of the Essex County Vocational School District, Essex County*, 1974 *S.L.D.* 1308. The Commissioner said:

> "***regardless of seniority or any other single factor, this Board and all other local boards of education have the responsibility to appoint the most able and competent person to fill any teaching staff position, including all administrative and supervisory positions. This is a basic responsibility which underlies the comprehensive requirement of all local education boards to provide the most thorough and efficient program of education possible, given all the circumstances unique to each school district.***"
>
> (at p. 1315)

In the instant matter this "basic responsibility" was assumed by the Board and its discretion is entitled to a presumption of correctness. *Thomas, supra*

Accordingly, the hearing examiner recommends that the Motion be granted and the Petition be dismissed.

This concludes the report of the hearing examiner.

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* * * *

The Commissioner has carefully reviewed the record, including the report of the hearing examiner in the instant matter, and he adopts the conclusions and recommendations therein set forth. The basis for such concurrence is grounded on previous decisions of the Commissioner which are similar to those circumstances described herein: *Nello Dallolio, supra; Joseph J. Dignan, supra; Henry R. Boney v. Board of Education of the City of Pleasantville, and Robert F. Wendland, Superintendent of Schools, Atlantic County,* 1971 *S.L.D.* 579.

The language of the Appellate Division of the New Jersey Superior Court in *Thomas, supra,* reinforces the Commissioner's position in this matter and reads as follows:

> "***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.*** *Quinlan v. Board of Education of North Bergen,* 73 *N.J. Super.* 40 (*App. Div.* 1962)***." (at p. 332)

The Commissioner also stated in *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, affirmed State Board of Education 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1947) that:

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

The Commissioner finds, for the reasons stated, that petitioners failed to present a *prima facie* case of arbitrary or capricious action by the Board in the instant matter. Therefore, the Commissioner determines that the Board acted within its discretionary authority in relieving Petitioner Oxley of his extra-classroom assignment as varsity football coach and assigning that responsibility and extra remuneration to another teaching staff member.

Accordingly, the Board's Motion is granted and the Petition is dismissed.

COMMISSIONER OF EDUCATION

May 16, 1975

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Patricia M. Kuran,

Petitioner,

v.

Board of Education of the Scotch Plains-Fanwood Regional School District and Charles Ferguson, President, Union County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Patricia M. Kuran, *Pro Se*

For the Respondents, Johnstone and O'Dwyer (John F. Malone, Esq., of Counsel)

Petitioner, a resident of Scotch Plains-Fanwood Regional School District, alleges that school administrators have manipulated scores of the Scholastic Aptitude Test and caused comparisons to be made with a specious national index for self-serving purposes. She requests that they be ordered to end such alleged manipulation. The Scotch Plains-Fanwood Board of Education, hereinafter "Board," denies that any manipulation of scores or improper comparisons have been made, and it moves to dismiss the Petition of Appeal.

A hearing in this matter was conducted on December 3, 1974 at the office of the Union County Superintendent of Schools, Westfield, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

The allegations of the instant Petition of Appeal are not precisely stated by petitioner, acting *pro se,* but implied. In general, however, they are allegations of a devious manipulation and representation of test scores by school officials. Specifically, petitioner alleges in testimony that on November 7, 1973, school administrators presented a "lower mean" (Tr. 42) with respect to Scholastic Aptitude Test scores (for comparison purposes with local scores) and that such "lower mean" was not representative "of current national norms." (Tr. 6, 15) She further alleges that on March 2, 1974, the principal of the Scotch Plains-Fanwood High School released other test scores which were related to college-bound pupils alone and, thus, not a true reflection of the achievement of all pupils who took the tests during the course of the school year.

Prior to the hearing in this matter the following statement of facts was stipulated:

"1. A meeting of the Scotch Plains-Fanwood High School Parents Liaison Committee was held on November 7, 1973 at which meeting there was a presentation and a discussion concerning Scholastic Aptitude Tests.

"2. At said meeting representatives of the Scotch Plains-Fanwood Board

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of Education provided the following information relative to Scholastic Aptitude Tests scores of students in the Scotch Plains-Fanwood School District:

Students Tested	Year		Total Average
344	1968	Verbal	492
		Math	507
394	1969	Verbal	472
		Math	497
400	1970	Verbal	468
		Math	500
396	1971	Verbal	458
		Math	484
517	1972	Verbal	458
		Math	489
453	1973	Verbal	448
		Math	479

"3. At said meeting copies of the 'Guide for High Schools and Colleges 1973-74' prepared by the College Entrance Examination Board (Educational Testing Service) Princeton, 1973 were made available by representatives of the Scotch Plains-Fanwood Board of Education and a copy of which guide was obtained by petitioner herein.

"4. Subsequent to the date of this meeting and more specifically on December 18, 1973 the Educational Testing Service released average 1972-73 Scholastic Aptitude Tests scores which tests scores were as follows: Verbal, 445; Math 481." (Stipulation of Fact)

Petitioner herself presented the only pertinent testimony with respect to her principal allegations. She averred that at a meeting she attended on November 7, 1973, school administrators compared the 1972-73 school year test result averages (448 verbal, 479 mathematics, *ante*) with "current national norms" which she stated were represented to be 383 verbal and 395 math. (Tr. 6, 15) She further averred that thereafter in December 1973, she learned that the released norms, *ante,* for the test were 445 and 481, respectively. (Tr. 6, 30) On cross-examination she admitted these latter figures were not available to anyone, including school officials, at the November 7, 1973 meeting.

Petitioner's allegation with respect to the March 2, 1974 release of information was also buttressed only by her own testimony. She testified that on that date the high school principal released local averages for the 1972-73 test as 450 verbal and 511 math, but that such figures were misleading since they were pertinent only to high school seniors who were college-bound. (Tr. 9)

School officials who testified for the Board in this matter included a guidance counselor and the high school principal.

The guidance counselor said that he was present at the November 7, 1973

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meeting and did make a presentation with respect to the Scholastic Aptitude Test. The basis of his talk was a recapitulation of mean test score results for the years 1968-72, and he portrayed these results in both graph and chart form. He testified that the test results he discussed were taken from computer printouts given to him each year by Educational Testing Service, the company which prepares the Scholastic Aptitude Tests. (Tr. 48) As an aid to understanding the test results, he also distributed a booklet (R-1) entitled "College Board—Guide for High Schools and Colleges 1973-74."

This booklet (R-1), prepared by Educational Testing Service, does contain the norms of which petitioner complains. On page 5, there is contained "Table 1a" designated "For college-bound juniors and seniors tested in 1971-72." The verbal mean score for "all students" is listed as 383. The mean score in mathematics is listed as 395. The guidance counselor testified, however, that he had not portrayed such scores as scores which should serve as a basis of comparison to the scores of local pupils but that he did refer to them as part of his review. (Tr. 57 *et seq.*)

The high school principal testified that the test score topic for the night of November 7, 1973, had been chosen by parents. (Tr. 72) He further testified that he heard no comparisons of national test results and local results that evening (Tr. 73) and stated further that he believed such comparisons should not be made. (Tr. 77, 87) He also testified that his separate release of the mean scores of test results for college-bound pupils on March 2, 1974, was occasioned by parental requests for just such information. (Tr. 76, 87)

The hearing examiner has reviewed the pleadings, the Stipulation of Fact, the limited documentary evidence, and the transcript of the hearing in this matter and finds no concrete and convincing evidence that school officials of the Scotch Plains-Fanwood School District manipulated or misrepresented the Scholastic Aptitude Test scores as charged by petitioner. In fact, the available evidence indicates that on the evening of November 7, 1973, school officials presented a comprehensive and detailed overview of the Scholastic Aptitude Test and that some parts of the presentation were taken out of context and mistakenly construed. The hearing examiner so finds. He also finds that the school principal did on March 2, 1974, isolate test result scores for college-bound seniors, but that there is no fault to be found in this fact since he testified that such results had been requested by parents. There is no evidence that the scores were represented to be other than what they were.

Accordingly, the hearing examiner recommends that the Petition be dismissed. This concludes the report of the hearing examiner.

* * * *

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

The Commissioner finds no reason to conclude that the transcript of the

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hearing is sufficiently flawed as to be unreliable by reason of inaccuracies, as is charged by petitioner.

The controverted matter is indicative of the numerous possibilities of misinterpretation which are ever present when advising the public of the grouped and averaged individual test scores of pupils taking such tests as the Scholastic Aptitude Test. It serves to emphasize the extreme importance of using and properly labeling only the directly comparable national and regional mean scores, if such are available. One may question the advisability of releasing the mean scores of previous years when, a month later, those pertinent to the 1973 Scholastic Aptitude Tests were to become available.

To raise such a question, however, is not tantamount to proof that the release of such previous years' scores (without those pertinent mean scores which were at the time unavailable) was either self-serving or an attempt to misinform the public.

The Commissioner has carefully reviewed and weighed the respective arguments and the testimony presented at the hearing, as well as the extensive exceptions filed by petitioner. It is the judgment of the Commissioner that petitioner has failed to prove that agents of the Board intentionally and for self-serving and deceptive purposes manipulated and misrepresented to the public the Scholastic Aptitude Test scores or mean averages of the scores of Scotch Plains-Fanwood pupils. There is no weight of evidence that supports such a conclusion. Absent such proof, it is determined that the Petition of Appeal is without merit; accordingly, it is dismissed.

The Commissioner is, however, constrained to caution this Board and all other local boards of education and their agents to carefully identify and fully explain to lay persons and groups the meaning and applicability of such terms as *means, averages, medians, percentiles* and *stanines* when disclosing the results of local testing programs. When such information is provided to lay persons and to pupils in meaningful nomenclature and when only the most valid comparisons of categorized scores are made, there will be less likelihood of invalid conclusions being reached or of controversies arising therefrom. Similarly, such an accurate and careful disclosure procedure will serve to alleviate the apprehensions of those persons throughout the State who may share concerns similar to those expressed herein by petitioner.

COMMISSIONER OF EDUCATION

May 16, 1975

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Patricia M. Kuran,

Petitioner-Appellant,

v.

Board of Education of the Scotch Plains-Fanwood Regional School District and Charles Ferguson, President, Union County,

Respondents-Appellees.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 16, 1975

For the Petitioner-Appellant, Patricia M. Kuran, *Pro Se*

For the Respondents-Appellees, Johnstone and O'Dwyer (John F. Maline, Esq. of Counsel)

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

Mrs. Marion Epstein abstained.
November 5, 1975

Edward C. Crews,

Petitioner,

v.

Board of Education of the Township of Bernards, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruhlman and Butrym (Cassell R. Ruhlman, Esq., of Counsel)

For the Respondent, Young, Rose & Millspaugh (Gordon Millspaugh, Esq., of Counsel)

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Township of Bernards, hereinafter " Board," to the date of June 19, 1972, when he was suspended by the Board for alleged "mental abnormality," avers that he is able to return to teaching duties. He proffers a

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series of documents in support of this avowal and requests reinstatement to his position. The Board maintains that the documents are not sufficient proof of petitioner's recovery from his former alleged disability and it demands an independent third-party examination to which petitioner has refused, or been unable, to submit.

Petitioner has advanced a Motion for Summary Judgment in his favor. The Board opposes the Motion and now avers the Petition should be dismissed. Oral argument on the Motion was conducted on October 11, 1974 at the State Department of Education, Trenton, and both parties have submitted Briefs. Receipt of the hearing examiner's report is waived.

The primary relevant facts are not in dispute and are stipulated. The basic issue which divides the parties is concerned with whether or not these facts attest to the validity of a judgment that petitioner has provided proof of recovery from an alleged disability attributed to alcoholism for which he was suspended by the Board on April 19, 1972. Petitioner avers his proof is sufficient. The Board maintains it is not. The Board further maintains that certain affirmative defenses it has advanced with respect to petitioner's claims raise new factual issues which mitigate against an accession by the Commissioner to the instant Motion.

The primary facts of the matter may be recited succinctly as follows:

Petitioner has had a history of alcoholism which has been the cause, at least in part, for a series of traffic violations and criminal charges against him in the Municipal Court of Bernards Township. Specifically, the record in this regard indicates that he was found guilty of four traffic violations and that in two instances the violations were attributed to "driving under the influence" or "driving while impaired." Additionally, the record shows that petitioner pleaded guilty to a charge of attempted suicide on November 6, 1972 and, on the same date sentence was imposed for that criminal act, he was found guilty of two other criminal offenses; namely, "assault and battery" and "repeated annoying and molesting telephone calls to police." Sentence for each of these latter convictions included "3 years probation with condition he attend A.A.," and a jail term of six months which was suspended. (It is noted here that the period of probation in each of these sentences, to run concurrently, will not expire until November 6, 1975.)

In March 1972, the Board was apprised of problems petitioner had experienced and initially placed him on sick leave. Subsequently, however, on March 26, 1972, the Board received a report of petitioner's condition from the Carrier Clinic, Belle Mead, New Jersey, and, after study of such report, resolved on June 19, 1972 to suspend petitioner from his employment. The suspension was to continue until such time as a condition which the Board and its consulting physician determined from the report to be a "mental abnormality" had been corrected and proof of recovery furnished.

Subsequently, on September 12, 1973, two physicians of the same Carrier Clinic addressed a letter to counsel for the Board in which they stated they had

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reviewed petitioner's record at the Clinic and conducted their own psychiatric examination. They concluded:

> "***[It] is our considered opinion that Mr. Edward Crews is not manifesting any evidence of mental illness, nor of any mental abnormality. He is, in our considered opinion, mentally competent to manage and handle his own affairs and to be returned to his gainful occupation.***" (P-8)

(It is noted here that at a later date, at a time subsequent to receipt of information about petitioner's criminal convictions recited *ante*, both physicians indicated their original opinion remained the same.)

Other reports concerning petitioner's mental health were also received in 1973:

(a) On February 9, 1973, the Board received a report of the psychiatric examination administered to petitioner on December 12, 1972, which stated, *inter alia,* that petitioner

> "***has not had, and does not have, any psychotic psychiatric disorder. *** There is no basis, past or present, from the records available to establish a diagnosis of a psychiatric disorder. Alcoholism is the prime factor. This condition at the time of my examination was in a state of remission." (P-5)

(b) On December 6, 1973, the Board received a decision of an Administrative Law Judge, Department of Health, Education and Welfare, Social Security Administration, dated September 13, 1973, which concluded that:

> "***Considering the claimant's age, his education, his vocational background and his residual functional capacity, he [petitioner] is able to return to the work he had previously performed as a school teacher.***" (P-6)

The judge then ruled that petitioner was not entitled to disability benefits for which he had apparently applied.

(c) On August 16, 1973, the Board received a report from a neurologist which, in questionnaire and answer form, indicated that petitioner was not impaired in any of his physical or mental faculties. (P-7)

On the basis of such reports petitioner argues he should have been, and should be, restored to his employment by the Board.

The Board maintains that Summary Judgment is not appropriate to this dispute and that factual issues remain which may only be decided at a plenary hearing. Of particular importance, the Board states, is a question concerned with whether or not petitioner has submitted conclusive proof of his recovery from

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illness. Specifically the Board disputes the "value and weight" which should be attached to reports of the two physicians from the Carrier Clinic which attest to petitioner's recovery and were reported, *ante.* (Tr. 9) Further, however, the Board avers that there remains another doubt of petitioner's recovery and that this doubt is grounded in a series of incidents which allegedly occurred between petitioner and a female Board member during the months of November and December 1973. These allegations are contained in the Board's fourth affirmative defense wherein it is stated that petitioner had confronted such Board member on various occasions and was guilty of "***leering at her, with the result that she was frightened and seriously concerned about her safety and security.***" (Respondent's Answer, at p. 4)

The Board additionally avers that it has referred all reports of petitioner's condition to its own physician and that this official recommended to the Board that petitioner "***be examined by a qualified psychiatrist who had not previously been involved with either Petitioner or Respondent.***" (Respondent's Answer, at p. 4) The Board states that petitioner has refused to submit to such an examination. This statement is not denied by petitioner.

It must also be noted that at a time immediately subsequent to the oral argument and conference of counsel in this matter the hearing examiner assigned to the case did secure the acquiescence of respective counsel to consider a new psychiatric examination for petitioner. Such examination was to be made by a physician agreeable to each of the parties or by a psychiatrist secured for the parties by the hearing examiner from either the Skillman Institute or the Trenton Psychiatric Hospital.

On October 23, 1974, the Board stated that it would conditionally approve such an examination with costs to be shared by the parties, but on November 11, 1974, counsel for petitioner informed the hearing examiner by letter that petitioner was "***temporarily in the State of California and that on October 31 he expected to be hospitalized in the U.C.L.A. Medical Center in Westwood, California for surgical treatment of an old fracture of an ankle.***" Counsel for petitioner also said in his letter:

> "***I have asked him [petitioner] to please inform me immediately as to when he will be in New Jersey and available for further examination as suggested at the recent conference. I will advise both you and the attorney for the Board of Education as soon as I hear from Mr. Crews."

There followed a series of letters dated November 25, 1974, December 12, 1974, December 16, 1974, February 18, 1975, February 24, 1975, March 3, 1975, and March 7, 1975, which need not be detailed for purposes of this Motion except that on February 18, 1975, the hearing examiner was informed that petitioner was "***unable to return to New Jersey and to submit to further medical examination.***" At that juncture both counsel requested a decision with respect to the Motion without further delay.

The Commissioner has reviewed the factual situation and arguments of the parties in the record of this dispute and observes that the issue herein is not

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whether or not petitioner should, or must, submit to a psychiatric examination to determine his mental health but whether the examinations which reportedly have been made are sufficient to attest to his mental health. Petitioner avers that they are since the physician who performed the principal examinations are from the same clinic which performed other examinations in March 1972 which served as the basis for the Board's decision to suspend him. (P-1; Tr. 8) The Board avers that such examinations do not suffice and that a submission of "***several unsworn statements from people who appear to be doctors***" (Tr. 10) is insufficient, in the absence of cross-examination, to justify a finding for petitioner. Further, the Board maintains that the recommendation of its consulting psychiatrist poses a conflict, or possible conflict, of experts which may not be resolved in a Summary Judgment proceeding.

The Commissioner concurs with these latter arguments in the context of the total record before him. This record attests to a series of difficulties experienced by petitioner which resulted in extreme reaction and unfortunate consequences. Suicide attempts and convictions with respect to traffic violations and criminal charges are but two of such consequences. At the present time petitioner is still on conditional probation which, in the circumstances, is apparently unsupervised. His present physical or mental state is unknown. There is no currently viable or authoritative opinion that evidence of his recovery from "mental abnormality," a conditional diagnosis by the Board which the Commissioner holds is reasonably substantiated by the complete record, is sufficient to justify a return to his teaching position. Nor, the Commissioner holds, has there ever been, since the controlling statutes require an approval by a local board of education to the choice of a physician in such matters if a physician "designated by the Board" is not acceptable to the person to be examined. *N.J.S.A.* 18A:16-3

The statutes of reference with respect to the authority of a local board of education to determine the physical or mental fitness of a teaching staff member to perform his duties are *N.J.S.A.* 18A:16-2 and 3. They provide:

18A:16-2. Physical examinations; requirement

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

"Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data.

18A:16-3. Character of examinations

"Any such *examination* may be made by a *physician or institution*

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> *designated by the board,* in which case the cost thereof and of all laboratory tests and fluoroscopic or X-ray procedures shall be borne by the board or, at the *option* of the employee, they may be made by a physician or institution of his own choosing, *approved by the board,* in which case said examination shall be made at the employee's expense.
> (*Emphasis supplied.*)

Thus, it is clear that local boards of education may "require" the psychiatric examination which, in the "judgment" of the Board, was necessary in the instant matter. It is also clear that if a teaching staff member decides to have his own physician perform the examination such physician must be "approved by the board."

The authority of local boards of education to exercise such discretion was stated by the Court in *Kochman v. Keansburg Board of Education,* 124 *N.J. Super.* 203 (*Chan. Div.* 1973) to be a constitutional entitlement and the Court said:

> "***The legislature has delegated to boards of education the authority to determine whether a teacher is fit to teach in general terms. These general terms were held in *Laba v. Newark Board of Education, supra,* 23 *N.J.* 364, to provide sufficient standards for application. In *N.J.S.A.* 18A:16-2 the legislature has delegated to boards of education the power to request a teacher who shows evidence of harmful, significant deviation from normal mental health affecting the teacher's ability to teach, discipline or associate with children of the age of the children subject to the teacher's control in the school district to submit to a psychiatric examination. As this court has construed the statute, it has delineated in as narrow terms as possible another area of unfitness which a teacher may evidence by his behavior. The legislature has, however, recognized that although a board of education may observe signs of what it considers a harmful, significant deviation, it does not have the expertise to question the teacher on the matter itself but must rely on the expertise of a psychiatrist. The grant of power to a board of education to require such an examination is viewed merely as an extension of the board's authority to require a teacher to answer questions at a hearing on general unfitness, held proper in *Laba v. Newark Board of Education, supra,* 23 *N.J.* 364. The legislature is concerned with protecting school children from the influence of unfit teachers. Protection of school children from teachers who have shown evidence of harmful, *significant deviation from normal mental health* is without question not only a valid legislative concern but one classifiable as a *compelling state interest.****" (*Emphasis supplied.*) (at p. 212)

In such a context the Commissioner holds that the Board's "judgment" to require petitioner to submit to a psychiatric examination was one it lawfully exercised and one which was well grounded in a number of factual considerations: petitioner's attempts at suicide, his court record, the report of the Carrier Clinic dated March 26, 1972. Further, it is clear from the statutory prescription that, in the event petitioner decided, as he did decide, to have such examination

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performed by a psychiatrist of his choice, it was necessary that the Board first give its approval. In fact, the Board has not approved petitioner's choice of physicians and it has disputed the determinations they made. It follows then that such determinations are not sufficient legal proof of petitioner's recovery.

This set of circumstances leads to the conclusion that the attempts to secure an examination mutually agreeable to petitioner and the Board, which attempts were made by the Board, by the hearing examiner, and even by respective counsel, posed the only viable alternative to the impasse which has existed and exists to the present day. Further, it is clear that petitioner, by his own action, has either refused to expedite a process leading to a decision with respect to an examination by a mutually approved physician or has refused alternatives which were offered to him.

Thus, the Commissioner holds he has forfeited his entitlement to such an examination at this juncture since his absence has exceeded the statutory limit of two years, and no satisfactory proof of recovery has been furnished. (See *In the Matter of the Tenure Hearing of David Bernstein, Matawan Regional School District, Monmouth County,* 1967 *S.L.D.* 73, 78.)

The statute *N.J.S.A.* 18A:16-4 that delineates such limits provides, *inter alia,* that if the examination by a physician selected by a teaching staff member and approved by the board "***indicates mental abnormality***" the tenured employee "***may be granted sick leave***" unless his absence "***shall exceed a period of two years."

In the instant matter petitioner's absence is one of almost three years and the Commissioner having held that no satisfactory examination or proof of recovery has been administered or submitted, it follows that petitioner's entitlement to sick leave has expired.

Accordingly, the Commissioner finds no reason to justify a restoration of petitioner to his position and determines, instead, that a Summary Judgment on the known facts which are a part of this record must be awarded in favor of the Board. The Petition is dismissed.

COMMISSIONER OF EDUCATION

May 16, 1975

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Betty Ascough, Dorothy Quinn, Ruth Bray, Gloria Forte, Betty Worth, Dorothy Jones, Gladys Dougherty, Elsie Vogel, Lucille Wiorek, Betty Grigg, and Jane Leach,

Petitioners,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners Haines, Schuman & Butz (Thomas P. Butz, Esq., of Counsel)

For the Respondent, Hiering, Grasso, Gelzer & Kelaher (Milton H. Gelzer, Esq., of Counsel)

Petitioners, all of whom are school nurses employed by the Toms River Regional Board of Education, Ocean County, hereinafter "Board," allege that the Board has improperly set their individual rates of compensation for the academic years 1972-73 and 1973-74 thereby violating their statutory rights as provided by *N.J.S.A.* 18A:29-4.2. The Board denies the allegations set forth herein and asserts that its actions regarding the establishment of salaries for each of the named petitioners was and is, in all respects, proper and legal.

A hearing in this matter was conducted on September 9, 1974 at the office of the Monmouth County Superintendent of Schools by a hearing examiner appointed by the Commissioner of Education. Briefs and supplemental information have been filed by the parties. The report of the hearing examiner is as follows:

While each of the named petitioners possesses a standard school nurse certificate, no one of them possesses a baccalaureate degree. Petitioners argue that their annual salaries must be determined by the rates set forth in the teachers' salary guide, bachelor's degree level, which was adopted by the Board and made part of the agreement (C-4) between it and the Toms River Education Association, hereinafter "Association." In support of their position, petitioners rely upon *N.J.S.A.* 18A:29-4.2 and the Commissioner's interpretation of that statute as set forth in *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, Passaic County,* 1972 *S.L.D.* 577.

N.J.S.A. 18A:29-4.2 provides, *in toto,* as follows:

"Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the

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full use of the same experience steps and training levels that apply to teachers."

In *Lenahan, supra,* the Commissioner described the intent of the Legislature regarding this statute when he stated:

> "***[T]he Commissioner determines that the legislative intent of the Act is as follows: a school nurse holding a standard school nurse certificate *and a bachelor's degree, or an academic degree higher than a bachelor's,* shall be compensated in the same manner as any other teaching staff member holding a parallel degree or parallel level of training. Placement on the proper step of the salary guide shall be determined in the same manner as placement is determined for any respective district. If a non-degree teachers' salary guide does not exist in a district, such a category must be created and its compensation rates determined according to proper negotiating procedures, or the Board may alternatively compensate all school nurses holding the appropriate certificate at the level set for a teaching staff member with a bachelor's degree.***" (*Emphasis in text.*) (at pp. 581-582)

Petitioners point out that the Board compensates them according to salary rates set forth in a nurses' salary guide (C-4), while it compensates other teaching staff members who do not hold degrees according to the higher salary rates of the Board's teachers' salary guide at either the bachelor's degree level or higher.

In this regard, the Board Secretary testified that:

> "***There are certain teachers engaged in teaching vocational subjects, who are paid***on the teachers guide even though they may not have the academic credits required for being a degree candidate of that particular position on the guide.***" (Tr. 79)

Subsequent to the hearing, the Board filed precise information (C-6) as to the number of "other" teaching staff members who do not possess a bachelor's degree but are paid according to the bachelor's degree level or higher of the Board's salary policy. (C-4) This information discloses that the Board employs twelve vocational education teachers, all of whom possess a vocational teacher's certificate, but none of whom possesses a bachelor's degree. Furthermore, the Board employs a first grade teacher who is a 1926 graduate of the Jersey City Teachers Training School (Normal School). While this person possesses a provisional teacher's certificate, she does not possess a bachelor's degree, but she is compensated according to the bachelor's degree level of the salary policy for teachers.

The Board Secretary, who did not hold that position until 1969 (Tr. 78), explained that at the time of their employment, the Board was unable to obtain fully certified vocational teachers who possessed degrees in the subject areas required at that time. Because of this shortage, vocational teachers were paid higher salaries than their formal educational credentials demanded in order to

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attract persons from industry. The method used by the Board to pay these vocational teachers higher salaries was to establish their salaries according to either the bachelor's or master's degree scales of its teachers' salary policy. There is nothing in the record to explain why the first grade teacher, who does not possess a degree, is compensated according to the bachelor's degree scale of the Board's salary policy.

To firmly establish the factual pattern of this dispute, it must be pointed out that the agreement (C-2) between the Board and the Association for 1970-71 provided, as part of the teachers' salary guide, minima and maxima rates of compensation for the following levels: a bachelor's degree; a bachelor's degree plus 30 credits; a master's degree *or full vocational certification;* a master's degree plus 30 credits. The Board established a non-degree nurses' salary guide for the same 1970-71 school year at rates $1,250 lower than the teachers' bachelor degree rates. An identical salary policy for the various categories, including non-degree nurses, was set forth in the agreement (C-3) for 1971-72, containing a wider disparity between rates for non-degree nurses and those teaching staff members compensated according to the teachers' salary guide.

The agreement for 1973-74 (C-4) sets forth an identical salary policy, except for nurses. The title of the nurses' salary guide set forth in this agreement (C-4) is "Nurses' Salary Guide 1973-74" which provides a still wider disparity in actual amounts of compensation. The Board argues that that salary guide for nurses is really an extension of the non-degree guide for nurses as set forth in the 1971-72 agreement (C-3) and was properly negotiated. Petitioners argue, however, that the "Nurses' Salary Guide" set forth in the 1973-74 agreement (C-4) had not been properly negotiated pursuant to the Commissioner's guidance in *Lenahan, supra,* and it is merely a device created by the Board to economically segregate school nurses from other teaching staff members.

At this juncture, it must be noted that, while a person who is employed as a school nurse may obtain a standard school nurse certificate without possessing a minimum bachelor's degree, so too may a person obtain a full vocational certificate without first obtaining a bachelor's degree. See *N.J.A.C.* 6:11-8.4, *art.* 16, 19, 21; *N.J.A.C.* 6:11-8.5.

It is clear from the record and from the Briefs filed herein, that since at least 1960-61 school nurses employed by the Board have had their rates of compensation established according to salary guides which are separate from the salary guides for teachers. The Board argues that since the enactment of *N.J.S.A.* 34:13A-1 *et seq.*, New Jersey Employer-Employee Relations Act, in 1968, for each and every year thereafter the nurses' salary guides were arrived at through negotiation.

The Board explains that by the time *N.J.S.A.* 18A:29-4.2 was enacted and the Commissioner's decision in *Lenahan, supra,* was issued, it had already negotiated for and adopted a nurses' salary guide for the 1972-73 year. Furthermore, the Board argues that the nurses' salary guide for 1973-74, as set forth in the agreement (C-4), was adopted by it subsequent to negotiations with

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the Association. It is stipulated that the Board compensates those school nurses who possess a bachelor's degree according to the terms of the teachers' salary guide, bachelor's degree level.

It is clear from the record that since 1972-73 and including 1973-74 the Board did adopt a non-degree nurses' salary guide which was intended solely for school nurses. The twelve vocational education teachers employed by the Board and the first grade teacher, none of whom possesses a bachelor's degree, are all compensated at the higher rates established in the Board's teachers' salary guide set forth in the agreement. (C-4)

In this regard, the Commissioner observed in *Pearl Schmidt v. Board of Education of the Passaic County Regional High School, Passaic County,* 1975 *S.L.D.* 19:

> "***The Board has the statutory authority to offer a higher salary than that called for on its initial steps on the salary guide for degree and non-degree teaching staff members alike. *** *N.J.S.A.* 18A:29-9 [text omitted]. The Commissioner finds, therefore, that these initial steps are negotiable; however, once a board compensates a teaching staff member according to a salary guide which recognizes educational achievement, all teaching staff members similarly situated must be compensated accordingly; *i.e.,* non-degree teachers on the non-degree guide, and degree teachers on the degree guide.***" (at pp. 23-24)

As was noted in *Shirley A. Martinsek v. Board of Education of the Eastern Camden Regional School District, Camden County,* 1974 *S.L.D.* 1210, pending before the State Board of Education, prior to the passage of *N.J.S.A.* 18A:29-4.2, boards of education were free to set school nurse salaries pursuant to the provisions of *N.J.S.A.* 18A:29-7 and prior case law. *Georgia L. Johnson v. Board of Education of the Township of West Windsor, Mercer County,* 1967 *S.L.D.* 324, affirmed State Board of Education, 1968 *S.L.D.* 262; *Mary Belli v. Board of Education of the City of Clifton, Passaic County,* 1963 *S.L.D.* 95

Since the passage of *N.J.S.A.* 18A:29-4.2 and the Commissioner's decision in *Lenahan, supra,* school nurses, so long as they hold a standard school nurse certificate, may not be treated differently from any other teaching staff member holding a parallel degree or parallel level of training.

There is no question that persons employed as school nurses are, in fact, teaching staff members. *N.J.S.A.* 18A:1-1; *Lenahan, supra* Whether a school nurse does, in fact, teach is a matter to be determined by the employing board. *Lenahan, supra*

Although it is clear that the Board herein does, in fact, compensate certain non-degree teaching staff members according to the terms of the teachers' salary guide, while compensating other non-degree teaching staff members (school nurses) according to the lower rates set forth in the nurses' guide, which guide is applicable only to school nurses, the issue to be decided is whether the Board has acted within the parameters set forth in *Martinsek, supra.*

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The Board argues that, whether or not petitioners had a basis for a claim against it, they should be barred individually and collectively from seeking relief at this time by the doctrine of laches.

The Board contends that by virtue of the fact it negotiated in good faith with petitioners' representative, the Association, and the nurses' salary guide was agreed to by the parties for 1972-73 and 1973-74, they should not now be allowed to disavow what their representative negotiated for. In arguing its defense of laches, the Board relies upon *Heagen et al. v. Borough of Allendale,* 42 *N.J. Super.* 472 (*App. Div.* 1956); *Matarrese v. Matarrese,* 142 *N.J. Equity* 226 (*E.&A.* 1948).

The testimony of the President of the Association (Tr. 22-65), as well as the uncontroverted narrative of negotiating sessions with the Board set forth in petitioners' Brief at pages six through ten, amply demonstrates that petitioners had asserted what they believed to be their rights pursuant to law, that the Board was seeking legal advice, that the subject matter of the instant matter was not lying dormant, and that the instant matter was viable. Only after the matter could not be settled at the local level did petitioners seek redress before the Commissioner. The hearing examiner recommends that the Commissioner dismiss laches as an equitable defense herein.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and the replies filed thereto by the parties. The Commissioner adopts the findings of the hearing examiner as his own. Accordingly, the Commissioner rejects the Board's reliance upon the doctrine of laches as an equitable defense herein.

Since the passage of Assembly Bill No. 623 (*L.* 1972, *c.* 64), now *N.J.S.A.* 18A:29-4.2, the Commissioner, on several occasions, has been called upon to adjudicate disputes arising therefrom. *Pearl Schmidt v. Board of Education of the Passaic County Regional High School, Passaic County,* 1975 *S.L.D.* 19 (decided January 21, 1975); *Shirley A. Martinsek v. Board of Education of the Eastern Camden Regional School District, Camden County,* 1974 *S.L.D.* 1210, pending before the State Board of Education; *Elizabeth Stiles and Grace Ferraioli v. Board of Education of the Borough of Ringwood, Passaic County,* 1974 *S.L.D.* 1170; *Julia Anne Sipos et al. v. Board of Education of the Borough of Manville, Somerset County,* 1973 *S.L.D.* 434; *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School, Passaic County,* 1972 *S.L.D.* 577

As was observed by the hearing examiner, *ante,* prior to the passage of *N.J.S.A.* 18A:29-4.2, boards of education were free to set school nurse salaries pursuant to the provisions of *N.J.S.A.* 18A:29-7 and prior case law. The passage of *N.J.S.A.* 18A:29-4.2, however, now provides school nurses with the benefit of, and local boards of education with the responsibility of, having their salaries

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determined, so long as the school nurse possesses a standard school nurse certificate in the same manner as salaries are determined for other teaching staff members employed by the Board.

The Commissioner is cognizant that local boards of education generally perceive their responsibility with clarity in regard to the payment of school nurses when those school nurses it employs possess standard school nurse certificates and baccalaureate degrees or higher credentials. This kind of responsibility requires the employing boards to determine school nurse salaries pursuant to the bachelor's scale, or higher scale, of its adopted salary policy. Such was the factual pattern and relief ordered in *Lenahan, supra,* and *Sipos, supra.* It appears that such clarity does not exist, however, where local boards of education employ school nurses who do not possess degrees but, instead, standard school nurse certificates, as in this instance. The perception of responsibility becomes more difficult when boards of education compensate teaching staff members who, after long years of service to the board and its pupils, do not possess four-year baccalaureate degrees, but do possess two-year normal school certificates authorizing them to teach, according to the higher rates of the bachelor's scale of its salary policy.

Additionally, the Commissioner recognizes the difficulty local boards of education encounter in their attempts to secure highly-trained persons to teach specialized and technical subjects in vocational education departments. In many instances, such persons possess the knowledge and ability to impart to pupils the specialized skills of auto mechanics, carpentry, sheet metal work, plumbing, and the like, but do not possess baccalaureate degrees. The quandary, therefore, facing local boards is in obtaining the services of highly-skilled persons for vocational education within the salary constraints of the relatively lower levels of compensation generally set forth in the "non-degree" salary scales of boards' salary policies. The Commissioner recognizes that such a problem is not easy to resolve. Consequently, many local boards offer persons, trained to teach vocational education, salaries as set forth in bachelor's degree scales, or higher scales, to attract them into their employ.

Obviously, the board's dilemma is justifying the compensation of a teaching staff member, not possessing a degree, according to its degree scale, as in the case of a highly-experienced teacher with a two-year normal school certificate or a highly-trained vocational education teacher, while at the same time compensating another teaching staff member likewise without a degree, such as a school nurse, according to its "non-degree" guide. In the Commissioner's judgment, the dilemma is irreconcilable and requires, therefore, immediate correction.

In *Schmidt, supra,* the Commissioner held:

> "***[O]nce a board compensates a teaching staff member according to a salary guide which recognizes educational achievement, all teaching staff members similarly situated must be compensated accordingly; *i.e.,* non-degree teachers on the non-degree guide, and degree teachers on the degree guide.***" (at p. 24)

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Boards of education which choose to compensate teaching staff members without degrees according to the bachelor's scale, or higher scale, of its salary policy *must* compensate all teaching staff members in the same manner.

The Board relies on *Martinsek, supra,* for justification of its actions herein. The Commissioner finds that its reliance thereon is misplaced. In *Martinsek,* the Board did not create, through its continued action, a differing salary scale for teaching staff members with the same academic credentials. It did, however, offer one applicant for the position of industrial arts teacher an amount equal to the rate set forth on the first step of its bachelor's scale. Boards of education are specifically empowered to negotiate the initial step on the salary schedule. *N.J.S.A.* 18A:29-9

The factual pattern in this matter is that the Board's policy is to compensate non-degree vocational education teachers and non-degree two-year normal school certificated teachers according to the higher rates set forth in its bachelor's or master's degree scales of its salary policy, while specifically establishing salary rates for non-degree school nurse teaching staff members according to the lower rates of its "non-degree" salary scale. The Commissioner finds this practice to be contrary to the provisions of *N.J.S.A.* 18A:29-4.2.

Accordingly, the Commissioner hereby orders the Board of Education of the Toms River Regional School District to compensate each of the individually named petitioners the difference between the amount of their salaries for 1972-73 and 1973-74 and the amount at which their salaries should have been set as determined by their years of experience, according to the provisions of the bachelor's scale of its salary policy for 1972-73 and 1973-74. Furthermore, the Board is required to establish each of petitioners' salaries for 1974-75 in the same manner the Board established the salaries for its other teaching staff members without degrees, retroactive to September 1974.

Finally, the Board is advised that it may, for 1975-76, negotiate for a non-degree salary scale, so long as the rates set forth therein do not abridge the tenure protection afforded by *N.J.S.A.* 18A:28-5 of any of its teaching staff members, and so long as such a non-degree scale is implemented pursuant to the provisions of *N.J.S.A.* 18A:29-4.2, *Lenahan, supra,* and the Commissioner's determination set forth herein.

COMMISSIONER OF EDUCATION

May 19, 1975

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Betty Ascough et al.,

Petitioners,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioners, Haines, Schuman & Butz (Thomas P. Butz, Esq., of Counsel)

For the Respondent, Hiering, Grasso, Gelzer & Kelaher (Milton H. Gelzer, Esq., of Counsel)

Pursuant to a Stipulation filed by the parties in regard to the decision of the Commissioner of Education in *Betty Ascough et al. v. Board of Education of the Toms River Regional School District, Ocean County,* 1975 *S.L.D.* 389; and

It appearing that said Stipulation is consistent with the determination of the Commissioner as set forth therein; now, therefore,

IT IS HEREBY ORDERED on this 29th day of August 1975, that the Board of Education of the Toms River Regional School District, Ocean County, shall establish the salaries of petitioners named therein and compensate each according to the amounts as set forth in the Stipulation so filed.

COMMISSIONER OF EDUCATION

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In the Matter of the Tenure Hearing of Edward J. Quinn, School District of South Orange-Maplewood, Essex County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, Lieb, Wolff & Samson (David Samson, Esq., of Counsel)

For the Respondent, Stern & Weiss (Harvey L. Weiss, Esq., of Counsel)

Charges of conduct unbecoming a teacher were filed with the Board of Education of South Orange-Maplewood, hereinafter "Board," against Edward J. Quinn, hereinafter "respondent," a teacher with a tenure status in its employ, by the parent of a female pupil, hereinafter "C.B.," enrolled in the Board's high school. The Board determined to certify the charges to the Commissioner of Education at a meeting conducted on March 25, 1974, and it also determined on that date to suspend respondent, with pay, pending a final determination of the charges. Respondent denies the allegations set forth in the charges and seeks to be restored to his teaching position.

Hearings were conducted in this matter on September 30, October 23 and October 31, 1974 at the office of the Essex County Superintendent of Schools by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The gravamen of the charges is set forth in C.B.'s signed statement dated March 11, 1974, filed with the Board on the same day through the high school principal (Tr. I-104), which reads in its entirety as follows:

> "About a month ago, Mr. Quinn stopped me in the hall (I never had him for a teacher) and he knew my name, but I had never seen him before. He asked me if I was interested in working for him in his office, typing and filing and doing other things.
>
> "Last Wednesday he asked me to do some work for him seventh period–delivering papers to some teachers, so I did. Then he said he'd like to bring me to his office and show me around so that maybe next week I could go to work. After school, at about 2:50 p.m. we went over and got in the car and went to his office in South Orange. He shut the door and asked if I wanted anything to drink–soda or wine; he asked if I drank. I said soda would be fine, so he gave me one. He sat down and the telephone rang, so he gave me a book–The Joy of Love Making–to look at. After he got off the phone he told me I was very pretty, and he'd like to have me around to look at–he said he was a hard working man. I started to wonder what he had in mind. He took out a camera and took two pictures–one of me standing up and one sitting down, and asked if I was interested in modeling–he said he had a friend in the business, and he could get me into it.

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"He said he wanted to find out if my mind was as beautiful as my body–some girls only have one thing going for them and it looked as if I had everything going for me, he said. Then I started to get scared. He said that it seemed to him that I liked nice clothes and things like that, and if I was good to him, he'd be good to me. He said, too, that he sometimes went to meetings and he'd like me to go with him as a hostess. Some of the meetings were overnight, he said, and he asked if my parents would let me stay away overnight, and I said no, so he said he'd have to get me back the same day. He told me to talk over working with my parents, but that I didn't have to tell them everything. He said that I was only sixteen, and he hoped I'd be able to handle it.

"He got up to go to the door of his office, and I got up. He put his hands on my hips–he was in back of me–and kissed the back of my head. Then he showed me around, and I said I wanted to go home. He said okay.

"Then we walked down the stairs and he said he'd give me a ride home. Just when he was ready to open the door to go outside, he said–give me a kiss. I said no, and he said–I won't drive you home until I get a kiss. Then he leaned over and put his arms on my shoulders and kissed me. Then I told him that I wanted to walk home, and he said no, that he wouldn't bother me in the car, but he wanted to drive me home.

"I got into the car with him, and he asked if I thought I was interested, and he said that he guessed I knew what he was talking about. I didn't talk in the car. He asked me if I had a boyfriend, and I said yes I did. Then he asked me how long I'd been going with him and I said a long time. Then he said that just because I'd been going with him for a long time, doesn't mean I had to ball him, and when I asked what he meant, he said he just took it for granted. He said it would be pretty hard to keep away from me. He wanted to hold my hand, but I said no.

"I got out of the car and he said to talk it over with my parents, and I just got out of the car."

At the time of the alleged incident described above, C.B. was enrolled in the tenth grade of the high school (Tr. I-13) where respondent was assigned as a reading teacher. (Tr. II-26) C.B. testified that she first met respondent near the end of January 1974, as she was reporting to one of her classes. (Tr. I-14) C.B. explained that in order to get to her biology class (Tr. I-17), she had to pass respondent's classroom. (Tr. I-14) Teachers in the high school are expected to monitor the halls during the change of classes. (Tr. II-27) C.B. testified that as she passed respondent in the hall, he said, "Hi, C***" and she returned the greeting. (Tr. I-14) After a short conversation she reported to her assigned class. C.B. testified that because she had not known respondent prior to this time, she felt it was strange that respondent would know her by name and speak to her. (Tr. I-16) When C.B. arrived home after school that day she reported the exchange with respondent to her mother. (Tr. I-16) C.B.'s mother corroborated her daughter's statement in this regard. (Tr. I-123)

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Subsequent to this initial meeting with respondent, C.B. testified that on several occasions thereafter she saw respondent in the hall as she was on her way to biology class. (Tr. I-17) As C.B. explained: "***he [respondent] sometimes just stopped and asked me how I was and how school was and asked me if I ever looked into modeling and he told me—about his office in South Orange and if I was interested in working for him.***" (Tr. I-18) C.B. testified that when she informed respondent she could not type, his response was "***maybe we can find something else for you to do, perhaps *** filing. ***" (Tr. I-18)

Respondent conducts a private educational business after his regular teaching day with the Board. This business is oriented towards government and industry, as well as adult schools, and its offices are located in South Orange. (Tr. II-33-34) Respondent testified that it was his practice to utilize male and female high school pupils to work at his South Orange office. (Tr. II-34-35)

In regard to respondent's question whether she would consider modeling, C.B. testified, respondent told her that he had a friend in the modeling field who might be of assistance. (Tr. I-18) However, C.B. explained she was not interested in modeling. (Tr. I-19)

C.B. testified that on or about the first of March 1974, she had another conversation with respondent in which he suggested that they go to his South Orange office some day the following week. There, he would explain her duties, and he would show her around the office. (Tr. I-19) C.B. obviously indicated a desire to be employed at respondent's South Orange office for she agreed to go "***to look into the employment situation.***" (Tr. I-19) C.B. testified that no specific date was set other than "some day the next week." (Tr. I-20)

On March 6, 1974, the date on which the incidents set forth above were alleged to have occurred, C.B. testified, she saw respondent as she was walking to her biology class. According to C.B., respondent said: " 'Hi, C.***, how are you doing, how about coming over to my office today and I will show you around the office and I will show you what I want you to do for me' and I said 'Okay.'***" (Tr. I-22) Upon finishing her academic courses for the day, C.B. returned to respondent's classroom at approximately 2:00 p.m. Respondent's actual teaching day concludes at 2:50 p.m. (Tr. II-40-41) When C.B. appeared at respondent's classroom door, he asked her to deliver some "slips of paper" (Tr. I-24), later identified as "reports" by respondent (Tr. II-43), to fellow teachers in the high school which she did, and to return to him the reports for those teachers who could not be located. (Tr. I-24) Upon returning to respondent's classroom at 2:30 p.m., C.B. sat down and "watched him teach the [reading] class" until after 2:45 p.m. (Tr. I-25)

At the conclusion of the class, respondent allegedly encouraged C.B. to take his course but C.B. replied that she didn't like reading. (Tr. I-26) C.B. testified that she and respondent left the high school at approximately 2:55 p.m. to go to his South Orange office. (Tr. I-26) On cross-examination, C.B. testified that upon their departure from the high school they passed and exchanged greetings with her biology teacher, Mr. DeMarco. (Tr. I-83) The hearing

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examiner points out that the Board sought to present Mr. DeMarco as its witness for these proceedings; however, he was on sabbatical leave from the Board's employ and engaged in a marine biology project at Woods Hole, Massachusetts. Mr. DeMarco did, however, have his deposition (P-1) taken in regard to his knowledge of the allegations herein.

Upon the departure of C.B. and respondent from the building, C.B. testified, there was a pupil standing outside and respondent gave the girl a ride home while on the way to his South Orange office. (Tr. I-26-27) Upon arriving at the South Orange building where respondent's offices were located, C.B. testified, they proceeded to his office. (Tr. I-30)

At this juncture, the hearing examiner relies on the description of the physical facilities of the South Orange office as provided by respondent. He testified that the building has three floors, with the first being an entry level; the second floor houses real estate offices, while his business occupies the third floor. (Tr. II-45) Furthermore, on the date of the alleged incident herein, a painter, who testified on behalf of respondent, was painting the stairs from the first floor to the third floor. Respondent testified that, upon entering the building, one would be at the base of the stairs. To ascend the stairs, one would make a left turn, go through a door, ascend the stairs to the second floor, turn left, go through a door and ascend to the third floor. (Tr. II-85-86) The stairways are not continuous; rather, they ascend in a parallel manner. (Tr. II-84)

Respondent testified that as one enters his offices there is a large reception area with several waiting chairs and two desks. At one end of this reception area is an office, next to which is respondent's office. Before reaching those two offices, however, if one made a left turn, one would be in a corridor off which was located five other rooms utilized as classrooms, an office and storage areas. (Tr. II-45-46)

C.B. testified that a man and a woman were in the reception area when they entered. (Tr. I-30-31) However, on cross-examination, C.B. testified that only one person, a secretary, was in the reception area but other people were in the smaller offices because she "heard them talking." (Tr. I-84-85)

Upon entering his private office, C.B. testified that she sat in front of his desk and respondent sat behind it. (Tr. I-33) During cross-examination, C.B. testified that respondent closed the door to his office after they entered. (Tr. I-87) After again asking her about typing and C.B. saying again she could not type, C.B. testified that respondent said: "Well, I am sure we can find something for you." (Tr. I-33) In order to testify as to subsequent events, C.B. reviewed prior statements she had made in response to interrogatories used by respondent. This review was objected to by counsel. (Tr. I-34-38)

C.B. testified that respondent then asked if she wanted "anything to drink, soda or wine." (Tr. I-39) She requested and received a soda. (Tr. I-39) Continuing, C.B. testified that the telephone rang and while respondent was talking on the telephone, he removed a book from a desk drawer and handed it to her over his desk. (Tr. I-39-40) The book was later identified by respondent as

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Joy of Sex. (Tr. II-111) Although respondent admitted having that book as part of his shelf collection, he testified that the book was on his book shelf directly behind where C.B. was seated and at no time did he give or request her to read any book while she was in his office. (Tr. II-114)

C.B. testified that when she realized what the contents of *Joy of Sex* were, she put the book down. (Tr. I-42) C.B. testified that respondent, after finishing the telephone conversation, asked her if she liked the book and she replied that she did not. (Tr. I-42) Thereafter, C.B. testified, respondent once again asked her if she would be interested in modeling because she had "a very pretty face and a nice smile and he wanted to find out if I had a good mind going with it. Most girls have only one thing going for them. He told me he wanted to take pictures of me and show them to his friend." (Tr. I-42-43) This "friend" now referred to twice, was later identified by respondent as a Dolores Roberson who was employed as a model by the Barbizon School of Modeling, Union. (Tr. II-94)

C.B. testified that respondent then took two photographs of her with a Polaroid camera as she sat in the chair she had occupied since first entering his office. (Tr. I-43-44) These two photographs were made part of a file (R-1) later introduced on behalf of respondent's defense. One photograph shows C.B. sitting in a chair, smiling, while the other shows C.B. standing as if she were going to open the closed door of respondent's office.

After the Polaroid photographs were developed, C.B. testified, respondent said she was photogenic and that she should really look into modeling because modeling paid good money. (Tr. I-44) After respondent put the camera away, C.B. testified, he stated that he was a hardworking man and he would like to have her around the office, that his business required him to go away on weekends and he needed a hostess, that he felt she would be good at that, that he would buy her appropriate clothes and that if she could go away on weekends, it would be helpful because he would not have to get her home the same day. (Tr. I-44-45)

After she explained to respondent that her parents would not allow her to go away on weekends, C.B. testified, respondent then said: "***well, with some of them [business trips] I can get you back the same day and they are not too far away." (Tr. I-45) C.B. testified that respondent explained the duties of a hostess as passing out name cards or "see people." (Tr. I-45) Thereafter, C.B. testified that respondent then said he noticed she liked nice clothes and if she were good to him, he would be good to her. Furthermore, C.B. added, respondent said that: "***I [C.B.] was only sixteen but he [respondent] hoped that I would be able to handle [it, or the situation, or the job] and he said he thinks I knew what he was talking about." (Tr. I-46)

Over objection raised by respondent, C.B. testified, when asked what she thought was meant when respondent said "***understanding what he was talking about ***" (Tr. I-46):

"***I wasn't sure at the time because if I was a teacher I think I would

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know what he was talking about, but he was a teacher in school and I didn't think he would be talking about that.***" (Tr. I-49)

Immediately thereafter, C.B. explained that "that" in her judgment referred to "things having to do with sex." (Tr. I-50)

C.B. testified that respondent then suggested that he show her around the other offices. They both got up from their chairs and when they got to the door, "***he put his hand on my hips and he kissed the back of my head ***and he said now, I hope you understand what I am talking about." (Tr. I-52) Here, C.B. testified that what respondent was "talking about" was "***the kind of job I would get." (Tr. I-52)

After seeing the other offices, C.B. testified, she told respondent she wanted to go home. (Tr. I-52) However, respondent said he wanted to show her "***a few more things and we then sat down *** in his office." (Tr. I-52) At that point the telephone rang again, respondent answered, and "***he gave me a Marilyn Monroe book ***" which he retrieved from "the bookshelf." C.B. testified that this book didn't interest her so she put it down. When respondent concluded his telephone conversation, C.B. testified, he said "***Marilyn Monroe had gorgeous legs and he would like to see mine sometime.***" (Tr. I-53) Thereafter, C.B. testified that respondent, who was sitting behind his desk while she was sitting in front of the desk, requested her to come to his side of the desk because he wanted to show her some papers. (Tr. I-54) She got up and went to respondent's side of the desk and sat on a chair which was approximately six inches from his. (Tr. I-54) When she sat down, C.B. testified that respondent "***put his hands on my knees and he put his hand up and down my leg [my thighs] and I got up and I said I don't want to sit there anymore." (Tr. I-55) C.B. then testified that she told respondent she wanted to go home and he said he would give her a ride home. Although C.B. testified that she "***was very scared and confused and didn't know what to do" (Tr. I-55), she told respondent she did not want a ride home. (Tr. I-56) After leaving respondent's office complex and descending the stairs to the first floor, C.B. testified, respondent wanted to give her a kiss for goodbye which she refused. (Tr. I-57) Respondent was then alleged to have said: "***come on, I am not going to bite you and I won't hurt you and he then tried to kiss me and I had moved my head.***" (Tr. I-57) In explanation of this occurrence, C.B. testified that at the first floor landing, respondent "***grabbed me*** put his hands on my hips*** [and when he tried to kiss C.B.] ***actually***kissed me over here on my cheek.***" (Tr. I-58)

C.B. testified that respondent queried as to why she was so frightened because when "***he first saw me in the hall***he thought that I would be able to handle it or something like that.***" (Tr. I-59) In response to whether he tried to kiss her again, C.B. testified:

> "He asked me to kiss him once and I said no and ***he tried to kiss me again—he didn't kiss me twice but he asked me to kiss him and I said no***." (Tr. I-59)

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After exiting the building, C.B. testified, she again said she didn't want a ride home; rather, she would walk. Respondent was alleged to have said "***your parents know that you are with me and I have the responsibility to take you home. I won't bother you in the car.***" (Tr. I-60)

Obviously C.B. changed her mind for they began walking toward his car. On the way, C.B. testified that: (Tr. I-60)

***

"[F]irst we stopped in the jewelry store next to his office and he asked me if I wanted a ring.

Q "Did you walk into the jewelry store?

A "No.

Q "What did he say?

A "He asked me if I liked a certain ring.

Q "And what did you say?

A "I said yes and he said well, if everything works out well, maybe I will buy you one—buy you a—ring.

Q "Did anything else happen there?

A "We got *** to the car.

Q "Now, did Mr. Quinn [respondent] start driving you home?

A "Yes.***"

While respondent was driving C.B. home, she testified, "he asked me if I wanted to hold his hand and I said no, you said you weren't going to bother me in the car and he asked me if I had a boyfriend and I said yes and he asked me if I was going out with [my boyfriend] and I said yes***." (Tr. I-60-61) C.B. then testified that respondent said "***just because I was going out for a long time that means that I have not been balling him [just because I was going out for a long time doesn't mean I have to ball him]***." (Tr. I-61) In response, C.B. testified, she asked who said anything about that, and respondent replied "***well, everybody is doing it nowadays and a beautiful***young and pretty girl like me [C.B.]—that it's hard to keep away from him.***" (Tr. I-61)

When they arrived in front of C.B.'s house, she testified, respondent told her to talk it over (obviously the job possibilities) with her parents and to let him know her answer the next day, but added that she didn't have to tell her parents everything. (Tr. I-62) C.B. testified that she did not tell her parents anything about the day's occurrences because she was scared. (Tr. I-62) However, C.B. testified she did call her girlfriend that evening and tell her. (Tr. I-63) C.B. testified that she did tell Mr. DeMarco, her biology teacher, the following day in school. (Tr. I-65) Later, she talked again with her girlfriend about the events of the preceding day. The next day, March 8, 1974, Mr. DeMarco called her to his office in school and told her he had talked with respondent about her allegations. C.B. testified that, although on March 7, 1974,

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Mr. DeMarco told her to stay away from respondent and to tell him she wasn't interested in working for him, he now advised her to tell either her parents or the principal. (Tr. I-68) Thereafter, on the same day, C.B. and Mr. DeMarco went to the principal and related to him the incidents with respondent on March 6, 1974, as hereinbefore set forth. That evening C.B. informed her mother regarding this entire matter.

On cross-examination, C.B. testified that when she and respondent first entered the reception area of his offices he had a short conversation with his secretary regarding telephone messages. (Tr. I-89) Thereafter, his secretary came into respondent's private office once while she and respondent were there. (Tr. I-89) A man identified as Dennis Ross also came in and remained for "a couple of minutes." (Tr. I-91-92) C.B. testified that as she and respondent were ascending the stairs to go to his offices, they passed a man painting the stairs (Tr. I-99), that she did not object nor was she scared when respondent took her photograph (Tr. I-106), that she told her mother the evening of March 6, 1974 (the day the allegations were to have occurred) she was not interested in the job (Tr. I-118), and that her parents knew on March 5, 1974 (the day prior to the alleged occurrences) that she had an appointment with respondent for a job interview. (Tr. I-116) C.B.'s mother confirmed that C.B. was, in fact, seeking employment (Tr. I-126), and that C.B. did tell her about the interview of March 6, 1974, the day before it occurred. (Tr. I-129)

Respondent, a teacher for fourteen years, five of which were in the employ of this Board, testified that the first time he met C.B. was near the end of January or beginning of February while he was monitoring the halls. On that occasion, he testified, C.B. came to him and asked him about his reading program. (Tr. II-28) Respondent testified that according to his customary procedure, he then took C.B. into his classroom to show her the materials used and the physical arrangements of his reading laboratory, an elective course. (Tr. II-29) About a week thereafter, respondent testified, C.B. came to him and told him she had enrolled in his reading course. (Tr. II-31) According to respondent, he explained to C.B. that while there was one reading laboratory in the high school there were two sections, each of which was taught by different teachers. (Tr. II-29-31) If a pupil were interested in participating in the reading laboratory, he would indicate this to the regular English teacher who in turn would inform the department chairman. The department chairman would then assign the interested pupil to one of the two sections. (Tr. II-29-31)

In any event, subsequent to C.B. allegedly expressing interest in the reading laboratory, respondent testified, he checked the master schedule in his classroom and determined that the pupils from the class taught by C.B.'s English teacher would be assigned to the other section of the reading laboratory, and not to his. (Tr. II-31)

Thereafter, respondent testified, the next time he saw C.B. was about a week before March 6, 1974, when she approached him to inquire of any employment possibilities in his South Orange business. (Tr. II-33) Respondent testified that he did have an opening for a secretary. (Tr. II-36) When he

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determined that C.B. could not typewrite, respondent testified, he informed C.B. "***there was no need to pursue it [the job opportunity] further because the job involved was a typing job and ***consequently the fact that she had not taken typing or was [not] currently taking typing would preclude her from employment." (Tr. II-36)

Respondent testified that the next time he saw C.B. was during the morning of March 6, 1974, while he was monitoring the corridors and she was passing his classroom. (Tr. II-37) Respondent testified that on this occasion he spoke first to C.B. and informed her of a job opportunity, which would only last one day (Tr. II-39), for a project his business would be conducting at a hotel-motel in Newark during the Board's scheduled spring vacation. (Tr. II-37) He explained that the project required a person to secure the names of those attending the project, and to distribute name cards. Respondent testified that the job would be from approximately noon to 5 p.m. and that it required someone who was attractive and friendly because the person selected would be the first person the visitors would see that day. (Tr. II-38) Respondent testified that because of C.B.'s earlier inquiry regarding employment, he asked her if she would be interested and whether she wanted to be interviewed that day. Respondent testified that C.B. responded affirmatively. He testified that he told C.B. he would be interviewing in his South Orange office that day commencing at 3:30 p.m. and explained where his office was located. No arrangements were made, respondent testified, as to how C.B. was going to get from school to his office in South Orange. (Tr. II-39-40)

Respondent testified that at the beginning of his last class period that day, 2:00 p.m., C.B. appeared at his door with her coat and books. At that point, respondent testified, C.B. asked whether she could go to his South Orange office at that time to be interviewed. According to respondent, he explained to C.B. that he was doing the interviewing for this particular project; therefore, no one was available at South Orange to interview her. Respondent testified that he told C.B. she could go with him if she wanted to wait until his class was concluded. He then invited her to sit and participate in his last class. (Tr. II-40-41) Subsequently, respondent did ask C.B. to deliver reports to teachers in the building. (Tr. II-43) In regard to her participating in his last class, respondent testified that because she had indicated interest in enrolling in the reading class, although assigned to the other section, he wanted her to become familiar with the purpose of the class. (Tr. II-43) Upon the conclusion of the class, they then departed for South Orange.

Respondent testified that upon the conclusion of his regular teaching day, he usually would go to his office in South Orange for meetings and to take care of business. (Tr. II-44) On the afternoon of March 6, respondent testified, the purpose of the interview with C.B. was to explain the specifics of the job, for her to understand the requirements, decide whether or not she wanted it, and finally, to inform her parents of the job. (Tr. II-44)

Respondent testified that he and C.B. arrived at his South Orange office at approximately 3:20 p.m. (Tr. II-44), and upon ascending the stairs, they passed the man who was painting. (Tr. II-47) When they entered the reception area,

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there were two secretaries seated at their desks. Respondent testified that as he and C.B. were going to his office he saw Dennis Ross, an employee of respondent's, seated at his own desk in his office. (Tr. II-47) Another employee, Sherman H. Hubelbank, was also in his office. (Tr. II-47)

Upon entering his private office, respondent testified that even before he was seated his secretary came into his office with telephone messages. The secretary departed after remaining for a few minutes, and Dennis Ross came in to discuss a particular project, not the specific project scheduled for Newark. This conversation with Dennis Ross lasted about twenty minutes. (Tr. II-48-50) All this time, respondent testified, C.B. was seated at the other side of the desk and he noticed that she was reading or looking at a book she had taken from the bookshelf directly behind her. During this twenty minute conversation, respondent testified, he introduced C.B. to Dennis Ross and explained that she was there for a job interview. (Tr. II-50-51)

Ross left at about 4:00 p.m., respondent testified, closing the door behind him and respondent apologized to C.B. for the delay and proceeded to explain the specifics of the job. (Tr. II-52-53)

Respondent testified that he explained to C.B. his office had not done anything like this Newark project before, but that she would be dealing with adults. According to respondent, he explained to C.B. that, although she was young, he thought she could handle it because of her personality. (Tr. II-54)

He then proceeded to fill out what he referred to as a job application by making written comments on a manila folder. It is noted here that five females were interviewed for this job and the five job applications were marked as follows: R-1: C.B.; R-2: F.M.; R-3: V.R.; R-4: S.B.; R-5: N.S. Respondent testified that he had already employed Dolores Roberson, who was "***going to be in charge of briefing the ladies on their specific duties at the [Newark] show and working with them in terms of coordinating." (Tr. II-59) Apparently, respondent employed two females to act as receptionist/hostess (Tr. II-66) for the Newark show, or that project for which C.B. was interviewed. Respondent testified that the interviewing procedure utilized for this project was somewhat unique. (Tr. II-91) Since he had already employed Dolores Roberson for the purposes set forth above, and because the major criteria of the successful candidates were appearance and personality and, because Ms. Roberson was not present during any one of the five interviews, *ante*, it was his practice to take photographs of each applicant at the conclusion of each interview in order to send the photographs to Ms. Roberson. (Tr. II-59-60) The hearing examiner points out that each of the five job applications, *ante*, (R-1, 2, 3, 4, 5) contains photographs of what purports to be the person interviewed. On cross-examination respondent testified that he was absolutely certain that he took the photographs of all five applicants on the day each was interviewed (Tr. II-99), and that the only reason was to show them to Ms. Roberson for the express purpose of soliciting her feelings about the applicants' "appearance and suitability" for the Newark project. (Tr. II-94)

After Dennis Ross made his exit from the office, respondent testified,

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Sherman Hubelbank came in, opening respondent's closed door, without knocking. (Tr. II-67) However, Mr. Hubelbank testified the door was open. (Tr. III-36) Respondent introduced C.B. to Mr. Hubelbank and explained he was interviewing her, but that he should be finished shortly. (Tr. II-67) At the conclusion of the interview, respondent went to see Mr. Hubelbank in his office, at the same time showing C.B. the office complex. (Tr. II-71) In denying that he ever kissed C.B., respondent testified that as he and C.B. were leaving his office to go see Mr. Hubelbank, C.B. began to walk the wrong way and he stopped her by reaching out and placing his hands on her waist. When she stopped, respondent testified that he said "***no, this way***" (Tr. II-70-72) and may have, at that time, "bumped" her.

After concluding his conversation with Sherman Hubelbank, respondent testified, he and C.B. returned to his office because "***we had concluded the interview and she was about to go home." (Tr. II-72) When they entered his office, respondent testified, his secretary called him on the telephone intercom to remind him that a person who had a 4:30 p.m. appointment was waiting. Simultaneously, Dennis Ross returned to respondent's office. (Tr. II-73) Upon concluding his conversation with Ross, respondent testified, he and C.B. left his office and went out to the reception area. There, respondent testified, he requested one of the two secretaries, P.C., to give C.B. a ride home because he had to meet his 4:30 appointment. (Tr. II-74) However, P.C. declined because she did not have her car. Respondent then determined to drive C.B. home, and asked the person waiting for the 4:30 appointment if she wanted to go for the ride. That person declined. (Tr. II-74)

As respondent and C.B. descended the stairs in making their egress from the building, respondent testified the painter was still working and they exchanged greetings. (Tr. II-75-76) During the ride to C.B.'s home, respondent testified, they talked about the job and about school. When they arrived at her home, respondent testified, C.B. began talking about her "***dog and such. I had to remind her somebody was waiting and I would see her in school tomorrow." (Tr. II-76) Respondent testified that that was the last time he had seen C.B. until her appearance at the proceedings herein. (Tr. II-77)

On March 8, 1974, respondent testified, Mr. DeMarco informed him regarding C.B.'s allegations. Respondent replied to Mr. DeMarco that he denied the allegations and suggested that he, respondent, confront C.B. Such a confrontation never occurred. (Tr. II-76-77) Respondent denies ever doing or saying or suggesting anything improper with C.B. Specifically, he denies saying he wanted to find out if her mind was as beautiful as her body; he denies saying that some girls have only one thing going for them and it looked as if C.B. had everything going for her; he denies asking C.B. to give him a kiss; he denies saying he would not drive her home until he got a kiss (Tr. II-70); he denies her saying she would walk home (Tr. II-71); he denies saying to C.B. that because she has been going with her boyfriend a long time does not mean she has to ball him. (Tr. II-77)

On cross-examination, respondent testified regarding the photographs in the following manner: (Tr. II-109-110)

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***

Q "and isn't that why you took the pictures of her [C.B.] to show her, to Miss Roberson, to get her interested in modeling?

A "No. I took the picture for that show and I told her Miss Roberson who was involved in modeling would be there and if she was interested she should speak with Miss Roberson and, in fact, I attempted to call Miss Roberson while [C.B.] was in the office.***"

Respondent testified on cross-examination he did not recall whether he asked C.B., upon entering his office, whether she wanted anything to drink. (Tr. II-107-108) Respondent denies stopping at the jewelry store as described by C.B. (Tr. II-128)

At this juncture, the hearing examiner points out that respondent called on his behalf Dennis Ross, Sherman Hubelbank, P.C., and the painter. The testimony of Dennis Ross and Sherman Hubelbank is of little relevance, because it was limited not to the charges, *sub judice,* but to the periphery of the situation. P.C. is no longer employed by respondent and testified that she recalled respondent asking her to take C.B. home on March 6, 1974 (Tr. I-13), but also testified that she did not know C.B. (Tr. I-12) P.C. did testify that respondent asked her to testify that he, respondent, did ask her to take C.B. home. (Tr. I-15) The painter testified that he observed respondent and C.B. enter and leave the building (Tr. II-81-82), and that as they left he did not see or hear anything unusual. (Tr. II-89) However, he also testified that, from where he was standing, he could not see all the way to the first floor. (Tr. II-88) The painter also testified that respondent "***asked me to come in to testify that I had seen him leave [the building] and not seen or heard any unusual occurrences." (Tr. II-89)

The hearing examiner observes that the proofs and the defense of the charges herein rest on the question of credibility. In this regard, the deposition (P-1) of Mr. DeMarco reveals the following: (P-1, at pages 29-30)

"***I [Mr. DeMarco] went to him [respondent] and *** told him that I was quite troubled ***. I told him everything that *** [C.B.] *** told me ***. I asked him if it in fact all occurred and then he told me it didn't occur that way, that she misinterpreted a lot of things that I [respondent] said.***"

And,

"***[W]hen he was offering her a job and telling–that he told her that she was nice and so forth, that it wasn't said with that meaning *** and that, in fact, when there was a kiss exchanged, it wasn't the type of kiss that she implied, it was a more of a reassurance fatherly hug kind of thing from the back and just a peck on the cheek which had no connotation at all of sex or any implied promiscuity.

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"Did Mr. Quinn say to you that he in fact had kissed [C.B.]?

"Well, yes on the cheek from the back, but not the kind of kiss that she described.***"

The hearing examiner does not find convincing respondent's testimony that he "bumped" into C.B. while they were exiting his office. The examiner is convinced, however, that the attempts made by respondent to kiss C.B. as she described are substantially true in fact.

In regard to the employment applications (R-1, 2, 3, 4, 5) and the photographs therein, respondent is adamant in his testimony that (1) each of the photographs was taken the day of each respective interview, and (2) that the photographs were taken purely to refer them to Ms. Roberson for her judgment as to the candidates' "appearance and personality." The hearing examiner is not convinced of respondent's version regarding either of these two positions for the following reasons:

I. In regard to the photographs and the job applications, R-5 is the alleged application of a female, N.S., who is a pupil enrolled in the high school. The principal testified that on October 23, 1974, one of the hearing dates herein, he, upon request of counsel for the Board (Tr. III-25), called N.S. to his office. He asked N.S. if she worked for respondent and she replied that she did. The principal testified he asked N.S. about how she acquired the job and the interview process and whether a photograph was taken of her *at the interview.* According to the principal, she replied that no photograph was taken at the interview, but that respondent did take a photograph *after she began working for him sometime in April.* The principal testified that N.S. stated it was her understanding that respondent took her photograph because he had a new camera. (Tr. III-26-28)

Subsequently, N.S. was called to testify on October 31, 1974. N.S. testified that the photograph, notwithstanding the principal's version, was taken before she began to work for respondent. N.S., who is still employed by respondent, also testified that when she reported to work on the afternoon of October 23, 1974, respondent and she discussed when her photograph was taken. (Tr. III-10-11)

The hearing examiner is not convinced by the testimony of N.S. He is convinced, however, of the accuracy and preciseness of the principal's testimony regarding their October 23 conversation, prior to her dialogue with respondent.

II. In regard to respondent's testimony that the purpose of taking the photographs of C.B. was to permit Ms. Roberson to review them as to C.B.'s "appearance and personality," and not to get C.B. engaged in modeling, respondent's own testimony on cross-examination is illuminating:

***

Q "Had you [contented] yourself, Mr. Quinn, at the termination of

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your interview on March 6 with [C.B.] that notwithstanding her age she would be able to handle the hostess or receptionist job at the Downtowner Motel in Newark?

A "I thought she was a suitable candidate, yes.

Q "And that was based on, as you have said, two criteria, is that right, appearance and personality?

A "That is correct.

Q "Did you think you might want somebody else's judgment with respect to her personality or were you satisfied to rest on your own interview which lasted about 20 minutes.

A "I was satisfied to rest on my own interview in that area.***"
(Tr. II-139)

While the hearing examiner finds that the photographs were not taken of C.B. for the purpose related by the respondent, he makes no finding as to why they were taken. Respondent's testimony and explanation of the events which occurred on March 6, 1974, is contradicted by his own testimony and the testimony of Mr. DeMarco as set forth in his deposition. (P-1) Compared to the testimony of C.B. as hereinbefore set forth, the hearing examiner finds that the charges against respondent are substantially true in fact. Finally, respondent's record (C-2, 3A, B, C) of his teaching career in the employ of this Board is referred to the Commissioner for examination.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto filed by respondent. Such exceptions are that the findings of the hearing examiner are not consonant with the weight of the evidence and that the standard applicable to the charges against respondent should be "***clear and convincing evidence and/or beyond a reasonable doubt due to the penal nature of the proceedings." (Respondent's Exception to Hearer's Report)

The "standard" or criterion to be employed in weighing proofs similar to those herein has been enunciated on many occasions by the Commissioner and the Courts. The Commissioner has always been mindful that the testimony of school pupils must be examined with great care. Thus, *In the Matter of the Tenure Hearing of Sally Williams, School District of Union Township,* 1973 *S.L.D.* 464 the Commissioner quoted *In re Fulcomer,* 1961-62 *S.L.D.* 160, remanded State Board of Education 1963 *S.L.D.* 251, decision on remand 1964 *S.L.D.* 142, affirmed State Board of Education 1966 *S.L.D.* 255, reversed and remanded 93 *N.J. Super.* 404 (*App. Div.* 1967) with respect to the testimony of children who are pupils in school:

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> "*** 'It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children.' *Palmer v. Board of Education of Audubon,* 1939-49 *S.L.D.* 183, 188.***" (1973 *S.L.D.*, at p. 484)

It has also been held that the quantum of proof required with respect to tenure charges against school employees is different from that required for conviction of a crime. *Ruth Schroeder v. Board of Education of Lakewood, Ocean County,* 1960-61 *S.L.D.* 37 In *Park Ridge v. Salimone,* 36 *N.J. Super.* 485, 498 (*App. Div.* 1955) the Court said:

> "***The *quantum* of proof necessary to convict is different. The proof might not be sufficient to demonstrate guilt of a crime to a jury beyond a reasonable doubt but it might indicate clearly and by the preponderance of the credible evidence an employee's guilt of conduct unbecoming a police officer or subversive of good order and discipline of the force. *Beggans v. Civil Service Commission,* 10 *N.J. Misc.* 1142 (*Sup. Ct.* 1932); *Smith v. Carty,* 120 *N.J.L.* 335, 343 (*E.&A.* 1938).***"

In *Schroeder, supra,* the Commissioner also quoted the Supreme Court of Wyoming in *Tracy v. School District No. 22,* 70 *Wyo.* 1, 243 *P.2d* 932 (1952) with respect to the relationship between a teacher and pupil:

> "***The peculiar relationship between the teacher and his pupils is such that it is highly important that the character of the teacher be above reproach.*** The Court of Appeals of Kentucky has said that both parents and pupils regard the teacher as an exemplar whose conduct might be followed by his pupils, and the law by necessary intendment demands that he should not engage in conduct which would invite criticism and suspicions of immorality. (Gover v. Stovall, 237 Ky. 172, 35 S. W. 2d 24). Even charges of or reputation for immorality, although not supported by full proof, might in some cases, be sufficient ground for removal. Not merely good character but good reputation is essential to the greatest usefulness of the teacher in the schools.***" (at p. 937)

Further, it has been long been held that unfitness to hold a teaching position may be shown by a series of incidents or by one incident, if sufficiently flagrant. *Redcay v. State Board of Education,* 130 *N.J.L.* 369 (1943), aff'd. 131 *N.J.L.* 326 (*E. & A.* 1944); *In the Matter of the Tenure Hearing of Emma Matecki,* 1971 *S.L.D.* 566, aff'd State Board of Education 1973 *S.L.D.* 773, aff'd as *Emma Matecki v. Board of Education of the City of New Brunswick,* New Jersey Superior Court, Appellate Division, 1973 *S.L.D.* 773

Measured against such standards, it is clear to the Commissioner that the

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findings of the hearing examiner are grounded in proofs which are sufficient. He was able to weigh and evaluate the demeanor of the witnesses. Contradictions in testimony were carefully noted. It is apparent that respondent abused his position as a teaching staff member to make a series of improper advances to a female pupil of minor years. The Commissioner holds that such conduct by respondent is sufficiently flagrant to warrant his dismissal and that by his own actions he has forfeited the tenure protection which is afforded by the statutes to teaching staff members who have otherwise complied with minimum requirements. (See *In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, Bergen County,* 1971 *S.L.D.* 284; *In the Matter of the Tenure Hearing of Francis Bacon, School District of the Township of Monroe, Gloucester County,* 1971 *S.L.D.* 387, aff'd State Board of Education 1972 *S.L.D.* 663; *In the Matter of the Tenure Hearing of Joseph Maratea, Township of Riverside, Burlington County,* 1966 *S.L.D.* 77, affirmed State Board of Education, affirmed New Jersey Superior Court, 1967 *S.L.D.* 351; *In the Matter of the Tenure Hearing of Kathleen M. Pietrunti, Township of Brick, Ocean County,* 1972 *S.L.D.* 387, affirmed and reversed in part on the question of retroactive applicability of *L.* 1971, *c.*435, 502, 1973 *S.L.D.* 782, 128 *N.J. Super.* 149 (*App. Div.* 1974), 65 *N.J.* 573 (1974), petition for *cert.* denied C-759, Supreme Court of New Jersey, July 22, 1974.)

Accordingly, the Commissioner directs that respondent be dismissed from his position as a teacher in the South Orange-Maplewood School System as of the date of his suspension by the Board of Education.

COMMISSIONER OF EDUCATION

May 19, 1975

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

COMMISSIONER OF EDUCATION

DECISION

For the Respondent Board of Education, William G. Brigiani, Esq.

Pursuant to a letter request filed by Candidate Stanley F. Thayer, alleging irregularities in the conduct of the annual school election held on March 11, 1975 in the Borough of Jamesburg, an inquiry was conducted by a hearing examiner designated by the Commissioner of Education at the State Department of Education, Trenton, on March 24, 1975. Specific allegations of improper conduct of the election are set forth as follows:

(1) Subsequent to the drawing of names to determine their placement on the ballot, the ballot was printed with the names in a different order than that determined by the drawing in violation of *N.J.S.A.* 18A:14-13.

(2) Candidate Thayer was not notified of the time and place when the prepared "voting machines" could be examined prior to the election pursuant to *N.J.S.A.* 18A:14-42. (Letter of Complaint)

The Board admits that the allegations as set forth herein are true in fact; however, it offered in evidence an affidavit of the Secretary of the Jamesburg Board of Education, hereinafter "Board," which states, *inter alia,* that he did not realize that an error had been made in the printing of the ballot until 3:00 p.m. on election day. (Exhibit A) The Board admitted further, that candidates were not given an opportunity to see the actual placement of names on the ballot prior to the election because they had never done so in the past. (Tr. 4-5) The affidavit from the Board Secretary states also that;

"***the positions as I submitted them to the County [Board of Elections] were as follows:

#1 John Nugent
#2 James Main
#3 Dennis Swartz
#4 Stanley Thayer
#5 Elizabeth Casey
#6 John Webster***" (Exhibit A)

However, when the ballot was printed the names appeared in the following order:

Webster
Main
Casey

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Nugent
Swartz
Thayer (Letter of Complaint and Exhibit A)

The Board also offered as evidence a card prepared by Candidate Thayer which was used to promote his election to the Board. That card reads as follows:

"Jamesburg School Board Election
If you think it's time for a CHANGE
Vote for the P.R.I.D.E. Slate

John Nugent
Dennis Swartz
Stan Thayer" (C-1)

Therefore, the Board argues that Candidate Thayer's placement position on the ballot did not prejudice his chances to be elected.

An analysis of the ballot as it appeared, and the voting results, follows:

Printed Ballot	Result	Votes
Webster	2nd place	301
Main	1st place	308
Casey	3rd place	259
Nugent	6th place	140
Swartz	5th place	153
Thayer	4th place	232

Only Candidate Main had his name printed in the proper position. It can be observed that the first three names received the highest number of votes, whereas the last three, the "P.R.I.D.E." slate of candidates, received a lower number.

The statute describing the drawing procedure, *N.J.S.A.* 18A:14-13, reads in pertinent part as follows:

> "The positions which names of candidates shall have upon the annual school election ballot in each school district shall be determined by the secretary of the board of education of the district by conducting a drawing***."

And,

> "***The drawing shall be done by the secretary *** [and in his absence] [t]he person making the drawing shall make public announcement at the drawing of each name, the order in which the name is drawn and the term of office for which the drawing is made.***"

There can be no question that a purpose for the drawing is to insure that subsequently the names will be printed on the ballot in the same sequence as drawn.

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N.J.S.A. 18A:14-42 (b), (d) read as follows:

> "***b. Written notices of the time and place when the machines will be prepared for use at the elections shall be mailed to each candidate to be voted upon at such election, stating the time and place where the machines may be examined, at which time and place said candidates shall be afforded an opportunity to see that the machines are in proper condition for use in the election;
>
> ***
>
> "d. The names of all candidates to be voted upon at such election shall be arranged in the manner provided by this act, and no grouping of two or more candidates or political party designations shall be permitted***."

Although this statute is addressed to voting machines and there is no expressed statutory provision for the inspection of paper ballots by candidates prior to the election, in the judgment of the hearing examiner such an opportunity should be afforded all candidates, regardless of the method of voting. This procedure, if followed, will permit errors such as those described herein to be found and corrected prior to the election. No lesser importance can be ascribed to the procedures regulating the preparation and eventual distribution of paper ballots.

There is no allegation that fraud or deliberate misconduct has been committed in the instant matter; however, *N.J.S.A.* 18A:14-69 reads in part as follows:

> "If any printer employed to print official ballots, or any person engaged in printing the same, shall appropriate to himself or give or deliver or knowingly permit to be taken any of such ballots by any other person than a person duly authorized so to do, *or shall print or cause to be printed any official ballot in any other form than that prescribed by the proper officer or officers, according to law, or with any other names thereon, or with the names spelled or the names or printing thereon arranged in any other way than that authorized and directed by this title,* the person so offending shall be guilty of a misdemeanor and shall be punished by a fine not exceeding $1,000.00 or imprisonment not exceeding five years.***" (*Emphasis supplied.*)

The hearing examiner's finding of facts is that the allegations by Candidate Thayer are true in that candidates' names were not printed on the ballot in the proper sequence following the drawing, and that he was not given an opportunity to inspect the ballot prior to the election in violation of *N.J.S.A.* 18A:14-42 as interpreted, *ante.*

The hearing examiner does not find, however, that the will of the voters has been thwarted in this election. An analysis of the votes cast shows that there was individual voter selection of candidates, irrespective of their position on the ballot, and that Candidate Thayer, specifically, finished in fourth place,

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reasonably close to the third place winner, even though his name was printed in sixth place on the ballot.

The responsibility for these procedural violations rests solely with the Board Secretary. The admission that an improper procedure has always been followed cannot be supported and should be condemned.

The Commissioner has previously commented about procedural violations in school board elections. *In the Matter of the Annual School Election Held in the School District of the Borough of Lindenwold, Camden County,* 1972 *S.L.D.* 241, the Commissioner commented as follows:

> "***The Commissioner would vigorously condemn any procedural faults found in any school election; however, in the instant matter he finds that there is no showing of misconduct or collusion that would vitiate this election. Nor can the Commissioner find that the will of the people was thwarted and could not be fairly determined. The Commissioner stated in his decision, *In the Matter of the Annual School Election in the School District of Riverside Township, Burlington County,* 1968 *S.L.D.* 73, 77:
>
> > '***It is purely speculative to propose that if conditions ~~have~~ had been different, the results would have been different. The Commissioner has consistently declined to set aside contested elections unless it can be shown that the irregularities clearly affected the result of the election.
> >
> > > '***[I]t has been held that gross irregularities when not amounting to fraud do not vitiate an election.' 15 *Cyc.* 372
> >
> > 'See also *Application of Wene,* 26 *N.J. Super.* 363 (*Law Div.* 1953); *Sharrock v. Keansburg,* 15 *N.J. Super.* 11 (*App. Div.* 1951); *Love v. Freeholders,* 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *In the Matter of the Annual School Election in the Township of Jefferson, Morris County,* 1960-61 *S.L.D.* 181; *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Lumberton, Burlington County,* 1959-60 *S.L.D.* 130.***' "
>
> (at pp. 246-247)

The hearing examiner observes also, that Exhibit C-1 does not meet the specific requirements of *N.J.S.A.* 18A:14-97, which provides:

> "No person shall print, copy, publish, exhibit, distribute or pay for printing, copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by and means, any circular, handbill, card, pamphlet, statement, advertisement or other printed matter having reference to any election or to any candidate or to the adoption or rejection of any public question at any annual or special school election unless such circular, handbill, card, pamphlet, statement, advertisement or other printed matter shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied or

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published or of the name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published."

It is found that Exhibit C-1, contrary to statutory prescription, does not "bear upon its face a statement of the name and address of the person or persons causing the same to be printed." *N.J.S.A.* 18A:14-97 Neither was there testimony elicited at the inquiry, which identified such "person or persons" who caused the card to be "published" or "printed."

In consideration of this irregularity and the procedural violations as recited, *ante,* the hearing examiner recommends that the election stand as recorded and further, that any violations of *N.J.S.A.* 18A:14-69 or 97, if deemed to be fraud or deliberate misconduct, be reported by the litigants to the Office of the New Jersey Attorney General for consideration and possible prosecution in a court of law.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed and considered the report of the hearing examiner and concurs with the recommendations contained therein. The irregularities of record in this election are clear and may not be condoned. There is no evidence, however, that such irregularities "***clearly affected the result of the election***" or that the "***will of the people was thwarted or could not be determined." *Lindenwold, supra; Riverside, supra.*

In such circumstances there is reason to caution the Board to prevent such irregularities in the future and to urge strict compliance with the statutes that govern the printing and distribution of campaign literature. *N.J.S.A.* 18A:14-97 There is no reason, however, to warrant a finding that this election should be set aside.

Accordingly, the Commissioner determines that Candidates Webster, Main, and Casey were each elected to three-year terms on the Board of Education of the Borough of Jamesburg. The complaint herein is dismissed.

COMMISSIONER OF EDUCATION

May 28, 1975

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Ronnie Abramson,

Petitioner,

v.

Board of Education of the Township of Colts Neck, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Chamlin and Schottland (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Saling, Moore, O'Mara & Coogan (Henry J. Saling, Esq., of Counsel)

Petitioner was employed as a teaching staff member by the Colts Neck Board of Education, hereinafter "Board," for the three academic years 1970-71, 1971-72, and 1972-73. She alleges that her non-reemployment by the Board for the 1973-74 academic year was illegally motivated because of her Jewish faith and because of her activity in the Colts Neck Education Association. The Board denies petitioner's allegations and avers that its determination not to reemploy her was and is legal and proper in all respects.

A hearing was conducted in this matter on January 23, 1974 at the office of the Monmouth County Superintendent of Schools, Freehold, by a hearing examiner appointed by the Commissioner of Education. Thereafter, counsel to the parties filed Briefs in support of their respective positions. On October 23, 1974, the Board, in response to petitioner's request, provided its reasons for not reemploying her for the 1973-74 academic year. The report of the hearing examiner is as follows:

Petitioner began her employment with the Board during September 1970, and was assigned to a third grade. Petitioner testified that the principal of the school to which she had been assigned formally evaluated her teaching three times during that year and visited her room, informally, on many occasions to provide guidance. (Tr. 6) These formal evaluations (R-3, R-3A, R-3B) were reduced to writing and a copy of each was provided petitioner.

During the years 1971-72 and 1972-73, another principal was assigned to the school in which petitioner taught. He, too, formally evaluated petitioner's teaching abilities and reduced his observations to writing. (R-1, R-2, P-6)

In regard to these six formal evaluations, *ante,* the two principals pointed out the strengths, as well as the weaknesses, of petitioner's teaching which each had respectively observed. Both principals recommended to petitioner that: 1) a more relaxed manner be developed between her and her pupils (R-3A); 2) a greater projection of personal warmth be developed between her and her pupils

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(R-1, R-3B); 3) classroom instruction and discipline be provided with more teacher patience. (R-1, R-3)

On February 4, 1972, the principal forwarded to the Superintendent of Schools a written recommendation (P-1) to renew petitioner's employment for 1972-73 with the following provisos:

> "*** – that communications with students continue to become more productive in terms of warmth on the teacher's part and in positive response on the student's part;
>
> " – that Mrs. Abramson be out of her chair going to students to meet individual needs;
>
> " – that there be visible evidence in Mrs. Abramson's daily work that she truly likes children (even the troublesome ones) and enjoys teaching; and,
>
> " – that she continue to seek opportunity for professional growth this year and next.
>
> "Mrs. Abramson must understand that she will receive careful consideration before receiving her tenure contract. Unless significant professional growth takes place, I will not be recommending her reemployment at this time next year." (P-1)

Subsequent to petitioner commencing her third year of employment, she was again formally evaluated on December 11, 1972. This was the last formal written evaluation (P-6) prior to the emergence of the controversy herein. This evaluation was positive in its comments regarding petitioner's teaching, as the principal stated in the last paragraph:

> "***I feel there is an improved professional attitude and understanding on Mrs. Abramson's part. I am pleased with her efforts and the classroom results at this time."

The principal testified that he recommended petitioner's reemployment for the 1973-74 academic year (Tr. 64), and the Superintendent testified he endorsed that recommendation. (Tr. 29)

On March 22, 1973, the Superintendent testifed that a private meeting of the Board was called to discuss staff reappointments for the 1973-74 academic year. (Tr. 28) Seven members of the nine-member Board were present, as well as the Superintendent and three school principals. (Tr. 28) It is noted that two of the three principals included the principal first in charge of petitioner's assigned classroom during 1970-71, and the principal who next received that assignment during the 1971-72 and 1972-73 academic years petitioner was employed.

The Superintendent testified that, at this meeting, petitioner's first principal gave her a satisfactory recommendation for reemployment "with qualifications" (Tr. 31) while the Superintendent and petitioner's second

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principal recommended that petitioner receive her fourth contract, thereby allowing her to acquire a tenure status. (Tr. 31) A Board member who was present at this meeting stated that he had observed petitioner's performance in the classroom and would not be supportive of her reemployment. (Tr. 32) In this regard, the principal testified that it has been his practice to encourage parents to visit their children's teachers. (Tr. 60) The Board member had a son in petitioner's third grade class, although petitioner testified no difficulty was experienced by this fact. (Tr. 10) It was during a parent-teacher visitation in early March 1973 (Tr. 60) that the Board member observed petitioner teaching. The Board member's criticism of petitioner was in the area of teaching mathematics. Specifically, he questioned petitioner's grasp of that subject.

Following the conference session of the Board on March 22, 1973, the Board convened a public meeting on March 26, 1973 for the reappointment of personnel. The minutes (P-5) of that meeting reflect that, by motion made and carried, petitioner was appointed by the Board by a roll call vote of five to four. Immediately thereafter, another motion was made and carried to reconsider petitioner's appointment. A second vote was taken on petitioner's appointment which was defeated by a vote of five to four. The Board member who made the motion to reconsider is the same Board member who changed his earlier affirmative vote to a negative one on the second resolution. This Board member is the same one who took issue with petitioner's grasp of mathematics at the earlier conference meeting of March 22, 1973.

There is no challenge herein to the timeliness of notice of petitioner's non-reappointment (Tr. 124); rather, the challenge is to the Board's action of first approving petitioner for reemployment and then denying her reemployment at the same meeting. Petitioner asserts that the Board acted in the manner it did because of: 1) her Jewish religion; and, 2) her work in the Education Association.

Counsel for petitioner argues that not only did the Board not employ petitioner, it also failed to renew the contract of another probationary teacher also of the Jewish faith. Furthermore, this other teacher was also active in the Education Association. (Tr. 10, 40) (Petitioner's Brief, at p. 4) Counsel also argues that the Board violated an administrative policy (P-2) adopted by the Superintendent in regard to staff evaluations when it failed to follow the Superintendent's recommendation to reemploy petitioner. That policy (P-2) was implemented by the Superintendent to make teacher evaluation more effective. (Tr. 20-24) The hearing examiner is aware of no rule nor law which would require a board of education to adhere to an administrative policy implemented by its superintendent or any other administrative officer.

Next, petitioner argues that she acquired a vested interest in her employment by the Board by virtue of its initial action on March 26, 1973, reemploying her and relies on *Rall v. Board of Education of the City of Bayonne,* 54 *N.J.* 373 (1969). The hearing examiner does not agree. It has been consistently held by the Commissioner and by the courts of New Jersey that a tenure status does not accrue until the precise conditions laid down by statute are met. *Zimmerman v. Board of Education of the City of Newark,* 38 *N.J.* 65 (1962), *cert. denied* 371

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U.S. 956, 83 *S. Ct.* 508, (1963); *Ahrensfield v. State Board of Education,* 124 *N.J.L.* 231 (*Sup. Ct.* 1940), affirmed 126 *N.J.L.* 543 (*E. & A.* 1941) In this regard, *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:
>
> ***
>
> "(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year***."

Furthermore, it has been consistently held that a board of education may rescind an action taken at any meeting as long as such rescission occurs during that meeting. *James Docherty v. Board of Education of West Paterson, Passaic County,* 1967 *S.L.D.* 297; *Marion S. Harris v. Board of Education of Pemberton Township,* 1939-49 *S.L.D.* 164 (1938) There is no rule nor law known to the hearing examiner nor has any been cited to him that would require petitioner in this case to be granted an opportunity to be heard between the adoption of the resolutions in question. Additionally, the Board did provide petitioner with its reasons for non-reemployment although it was not required to do so. *Joan Sherman v. Malcolm Connor and Board of Education of the Borough of Spotswood,* Docket Number A-2122-73, aff'd New Jersey Superior Court, Appellate Division, decided January 28, 1975

Finally, petitioner argues that the action of the Board rescinding its resolution granting reemployment was based upon improper action by certain members of the Board and likens the instant matter to *Aikins v. Board of Education of East Paterson, Bergen County,* 1973 *S.L.D.* 80. This argument is linked directly to the factual issues involved herein. The hearing examiner can find no evidence that the Board failed to reemploy her because of her religious beliefs nor because of her Association activities. The fact is that one Board member, who was vociferous at the Board's closed meeting of March 22, 1973, stated at that time he would not support petitioner's reemployment for the reasons stated above. At the public meeting of March 26, 1973, he still needed a sufficient number of Board members to agree with him in order to have the Board reconsider its appointment, and then to deny the appointment. While the hearing examiner may not agree with the tactics adopted by one Board member, he finds no violation of law nor does he find that petitioner was discriminated against because of her religion or because of her activities with the Association.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions thereto filed by petitioner. Such exceptions are, in effect, that the evaluations of petitioner's teaching during the latter two years of her employment by the Board indicate

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that she has corrected earlier deficiencies and, thus, that a failure to reappoint her was grounded on arbitrary considerations. In summation, petitioner avers:

> "***The respondent herein was confronted with the unanimous recommendations of its administrators that petitioner should be granted tenure because of her development as a teacher and her ability to respond successfully to the criticism of her earlier classroom problems. To permit a part-time Board of Education made up of persons who are not authorized or otherwise sanctioned by the State of New Jersey to be professional evaluators or administrators to overrule the experts as was done in this case, is to violate the very principle in the cases above cited.***" (Exceptions to the Report of the Hearing Examiner, at pp. 4-5)

Petitioner further avers that the Board's own policy with respect to the supervision of teaching staff members (P-2) entrusts the supervision of such employees to the professional administrators of the district.

The Commissioner has reviewed the facts of the instant matter in the context of this argument and finds no reason to fault an assertion that local boards of education may not be completely arbitrary in their employment practices with respect to nontenure teachers. Nontenure teachers do require supervision. The reports of supervisory visits must, at least in some important respects, serve as part of the basis for a local board of education's final determination with respect to the reemployment of such personnel.

The Commissioner cannot agree, however, that the facts pertinent to the instant matter show either that the Board acted in an arbitrary manner or that it exercised an authority with respect to the reemployment of petitioner that it was not empowered to exercise. The facts of reference are not in dispute. Petitioner had been observed many times over a period of three years. The reports with respect to such observations cannot be labeled laudatory but were instead conditional and tentative. Reservations were the rule and not the exception.

Further, it must be observed that the Board's final consideration of petitioner's complete record of three years of employment constituted a long and anguished review. The Board met in private session with the school administrators most familiar with petitioner's work. The written reports of record were supplemented by oral discussion. A public session followed where the final decision was that petitioner would not be offered reemployment for a fourth year.

It is clear from such facts and the sequence of events that, contrary to petitioner's claim, the Board's action was not an arbitrary one, founded in a vacuum of meaningful review or of expert opinion, but instead an action grounded in reasoned judgment. The Commissioner so holds.

This holding is, of course, a rejection of petitioner's argument that the Board could not as a "part-time" governing body "overrule the experts." The review here required was of a three-year period, and not of one report of an

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"expert." Furthermore, local boards of education clearly have the authority, which is not possessed by school administrators, to make the final judgments with respect to the employment of personnel to staff the schools of the State. The pertinent statutes are:

N.J.S.A. 18A:11-1

"The board shall –

"a. Adopt an official seal;

"b. Enforce the rules of the state board;

"c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes [1]; and

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

[1]Section 11:1-1 *et seq.*

N.J.S.A. 18A:27-1

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

N.J.S.A. 18A:27-10

"On or before April 30 in each year, every *board of education* in this State shall give to each nontenure teaching staff *member* continuously *employed by it* since the preceding September 30 either

"a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

"b. A written notice that such employment will not be offered." (*Emphasis supplied.*)

An argument that such authority to employ may not be exercised because it is not "expert" is one that adds a dimension which the statutes do not contain. It reduces to a sham the State's long commitment to the idea that the citizens of the State are capable of governing and managing the public schools

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and of adopting school programs which fit local need. The Commissioner does not accept such an argument.

Accordingly, for the reasons stated the Commissioner finds that the Board acted properly pursuant to its statutory authority in its decision not to reemploy petitioner for a fourth year of teaching in the 1973-74 school year. The Petition is dismissed.

COMMISSIONER OF EDUCATION

May 28, 1975

Ronnie Abramson,

Petitioner-Appellant,

v.

Board of Education of the Township of Colts Neck, Monmouth County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 28, 1975

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

For the Respondent-Appellee, Saling, Moore, O'Mara & Coogan (Henry J. Saling, Esq., of Counsel)

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

October 1, 1975
Pending before Superior Court of New Jersey

You are viewing an archived copy from the New Jersey State Library.

Passaic Education Association, Rita Scavuzzo, Olga Bacha, Wanda Hopkins, and Mary Ann Levkiv,

Petitioners,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Saul R. Alexander, Esq.

For the Respondent, Louis Marton, Jr., Esq.

Petitioners, all of whom are members of the Education Association of Passaic, hereinafter "Association," and all of whom are employed as school nurses by the City of Passaic Board of Education, hereinafter "Board," allege that the Board has improperly established their individual salaries since July 1, 1972, in contravention of *N.J.S.A.* 18A:29-4.2. Petitioners now demand judgment of the Board in the form of moneys they allege they should have received, and they request an order of the Commissioner of Education requiring the Board to henceforth comply with the provisions of law with respect to their salaries. The Board denies the allegations and replies that its determinations in regard to each of petitioners' salaries since July 1, 1972, has been and is in all respects proper and legal.

Petitioners move for Summary Judgment in their favor and rely on the pleadings and documentary evidence now part of the record. Accordingly, the matter is before the Commissioner for determination.

All of the individually-named petitioners are employed as school nurses by the Board. While each of them possesses a standard school nurse certificate, no one of them possesses a baccalaureate degree. Petitioners claim that their respective salaries have been determined by the Board according to rates set forth in a non-degree salary scale, while other non-degree teaching staff members are compensated according to higher rates set forth in the bachelor's degree scale of the Board's salary policy. Petitioners allege that this not only contravenes the intent of *N.J.S.A.* 18A:29-4.2, but more specifically is diametrically opposed to the holding of the Commissioner in *Evelyn Lenahan v. Board of Education of Lakeland Regional High School District,* 1972 *S.L.D.* 577 wherein he determined the legislative intent of the above-referenced statute.

In this regard, *N.J.S.A.* 18A:29-4.2 provides as follows:

> "Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the

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full use of the same experience steps and training levels that apply to teachers."

The Commissioner, in *Lenahan, supra,* held that:

"***a school nurse holding a standard school nurse certificate *and a bachelor's degree, or an academic degree higher than a bachelor's,* shall be compensated in the same manner as any other teaching staff member holding a parallel degree or parallel level of training. Placement on the proper step of the salary guide shall be determined in the same manner as placement is determined for any other teaching staff member. A school nurse who holds a standard school nurse certificate, but who does not hold a bachelor's degree, is to be compensated according to the non-degree teachers' salary guide in effect in each respective district. If a non-degree teachers' salary guide does not exist in a district, such a category must be created and its compensation rates determined according to proper negotiating procedures, or the Board may alternatively compensate all school nurses holding the appropriate certificate at the level set for a teaching staff member with a bachelor's degree.***"

(*Emphasis in text.*) (1972 *S.L.D.* at 581-582)

The factual circumstances in the instant matter are not in dispute. Petitioners Scavuzzo, Bacha, Hopkins, and Levkiv each have been employed by the Board for a sufficient period of time to acquire a tenure status. (Petition of Appeal, Point Two; Board's Answer, Point Two)

The Board and the Association entered into an agreement for 1972-73 which set forth the Board's salary policy (C-1) for that year. That policy is reproduced here in pertinent part:

"APPENDIX A

"TEACHER SALARY GUIDES – 1972-1973(A)

"BA	BA + 32	MA	MA + 32
1. 8,400	8,600	9,000	9,400
2. 8,700	8,900	9,300	9,700
3. 9,000	9,200	9,600	10,000
**********	*****	*****	******
15. 13,800	14,000	14,400	14,800
16. –	14,600	15,000	15,400
17. –	–	–	16,000

"APPENDIX B

"OTHER SALARY GUIDES – 1972-1973

" (AN) " Nurses*	(AO) Attendance Officers	(AP) Psychologists
1. 7,700	1. 5,600	1. 13,500
2. 8,000	2. 5,900	2. 15,000
3. 8,300	3. 6,200	3. 17,500

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	*****		*****
9.	10,750	9.	8,100
10.	11,100	10.	8,500
11.	11,450		

*"Pending legislation putting nurses on Teachers' Salary Guide shall take precedence if enacted into law." [The pending legislation was enacted and is now known as *N.J.S.A.* 18A:29-4.2.] (C-1)

The Commissioner notices from the record (C-3) that the 1972-73 salary of each named petitioner was established by the Board according to the "nurses" salary scale in Appendix B of its salary policy (C-1) as set forth above.

Subsequent to the 1972-73 year, the Board and the Association entered into an agreement which contained the Board's salary policy (C-2) for the years 1973-74, 1974-75, and 1975-76. That policy (C-2) provides, in pertinent part, as follows:

"APPENDIX A

"TEACHER SALARY GUIDES (A)

		"BA			BA + 32	
"Step	**1973-74**	**1974-75**	**1975-76**	**1973-74**	**1974-75**	**1975-76**
1.	8,545	8,946	9,483	8,750	9,159	9,709
2.	8,862	9,438	10,004	9,073	9,663	10,243
3.	9,179	9,776	10,363	9,390	10,000	10,600
		*****	*****	*****		
14.	13,557	14,438	15,304	13,768	14,663	15,543
15.	14,559	15,505	16,435	14,630	15,600	16,535
16.				15,403	16,404	17,388

"APPENDIX B

"TEACHER SALARY GUIDES (A)

		"MA			MA + 32	
"Step	**1973-74**	**1974-75**	**1975-76**	**1973-74**	**1974-75**	**1975-76**
1.	9,188	9,585	10,160	9,600	10,011	10,612
2.	9,495	10,112	10,719	9,917	10,562	11,196
3.	9,812	10,450	11,077	10,234	10,899	11,553
		*****	*****	*****		
15.	14,750	15,700	16,635	14,981	15,955	16,912
16.	15,825	16,854	17,865	15,844	16,900	17,927
17.				16,880	17,977	19,056

"APPENDIX C

"OTHER SALARY GUIDES

"(AO)		(AN) "Nurses**	
"Attendance Officers*	**1973-74**	**1974-75**	**1975-76**
1. 5,600	7,816	8,324	8,823

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2.	5,900	8,124	8,652	9,171
3.	6,200	8,432	8,980	9,519s.
		***** ***** *****		
9.	8,100	10,972	11,685	12,386
10.	8,500	11,341	12,078	12,803
11.		12,080	12,865	13,637

***

**"Nurses earning degree will be paid at the appropriate teachers salary guide (BA, BA+32, MA or MA+32).

APPENDIX D
*"PSYCHOLOGISTS (AP)***"* (C-2)

Here, too, the Commissioner observes from the record (C-3) that the 1973-74 salary, and the Commissioner believes the 1974-75 salary, of each named petitioner was established by the Board according to the "nurses" salary scale in Appendix C of its salary policy (C-2) as set forth above.

The Board also has in its employ seven other teaching staff members, none of whom possesses a baccalaureate degree, but whose salaries have been determined, and are still determined by the Board, according to the rates set forth in the bachelor's degree salary scale of the Board's salary policies. (C-1, C-2, *ante*)

The Commissioner requested and received from the Board the following information (C-4) in regard to those seven teaching staff members:

Name	Date of Employment	Certification	Date Placed on B.A. Scale	Position
S.H.	1968-Present	Normal	1968	Teacher
S.L.	1928-1953; 1957-Present	Normal	1958	Teacher
I.L.	1928-Present (Retired 1/31/75)	Normal	1958	Teacher
N.M.	1930-1947; 1953-Present (To Retire 6/30/75)	Normal	1958	Teacher
V.P.	1960-Present	Vocational	1960	Voc. Teacher
J.R.	1972-Present	Vocational	1972	Voc. Teacher
S.S.	1966-Present	Vocational	1966	Voc. Teacher

In a letter (C-5) attached to this information, the Superintendent stated that three of the four persons who possess the two-year normal school certificates as set forth above were placed on the bachelor's scale in 1958 when the Association requested the Board to change its then-existing salary policy which differentiated between teaching staff members who possessed a degree and those who did not, by compensating them all under the provisions of the

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bachelor's scale. The Superintendent also stated that the policy which was adopted by the Board, upon the encouragement of the Association, is now being used by the Association in support of the claims made herein.

In regard to the three vocational education teachers, the Superintendent stated that those three persons were the sole applicants for the vacancies and the Board was obligated to offer higher salaries commensurate with the then-existing vocational teacher market or eliminate the courses they were employed to teach.

In the Commissioner's judgment, the paramount issue to be determined herein is whether petitioners' salaries, since the passage of *N.J.S.A.* 18A:29-4.2, have been properly established according to "***the full use of the same experience steps and training levels that apply to teachers."

There is no question that prior to the passage of *N.J.S.A.* 18A:29-4.2 boards of education were free to set school nurse salaries pursuant to the provisions of *N.J.S.A.* 18A:29-7 and prior case law. *Shirley A. Martinsek v. Board of Education of the Eastern Camden Regional School District, Camden County,* 1974 *S.L.D.* 1210, pending before the State Board of Education; *Georgia L. Johnson v. Board of Education of the Township of West Windsor, Mercer County,* 1967 *S.L.D.* 324, affirmed State Board of Education, 1968 *S.L.D.* 262; *Mary Belli v. Board of Education of the City of Clifton, Passaic County,* 1963 *S.L.D.* 95

Since the passage of *N.J.S.A.* 18A:29-4.2 and the Commissioner's holding in *Lenahan, supra,* school nurses, so long as they hold standard school nurse certificates, may not be treated differently from any other teaching staff member holding a parallel degree or parallel level of training. More recently, the Commissioner observed in *Pearl Schmidt v. Board of Education of the Passaic County Regional High School, Passaic County,* 1975 *S.L.D.* 19 (decided January 21, 1975) that:

> "***The Board has the statutory authority to offer a higher salary than that called for on its initial steps on the salary guide for degree and non-degree teaching staff members alike *** *N.J.S.A.* 18A:29-9 [text omitted] The Commissioner finds, therefore, that these initial steps are negotiable; however, once a board compensates a teaching staff member according to a salary guide which recognizes educational achievement, all teaching staff members similarly situated must be compensated accordingly; *i.e.,* non-degree teachers on the non-degree guide, and degree teachers on the degree guide.***" (at pp. 23-24)

It is clear and the Commissioner so holds that in this instance the Board has established each of petitioners' salaries for 1972-73, 1973-74 and 1974-75 in contravention of *N.J.S.A.* 18A:29-4.2. There is no question that the Board employs eleven teaching staff members who do not possess baccalaureate degrees, but all of whom are properly certified. For the Board to compensate seven of these eleven persons, excluding the four named petitioners who are school nurses, according to the higher rate set forth in the bachelor's scale of its salary policy, but, on the other hand, to confine petitioners to the lower rates of

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the "school nurse scale" is, on its face, discriminatory. The Commissioner recognizes, however, that local boards of education may establish a non-degree salary schedule as part of their salary policies through proper negotiations. Once such a salary schedule is established, however, all teaching staff members who do not possess degrees are to be compensated according to its terms. In the instant matter, the Board discriminated against four persons by holding them to a non-degree salary schedule while compensating the remaining seven according to the bachelor's degree schedule when, in fact, these latter did not possess bachelor's degrees.

Consequently, the Commissioner hereby directs the Board of Education of the City of Passaic to compensate Petitioners Scavuzzo, Bacha, Hopkins, and Levkiv the difference between their actual salaries for 1972-73 and 1973-74 and the amounts their salaries would have been according to the bachelor's degree schedule of its salary policy. Furthermore, the Board is directed to adjust each of petitioners' salaries for 1974-75 according to the bachelor's scale now in effect, retroactive to September 1, 1974.

Finally, The Commissioner points out that, for 1975-76, the Board may negotiate for a non-degree salary scale to be incorporated into its salary policy. The rates set forth therein may not diminish the tenure protection afforded its teaching staff members, and the non-degree scale must be implemented pursuant to the provisions of *N.J.S.A.* 18A:29-4.2 and the Commissioner's determination in *Lenahan, supra.*

COMMISSIONER OF EDUCATION

May 29, 1975

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In the Matter of the Application of the Board of Education of the Township of Liberty for the Termination of the Sending-Receiving Relationship with the Board of Education of the Town of Belvidere, Warren County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Wayne Dumont, Esq.

For the Respondent, Robert E. Wade, Esq.

Petitioner, the Board of Education of the Township of Liberty, has, by resolution adopted on July 10, 1974, requested the Commissioner of Education to dissolve the present sending-receiving relationship between it and respondent, the Board of Education of the Town of Belvidere, for the education of some of the high school pupils resident in the Township of Liberty. Respondent, by resolution of September 3, 1974, avers that it "disapproves and objects" to petitioner's request and recommends that such request be denied by the Commissioner.

A hearing in this matter was conducted on January 15, 1975 by a hearing examiner appointed by the Commissioner at the office of the Warren County Superintendent of Schools, Belvidere. The report of the hearing examiner is as follows:

The sending-receiving relationship between petitioner and respondent has been a long and amicable one dating from at least 1925 when Liberty Township was formed as a separate political entity. (See P-4.) A more recent phase of such relationship began in 1944 when petitioner closed its last small elementary school, established a sending-receiving relationship with the Township of White and Independence for the education of elementary age pupils, and continued by agreement to send certain high school age pupils to high schools in Belvidere and in the town of Hackettstown. Traditionally, the apportionment of pupils to these high schools has been founded on geographic boundaries, although petitioner and respondent have never executed a contractual agreement with respect to their relationship. Petitioner has, since 1958, entered into successive contracts with the Board of Education of the Township of Hackettstown, hereinafter "Hackettstown Board," for the education of high school pupils from previously designated areas. (P-5)

Most recently, however, in September 1973, petitioner again began to educate elementary pupils, grades kindergarten through eight, in its own new school and now deems it desirable to send all of these pupils on to grade nine in a single high school.

The past and present boundaries which have served as a determinant of high school attendance for pupils of Liberty Township would, if allowed to

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remain in effect, produce the following enrollments of such pupils in the Belvidere and Hackettstown High Schools: (P-3)

Year	Belvidere	Hackettstown		Total
(Present)	40	64	=	104
1975-76	47	64	=	111
1976-77	42	75	=	117
1977-78	40	68	=	108
1978-79	36	75	=	111
1979-80	28	74	=	102
1980-81	25	66	=	91
1981-82	24	69	=	93
1982-83	22	71	=	93

Such statistical projection reflects only present enrollments in the Liberty Township Elementary School, according to the administrative principal, but he testified that the mountainous character of the Township precludes great future in-migration. In any event, it is noted that the percentage of pupils scheduled by present apportionment methods to attend Belvidere High School is programmed to decrease from approximately forty-two percent of total high school pupils in 1975 to twenty-four percent in 1982.

According to petitioner, this division of high school pupils is no longer desirable, and it advances the following reasons and arguments for a total realignment to Hackettstown High School: (P-1)

> "(a) The Liberty Township Board of Education desires to consolidate all of our high school students into a single high school for the education and social betterment of our children. While there were good reasons in the past to send our students to two different high schools, the situation changed when we opened our own elementary school in September of 1973.
>
> "(b) From the educational standpoint, sending our children to one high school greatly simplifies the problems of curriculum coordination. Now, with two schools, professional staff time in this function is doubled and the results are necessarily a compromise.
>
> "Extracurricular activities are also considered important to the education of our children. We have been approached to provide a late bus for those students participating in after-school activities at Belvidere High School. This request was reluctantly refused because the costs of providing two extra bus runs (one from each high school) are prohibitive.
>
> "(c) From a social standpoint, the Liberty Township Board of Education contends that matriculating our elementary school graduates into two separate high schools is highly undesirable. Friendships formed in elementary school are strained by the separation. Teammates in elementary school sports become competitors in high school. Even the community spirit is divided geographically by the high school split.

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"(d) The reasons for selecting Hackettstown as the high school for consolidation of our children are listed as follows:

"(1) Hackettstown has sufficient pupil capacity now to accept all of our students;

"(2) The Hackettstown Board of Education has officially indicated its willingness to accept all of our high school students.

"(3) Since most of our students now attend Hackettstown High School, the effects of the change are minimized."

Petitioner does not propose, however, that all high school pupils be reassigned to Hackettstown High School during the 1975-76 school year but that such reassignment begin with grade nine pupils in that year and continue in future years with other grade nine classes until, in 1978, the present sending-receiving relationship between it and respondent will be terminated.

Respondent avers that it is better able than Hackettstown to offer petitioner a long-range sending relationship for high school pupils since the voters of Belvidere have recently authorized the construction of a large addition to the Belvidere High School and since, in the context of this authorization, the ratio of pupils to building capacity in this enlarged facility is more favorable than that in Hackettstown High School. Respondent's reasons and arguments for retention of petitioner as a sending district are set forth as follows: (R-1)

"A. By a study prepared by Joseph E. Nixon, Bureau of Facility Planning Services of the Department of Education of the State of New Jersey it becomes apparent that the capacity of the Belvidere High School complex after the proposed building program is completed will be far better able to handle the Liberty Township students than that of Hackettstown. At the present time the Hackettstown High School has a functional capacity of 1,113 students and a student body of 980 whereby Belvidere High School System now has a student body of 640 and a functional capacity after addition of 960.

"B. On a straight line pupil projection the number of Belvidere High School students in 1984 (from present sending districts and the Town of Belvidere) will be 594 and as stated above the functional capacity will be 960. This differential provides room for the growth to take place in the Town of Belvidere or its sending district so as to be able to handle the additional Liberty students.

"C. The Board of Education of the Town of Belvidere is willing at this point to offer the Township of Liberty Board of Education a 10-year contract to establish a sending-receiving relationship either beginning in the fall of this year or when the building program is completed. ***

"D. Belvidere High School and the Township of Liberty have for approximately 35 years built up an excellent sending-receiving district relationship which fact is evidenced simply by its duration.

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"E. The Board of Education of the Town of Belvidere and the Boards of Education of the sending districts of Belvidere High School have established an advisory board which meets every month to discuss mutual problems concerning the sending-receiving relationship, the running of the high school and the coordination of curricula in the elementary sending district schools and the high school. This advisory board has made excellent progress in the coordinating of curriculum between said schools. The work completed by said board has not been easy to accomplish and it would be unfortunate to have such a relationship be broken up after such progress has been made.

"F. The addition which is planned for the Belvidere High School complex would not only increase the size of the facilities available to all students of the high school but would in addition allow for updating and expanding of the curriculum offered to said students. Expansion of curriculum and betterment of same are already being planned by the high school administration and faculty. ***

"H. Approximately 75% of the students of Belvidere High School are sending district students. This fact has been true for some time. It is therefore evident that Belvidere has had a good relationship with its sending districts and in fact shows them extra deference due to their size as compared to the student body as a whole.

"I. The loss to the Belvidere School District of approximately 36 Liberty students (which is what would occur if the Commissioner grants Liberty's petition) would be a major problem to Belvidere considering the size of Belvidere High School student body and the fact that Belvidere has now embarked upon a 4.5 million dollar building program. The loss of said students would mean a loss of approximately $63,600.00 in tuition per annum.

"J. Mr. Leroy Everett the architect for the new addition to the Belvidere High School complex has made it known to the Belvidere Board of Education that the special areas which are to be included in the addition can accommodate up to 1,200 students. This means that if there were a substantial influx of new residents to Belvidere or its sending districts which would make the proposed high school complex inadequate the next step in expansion would be solely for classrooms. This would mean that the dollar amount expended on same would be considerably less than if special areas had to be included."

The building capacity studies recently completed by the Bureau of Facility Planning Services, State Department of Education, and of reference, *ante*, indicate that at the present time the Belvidere High School is operating with a pupil population in excess of its rated functional capacity whereas Hackettstown's pupil population is less than such capacity. These studies (PR-1,2) may be summarized and compared with present pupil enrollment as follows:

High School	Present Enrollment	Functional Capacity	Comparison Re: Capacity
Belvidere	640 (R-3)	501 (PR-1)	127%
Hackettstown	980 (P-18)	1,113 (PR-2)	88%

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As noted by respondent, however, when the recently authorized building program is completed, the functional capacity of Belvidere High School will be significantly greater. This enlarged capacity, when compared with projected straight-line enrollments for the 1977-78 school year may be shown as follows:

High School	Projected Enrollment	Functional Capacity	Comparison Re: Capacity
Belvidere	647 (R-3)	960 (PR-1)	67%
Hackettstown *	1,079 (P-18)	1,113 (R-1)	96%

*Includes all pupils, Liberty Township

Such projected enrollments are regarded by the hearing examiner as minimal, however, since as noted, they are straight-line projections with no added calculation projected to reflect general population growth. Data from the Warren County Planning Board submitted in evidence at the hearing indicates that the County as an entity increased by 16.9 percent in the ten-year period 1960-70, and it is estimated to increase an additional 25% in the period 1970-80. (P-8) According to respondent's own calculation submitted at the time when the Belvidere High School enlargement plans were forwarded to the State Department of Education for approval, the pupil population of the building may be expected to increase to 1,000 in 1984 and to 1,200 within the period of 1979-90, if Liberty is included in the calculation.

The Hackettstown Board had on two occasions in 1974 resolved by unanimous vote that it was willing to accept all of the high school pupils of Liberty Township effective immediately. (P-17) It was the testimony of the Hackettstown Superintendent of Schools that the High School has a maximum pupil capacity in excess of 1,500, and that its functional capacity may be readily expanded. (Tr. 101)

The Acting County Superintendent of Schools indicated in testimony that she believed petitioner's desire to have all of its pupils attend one high school was an understandable one although she indicated that certain geographical features do act as natural dividers in Liberty Township. She further testified that if petitioner's request is granted, there would be some immediate relief with respect to the overcrowded Belvidere High School but that in the long-term view the Hackettstown High School may experience similar problems if all of petitioner's high school pupils are sent there. (Tr. 93)

The following evidence was also adduced at the hearing:

1. Petitioner has theoretically calculated the costs of busing all of its high school pupils to either Belvidere or Hackettstown High School in 1975-76. It estimates a cost of $35,315 if all such pupils were to be sent to Hackettstown and $37,228.51 if Belvidere were the receiving school. (P-14)
2. There is no significant factor of racial balance involved in this matter.

3. The tuition rates in Hackettstown and Belvidere for high school pupils

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do not vary greatly at the present time and may be expected to be even more equalized in the future. (See P-6, Tr. 82.)

4. The Secretary of the Belvidere Board of Education estimated tuition revenue received from petitioner to be six to seven percent of total revenue. (Tr. 80)

Such facts and arguments must now be considered and evaluated in the context of the statutory prescription (*N.J.S.A.* 18A:38-13) which mandates that "good and sufficient reason" must be advanced for a change in a sending-receiving relationship. The statute in its entirety is recited as follows:

> "No such designation of a high school or high schools and no such allocation or apportionment or pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except for *good and sufficient reason* upon application made to and approved by the commissioner, who shall make equitable determinations upon any such applications."
> (*Emphasis supplied.*)

The principal question for determination herein is whether petitioner has advanced the required "good and sufficient reason" which should cause the Commissioner to make an equitable determination in its favor. If the answer to this question is an affirmative one and if it is determined that a severance of petitioner's relationship with respondent would be equitable, there is a subsidiary question concerned with the selection of an appropriate date for the severance to be effectuated.

One of the most complete rationales for decision-making involving sending-receiving relationships is found in *Board of Education of the Borough of Haworth v. Board of Education of the Borough of Dumont,* 1950-51 *S.L.D.* 42. In his decision in that matter the Commissioner said:

> "*** In considering an application for a change of designation or reallocation of pupils, the Commissioner must be mindful of the purpose of the high school designation law. In this State there are 165 school districts which maintain high schools for pupils of all high school grades. This means that 387 school districts must depend upon the 165 for the education of their high school pupils. This arrangement is mutually advantageous. The sending districts obtain high school facilities cheaper than such facilities can be provided by themselves and the additional pupils enable the receiving districts to expand their educational offerings and reduce their overhead.
>
> "The success of the so-called 'receiving-sending set-up' has given New Jersey an enviable position in the nation in secondary education. New Jersey has fewer small high schools than any other State in the United States. It was to give stability to the receiving-sending set-up that the first high school designation law was enacted. Before the enactment of this law,

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receiving districts hesitated to bond themselves to erect buildings and to expand their facilities to provide for tuition pupils for the fear that the tuition pupils might be withdrawn after the facilities have been provided. The high school designation law protects such districts from the withdrawal of tuition pupils without good cause. This statute benefits the sending district as well as the receiving district. If the law were not in effect, many sending districts, either individually or by uniting with other districts, would be burdened with the erection and maintenance of high schools.

"In order to provide for cases where good and sufficient reasons exist for the transfer of pupils to another high school, the Legislature charged the Commissioner with the duty of determining when there is good and sufficient reason for a change of designation. The Commissioner feels constrained to exercise his discretion under the statute with great caution. Otherwise, the law will not accomplish the salutary purposes intended by the Legislature. Accordingly, the Commissioner will grant an application for change of designation or reallocation of pupils only when he is satisfied that positive benefits will accrue thereby to the high school pupils sufficient to overcome the claims of the receiving district to these pupils.***" (at p. 43)

(See also *In the Matter of the Application of the Upper Freehold Regional Board of Education for the Termination of the Sending-Receiving Relationship with the Board of Education of the Township of Washington, Mercer County,* 1972 *S.L.D.* 627.)

Thus, the question whether or not good and sufficient reason exists to grant petitioner's request herein requires a balanced judgment. If there are "positive benefits" for the pupils of petitioner's district, they must be sufficient to "overcome the claim of the receiving district."

The hearing examiner has reviewed and considered the evidence in this matter, as reported *ante,* and sets forth the following findings and conclusions:

1. The majority of the high school pupils of Liberty Township already attend Hackettstown High School. The request of petitioner herein is that the minority who do not be permitted to join them.

2. There are obvious and positive immediate advantages for a prompt beginning of the severance which petitioner requests. If given effect, a limited, phased severance will provide a measure of alleviation for overcrowded conditions in Belvidere High School. All of the present eighth grade pupils from Liberty Township may, for the first time in many years, attend one high school together.

3. Against these primary advantages there is the fact that, if given effect, the severance which petitioner requests will result in a small loss in calculated tuition revenue for respondent in the 1975-76 year. (12 pupils

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of a pupil population in Belvidere High School estimated to total 661 pupils in September 1975) (R-3)

4. Similar principal advantages and disadvantages are also calculated to be applicable to the 1976-77 year.

5. In the long-term view, when respondent's building addition program at the High School is complete, the immediate problem of overcrowded conditions will cease to be a factor. From that time forward the chances of overcrowded conditions appear to be greatest at Hackettstown High School.

6. If the request for severance is finally given complete effect, there will be an evident simplification of busing schedules for high school pupils of Liberty Township.

7. The number of pupils from Liberty Township scheduled even by present boundaries to attend Belvidere High School in future years is a steadily decreasing number of all such pupils. (There are only six pupils presently enrolled in first grade in Liberty Township who would attend Belvidere High School as ninth graders if present boundaries remain unchanged.) (P-3)

The hearing examiner has considered such factors and concludes that a decision by the Commissioner to grant petitioner's request for a phased severance would be an equitable one of benefit to petitioner and without major harm to respondent, immediately or in the future, although present budgetary considerations do provide some argument for a delay to September 1976 in the initial implementation of a decision to grant petitioner's request.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter, and the report of the hearing examiner. He observes that no exceptions have been filed to this report pursuant to the provisions of *N.J.A.C.* 6:24-1.16.

The Commissioner has carefully considered and weighed the respective arguments of both petitioner and respondent. It is determined that the best educational interests of the pupils of Liberty Township will ultimately be served by their attending one high school. The preponderance of evidence convinces the Commissioner that efficiency, economy, and convenience will best be served by allowing all of the pupils of Liberty Township to attend the Hackettstown High School. This determination is made in recognition of those pupil population trends set forth in the findings of the hearing examiner.

The Commissioner is constrained to comment that the above determination is in no way predicated upon an assumption that superior educational opportunities exist in the Hackettstown High School as compared to

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those which either exist at this time or will become available at Belvidere High School upon completion of its building program. The long and amicable relationships which have existed between the Boards of Liberty Township, the Town of Belvidere, and the Borough of Hackettstown bear eloquent testimony to the satisfactory nature of the educational programs provided for the high school pupils of the Liberty Township in the two high schools.

It is further determined that a phased severance of the sending-receiving relationship between petitioner and respondent shall begin in September 1975 when all of petitioner's ninth grade pupils shall attend Hackettstown High School. At that time and thereafter, those pupils presently attending Belvidere High School who have not graduated will continue their education at the Belvidere High School until the time of their graduation in June 1978 when the phased severance of the sending-receiving relationship between petitioner and respondent will be completed. It is so directed.

COMMISSIONER OF EDUCATION

June 2, 1975

Alfred Zitani,

Petitioner,

v.

Board of Education of the Township of Willingboro, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Hartman, Schlesinger, Schlosser and Faxon (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Hyland, Davis and Reberkenny (John S. Fields, Esq., of Counsel)

Petitioner, a school psychologist with a tenure status employed by the Board of Education of the Township of Willingboro, hereinafter "Board," alleges that he was improperly denied salary increments for the academic years 1971-72, 1972-73, and 1973-74 as the result of the Board's refusal to recognize appropriate experience credit from his prior employment. He appeals to the Commissioner of Education to fix the amount of experience credit and annual increments to which he is entitled and to order the Board to compensate him in accord therewith.

The Board while admitting that petitioner was granted only $100 in salary

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increment for the above-designated three year period, asserts that it has properly compensated him in full accord with the salary policies in effect as agreed upon by the Board and petitioner's negotiating agent, the Willingboro Education Association, hereinafter "Association."

The original Petition of Appeal and the Answer thereto were filed with the Commissioner, whereupon the Board moved for Summary Judgment to dismiss the Petition on grounds that the relief requested is not available as a matter of law in a proceeding before the Commissioner. Thereafter, on June 14, 1974, petitioner moved to amend the Petition and the Board filed an Answer to the Amended Petition on July 23, 1974. Supporting Briefs were filed by the respective parties.

Oral argument was conducted on the Motion for Summary Judgment at the State Department of Education, Trenton, on November 4, 1974 by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The uncontested facts reveal that petitioner was first employed by the Board on a full-time basis as a school psychologist for the academic year 1969-70 at an agreed-upon salary of $13,000, there being no existing salary scale applicable to school psychologists at the time. Thereafter he was similarly employed for the academic year 1970-71 at an agreed-upon salary of $14,000. During these two years, school psychologists were not included in the unit for which the Association was the negotiating agent.

Pursuant to a decision of the Executive Director of the New Jersey Public Employee Relations Commission, effective at the beginning of the 1971-72 academic year, school psychologists were placed in the negotiating unit represented by the Association. Thereafter, the Board paid petitioner the salary of $14,000 for 1971-72. He was paid $14,100 for 1972-73, the additional $100 being a service increment payable at the fourth year of service with the Board, pursuant to Article XV-A-5 of the salary policy. (P-2, at p. 14) During 1973-74 the Board continued to pay petitioner $14,100. Thus, for a period of three years, petitioner's salary remained the same with the single exception of the service increment of $100, *ante.* It is this fact that provides the basis for the controversy herein.

The 1971-72 salary policy negotiated by the Board and the Association provides, *inter alia,* under Article XV - Compensation, that:

> "***[U]nit members shall be granted full credit for training and teaching experience and shall be placed on the appropriate position on said salary guide in accordance therewith.***" (P-1, at p. 16)

An identical provision is found in the 1972-73 and 1973-74 salary policies. (P-2, at p. 15) No further Board policy regarding the recognition of prior service is found in the negotiated agreements nor has been otherwise entered into the record of the instant matter.

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Petitioner, on October 25, 1972, grieved the Board's determination of his contract salary, which grievance was denied at the second level by the Superintendent, who stated that petitioner's past experience as a psychologist in industry was not applicable in determining his level of compensation on the Board's salary guide. Petitioner did not move the grievance to the third level which provides for final and binding arbitration.

The Board allowed petitioner credit for his six years of prior public school employment elsewhere, plus credit for his two years of employment in its School District, in determining his proper placement on the M+30 salary guide for the 1971-72 school year. Thus the Board determined that he was eligible for placement at the ninth level for which, in that year, the guide indicated a salary of $11,300, a figure less than the $14,000 petitioner was paid in 1970-71. Similarly, in 1972-73 and in 1973-74 the Board determined that petitioner's appropriate place on the salary guide was below the salary he was paid in each previous year. The Board awarded him no increment over this three year period, with the sole exception of the $100 service increment, *ante*.

Petitioner alleges that he was wrongfully denied the chronological increments which were provided other professionals within the negotiating unit and that the Board has failed to inform him of its reasons for such denial. He further alleges that the Board has improperly denied him experience credit for his years of service as a professional psychologist in industry from December 1950 to January 1962 and in private schools from February to December 1950.

Petitioner argues that by reason of these denials the Board has discriminated against him in the application of its salary policies and that the Commissioner in such matters is empowered to determine disputes that arise therefrom pursuant to *N.J.S.A.* 18A:6-9 *et. seq.* and *N.J.S.A.* 18A:29-4.1. In support thereof, petitioner cites the following as supportive of the Commissioner's jurisdiction over the improper and discriminatory application of salary policies by boards of education: *Robert J. Cusack v. Board of Education of West Paterson, Passaic County,* 1970 *S.L.D.* 144; *Doris Van Etten and Elizabeth Struble v. Board of Education of the Township of Frankford, Sussex County,* 1971 *S.L.D.* 120; *Charles Brasher v. Board of Education of the Township of Bernards et al., Somerset County,* 1971 *S.L.D.* 127; *Norman Ross v. Board of Education of the City of Rahway, Union County,* 1968 *S.L.D.* 26; *William J. Convery v. Perth Amboy Board of Education et al., Middlesex County,* 1974 *S.L.D.* 372.

The Board, conversely, holds that the Commissioner is without jurisdiction over the implementation of the Board's salary provisions since the salary level of petitioner exceeds that to which he would be entitled pursuant to *N.J.S.A.* 18A:29-7. *Goldberg v. Board of Education of West Morris, Morris County,* 1964 *S.L.D.* 89; *Starego v. Board of Education of Borough of Sayreville et al., Middlesex County,* 1964 *S.L.D.* 100 In this regard, the Board asserts that it has negotiated, pursuant to *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:27-4, in good faith, Article XV A, *ante,* which provides that credit on the salary guide shall be given only *for training and teaching experience.* The Board argues that, in any event,

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petitioner was compensated in each of the last three years at a rate in excess of that which was negotiated for those with his level of training and experience by the Association which represented him at the negotiating table. (Tr. 5-6)

Similarly, the Board maintains that petitioner failed to press his grievance, *ante,* beyond the second level and that he is effectively barred from further adjudication of the matter by Article XIV A-5 which provides that:

> "The failure to appeal any decision upon the grievance, in accordance with these rules, to the next level, shall constitute acceptance of the answer not appealed." (P-2, at p.14)

Finally, the Board asserts that the Commissioner herein is improperly called upon to adjudicate a matter of compensation which the Court in *Board of Education of Englewood v. Englewood Teachers Association,* 64 *N.J.* 1 (1973) determined to be a matter of labor relations not properly reserved for the Commissioner.

For the foregoing reasons, the Board has moved that Summary Judgment be entered dismissing the Petition herein.

The hearing examiner recommends that the Commissioner, in the light of *Cusack, supra; Van Etten and Struble, supra; Brasher, supra; Ross, supra;* and *Convery, supra,* determine that he holds jurisdiction over the salary controversy herein. The Commissioner has consistently maintained that he will not substitute his judgment for that of a board of education when it acts in ways that are not arbitrary, unreasonable, or capricious. It follows therefore that the acts of a board of education are reviewable by the Commissioner, the State Board of Education, and the courts in order that there be no doubt in the public mind that actions of local boards are legal and reasonable. A further comprehensive review of the authority of the Commissioner pursuant to *N.J.S.A.* 18A:6-9 *et seq.* is set forth in *James McCabe v. Board of Education of the Township of Brick, Ocean County,* 1974 *S.L.D.* 299 wherein it was said:

> "***The Commissioner has in numerous instances been called upon, in his quasi-judicial capacity, to make determinations regarding the reasonableness of the actions of local boards of education. The Commissioner will, in determining controversies under the school laws, inquire into the reasonableness of the adoption of policies, resolutions, or bylaws, or other acts of local boards of education in the exercise of their discretionary powers, but will not invalidate such acts unless unreasonableness clearly appears.***" (at pp. 307-308)

The hearing examiner finds in the record of the instant matter no relevant facts which are unknown or in dispute and recommends that the Commissioner proceed to a final determination of the matter in the event that he determines that he holds jurisdiction.

There remains for determination, also, the narrow issue of whether

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petitioner is entitled within the above context to additional years of credit on the Board's salary guide or whether he is entitled to yearly increments for the years 1971-72, 1972-73, and 1973-74.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the matter herein controverted, the Briefs of counsel, the hearing examiner report, and the exceptions thereto filed by the Board pursuant to *N.J.A.C.* 6:24-1.16.

The matter raises certain issues which may be determined under the education laws and therefore was properly filed under the provisions of *N.J.S.A.* 18A:6-9 *et seq.* This being so, the Commissioner has jurisdiction. There being no relevant facts in dispute, he proceeds, herewith, to a determination of the matter. *Cusack, supra; Van Etten and Struble, supra; Convery, supra*

Petitioner was by action of the New Jersey Public Employee Relations Commission declared to be a member of the negotiating unit represented by the Association effective in September 1971. Thereafter, the Board's salary policies, including salary scales which applied to petitioner, were those negotiated between the Board and the Association. Petitioner's argument that he was entitled to incremental salary adjustments not detailed therein for those with his recognized experience and training is without merit.

The Board, recognizing that petitioner was above his appropriate step on the salary schedule, held petitioner from 1971-72 through 1973-74 at the salary level he had already achieved with the exception that it granted the $100 service increment for 1972-73 and 1973-74 as provided in its salary policy. It is well established that a board may not compensate a previously employed teacher at a level below that provided in its negotiated salary policy for the attained level of experience and training. While it may legally compensate the teacher at a higher level, *N.J.S.A.* 18A:29-13, it is not required to do so. *Board of Education of the City of Englewood v. Englewood Teachers Association,* 64 *N.J.* 1 (1973) No increment was withheld, as argued by petitioner. Rather, the Board chose not to award a salary higher than that provided by its negotiated salary policy.

A careful examination of the negotiated salary policy agreements reveals no provision to compel the Board to grant a higher salary to one who has already reached that salary level indicated by his experience and educational attainment. The statutes are similarly silent regarding any such requirement. It was said in *Harry A. Romeo, Jr. v. Board of Education of the Township of Madison, Middlesex County,* 1973 *S.L.D.* 102, that:

> "***In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. *Lane v. Holderman,* 23 *N.J.* 304 (1957) Where the wording is clear and explicit on its face, the policy must speak for itself

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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* (3*rd ed.* 1943), *section* 4502***" (at p. 106)

It must, therefore, be concluded that the Board was within its discretionary powers when it determined to hold petitioner at the level he had previously attained until such time as he would again, by reason of increased years of experience, become eligible for consideration for an increment. In any event, increments are not mandatory but subject to the discretion of the Board. *Westwood Education Association v. Board of Education of the Westwood Regional School District,* Docket No. A-261-73, New Jersey Superior Court, Appellate Division, June 21, 1974; *cert.* den. 66 *N.J.* 313 (1974)

Similarly, the Commissioner knows of no requirement of law that compels the Board to recognize for salary purposes petitioner's years of service as a psychologist in industry or his experience in private schools of less than one calendar year. No documentary evidence was submitted that shows that the Board did so when it negotiated his initial salary for the 1969-70 school year. Nor is it alleged in the Petition that such an agreement was reached. Thus, the Board's determination at a later date not to recognize this previous service for salary purposes may not be termed as capricious or unreasonable. It is clear that the Board could have recognized this service when petitioner was first employed. At any rate, such determination is within its discretionary powers. In such matters the Commissioner will examine the reasonableness of the Board's actions but will not, absent a finding of arbitrary, unreasonable, capricious, or illegal action, interpose his judgment by invalidating that which the Board is statutorily empowered to do. The Commissioner so holds. See *McCabe v. Brick, supra.*

The Commissioner finds herein no improper act or abuse of discretion on the part of the Board; nor does he find merit in the Petition of Appeal.

Accordingly, it is dismissed.

COMMISSIONER OF EDUCATION

June 4, 1975

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In the Matter of the Application of the Board of Education of the Borough of Milltown to Terminate Its Sending-Receiving Relationship With the Board of Education of the City of New Brunswick, Middlesex County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner Milltown Board of Education, Russell Fleming, Jr., Esq.

For the Petitioner Mayor and Borough Council of the Borough of Milltown, Charles V. Booream, Esq.; Rosen and Weiss (William C. Slattery, Esq., of Counsel)

For the Respondent New Brunswick Board of Education, Terrill M. Brenner, Esq.

For the Respondent City of New Brunswick, Joseph E. Sadofski, Esq.

The Board of Education of the Borough of Milltown, petitioner, avers that the New Brunswick Board of Education, respondent, has failed to provide high school pupils from Milltown with a suitable public school education and therefore the sending-receiving relationship between the two school districts should be severed in whole or in part. It requests a judgment by the Commissioner of Education to effect such severance. Respondent opposes petitioner's request and avers that it has been, and is, providing a suitable educational program to pupils from Milltown. Further, respondent avers that petitioner has not provided good and sufficient reason for a termination of the sending-receiving relationship between the districts and that, if such termination is allowed, the racial balance in New Brunswick High School will be "further aggravated."

At this juncture, petitioner has advanced a Motion for Interim Relief while another matter in which it is involved with New Brunswick and the Township of North Brunswick moves on appeal to the Appellate Division of the New Jersey Superior Court. *Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick and the Board of Education of the Borough of Milltown,* 1974 *S.L.D.* 938, aff'd State Board of Education, March 5, 1975 Oral argument on the Motion was conducted on March 18, 1975 at the office of the Middlesex County Superintendent of Schools, New Brunswick, before a hearing examiner appointed by the Commissioner. Additionally, a total of twenty exhibits, including affidavits of respective school administrators and members of the Boards of Education, were stipulated in evidence with respect to the merits of the dispute. There was, however, no testimony on that occasion. The hearing examiner's report has been waived. The matter is directly before the Commissioner for decision on the Motion on the basis of such stipulations, the pleadings, the oral argument, and memoranda of law.

Certain facts pertinent to the instant adjudication are not in dispute.

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In years prior to 1964 petitioner had sending-receiving relationships for high school education with two school districts, the City of New Brunswick and the Borough of South River, Middlesex County. According to Milltown school officials, this dual relationship had continued by informal arrangement for many years and, in fact, has never been officially terminated by action of the Commissioner pursuant to statutory authority. *N.J.S.A.* 18A:38-13 It appears from statistics, submitted by letter from petitioner on March 31, 1975 at the request of the hearing examiner assigned to this case, that the preponderance of petitioner's pupils had, however attended New Brunswick High School in the years prior to 1964. (In 1960 only 15 pupils from Milltown attended South River High School while 194 attended New Brunswick. The ratio in other years ranges from three to one to seven or eight to one in favor of New Brunswick.)

In 1964, however, the dual relationship was ended since in that year petitioner and respondent entered into a ten-year agreement for the education of high school pupils from Milltown in the New Brunswick High School. Additionally, at that time a third Board of Education, that of the Township of North Brunswick, entered into a similar agreement with respondent. Thus, for a ten-year period the three school districts were united for purposes of high school education.

In the year 1971, however, the North Brunswick Board of Education requested and ultimately received permission from the Commissioner to construct its own high school, and plans for such construction went forward. At that juncture, respondent herein moved to enjoin the North Brunswick Board from proceeding with construction and averred by separate Petition, cited *ante,* that the three districts should be regionalized in order that racial balance and a racially integrated school system might be maintained. A protracted hearing ensued with respect to such proposed regionalization and culminated in a series of recommendations by the hearing examiner and ultimately in the decision on October 25, 1974 by the Commissioner in *New Brunswick, supra.*

The recommendations of the hearing examiner, which preceded the decision and the final decision of the Commissioner, are germane to the instant matter and need to be recited in part at this juncture. The following specific recommendations were made by the hearing examiner in his report to the Commissioner:

"RECOMMENDATIONS

"For all of the above reasons, the hearing officer recommends that the Commissioner issue an Order in this matter as follows:

"1. Denying the merger relief sought by the New Brunswick Board and the City;

"2. Permitting the permanent withdrawal of North Brunswick's tenth, eleventh and twelfth grade pupils from New Brunswick High School for purposes of their attending the new high school facility in North Brunswick;

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"3. Directing the North Brunswick Board to provide space at the North Brunswick High School to accommodate up to 200 volunteering nonwhite high school pupils from New Brunswick (ninth, tenth, eleventh and twelfth grades);

"4. Directing the New Brunswick Board to send up to 200 volunteering nonwhite New Brunswick pupils proportionately from ninth, tenth, eleventh and twelfth grades to the North Brunswick High School facility. Selection of these pupils should be made by the New Brunswick Board, among volunteers only, in accordance with the following criteria:

"(a) pupils who have particular educational needs who would benefit from participation in programs offered at North Brunswick High School, and

"(b) convenience of access;

"5. *Denying the relief sought by the Milltown Board to permit a choice by Milltown pupils to attend either New Brunswick or North Brunswick High School;*

"6. Directing that any North Brunswick pupil currently enrolled in New Brunswick High School be permitted to remain at New Brunswick High School on a voluntary basis for the duration of his or her high school education.

"This recommended solution will permit New Brunswick and North Brunswick to operate their own school systems for grades kindergarten through twelve, and at the same time maintain a relationship that will permit a continuation of integrated education for all high school pupils of the three school districts. If fully implemented, this solution will result in a racial composition of New Brunswick High School of approximately 52 percent white and 48 percent nonwhite, a difference of 8 percent from the present ratio of 60 percent white and 40 percent nonwhite. In any event, the New Brunswick High School will return to a single-session program and will be able to operate well within its optimum capacity. The disadvantage that flowed from its prior state of overcrowdedness would now be removed, thereby enhancing the opportunity for the successful education of the remaining New Brunswick and Milltown pupils. The continued presence of Milltown pupils in New Brunswick High School will help preserve the school's above-stated racial percentages.

"With respect to the North Brunswick High School, the racial composition resulting from implementation of the recommended plan, 80 percent white and 20 percent nonwhite, will preserve the values of integrated education within the space limitations of the new high school. These statistics are for ninth, tenth, eleventh and twelfth grades and reflect approximately a 16 percent change from the present ratio of white to nonwhite North Brunswick pupils.

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> "Given the complexities of scheduling, and the time required for proper program development, it is apparent that the recommended plan cannot be successfully implemented for the 1974-75 academic year. It is accordingly urged that the above recommendations be ordered implemented for the 1975-76 school year. It should be noted that projected racial percentages are approximate. It is impossible to determine in advance the exact pattern of school enrollment which would result from the full implementation of the above-stated recommendations.***"
>
> (1974 *S.L.D.* at 994-995) (*Emphasis supplied.*)

The Commissioner accepted certain of these recommendations. He denied the merger relief sought by New Brunswick and terminated the sending-receiving relationship between New Brunswick and North Brunswick although certain pupils were allowed to remain by choice in New Brunswick High School. Further, he ordered that the North Brunswick Board "***accommodate up to 200 volunteering pupils from New Brunswick yearly for a ten-year period," and

> "***[t]hat the Milltown Board of Education comply with the Commissioner's interim order of August 15, 1974, and continue its sending-receiving relationship with New Brunswick pending determination of Milltown's September 4, 1974 appeal to the State Board of Education of the interim order. The Commissioner determines that the Milltown Board's application for termination of its sending-receiving relationship with New Brunswick, previously held in abeyance (Decision on Motion, dated March 27, 1973), may now proceed to plenary hearing before the Commissioner." (1974 *S.L.D.* at 998-999)

Thus, in effect, the Commissioner determined that he did not accept the hearing examiner's recommendation (No. 5, *ante*) that Milltown be denied a choice with respect to the placement of its high school pupils. He stated instead that a plenary hearing could go forward with respect to Milltown's separate Petition for severance. The instant matter, a submission of petitioner's plea and respondent's answer thereto on stipulation, written testimony, oral argument, and memoranda of law, constitutes such plenary hearing. In fact, many of the arguments advanced by petitioner at this juncture were advanced similarly in the main case, *ante,* although certain factual circumstances have been altered in the interim.

It is also observed that in the interim since the Commissioner's decision in *New Brunswick, supra,* the State Board of Education affirmed the decision on March 5, 1975. On April 22, 1975, respondent appealed to the Appellate Division of the New Jersey Superior Court and a decision is pending.

By Amended Petition of Appeal of April 10, 1975, petitioner now requests the Commissioner to issue an order that would permit the "***Board of Education of the Borough of Milltown to change its designation of receiving districts for its high school pupils from New Brunswick and South River to New Brunswick and North Brunswick, or New Brunswick and some other district with which Milltown can agree within a reasonable period of time from the determination of this petition." (Amended Petition of Appeal, at p. 11) (Note:

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The original Petition of Appeal in the instant matter was filed October 5, 1972, but was held in abeyance as noted, *ante,* by decision of the Commissioner until such time as the *New Brunswick* case, *supra,* for regionalization had been adjudicated.)

Certain basic arguments of the parties with respect to the instant Petition may be summarized succinctly.

Petitioner's most important and substantive argument herein is that in practical terms its pupils have not been afforded an educational program which they deem suitable. In support of this avowal it cites the record of enrollment of Milltown pupils in New Brunswick High School in recent years which is set forth, in part, as follows:

"ENROLLMENT OF MILLTOWN STUDENTS"

NINTH GRADE

Year	Number	Percentage
1966	106	88%
1967	105	85%
1968	105	86%
1969	96	78%
1970	71	53%
1971	72	51%
1972	41	26%
1973	33	26%
1974	23	18%

(From Schedule B, Amended Petition of Appeal)

Statistics for grades ten, eleven, and twelve enrollments show similar, albeit less drastic declines in enrollment.

Such declines are attributed by petitioner to a number of alleged incidents in New Brunswick High School in the years since 1968. In particular, petitioner avers there have been riots and destruction of property which have had unfortunate consequences, locked classroom and rest room facilities, absence of general assembly programs, lack of a true lunch period, etc. Additionally, petitioner avers its pupils have been the victims of extortion and have been refused admittance to school, if tardy, while at the same time tardy pupils from New Brunswick were admitted. Other complaints and allegations are numerous. (See P-1, P-3, P-4, P-6.)

The result of such incidents, according to a member of the Milltown Board of Education, has been a reaction by New Brunswick school administrators which emphasizes what they "***perceive the New Brunswick community wants, not what the Milltown needs may be.***" (P-1, at p. 3) Accordingly, the Board members aver that "***Milltown must be allowed to terminate the exclusivity of its sending-receiving relationship with New Brunswick***." (P-1, at p. 6)

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The Milltown Superintendent of Schools avers that, if present trends continue, a total as low as ten percent of the eligible high school pupils from Milltown will attend New Brunswick High School in future years. (P-3, at p. 4) He states that this fact, and the wide dispersal of remaining pupils in private schools "***makes it very difficult to develop a thorough program of curriculum coordination between grade school and high school.***" (P-3, at p. 6) Furthermore, he avers that the "***educational program at New Brunswick High School is being generally, constantly changed to favor the special needs of the student population of New Brunswick.***'. (P-3, at p. 6) The Superintendent advances the proposition that "***the North Brunswick High School offers the most viable educational alternative to Milltown students generally***" (P-3, at p. 8), although there is no present agreement by North Brunswick to accept the pupils of Milltown. He also postulates the view that if allowed a choice, Milltown pupils might in fact be more willing to attend New Brunswick High School and might encounter a more favorable attitude there. (P-3, at p. 8)

The Mayor of the Borough of Milltown, by affidavit, states that the "***crux of the within application is that Milltown simply cannot be treated differently than North Brunswick.***" (P-4, at p. 3) He also avers that "***Milltown is not even contiguous with New Brunswick and Milltown never had an exclusive sending-receiving relationship with New Brunswick until the 1964 contract, while North Brunswick has had such a relationship for over 100 years.***" (P-4, at p. 3) Further, he avers that a removal of Milltown pupils from the New Brunswick High School will have no appreciable impact on racial balance since the Commissioner has already permitted withdrawal of approximately 600 white pupils from North Brunswick.

Factually, according to the Milltown Superintendent of Schools, a total of 151 pupils from Milltown attended New Brunswick High School on September 30, 1974. (See P-3b.) However, he estimates that 487 pupils were eligible to attend. (See P-3c.) The delineation of such statistics by grade may be shown as follows:

September 1974

Milltown Pupils – Enrollment

Grade	Total Number Eligible	At New Brunswick	Elsewhere
9th	126	23 (18%)	103
10th	115	30 (26%)	85
11th	128	47 (36%)	81
12th	118	51 (43%)	67
	487	151 (31%)	336

(See P-3b, c.)

Such facts and arguments, in petitioner's view, constitute "good and sufficient reason" for the Commissioner to sever the exclusivity of its relationship with New Brunswick and restore to Milltown pupils and citizens the choice they had prior to 1964.

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Respondent does not agree that petitioner has advanced good and sufficient reason for such severance. It proffers, instead, a series of affidavits and exhibits which it avers constitute proof that New Brunswick High School is offering a suitable thorough and efficient program of education to pupils of Milltown, as well as to pupils of New Brunswick. Included in such affidavits and exhibits are affidavits of the New Brunswick Superintendent of Schools (R-1, R-4) and a member of the Board of Education. (R-13)

The Superintendent avers that New Brunswick High School offers a full spectrum of courses that adequately prepares pupils for a variety of occupations and careers, in college or in gainful employment. He further avows that if the Commissioner "***desires to carry out the philosophy enunciated by the State Board of Education regarding integration, he must not only mandate that Milltown students remain in New Brunswick High School, but also must take affirmative steps to countermand his Order allowing the North Brunswick students to leave New Brunswick High School." (R-1, at p. 2)

A member of the New Brunswick Board states that, in his opinion, the New Brunswick Board of Education has always provided an adequate and thorough education to all enrolled pupils and avers "[n]ow that the school is no longer on double sessions, the opportunities offered to its students are even greater.***" (R-13), at p. 2) Further, he avers that he does not believe that Milltown pupils "***who, in reality, have no other public school to attend, should be permitted to leave New Brunswick High School.***" (R-13, at p. 3)

In support of the statement that New Brunswick High School offers a "full spectrum" of courses to provide an "adequate and thorough education," respondent has proffered a number of documents which include:

1. a Program of Studies (R-6);
2. a Follow-Up Study with respect to the High School Class of 1973 (R-5);
3. a report of the involvement of Milltown pupils in extracurricular activities (R-12);
4. a recommendation for continued approval of New Brunswick High School which was forwarded by State Department of Education officials to the principal of New Brunswick High School and the State Board of Education on June 21, 1974. (R-7) (Note: Such approval was given by the State Board on September 24, 1974, and extends to June 30, 1979.)

Further, respondent has submitted a pupil enrollment summary (R-2) which indicates that on September 30, 1974, New Brunswick High School was attended by 1,288 pupils of whom 500 (approximately 39%) were white and 788 (approximately 61%) were nonwhite. (It is noted here that the Commissioner's decision in *New Brunswick, supra,* ordered that 200 pupils be permitted to enroll in North Brunswick yearly for a ten-year period. If fully implemented for the first time in the 1975-76 school year, this program might be expected to result in a more racially balanced pupil population in New Brunswick High School.)

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Petitioner, in its Memorandum of Law, avers that a continuance of the present sending-receiving relationship will confer no appreciable educational advantage on New Brunswick but will be "***brutal to the educational opportunities afforded Milltown students as a whole.***" (Petitioner's Memorandum of Law, at p. 7) Further, petitioner cites the Commissioner's decision in *Morris School District v. Board of Education of the Township of Harding et al.,* 1974 *S.L.D.* 457 in support of its argument that educational advantage may, in certain circumstances, be weighted more heavily than racial balance factors, particularly when they are negligible, in a decision with respect to the severance of sending-receiving relationships. Petitioner also avers that the recent decision of the Supreme Court of the United States in *Milliken v. Bradley,* 418 *U.S.* 717, 94 *S.Ct.* 3112 (1974) supports the principle that local control and freedom of choice must be afforded to individual communities in efforts to secure what is regarded by such communities as a "suitable" educational program. In particular, petitioner cites that part of the decision which states:

> "***No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. See Wright v. Council of the City of Emporia, 407 U.S. 451, 469***. Thus, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 50 *** we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'***" (94 *S.Ct.* at 3125-3126)

Further, petitioner cites *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, 13, aff'd State Board of Education 15, aff'd 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1947) as the basis for an avowal that the Commissioner has not in the past substituted his discretion for that of local boards of education with respect to the government of local school districts.

Respondent maintains that petitioner has not advanced good and sufficient reason to warrant a determination by the Commissioner, that, pursuant to the statutory authority *N.J.S.A.* 18A:38-13, the sending-receiving relationship between petitioner and respondent should be severed. Further, respondent avers that petitioner has failed to show that a termination of such relationship "***will not seriously affect the New Brunswick Board of Education financially or educationally.***" (Memorandum of Respondent, at p. 6) In support of respondent's position that this effect must be considered, it cites *In the Matter of the Application of the Upper Freehold Regional Board of Education for the Termination of the Sending-Receiving Relationship with the Board of Education of the Township of Washington,* 1972 *S.L.D.* 627. Additionally, respondent cites the Statement of Policy of the State Board of Education adopted on November 5, 1969 wherein the State Board states that segregation of children by race is educationally harmful to all children.

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Respondent avers that a decision by the Commissioner to grant petitioner's application "***will be the final blow to integrated education in New Brunswick and the children of New Brunswick will be denied an equal educational opportunity.***" (Memorandum of Respondent, at p. 8)

The Commissioner has considered the facts and arguments reported, *ante*, and other peripheral contentions of the parties and finds that certain primary facts must serve as the basis for decision with respect to petitioner's application. These facts are that:

1. For the first time in years the New Brunswick High School is not overcrowded and its pupil population is well within its rated functional capacity. (1,288 pupils enrolled September 30, 1974; functional capacity 1,469)

2. The true measure of the effect that this more comfortable, contained operation will have on pupil welfare has yet to be determined.

3. The full effect of the decision in *New Brunswick, supra,* has also yet to be evaluated since the Commissioner's Order with respect to the voluntary transfer of 200 New Brunswick pupils to North Brunswick High School is not scheduled to be implemented until September 1975.

4. A decision to grant petitioner's request at this juncture would be untimely since budgets for the coming year are established and respondent has programmed its tuition revenue from petitioner for pupils from Milltown.

5. The decision of the Commissioner in *New Brunswick, supra,* was affirmed by the State Board of Education but such affirmance has been appealed to the Appellate Division of Superior Court.

Thus, the immediacy of the overcrowded conditions which in some respects prompted the decision in *New Brunswick, supra,* is absent, while at the same time the decision of the Commissioner, *per se,* remains challenged to a final test. In such circumstances the Commissioner determines that the proofs advanced by petitioner herein do not provide sufficient reason to warrant a determination in its favor at this juncture. To the contrary, in the context of an appeal by respondent in the main case (*New Brunswick, supra*), wherein the parameters of the Commissioner's authority again await definition, the Commissioner holds that a decision now to grant petitioner's request, even assuming *arguendo* that its proofs were sufficient, would be patently inappropriate. The Commissioner is not unaware of the weighty constitutional implications which are an integral part of respondent's argument. While the Commissioner's own interpretation of present law has not changed his expressed opinion of October 25, 1974, there is no certainty that such opinion will be sustained. Further alteration now of the relationship between and among any of

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the districts involved in the main case could well prove, in the future, to be both transitory and precipitous. The Commissioner so holds.

Accordingly, petitioner's application for severance of its sending-receiving relationship with respondent and its Motion that the relief it requests be afforded for the 1975-76 school year is denied.

The Commissioner directs the New Brunswick Board of Education to review again its relationships and policies with respect to the Milltown Board in order that the educational program afforded Milltown pupils may, to the extent that it is possible for the New Brunswick Board to insure it, be lodged in an atmosphere of amity.

COMMISSIONER OF EDUCATION

June 4, 1975

In the Matter of the Application of the Board of Education of the Borough of Milltown to Terminate Its Sending-Receiving Relationship with the Board of Education of the City of New Brunswick, Middlesex County.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 4, 1975

For the Petitioner-Appellant Milltown Board of Education, Russell Fleming, Jr., Esq.

For the Petitioner-Appellant Mayor and Borough Council of the Borough of Milltown, Rosen and Weiss (William C. Slattery, Esq., of Counsel) and Charles V. Booream, Esq.

For the Respondent-Appellee New Brunswick Board of Education, Terrill M. Brenner, Esq.

For the Respondent-Appellee City of New Brunswick, Joseph E. Sadofski, Esq.

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

P. Paul Ricci abstained.

September 10, 1975
Pending before Superior Court of New Jersey

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"E.H.," a minor, by her mother and natural guardian,

Petitioner,

v.

Board of Education of the Town of Boonton; Robert Kane, Principal, Michael E. Rinaldo, Vice-Principal, Boonton High School; and John Greed, Superintendent of Schools, Morris County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, I. Jacob Weingarten, Esq.

For the Respondents, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Esq., of Counsel)

Petitioner is the mother of E.H., an eleventh grade pupil enrolled in the Boonton High School operated by the Board of Education of the School District of the Town of Boonton, hereinafter "Board." She alleges that an action of the Board denying E.H. the opportunity to continue to participate in her United States History II class constituted an excessive and unjust penalty for a single illegal absence from class. She further alleges that the Board's action was violative of E.H.'s rights under the Constitution of the State of New Jersey to a thorough and efficient education and was taken in total disregard of due process rights guaranteed by the Constitution of the United States. Petitioner prays for an order of the Commissioner of Education directing the Board to reinstate E.H. to her United States History II class with supplementary instructional assistance and to expunge from her school records all reference to her exclusion from the class.

The Board, while admitting that E.H. was excluded from her United States History class because of a single illegal absence, in accordance with an existing policy of the Board, denies that either of its action or its policy was improper.

Petitioner filed with the Verified Petition of Appeal a Notice of Motion for Relief *Pendente Lite.* It was agreed at a conference of counsel that the principal relevant facts would be stipulated and testimony thereby limited to that by E.H. and one expert witness appearing on behalf of petitioner. It was further agreed that the parties would waive their rights to receive a hearing examiner report. Thus, it was agreed that the entire matter would be submitted directly for Summary Judgment by the Commissioner on the pleadings, the stipulation of facts (J-1), and the record of the hearing.

A hearing was conducted at the State Department of Education, Trenton, on May 23, 1975 by a hearing examiner appointed by the Commissioner. The report of the hearing examiner, setting forth the respective positions of the parties with the relevant facts as stipulated or otherwise found to be true, is as follows:

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On February 10, 1975, E.H. elected not to attend her scheduled class in United States History II. She testified at the hearing that she knew a substitute teacher was in charge of the class and believed that her absence would not be noted. As the result of this absence she was removed from the class for the remainder of the school year by the vice-principal. This action was in accord with a school policy which mandates that a pupil who is voluntarily absent from any class without a valid excuse must be dropped from that class for the remainder of the school year without credit for work previously done in that course. (J-1)

E.H. was thereafter assigned to a study hall for that period. She elected not to exercise options available to her of enrolling in another course during that same period or otherwise altering her schedule. (J-1) Existing school policy precludes her from re-enrolling in a United States History II course until the summer school session of 1975. She may similarly re-enroll in September 1975 during her twelfth grade year for the regular full year course in United States History II.

Petitioner argues that the Board's policy of excluding a pupil from a class for a single illegal absence is arbitrary, unreasonably harsh, excessive and unjust. She grounds her charge of arbitrariness on the fact that the Board's policy of truancy for an entire day of school requires that for a first offense a pupil be assigned an in-school suspension whereafter the pupil is free to continue to participate in all classes. Petitioner argues that such a lesser penalty for the more serious offense of truancy, when contrasted to the penalty of total exclusion from a class for a single absence, is proof that the Board's policies are arbitrary.

Petitioner asserts that the Board's policy denying E.H. credit for work already satisfactorily accomplished in the class for one half of the year is excessively harsh. She further contends that the Board's denial of opportunity for E.H. to continue in the class, given such minimal provocation as she was responsible for, is in fact violative of her right to a thorough and efficient education as guaranteed by the New Jersey Constitution.

Petitioner further argues that the fact that E.H. could have enrolled in another course when she was excluded from the class did not present a viable alternative in that she, as an average student, would be unable to comprehend the subject matter in a course which had already been in progress for a considerable period of time. Similarly, petitioner argues that summer school enrollment is unacceptable in view of the necessity that E.H. work to supplement the family income.

Petitioner recognizes that the Board's achievement-oriented curriculum policy would allow E.H. to take an examination in United States History II early in September when she would be allowed to re-enroll in the course, and that, upon successful completion of the examination, she would be granted full credit for the course. (P-1; P-2) However, petitioner does not view this as a practicable nor appropriate substitute for the teacher-directed learning process of ninety days of classroom instruction. In support of this contention petitioner called an

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expert witness in the field of educational philosophy. This witness stated that in her opinion the interaction of a pupil with a teacher and with other pupils in a class is implicit and essential to a thorough educational program in social studies. She stated further that it is her opinion that total exclusion of the pupil from the class, as herein, removes all opportunity for the teacher to learn of and meet the pupil's needs for supplemental study aids and assistance in order that perceptions may be expanded rather than allowed to narrow and stagnate. She stated that, while she believes independent study to be desirable for certain pupils, she finds that most adolescents are incapable of pursuing independent study successfully when totally cut off from teacher supervision, as was E.H.

Finally, petitioner contends that E.H. was denied due process, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, in that E.H. was not allowed opportunity to explain her absence from the class to the vice-principal.

Conversely, the Board maintains that its policy requiring that E.H. be dropped from the class for the remainder of the year was reasonable and that E.H. was not without viable alternatives. She could re-enroll for the course without cost either in the summer school or in the following school year. She was free to enroll in another course of either a full year or one semester's duration at once or to otherwise alter her schedule. Similarly, upon re-enrollment, she could elect to take an examination, which if successfully completed, would obviate the need for spending additional time in the class. (P-2) In this sense, the Board asserts, the time already spent in class is recognized.

The Board refutes the charge of arbitrariness by pointing out that no record of her exclusion is placed on the permanent record of E.H., whereas such a notation is in fact placed on the permanent record of a pupil who is truant. The Board points out that, unlike E.H., a truant is subjected to a one-day suspension and thereafter to a three-day suspension for repeated offenses.

The Board argues that such a policy is necessary and justified by the inordinate number of illegal class absences previously experienced in its high school, approximately 1,100 absences by 150 pupils in the school year 1973-74. By comparison, the number of known class absences to date has been reduced to 120 by 80 pupils in the 1974-75 school year.

The Board denies that due process was not afforded to E.H. and points out that on March 17, 1975, it afforded E.H. a hearing wherein she was allowed to testify and wherein she was, in fact, represented by counsel. (Petition of Appeal, Paragraph 8, First Count)

For these reasons the Board concludes that both its action removing E.H. from a single class and its total policy are reasonable, necessary, legal, and an appropriate exercise of its discretion as provided in *N.J.S.A.* 18A:11-1 which provides that:

"The board shall –

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***

"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***.

"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."

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner, the respective contentions of the parties, and the entire record of the matter herein controverted. He finds no merit in petitioner's assertion that due process was denied. E.H. was afforded opportunity to discuss the matter with the vice-principal on or about February 27, 1975, and was represented by counsel at a hearing before the Board on March 17, 1975. Such procedure represented substantial compliance with the law requiring that E.H. be given opportunity to state her side of the matter and the further opportunity to be heard at an informal hearing before the Board in timely fashion.

The Commissioner addresses the remaining narrow issue of whether the Board's policy herein controverted was legal and appropriate and whether its application to E.H. was a sound exercise in discretion. It was said by the Commissioner in *Gustave M. Wermuth and Sylvia Wermuth, as natural parents and guardians for Marsha Wermuth, a minor under the age of 16 v. Julius C. Bernstein, Principal of Livingston High School, and Board of Education of the Township of Livingston, Essex County,* 1965 *S.L.D.* 121:

"***An effective school is an orderly one, and to be so it must operate under reasonable rules and regulations for pupil conduct. 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.***" (at p. 129)

The Board asserts that it has exercised its discretion to establish the policy herein controverted as an effective deterrent against continued abuse by pupils in the cutting of classes. It has further affirmed the application of this policy as affecting E.H. by a unanimous vote. The Commissioner recognizes the right of the Board to establish policy regarding the attendance of pupils in its schools and will not upset such policy or action absent a showing that the discretion of a board has been abused:

"***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

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presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable.***" *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327, 332 (*App. Div.* 1965)

It was also said in *Theodore C. Seamans et als. v. Board of Education of the Township of Woodbridge, Middlesex County,* 1968 *S.L.D.* 1 that:

"***The Commissioner***conceives it is his responsibility to examine not only the reasonableness of a board's regulations***but also the proper use of the board's discretion in the application of such regulations.***"

(at p. 5)

See also *Arthur Levine et al v. Board of Education of the Borough of Fort Lee, Bergen County,* 1975 *S.L.D.* 83 (decided February 21, 1975). Similarly it was said in *James McCabe v. Board of Education of the Township of Brick, Ocean County,* 1974 *S.L.D.* 299 that:

"***The Commissioner has in numerous instances been called upon, in his quasi-judicial capacity, to make determinations regarding the reasonableness of the actions of local boards of education. The Commissioner will, in determining controversies under the school laws, inquire into the reasonableness of the adoption of policies, resolutions, or bylaws, or other acts of local boards of education in the exercise of their discretionary powers, but will not invalidate such acts unless unreasonableness clearly appears. See 62 *C.J.S., Municipal Corporations* § 203. *Cf. Kopera v. West Orange Board of Education* [60 *N.J. Super.* 288 (*App. Div.* 1960] ***"

(at pp. 307-308)

The Commissioner is in agreement with the Board's position that excessive absences from classes subvert the learning process. Herein, however, the Board has established a penalty of one day of in-school suspension for a day of truancy. The truant is then free to go back to all assigned classes. By contrast, other pupils who, like E.H., are apprehended in cutting a single class are barred from further attendance of that class for the remainder of the year. The Commissioner determines that such a greater penalty for a recognizably lesser offense shows arbitrariness. He further determines that it is excessively harsh and inappropriate. Such an overly-stringent policy assumes that adolescent pupils are capable of greater judgmental reasoning than is frequently the case. The Board's policy mandates, for a single offense, an inflexible penalty which has too great an aspect of finality.

The Commissioner recognizes that there is no justification for such subversions of the educative process as the cutting of classes and "cut days." However, a penalty must not wreak greater havoc than that which it seeks to cure. To deny further attendance at a class which was cut is contrary to the desired goal of regular attendance by all pupils.

The Board's suggested alternatives are not in all instances viable, nor are they applicable to all pupils. To assume that a pupil of average or less than

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average ability, cut off from the teacher, the class, and the resources of the classroom, may without even a textbook re-enroll in United States History II in September, and at that time successfully take a test in full satisfaction of the course requirements is, at best, unrealistic. As was said in *Sharon Ann Pinkham v. Board of Education of the Borough of South River et al., Middlesex County,* 1974 *S.L.D.* 1103:

> "***It is the teacher who must, by virtue of professional skill and expertise, transform the course of study from an inert document to a living reality through the employment of a variety of techniques and procedures.***" (at p. 1112)

The policy herein controverted, while well intentioned, is inappropriate. The Commissioner so holds. He therefore directs the Board to reexamine and revise its policy regarding the cutting of classes by pupils and employ henceforth those less drastic and more flexible means and procedures at its disposal which are commonly formulated to provide reasonable deterrents. Such revised policy should use only as a desperate last resort the exclusion of pupils from the classes which they, their guidance counselors, and their parents have determined will best further their educational goals. See *Gustave M. Wermuth, supra.*

The Commissioner further directs the Board to reinstate E.H. to her United States History II class, forthwith, and to provide her with two hours of supplemental instruction daily in content of this course until the end of the 1974-75 school year. To this extent petitioner's prayers for relief are granted. There is no necessity to direct that the record of the matter be expunged from the school records, it being a stipulated fact that no record of the matter appears on the permanent school record of E.H. Therefore, petitioner need not be apprehensive that the matter will follow E.H. throughout her lifetime on such transcripts as will be provided by the school.

COMMISSIONER OF EDUCATION

June 6, 1975

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North Bergen Federation of Teachers, Local 1060 AFL-CIO and Raymond Farley,

Petitioners,

v.

Board of Education of the Township of North Bergen, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Victor P. Mullica (Richard J. Plaza, Esq., of Counsel)

For the Respondent, De Bona, Goldberg & Johnson (Joseph J. Ryglicki, Esq., of Counsel)

Raymond Farley, hereinafter "petitioner," a classroom teacher in the North Bergen public schools, is a member of the North Bergen Federation of Teachers, Local 1060 AFL-CIO, hereinafter "Federation," which is the negotiating unit for teachers employed by the North Bergen Board of Education, hereinafter "Board." Petitioners allege that an action of the principal of the Robert Fulton School in unilaterally removing two notices from a faculty room bulletin board was both violative of petitioners' constitutional rights of free speech and contrary to statutory and negotiated agreement guarantees. The Board admits that the principal removed the controverted postings but denies that this action was in any way illegal or improper.

The matter is jointly submitted for Summary Judgment by the Commissioner of Education in the form of stipulated facts, exhibits, and Memoranda of Law.

The Robert Fulton School Parent Teacher Association, hereinafter "PTA," during the school year 1973-74 distributed its newsletter by delivering it to the school office, from where it was sent to teachers who, in turn, directed pupils to take copies to their parents. The October 1973 issue of the newsletter contained material relative to the forthcoming November referendum wherein the voters were to choose whether the school district would continue to be a Type I district with an appointed board of education or become a Type II district with an elected board. The contents of that portion of the newsletter are set forth *in toto* as follows:

> "The Township of North Bergen is considering an Elected Board of Education as opposed to an Appointed Board. Below is a rough outline of each of these:
>
> *"ELECTED BOARD*
>
> "Voters have the opportunity to vote in an election in February to decide who are to be members of the Board.

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"Voters have the opportunity to vote on the budget and capital expenditures. (Under present statutes the Commissioner of Education can re-instate any budget after the voters turn it down.)

"*APPOINTED BOARD*

"Less expensive to the taxpayers. (There would be a $60,000 annual election plus specific referendums for budgets and capital projects, i.e., bond issues.)

"Greater harmony and continuity in educational policies, programs and projects.

"Board members are not subject to emotional or reactionary pressures.

"Board members are chosen based upon qualifications. Many doctors, professors and other professional people would not subject themselves or their families to the slings and arrows of a political campaign for an unsalaried position." (Exhibit A)

In November 1973 the voters of the Township of North Bergen voted on the referendum in favor of an elected board of education. Thereafter, in its December 1973 newsletter, the PTA published and distributed in similar fashion the following statements relative to the forthcoming election of members to the Board:

"Anyone can run for the Board of Education. Qualifications are: 1) must be a citizen, 2) must be able to read and write, 3) must be a resident of the district for 2 years. Persons wishing to be nominated must be nominated directly by petitions signed by at least 10 persons not including the candidate. The deadline for filing petitions is January 4, 1974, 4:00 PM at the Board of Education Office ***No screening is necessary!

"The Board of Education election for members of the Board and for the school budget is February 13, 1974 – DON'T FORGET TO VOTE!" (Exhibit B)

Four of the eight meetings of the PTA were scheduled during 1973-74 to meet in the afternoon at the Robert Fulton School auditorium. (Exhibit C) On these occasions a music class which regularly met therein was rescheduled for another location. On May 8, 1974, petitioner posted a written statement on a bulletin board customarily used by faculty for posting of notices in the faculty room, as follows:

"*Faculty*

"I urge all my colleagues in Robert Fulton School to *resign* their membership and not become members of the PTA next year!

"I accuse the *PTA leadership* of the following attempts to aggravate a split between the parents and the teachers:

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"1. Attempting to intimidate picketing teachers by writing down the names of those that demonstrated.

"2. An indifferent attitude toward teachers by scheduling meetings in the afternoon which *disrupts* the educational process and *denies* faculty members the opportunity to attend.

"3. Failure to speak out when the school budget was cut by $200,000.

"4. 'Psuedo' evaluation of a faculty member and the sending of a letter to the Board of Education by Mrs. [S] with 'second hand' information concerning the matter. (?? – were faculty members consulted)

"This amateurish and immature approach to *education* callowness toward *teachers* makes it impossible for this organization to call itself the 'PTA' – it should call itself the 'PA' and even then I wonder if the PTA's of America would even allow it to have a charter based on their pseudo – PTA *philosophy*.

Ray Farley
Former Member" (Exhibit D)
(*Emphasis in text.*)

This notice was removed from the bulletin board by the school principal which action was protested by petitioner to the president of the Federation who, after conferring with the principal, signified that petitioner could again post his statement. This was done in slightly modified form on May 12, 1974 as follows:

"Faculty,

"Once again an attempt has been made to destroy *Freedom of Speech* in Robert Fulton. When will people learn that you can't destroy an idea, a word, or a belief by ripping down and destroying a piece of paper.

"And for those of you that didn't get a chance to read what Mr. [M] arbitrarily ripped down, let me reiterate summarily:

"I asked my colleagues to *resign* their membership in the *Robert Fulton PTA* because of:

"1. *Undermining tactics* employed by PTA leaders against teachers such as malicious and pseudo-evaluations of some colleagues!!

"2. *Failure* of the leadership to fight against the $200,000 school budget cut!!

"3. Holding meetings in the afternoon that makes it impossible to attend and *interferes* with the educational process.

"4. Attempting to *harass* teachers that picketed by writing down the names of those that demonstrated!!

"Therefore, it has become apparent that the PTA leadership would like to take the 'T' out and call itself the 'PA'. This amateurish and immature

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approach to education and callowness toward teachers makes it impossible to remain as members!!

"And thanks to the union and [A. E.] and their swift handling of an administrative violation of the contract-once again *Free Speech* reigns!!

Ray Farley" (Exhibit E)
(*Emphasis in text.*)

On May 14, 1974, the principal, without consultation with petitioner, removed this second posting and, when asked that the postings be returned, refused. Petitioner grieved these actions which grievance was denied by the Superintendent on June 7, 1974, and by the Board on July 3, 1974. The offending material was returned on September 10, 1974 to petitioner who thereafter moved the matter to arbitration contending that the negotiated agreement was violated. An arbitrator's award dated December 5, 1974, denied that the actions hereinbefore set forth were violative of the negotiated agreement.

Petitioners allege that their rights to free speech under the First Amendment of the Constitution of the United States have been violated by these events. In this they rely upon that which was stated by the United States Supreme Court in *Tinker v. Des Moines Community School District,* 393 *U.S.* 503 (1969) as follows:

"***It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.***" (at p. 506)

Petitioners additionally rely upon *River Dell Education Association v. River Dell Board of Education,* 122 *N.J. Super.* 350 (*Law Div.* 1973) wherein it was said:

"***[A] teacher's statements, wherever made, are to be given no less opportunity for issuance than those of any other citizen.***" (at p. 355)

Petitioners argue that the Board, on the one hand, allowed the PTA to disseminate its material through the schools, but at the same time prevented petitioner from expressing himself on the very same issues without giving reason for such restriction. Petitioners characterize as "frivolous afterthought" the Board's description of the controverted postings as "inflammatory." In this regard petitioners contend that:

"***It is sadly ironic that an individual whose chosen profession, the education of youth in the 'Market place of ideas,' was denied his personal right of expression, without legitimate reason or cause, by the entity statutorily entrusted with the instruction of our ideals.***" (Petitioners' Memorandum of Law, at pp. 3-4)

Petitioners seek an order from the Commissioner directing the Board to:

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1. Cease its present policy denying exercise of free speech to petitioners and others.

2. Permit the posting of the controverted material.

3. Discontinue its policy of allowing PTA meetings to be held at times that allegedly disrupt the education process.

4. Reimburse petitioners for all costs, including attorney's fees.

The Board, denying that the actions herein described constitute a violation of petitioners' protected rights of free speech, characterizes the postings as inflammatory and unprofessional. It argues that the contents thereof were disloyal and sought to undermine the basic relationships it seeks to maintain among the schools, the teachers, and the PTA as a representative of parents and the community. The Board avers that such allegedly improper action may not be cloaked under the mantle of free speech.

In this regard the Board argues the applicability of *In the Matter of the Tenure Hearing of Kathleen M. Pietrunti, School District of the Township of Brick,* 1972 *S.L.D.* 387; aff'd and reversed in part State Board of Education, 1973 *S.L.D.* 782; aff'd and reversed in part 128 *N.J. Super.* 149 (*App. Div.* 1974); *cert. den.* 65 *N.J.* 573 (1974); *cert. den.* United States Supreme Court, December 9, 1974. Therein it was stated by the New Jersey Superior Court, Appellate Division, that:

> "***A teacher is expected to exhibit loyalty to the district in which he or she is employed and to cooperate with the administration in seeking the educational goal. *** A teacher is expected to show a reasonable respect for the authority of his or her employer and to maintain a civility commensurate with his or her professional status.***"
>
> (128 *N.J. Super.* at 165)

And,

> "***We do not suggest that any teacher may not legally or constitutionally believe that a board of education or a superintendent of schools is not carrying out their functions properly, and may not speak out publicly with respect to such belief, or resort to political activities to defeat the members of such a board of education. These are rights which need not be emphasized since they are inherent in our democratic process. Indeed, the failure to exercise such rights, on proper occasion, might well constitute unprofessional conduct. What we do suggest is that the exercise of these rights be accomplished professionally.***" (at pp. 165-166)
>
> "***[N]either the constitutional right of a teacher to speak freely on public issues nor the statutory right of school employees to bargain collectively for their own welfare will override the basic obligation of an employee to the employer.*** The employer-employee relationship restrains the right of the employee to the extent reasonably necessary to

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> retain that harmony and loyalty which is necessary to the efficient and successful operation of the educational system.***" (at p. 166)

For the foregoing reasons the Board requests that the Petition of Appeal be dismissed.

The Commissioner has carefully examined the entire record including the arguments of the parties. He finds no reason to take issue with the arbitration award which categorically denies that the provisions of the negotiated agreement were violated by the unilateral removal of the posted material by the principal. The chief remaining issue which requires a determination is whether this removal, which was subsequently supported by the Superintendent and the Board, was violative of petitioners' guaranteed rights of freedom of speech.

The Supreme Court in *Pickering v. Board of Education of the Township High School District,* 391 *U.S.* 563 (1967), 88 *S.Ct.,* 1731, 20 *L.Ed.* 2*d* 811 (1968) succinctly stated the considerations that must be weighed in such matters, as follows:

> "***At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of its citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.***" (391 *U.S.* at 568)

The Commissioner has weighed the respective arguments herein set forth. He determines that the matter does not rise to the level which justifies the curbing of free expression as is constitutionally guaranteed.

The Board cites in support of its contention *Pietrunti, supra.* It must, however, be recognized that the instant matter is importantly distinguishable from *Pietrunti* in the degree of offensiveness of the language employed. It is likewise distinguishable in that Pietrunti's callous vituperative attack was made publicly upon the chief administrative officer of the Board. The Commissioner, the State Board, and the Courts deemed this attack to be irresponsible, unprofessional, and disloyal. It is, of course, further distinguishable in that no action was brought herein in the form of charges by the Board against petitioner seeking either reduction of his salary or his dismissal. Importantly, it is distinguishable in that petitioner's remarks, herein, were directed at an organization which only indirectly is affiliated with the Board. No frontal attack was made, as was the case in *Pietrunti,* upon the Board or its administrative agents which threatened the orderly and efficient process of education in the district.

Petitioner had the right to disagree with the stated position of the PTA on the forthcoming public question. He likewise had the right, as had other teachers, to withhold his support and membership from that organization. He

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had the right, at appropriate times and places, to express his own views and seek to influence others not to join the PTA; similarly, others of his peers had the similar right to encourage their fellow teachers and others to join the organization. Such rights are not limited to the spoken word but extend to posted material, so long as it is posted in appropriate places and in accord with reasonable policies of the Board respecting the posting of material on its bulletin boards.

There being no evidence herein that such a Board policy exists, the Commissioner proceeds to a determination of whether the posting was appropriate. The arbitrator's award makes it clear that sworn testimony had established the fact that the bulletin board in question was frequently viewed by parents, pupils, Title I personnel, and others, rather than exclusively by teachers, as petitioners assert. In that it was petitioner's obvious intent to communicate his feelings regarding the PTA to his fellow teachers, his choice of a place for such posting, where it was clearly visible to parents, pupils and others, appears inappropriate.

The Commissioner directs the Board to establish, in a place both convenient and generally private to teachers, a bulletin board for the use of teachers. The details of such arrangement may well be the subject of subsequent negotiations. *Jersey City Federation of Teachers, Local 752 v. Jersey City Board of Education and Jersey City Education Association, Hudson County,* 1972 *S.L.D.* 436 The Commissioner further recommends that the Board, pursuant to its statutory authority in *N.J.S.A.* 18A:11-1(d), enact appropriate policy with regard to its bulletin boards that will further insure the orderly and efficient operation of its schools. To the limited extent hereinbefore set forth, petitioners' first and second prayers for relief are granted.

The Commissioner, however, finds no evidence herein that use of the Board's auditorium a total of four times per year for afternoon meetings of the PTA created such disruption as to threaten a viable, thorough and efficient education for pupils of the school. Petitioners' third prayer for relief is, accordingly, denied.

Petitioners' fourth prayer for relief wherein they seek an award of counsel fees is similarly denied. The Commissioner has consistently held that awards for punitive damages, counsel fees, and interest charges may properly be awarded only by the courts, absent statutory provision granting such power to an administrative authority. *Fred Bartlett, Jr. v. Board of Education of the Township of Wall, Monmouth County,* 1971 *S.L.D.* 163; *Romanowski v. Jersey City Board of Education, Hudson County,* 1966 *S.L.D.* 219; *David v. Cliffside Park Board of Education, Bergen County,* 1967 *S.L.D.* 192; *Thomas Smith, Jr. v. Board of Education of the Township of Egg Harbor, Atlantic County,* 1974 *S.L.D.* 430; *Raymond Winter v. Board of Education of the Township of North Bergen, Hudson County,* 1975 *S.L.D.* 236

The Commissioner is constrained to comment upon an important facet of the matter, which received no attention in the Memoranda of Law, relative to the distribution of the PTA newsletters. The material quoted from the October

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1973 newsletter, *ante,* was utterly inappropriate and illegally distributed through pupils of the school, containing as it did material obviously favoring one side of the public question to be voted on in the November 1973 election. A PTA, being a nonschool organization, has every right to favor or oppose a public question. It may not, however, employ public school pupils to distribute such literature. To do so is violative of *N.J.S.A.* 18A:42-4 which provides that:

> "No literature which in any manner and in any part thereof promotes, favors or opposes *** the adoption of *** any public question *** shall be given to any public school pupil *** for the purpose of having such pupil take the same to his home***. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section."

The Board is directed to instruct its agents to properly screen all material that is sent to homes by pupils to be certain that such improper electioneering material is not contained therein. *In the Matter of the Annual School Election Held in School District of the Township of Madison, Middlesex County,* 1974 *S.L.D.* 744 The matter, being rendered moot by the result of the election, requires no further action.

COMMISSIONER OF EDUCATION

June 6, 1975

"M.Q.," by his parent and natural guardian,

Petitioner,

v.

Board of Education of the Township of Livingston, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Fred M. Bado, Esq.

For the Respondent, Riker, Danzig, Scherer & Debevoise (Thomas C.C. Humick, Esq., of Counsel)

Petitioner, the parent of pupil "M.Q.," enrolled in the Township of Livingston School System during the 1972-73 and part of the 1973-74 school years, avers that M.Q. has been incorrectly classified as mentally retarded, and that the educational program provided him has been inappropriate. Petitioner, prior to the institution of the instant matter, withdrew M.Q. from the Livingston School System and enrolled him in a private school located in South Orange.

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Petitioner now demands judgment of the Board in the form of reimbursement of the tuition he must pay for M.Q. at the private school. The Board of Education of the Township of Livingston, hereinafter "Board," maintains that it has complied in all respects with the statutes concerned with handicapped pupils (*N.J.S.A.* 18A:46-1 *et seq.*), and that the educational program provided for M.Q. was appropriate to his needs. Furthermore, the Board has moved for Summary Judgment in its favor on the grounds that petitioner voluntarily and unilaterally withdrew M.Q. from its enrollment and placed him in the private school.

Upon receipt of the Board's Notice of Motion, the representative of the Commissioner of Education conducted a conference of counsel among the parties wherein it was agreed that oral argument on the Motion would be waived, although legal Briefs of the parties would be entertained in support of their respective positions. By letter dated January 22, 1975, the Board was granted until March 1, 1975 to file its supporting Brief, and petitioner was granted until March 15, 1975 to file his reply Brief in opposition to the Motion.

The Board's Brief was timely filed, while petitioner's Brief had not been received as of May 16, 1975. The Commissioner's representative unsuccessfully attempted telephone contact with counsel for petitioner on April 21 and May 2, 1975, regarding his overdue Brief. Having received no reply nor communication from petitioner regarding the matter, the representative now refers the Board's Motion for Summary Judgment, with its supporting Brief, and the pleadings to the Commissioner for adjudication.

Petitioner complains in his moving papers that M.Q. was improperly classified by the Board's Child Study Team as mentally retarded and placed in a class for mentally retarded pupils. Petitioner avers that M.Q. has a visual learning disability and his placement in the class with mentally retarded pupils created an unhealthy learning situation for him. Thereafter, petitioner had his son examined by his own private physician whose report (C-1), dated September 18, 1973, concluded as follows:

> ***
>
> "Recommendations: [M.Q.] is in need of the following:
>
> "1. One to one relationship educationally for academic help and immediate feedback of his performance.
>
> "2. Small class placement with a group of his peers. (Minimum of six children to a class)
>
> "3. Placement in the Gramon School [the private school referred to earlier], South Orange, New Jersey where he can receive the type help he needs.***"

Petitioner, while alleging that the Board does not have adequate facilities to provide M.Q. with the program he requires, enrolled him at the Gramon School. He demands reimbursement by the Board for the tuition he now expends.

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The Board, in its letter Brief, agrees that its Child Study Team classified M.Q. as educable, mentally retarded and placed him in an appropriate class for instruction. Although the Board avers that its classification of M.Q. was correct, it suggested to petitioner, subsequent to the receipt of his physician's report (C-1), that the classification, if he chose, would be reviewed by the Essex County Child Study Team. However, petitioner withdrew M.Q. and placed him in the private school.

The Board argues that by virtue of petitioner enrolling M.Q. in a private school, it no longer had the responsibility for the pupil until and, if, he is re-enrolled in the public schools. Finally, in regard to the relief requested, the Board maintains that it is not required to assume the costs of private schools elected solely by the parents.

The Commissioner agrees with the Board and, consequently, finds the Petition herein without merit. It has been consistently held that, while parents have the right to withdraw their children from public school and enroll them in a private school, they also assume any costs incurred. *Lange v. Hi-Nella Board of Education,* 1959-60 *S.L.D.* 65; *In the Matter of "G" v. Board of Education of the City of Union, Hudson County,* 1967 *S.L.D.* 6; *"T.A." v. Board of Education of the Township of Edgewater Park and the City of Burlington, Burlington County,* 1973 *S.L.D.* 501

The Commissioner having found no basis to intervene herein, the Board's Motion for Summary Judgment is hereby granted. The Petition is dismissed.

COMMISSIONER OF EDUCATION

June 9, 1975

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Phebe Baker,

Petitioner,

v.

Board of Education of the Lenape Regional High School District and K. Kiki Konstantinos, Superintendent, Burlington County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondents, Archer, Greiner & Read (Jeffrey I. Baron, Esq., of Counsel)

Petitioner, who was employed as a teacher for three academic years from September 1971 through June 1974 by the Board of Education of the Lenape Regional High School District, hereinafter "Board," alleges that the nonrenewal of her teaching contract was without proper basis. She therefore seeks an order from the Commissioner of Education directing the Board to reinstate her to a full-time teaching position with other appropriate remedies. Conversely, the Board, denying that its nonrenewal of petitioner's contract was other than a lawful exercise of its discretionary authority under Title 18A, Education, and controlling New Jersey decisional law, moves for dismissal.

This matter comes directly before the Commissioner in the form of a Petition of Appeal filed February 27, 1975, a timely Answer accompanied by a Motion to Dismiss with supporting Brief, and an Answering Brief in Opposition of Motion to Dismiss. No important facts relevant to the Motion to Dismiss are in dispute.

Petitioner was notified verbally by her school principal in March 1974, that she would not be reemployed for the ensuing academic year. She was thereafter notified in writing by the Superintendent on March 21, 1974, that the Board had voted on March 19, 1974, not to reemploy her. The Superintendent, by letter of June 26, 1974, supplied petitioner with a list of reasons for the non-reemployment which stated:

"The reasons your contract was not renewed for 1974-75 are as follows:

"1) Classroom Procedures

"a) Lateness of teacher and students to class

"b) Daily student attendance check not followed as prescribed

"c) Classroom relocated at teacher convenience with no indication

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as to new location in spite of form developed to accommodate this type action

"d) Classroom discipline, attitude, and control as noted in written observation reports

"e) Organization and conduct of certain classes was not as expected

"2) Lack of Concerns in Compliance with General Job Responsibilities

"a) Lack of concern for school property (non-compliance with book loan procedure)

"b) Failure to submit requested and required material on time

"c) Did not replace Emergency Lesson plans when necessary

"d) General lack of concern for organization and proper housekeeping, frequently lost forms, misplaced items, not returning papers to students, etc.

"e) Failed to 'sign in' to school for one week

"f) Did not always comply with employee late card system

"g) Use of materials assigned to other teachers without prior notification of such intention

"In general, it appears apparent to us that your personal coordination with the school organization is lacking.

"Your request for an informal hearing has been scheduled for July 16, 1974 at the conclusion of the regular Board of Education meeting.***"
(Petitioner's Exhibit A)

Petitioner provided the Board members with a letter (Petitioner's Exhibit B) prior to the date of her informal hearing. Therein she set forth at length her philosophy of education which philosophy, she alleges, is at variance with that of the Board's administrators. Therein she stated, *inter alia,* that:

"***I was first notified that I was not to be rehired next year by [the principal], verbally, on March 19. The reasons given then were not the ones listed in the letter I received on June 26 from Mr. Konstantinos.

***

"I feel it is demeaning to have to answer point by point, the list of reasons finally given me. If the truth is desired, let's discuss the place of differing philosophies in a public educational system. Because that's the real reason I have been fired. And I believe strongly that all public schools should offer as wide a gamut of role models in the form of teachers as possible. It is not up to one man, or even a group of men, to make the world in their own image.***" (at p. 3)

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***

"***[T]he reasons all have to do with school administration, really, and not the art of teaching, which is why I was hired by this school board and why I receive several extra dollars because of my master's degree and experience.***" (at p. 4)

Thereupon, petitioner set forth twenty-six complaints she had with the administration and the school system. Additionally, she set forth in this letter a number of commendations by her evaluators, as well as what she believed to be a number of successes she had achieved while conducting her classes in her three years of teaching for the Board.

The Board notified petitioner by letter from its Superintendent dated July 26, 1974 that it had reviewed her position as expressed at the informal hearing, but that it found no reason to change its decision not to reemploy her. (Petitioner's Exhibit C)

The Board states that petitioner's performance as a teacher for 1971-72 was satisfactory, but that subsequent formal and informal evaluations by its principal and subject area supervisor revealed numerous significant deficiencies which provided the basis for its decision not to reemploy her for 1974-75.

The Board asserts that while it was under no obligation to provide reasons to petitioner as to why she was not reemployed, it did so merely for informational purposes, rather than in compliance with the decision of the Court in *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974) which mandated for the first time that nontenured teachers be provided with a statement of reasons for non-reemployment. Thus, the Board argues, the Petition of Appeal fails to set forth sufficient legal or equitable grounds for review of its action by the Commissioner.

Additionally, the Board raises the equitable defense of laches in that petitioner waited a period of eight months before bringing the matter before the Commissioner.

Finally, the Board avers that its action was in full compliance with *N.J.S.A.* 18A:27-10 *et seq.* and all of the relevant education laws and decisional law and represented a proper exercise of its discretionary authority. For these reasons the Board moves for dismissal of the Petition of Appeal.

Petitioner argues to the contrary, that, notwithstanding *Donaldson, supra,* and *Joan Sherman v. Malcolm Conner and Board of Education of the Borough of Spotswood,* Docket No. A-2122-73, New Jersey Superior Court, Appellate Division, January 28, 1975, in which the Court determined that *Donaldson* was prospective only in its application, the Board did indeed provide her with a statement of reasons. She avers that such reasons must be proven true and sufficient to warrant her termination. She states that, even if given only for informational purposes or in the interest of fostering teacher self-improvement and maintaining an equitable relationship with the Lenape Education Association (as alleged by the Board), they are reviewable by the Commissioner

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to determine whether the reasons were true in fact. Petitioner contends they are not true in fact and that the matter requires an evidentiary hearing to determine whether the Board's act was arbitrary, capricious, or otherwise improper.

The Commissioner has thoroughly reviewed the pleadings and the respective arguments of law relative to the Motion to Dismiss. All local boards of education are empowered by the Legislature to implement at the local level the constitutional mandate to provide a thorough and efficient system of free public education. The general mandatory powers and duties are set forth in *N.J.S.A.* 18A:11-1 which provides, *inter alia,* 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 *** *employment, regulation of conduct and discharge of its employees* ***
>
> "d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."
>
> (*Emphasis supplied.*)

N.J.S.A. 18A:27-1 *et seq.* provides the basis for a board of education entering into contractual relationships with teaching staff members and the conditions under which such teaching staff members may be terminated. Herein, there is no showing that the Board acted other than as provided by statute. The Board's notice of termination was given prior to the statutory deadline of April 30 as required by *N.J.S.A.* 18A:27-10. The Board was clothed with statutory authority to terminate petitioner's services. It remains only to determine whether this action was taken for proscribed reasons.

The Commissioner has at various times reviewed such actions of local boards of education and in certain instances, finding that the protected rights of teaching personnel were violated, has set aside the actions of boards wherein they violated those protected rights of nontenured employees or otherwise abused their discretionary powers. *Elizabeth Rockenstein v. Board of Education of the Borough of Jamesburg, Middlesex County,* 1974 *S.L.D.* 260 and 1975 *S.L.D.* 191 (decided March 20, 1975); *North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO, and Beth Ann Prudente v. Board of Education of the Township of North Bergen, Hudson County,* 1975 *S.L.D.* 138 (decided February 26, 1975)

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

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The discretionary powers of education boards are well recognized by both the Commissioner and the Courts. The Commissioner has said in numerous instances that he will not substitute his discretion for that of a board absent a clear showing of bad faith, statutory violation, or violation of constitutional rights. It was said in *South Plainfield Independent Voters et al. v. Board of Education of the Borough of South Plainfield, Middlesex County,* 1975 *S.L.D.* 47;

> "***In a deliberation of a local board of education, particularly with respect to disciplinary action against any employee, '***it is of the very essence that justice avoid even the appearance of injustice***.' *James v. State of New Jersey,* 56 *N.J. Super.* 213, 218 (*App. Div.* 1959); *Hoek v. Board of Education of Asbury Park,* 75 *N.J. Super.* 182, 189 (*App. Div.* 1962)***" (at p. 56)

Additionally, it was said in *John J. Kane v. Board of Education of the City of Hoboken, Hudson County,* 1975 *S.L.D.* 12 that:

> "***[T]he Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious, or unreasonable. See *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County,* 1973 *S.L.D.* 167; *James Mosselle v. Board of Education of the City of Newark, Essex County,* 1973 *S.L.D.* 176; *Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County,* 1973 *S.L.D.* 217, affirmed State Board of Education March 6, 1974.***" (at p. 16)

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

In *Board of Education, East Brunswick Township v. Township Council, East Brunswick,* 48 *N.J.* 94 (1966), the Supreme Court stated that:

> "***[T]he Commissioner's responsibility was to make independent determinations *giving due weight, of course, to the lower findings and the measures of discretion vested below.* ***" (*Emphasis supplied.*) (48 *N.J.* at 106)

> "***As Justice Hall pointed out in *Botkin v. Mayor and Borough Council of Borough of Westwood, supra,* [52 *N.J. Super.* 416 (*App. Div.*), appeal dismissed 28 *N.J.* 218 (1958)] a board of education *** is an independent governmental entity***." (48 *N.J.* at 107-108)

Nevertheless, under certain circumstances the Commissioner is obliged to make a determination of fact arising from the record below. Thus, in *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional School District, Atlantic County,* 1968 *S.L.D.* 7; dismissed State Board of Education May 1,

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1968; affirmed Superior Court, Appellate Division, 1969 *S.L.D.* 202, the Commissioner commented that:

> "***The Commissioner agrees that boards of education may not act in an unlawful, unreasonable, frivolous, or arbitrary manner in the exercise of their powers with respect to the employment of personnel. Thus a board of education may not resort to statutorily proscribed discriminatory practices, *i.e.,* race, religion, color, etc., in hiring or dismissing staff. Nor may its employment practices be based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served. Such a *modus operandi* is clearly unacceptable and when it exists it should be brought to light and be subjected to scrutiny.***" (1968 *S.L.D.,* at p. 10)

Herein, there is no showing of violation of protected constitutional or statutory rights as in *Rockenstein, supra,* or *North Bergen, supra.* The instant matter bears strong resemblance to *Ruch, supra,* in that petitioner, like Ruch, takes strong exceptions to the validity of her supervisory evaluations. It is also clear that she takes strong exceptions to certain educational practices and philosophies which she believes to be extant within the school system. (Petitioner's Exhibit B)

It is not uncommon when divergent philosophies are present within a teaching and administrative staff that conflict situations emerge which are disruptive of the efficient functioning that is exemplified in a well-ordered school. This is not to say that no place may be given to differing philosophies or their manifestations in varying acceptable techniques and modes of instruction within a single school system. Such are frequently desirable and found in the most productive school systems. They must, however, manifest themselves in an orderly, efficient and harmonious atmosphere in order that they not be counter-productive.

In the instant matter, a review of the written evaluations of petitioner's 1973-74 performance, and the written reasons given by the Superintendent for her non-reemployment, discloses that serious concern and dissatisfaction existed relative to both her classroom and non-classroom performance. It is further evident that there was indeed concern over conflicting philosophies of education. This is clearly reflected in the reasons for dismissal given by the Superintendent. The school's administrators made their report to the Board which determined not to reemploy petitioner for a tenure year. In June 1974, petitioner was provided a written statement of reasons for her non-reemployment. When petitioner requested an appearance before the Board, she was accommodated and given opportunity to state her views. Following a review of the entire matter, the Board affirmed its prior decision.

The Commissioner finds herein no abuse of the Board's discretionary powers. Petitioner's complaint that her non-classroom performance should not be accorded importance is without merit. In *Donaldson, supra,* the Court held as follows:

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> "***The Legislature has established a tenure system which contemplates that the local board shall have broad discretionary authority in the granting of tenure and that once tenure is granted there shall be no dismissal except for inefficiency, incapacity, unbecoming conduct or 'other just cause.' *N.J.S.A.* 18A:28-5 *The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board *** may conclude that tenure should not be granted.****" (*Emphasis added.*) (65 *N.J.* at 241)

The Board acted in full compliance with the spirit of the Court's decision in *Donaldson, supra.* This has long been the practice of numerous boards of education and will hereafter be required for all in New Jersey. *Donaldson, supra* The Board's action is deserving of a presumption of correctness, there being no clear showing of bad faith, arbitrary or capricious motivation, or violation of petitioner's constitutional rights. This being so, the Commissioner will not substitute his judgment for that of the Board and its school administrators. Petitioner has established no cause for action on which relief can be granted. *Ocean Cape Hotel Corporation v. Masefield Corporation,* 63 *N.J. Super.* 369 (*App. Div.* 1960) Respondent's Motion to Dismiss is therefore granted.

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)

For those reasons previously enunciated, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 9, 1975

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Shirley Smiecinski,

Petitioner,

v.

Board of Education of the Township of Hanover, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Shirley Smiecinski, *Pro Se*

For the Respondent, Riker, Danzig, Scherer & Debevoise (Peter N. Perretti, Jr., Esq., of Counsel)

For the New Jersey Education Association, *Amicus Curiae,* Ruhlman and Butrym (Cassel R. Ruhlman, Jr., Esq., of Counsel)

Petitioner, the spouse of a member of the Board of Education of the Township of Hanover, hereinafter "Board," avers that her name was not approved for employment as a substitute teacher during the 1974-75 school year because the Board determined that the marriage relationship posed the appearance of a conflict of interest. She requests the Commissioner of Education to determine that such a reason should not bar her employment as a substitute teacher and to order that her name be approved for substitute teaching duties. The Board admits that petitioner was not approved for substitute teaching for petitioner's stated reason but maintains that its decision in this regard was generally applied to all candidates for substitute work and was a proper and legal exercise of discretion.

A conference of counsel in this matter was held on November 26, 1974, and it was agreed that the dispute would be submitted for Summary Judgment on the pleadings and/or Memoranda of counsel. The New Jersey Education Association has filed a Memorandum as *amicus curiae* and the Board has filed a Memorandum. Petitioner, acting *pro se,* has not. The facts of the matter may be concisely stated and are not in dispute.

The Board, pursuant to law and its own policy, approves a list of substitute teachers each year for its schools, and prior to the 1974-75 school year petitioner's name had been included on such lists. Her name was again recommended for approval as a substitute teacher by the Superintendent of Schools in May, 1974, but the Board did not approve it and, instead, formally adopted on October 17, 1974, a policy which states:

> "The Board of Education discourages the employment of relatives of members of this Board of Education." (Memorandum on Behalf of Respondent, at p. 4)

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The Board states that such policy was informally approved by it at a caucus meeting on May 9, 1974 at which time

> "***consensus was reached that as a matter of policy, relatives of Board members or administrators should not be recommended for subsequent employment within the School District because the Board desired to move away from either the reality or the appearance of conflicts of interest in the public employment of elected officials' relatives.***"
>
> (Memorandum on Behalf of Respondents, at p. 2)

On July 18, 1974, pursuant to the provisions of this policy of "consensus," petitioner's name was not approved for employment as a substitute teacher during the 1974-75 school year since her husband was a member of the Board. Neither, the Board states, for a similar reason, was approval given on July 18, 1974 for the employment of a vice-principal's wife.

Subsequent to its meeting of July 18, 1974, the Board requested and received an opinion from its counsel with respect to the legality of the employment of spouses of Board members. On September 25, 1974, petitioner filed the instant Petition of Appeal. On October 17, 1974, the Board formally adopted its policy as reported, *ante*.

At the conference of counsel in this matter petitioner amended her Petition of Appeal to allege that two present members of the Board have relatives, including one spouse, who are employees of the Board and that, accordingly, petitioner's bar from service as a substitute is discriminatory. The Board does not deny the factual truthfulness of this amendment but avers that the relatives so employed are tenured in their employment and not per diem substitute teachers. The Board does deny that this factual situation is discriminatory with respect to its action to bar petitioner. *Amicus curiae* supports petitioner in her contention that the facts and the law do not justify the Board's refusal to approve her as a substitute teacher, although admitting that there is some potential for conflict in the situation. In this view, *amicus* avers that the Board seems to be more concerned with appearance than with substance. He cites the State Board of Education decision *In the Matter of the Election of Dorothy Bayless to the Board of Education of the Lawrence Township School District, Mercer County,* 1974 *S.L.D.* 603, which reversed the May 31, 1974 decision of the Commissioner, to support the view that if a board member/full-time employee relationship is not a conflict of interest, it cannot be held with logic that a conflict exists from the employment of a part-time, per diem substitute. Further, *amicus* contends that the Commissioner has already considered the matter of incidental conflicts of interest which are shared by many board members but has found such conflicts no bar to part-time or substitute employment or to service on local boards of education. The cases cited in this regard are *Donald P. Sweeney v. Henry Komorowski,* 1974 *S.L.D.* 740 and *Decker v. Board of Education of the Township of Berkeley,* 1959-60 *S.L.D.* 57.

Amicus also maintains that the Board's policy at issue

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"***infringes on the constitutionally protected right to engage in political activity. That right is guaranteed by the First and Fourteenth Amendments to the U.S. Constitution. *DiStefano v. Wilson,* 96 *N.J. Super.* 592, 598 (*Law Div.* 1967)***" (Memorandum on Behalf of New Jersey Education Association, *Amicus Curiae,* at p. 5)

It further asserts that there is no compelling State interest which may be used to set aside such rights.

The Board avers, on the other hand, that it has done nothing with respect to petitioner's employment that it is not empowered to do by explicit and implied authority contained in the education law. Specifically, the Board cites *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:16-1 which are recited in their entirety as follows:

N.J.S.A. 18A:11-1

"The Board shall –

"a. Adopt an official seal;

"b. Enforce the rules of the state board;

"c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes[1]; and

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

N.J.S.A. 18A:16-1

"Each board of education, subject to the provisions of this title and of any other law, shall employ and may dismiss a secretary or a school business administrator to act as secretary and may employ and dismiss a superintendent of schools, a custodian of school moneys, when and as provided by section 18A:13-14 or 18A:17-31, and such principals, teachers, janitors and other officers and employees, as it shall be determined, and fix and alter their compensation and the length of their terms of employment."

In the Board's argument, such statutes confer on it and all local boards,

[1]Section 11:1-1 et seq.

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"***the power to determine the direction for the government and management of the public schools which it wishes to pursue***." (Memorandum on Behalf of Respondent, at p. 6) Further the Board avers that the controverted policy is an exercise of its discretion "***to pursue the highest standard of ethics in the hiring of public employees***" which is not a proper subject for review by the Commissioner. (Memorandum on Behalf of Respondent, at p. 6) In practical terms the Board states the problems it envisages, when relatives of Board members are approved as substitute teachers, in the following manner:

> "The performance of all employees *** must be evaluated by the administrative staff. The performance of the administrative staff is evaluated by the Board. To see a potential conflict one need only recognize the burden cast upon an administrative staff member who must evaluate Board members' spouses when in turn that administrator must be evaluated by the Board. The problem is peculiarly acute in the case of substitutes. Each day that a substitute is called an agent of the Board must determine who to call from amongst those names on the approved list. If some are relatives of Board members and some are not, the potential for the interjection of considerations divorced from the public interest becomes manifest.
>
> "Even if no conflict exists the appearance of such in the eyes of the public is manifest. The Board has, acting within its statutory authority, reduced potential conflicts and pursued the highest standards of official conduct in order to retain the public's confidence. Its actions in this regard should not be condemned by the Commissioner.***"
>
> (Memorandum on Behalf of Respondent, at pp. 7-8)

Further, the Board avers that its action herein is not discriminatory against petitioner and that there is a compelling interest which mandates a denial of employment to relatives of Board members.

The Board asserts, and it is nowhere denied by petitioner, that from the inception of its controverted policy it has not approved the names of Board members' spouses as substitute teachers. Therefore, the Board argues that all persons situated similarly to petitioner have been afforded the same treatment, although, as noted *ante*, the Board continues to employ tenured personnel who are related to members of the Board.

The Board's argument that a compelling interest does bar service as a substitute teacher by petitioner is buttressed by the Board with a series of Court decisions which set forth authoritative dicta pertinent to disputes concerned with alleged conflicts of interest. *Graham v. United States,* 231 *U.S.* 474, 480 (1913); *Shapiro v. Thompson,* 394 *U.S.* 618 (1969); *Jones v. MacDonald,* 33 *N.J.* 132 (1960); *Newton v. Demas,* 107 *N.J. Super.* 346 (*App. Div.* 1969); *Aldom et al. v. Borough of Roseland,* 42 *N.J. Super.* 495 (*App. Div.* 1956)

The Commissioner has reviewed such arguments and the facts on which they are grounded. There are two primary questions which require answers in this matter. The first is concerned with whether or not the Board has legally

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exercised its discretion to bar the service of petitioner, and others similarly situated, as a substitute teacher and/or secretary, because of her husband's position as a member of the Board. The second question is if such discretion may be exercised by a local board of education, was petitioner's treatment by the Board discriminatory.

The Commissioner observes, with respect to the first question, that substitute teachers are not "teaching staff members" in the purview of the definition contained in the law. *N.J.S.A.* 18A:1-1 This statute defines a teaching staff member as a "***member of the professional staff***holding office, position or employment of such character that the qualifications***require him to hold a valid and effective standard, provisional or emergency certificate*** issued by the state board of examiners***." There is no such requirement for service as a substitute teacher although many, if not most, school districts do employ fully certificated personnel in this capacity. There is a rule of the State Board of Education which does set a minimum standard of "60 semester-hour credits" for the acquisition of a county substitute certificate to be issued by the County Superintendent of Schools when there is an emergency need for such persons. *N.J.A.C.* 6:11-4.7 There are no rules at all with respect to the qualifications of school secretarial personnel or their substitutes, and it must be expected that local boards of education have full discretion under general statutes to establish appropriate standards with respect to such employees. (*i.e.*, *N.J.S.A.* 18A:11-1) Indeed the standards with respect to such employees and of many other employees of local boards of education are not firmly established. These standards depend, in fact, on an exercise of discretion by local boards which are attuned to local conditions and reflect local needs. The question in the instant matter is, thus, not whether a local board of education may exercise independent discretion in the establishment of standards for employment but whether, in this instance, the Board abused its authority.

The Commissioner determines that it did not. A local board of education is specifically empowered to make rules for its own government and for the "government and management" of the schools over which it has control and this authority is clearly greater, not less, when the subject of a given policy is not definitively mandated by other authority or specific rule. The Commissioner holds, therefore, that the Board's policy of October 17, 1974, and its actions prior thereto, which effectively barred the service of substitute teachers and other employees whose spouses were members of the Board, was a proper exercise of discretion, and may not be set aside by the Commissioner absent evidence that such policy was administered in a discriminatory manner. *Thomas v. Board of Education of Morris Township*, 89 *N.J. Super.* 327 (*App. Div.* 1965); *Boult and Harris v. Board of Education of Passaic*, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1947) There is no such evidence herein but, instead, evidence that the policy of the Board adopted October 17, 1974, was applied equally to all who were similarly situated as applicants for position as substitute teachers and/or secretarial positions.

Accordingly, the instant Petition is dismissed.

COMMISSIONER OF EDUCATION

June 10, 1975

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Robert Searles,

Petitioner,

v.

Board of Education of the Township of Hillside, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

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

Petitioner, a high school principal employed for two years by the Board of Education of the Township of Hillside, hereinafter "Board," and not reemployed for a third year, asserts that his termination was statutorily defective; therefore, he prays for reinstatement in his former position and any retroactive pay to which he is entitled.

This matter is submitted to the Commissioner of Education for Summary Judgment on stipulations, exhibits, and Briefs. There is no issue of material fact in dispute. The issue to be determined is whether or not petitioner was given proper notice by the Board pursuant to *N.J.S.A.* 18A:27-10, 11, and 12. Those statutes are reproduced here as follows:

N.J.S.A. 18A:27-10

"On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

> "a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment with such increases in salary as may be required by law or policies of the Board of education, or
>
> "b. A written notice that such employment will not be offered."

N.J.S.A. 18A:27-11

"Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same

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terms and conditions but with such increases in salary as may be required by law or policies of the board of education."

N.J.S.A. 18A:27-12

"If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable."

The litigants stipulate that:

1. A resolution to offer a renewal contract to petitioner at a special meeting of the Board on April 29, 1974, which was a public meeting, resulted in a four-four tie vote.

2. Petitioner thereafter filed a notice of acceptance of reemployment pursuant to *N.J.S.A.* 18A:27-12 (Exhibit A)

3. Petitioner was personally given written notice by the Superintendent of Schools on April 30, 1974, that his employment would be terminated on June 30, 1974. (Conference Agreements; Petitioner's Brief, at pp. 2-3; Respondent's Brief, at p. 2)

Petitioner argues that the vote taken by the Board concerning his reemployment is void and of no effect because of improper procedures utilized by the Board leading to and culminating with the meeting of April 29, 1974, regarding, specifically, procedures required for calling a special meeting. Petitioner contends that this meeting was not properly called pursuant to the Board's own rules which it adopted on February 18, 1974. The Board's adopted rules as stated in Exhibit 1(c) *Robert's Rules of Order Revised* which provide that a special meeting may be "***convened only to consider one or more items of business specified in the call of the meeting***" [and] "[w]ith the possible exception of details of very minor importance, only business mentioned in the call of a special meeting can be transacted at such a meeting.***" (Exhibit 2)

Petitioner asserts that the matter of his reemployment was not on the Board's agenda on the call of the special meeting April 29, 1974; that one Board member was absent; that the vote taken resulted in a four-four tie which is a defeat of the motion; and that the matter of his reemployment was of such major public importance that the absent ninth Board member might have made herself available to cast the deciding affirmative vote if she had known that this item of business were to be transacted on April 29, 1974. (Petitioner's Brief, at pp. 2,7)

Petitioner asserts, further, that another special meeting of the Board was convened on June 26, 1974, because of the public outcry concerning his non-reemployment, and that the Board's agenda included a motion to reappoint him as high school principal. (Petitioner's Brief, at p. 2) The reconsideration of his reemployment was tabled at this meeting; however, petitioner argues that the

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Board's action at the June 26, 1974 meeting is proof that its action taken on April 29, 1974, concerning him, was inconclusive and, therefore, null and void.

In support of his contention that the special meeting held on April 29, 1974, was void and of no effect concerning him, petitioner cites the following decisions: *In re Fulcomer,* 93 *N.J. Super.* 404 (*App. Div.* 1967); *Cullum v. Board of Education of North Bergen, Hudson County,* 15 *N.J.* 285 (1954); *Evaul v. Camden Board of Education,* 65 *N.J. Super.* 68 (*App. Div.* 1961), reversed and remanded, 35 *N.J.* 244 (1961); *Stackhouse et al. v. Clark et al.,* 52 *N.J.L.* 291 (*Sup. Ct.* 1890); *Zabriskie et al. v. Trustees, School District No. 10,* 52 *N.J.L.* 104 (*Sup. Ct.* 1889).

Petitioner asserts, finally, that the Board's action was not in compliance with determinations made by the Commissioner in *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207 and *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396 in which the Commissioner determined that those boards had not conclusively decided the fate of petitioners.

The Board denies that its notice of the special meeting on April 29, 1974, was improper and offers as proof its agenda entitled "Notice to Board Members" dated April 19, 1974, listing special meetings scheduled for the week of April 22, 1974. It reads in pertinent part as follows:

> "Wednesday, Apr. 24, 1974 7:30 p.m.
> "Complete Board-Conference Meeting *to discuss the following matters to be acted upon at a Special Meeting of the Board to be held on Monday, April 29,* 1974: ***
>
> "3. *Appointment of non-tenure Administrators."*
> (*Emphasis added.*) (Board's Exhibit 2)

The subject of nontenured administrators did not come up at the April 24, 1974 meeting and the Board Secretary sent another notice to Board members dated April 26, 1974, announcing further special meetings and their agenda. That notice reads in pertinent part as follows:

> "The Board President has scheduled a Special Meeting of the Board of Education to be held on Monday, April 29, 1974, at 8:00 P.M., at the Administration Building.***
>
> "Monday, Apr. 29, 1974 6:30 P.M.
> "Conference Meeting (Full Board) – to discuss the appointment of non-tenure administrators for the 1974-75 school year."
> (Board's Exhibit 3)

Additional meetings for the week of April 29, 1974, were scheduled in the above notice.

The Board asserts that nontenured administrators, including petitioner, were discussed at the conference meeting and at the special meeting which was a

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public meeting, on April 29, 1974. (Board's Brief, at p. 3) This contention is not denied by petitioner.

The Commissioner determines, therefore, that the notices are clear, precise, and in full compliance with *N.J.A.C.* 6:3-1.9 regarding the call of special meetings. Further, the record does not support the view that this meeting was held secretly. (Board's Exhibits 2, 3, and 4)

Regarding petitioner's argument that personnel matters should be held "***in public so that the public will have an awareness as to the business being conducted by the Board***" (Petitioner's Brief, at p. 3), the Board argues that the better practice is to vote publicly only on those contracts which will be renewed. The Board argues further that matters concerning the non-reemployment of teaching staff members should be considered in executive session, and when the Board determines not to reemploy an individual, written notice should be given pursuant to *N.J.S.A.* 18A:27-10 *et seq.* without having the matter made public.

The Commissioner holds that such a procedure insures confidentiality in handling non-reemployment decisions and serves the salutary purposes of protecting the reputation of the employee, shielding him from publicity and possible stigma.

N.J.S.A. 18A:27-1 reads as follows:

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

The law does not require that non-reemployment determinations be confirmed by action at a public meeting. In several recent decisions the Commissioner has addressed the practice of making determinations not to reemploy teaching staff members in private board sessions and has held it to be acceptable. *Aitken, supra; Burgin, supra; Bolger and Feller v. Board of Education of the Township of Ridgefield Park, Bergen County,* 1975 *S.L.D.* 93 (decided February 27, 1975), aff'd State Board of Education May 7, 1975; *Patricia Fallon v. Board of Education of the Township of Mount Laurel, Burlington County,* 1975 *S.L.D.* 156 (decided February 28, 1975), reversed and remanded by State Board of Education, June 4, 1975: *George Mazawey v. Board of Education of the City of Union, Hudson County,* 1975 *S.L.D.* 285 (decided May 1, 1975); *Marilyn Frignoca v. Board of Education of the Northern Regional High School District, Bergen County,* 1975 *S.L.D.* 303 (decided May 2, 1975); *Ronnie Abramson v. Board of Education of the Township of Colts Neck, Monmouth County,* 1975 *S.L.D.* 418 (decided May 28, 1975)

Further, the Commissioner has consistently held that it is in the public interest as a matter of sound educational policy that personnel matters should not be discussed at public meetings of a board. *Bolger and Feller, supra; Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332

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In *Ruch v. Board of Education of Greater Egg Harbor Regional High School District,* 1968 *S.L.D.* 7, the Commissioner commented as follows:

> "***It is equally clear that petitioner was not dismissed nor was his contract with respondent breached or terminated. The agreement between the parties expired June 30, 1966, by its own terms. Respondent took no action with respect to petitioner's third contract nor was any called for. It simply fulfilled its obligations under the contract and took no action to continue the relationship. The Commissioner knows of no statute or rule which requires a board of education to take some formal action with regard to the nonrenewal of a probationary contract which has expired. The employment of teachers who have not achieved tenure status in the district is a matter lying wholly within the discretionary authority of the board. *N.J.S.* 18A:11-1c, 18A:16-1, 18A:27-4 See also *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962). Respondent was under no obligation to renew its agreement with petitioner, and in failing to take any action with respect to his reemployment it did no more than exercise the discretionary powers accorded it by statute.***" (at pp. 8-9)

In *Donaldson v. Board of Education of North Wildwood, Cape May County,* 65 *N.J.* 236 (1974), the Court commented as follows regarding the Commissioner's decision in *Ruch*:

> "***The Commissioner first noted that the board's discretionary authority was not unlimited and that its action could be set aside if it was 'arbitrary, unreasonable, capricious or otherwise improper.' He then pointed out that the board could not resort to 'statutorily proscribed discriminatory practices, *i.e.,* race, religion, color, etc., in hiring or dismissing staff' nor could it adopt employment practices 'based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served.' 1968 *S.L.D.* at 10. He held that, procedurally, the burden of sustaining the appeal was on the teacher and that the teacher's 'bare allegation' or arbitrariness was 'insufficient to establish grounds for action.' He declined to enter into a reevaluation of the teacher's classroom performance and teaching competence, pointing out that the matter involved the supervisor's professional judgment which was highly subjective and which was not charged to have been made in bad faith.***" (at pp. 247-248)

In the instant matter, there is no allegation that the Board was arbitrary, capricious, unreasonable, or that it acted in bad faith; rather, petitioner attacks the Board's procedure regarding the call of special meetings, and the matters of personnel, which he contends may not be discussed by the Board in private session for the purpose of determining which staff members will not be offered renewal contracts.

The Commissioner cannot agree. The Board made its reappointments pursuant to *N.J.S.A.* 18A:27-1, and the motion to reappoint him at the special meeting of April 29, 1974, was not adopted. Thereafter, the Board notified him

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in writing that he would not be reemployed. (Board's Exhibit 1) Therefore, the Board has met its statutory obligation to petitioner and he has no further entitlement concerning his reemployment.

Petitioner's arguments concerning special meetings and executive sessions are without merit and will be set aside.

The Commissioner determines as groundless petitioner's contention that the special meeting called for June 26, 1974 to discuss, *inter alia,* petitioner's reemployment, is proof that the Board had not decided on his reemployment status. Petitioner's reliance on *Aitken, supra,* and *Burgin, supra,* is misplaced. The matter herein is distinguishable. In *Aitken* the Commissioner determined that the Board had not reached a decision concerning his reemployment, and in *Burgin* petitioner was informed that his reemployment would be reconsidered if he made the necessary improvements. He was thereafter notified to meet with the administrative principal for the purpose of discussing his employment for the next school year. No written notice followed that meeting. In the instant matter, the Board's vote resulting in a four-four tie precluded petitioner's reappointment pursuant to *N.J.S.A.* 18A:27-1, and he was thereafter so notified in writing on April 30, 1974.

The fact that certain Board members raised the matter again at the June 26, 1974 special meeting, does not negate the Board's action taken on April 29, 1974. Such a holding would mean that a board of education could never reconsider an earlier negative determination concerning the reemployment of a staff member. The same holding would fly in the face of the Court's directive in *Donaldson, supra,* which requires written reasons for non-reemployment when requested by teaching staff members and informal appearances before boards of education when so requested. These statements of reasons and informal appearances would often occur after April 30 in each academic year.

For all of the reasons set forth herein, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 11, 1975

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James Kenngott,

Petitioner,

v.

Lower Camden County Regional Board of Education, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Bleakly, Stockwell & Zink (Charles A. Little, Esq., of Counsel)

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

This matter having been opened before the Commissioner of Education (Daniel B. McKeown, Assistant Director, Division of Controversies and Disputes) by Charles A. Little, counsel for petitioner, on a Notice of Motion for Interim Relief received June 13, 1975, requesting a restraint against the Board of Education of the School District of Lower Camden County Regional, hereinafter "Board," to prevent said Board from excluding petitioner from participation in the twelfth grade commencement exercises scheduled to be held Sunday, June 15, 1975; John D. Wade, Esq., counsel for the School District of the Lower Camden County Regional; and

The arguments of counsel and testimony of witnesses having been heard regarding the allegation by petitioner that irreparable harm may result if respondent Board is not restrained from its intention to exclude petitioner from the twelfth grade commencement exercises which argument is grounded upon the allegation that such exclusion constitutes an excessively harsh penalty for the disciplinary infractions of chronic lateness allegedly committed by petitioner and upon the allegation that petitioner was denied due process, and the Brief filed by the Board in support of its position having been reviewed; and

It appearing that Board policy 5127-A (G) provides: "Seniors who have been suspended four (4) times during their Senior year will not be permitted to participate in the graduation ceremonies"; and

It appearing that petitioner was in fact suspended from school attendance four times during the 1974-75 academic year (his senior year); and

It appearing from the record herein that petitioner was in fact afforded a preliminary hearing by the school administrators; and

It appearing that petitioner grounds his motion for relief, *sub judice,* on the allegation that his last two suspensions were administered improperly; and

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It appearing that such an allegation requires a finding of fact in order to be sustained; and

It appearing that the element of time in this matter is critical; and

It appearing that petitioner was not denied an opportunity to be heard or that his rights to due process were violated; and

It appearing that the Board violated no provision of statutory law, Title 18A, Education Law; and

It appearing that petitioner's parents were notified of each and every suspension; and

It appearing that petitioner had complete knowledge of Board policy 5127-A (G), *ante;* and

It appearing that the Board will grant petitioner a certificate of promotion even though it has indicated its intention to exclude him from the promotion exercises;

The Commissioner finds that, under the circumstances of this matter the penalty imposed by the Board upon petitioner is not excessively harsh in view of the disciplinary record established by him during the school year. The Commissioner has previously held that, under certain circumstances, a local board of education may withhold a public award privilege in the interest of maintaining an orderly and efficient school system. *R.H., a minor, by his parent and guardian ad litem v. Board of Education of the Township of Delanco, Burlington County,* 1974 S.L.D. 655

In the previous case of *Gustave M. Wermuth et al. v. Board of Education of the Township of Livingston, et al., Essex County,* 1965 *S.L.D.* 121, the Commissioner stated the following:

> "***An effective school is an orderly one, and to be so it must operate under reasonable rules and regulations for pupil conduct. 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. ***" (at p. 129)

The basic fact in the instant matter is that the Board has exercised its discretionary authority to impose what it considers an appropriate penalty as a deterrent against future abuse of the kind alleged and, in all instances but one, admitted by petitioner.

The Commissioner will not set aside a discretionary action taken by a local board of education, acting within its statutory authority, unless he finds that the Board's exercise of its discretion constituted an arbitrary, capricious, or unreasonable action. *Thomas v. Board of Education of the Township of Morris,*

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89 *N.J. Super.* 327, 328 (*App. Div.* 1965), aff'd 46 N.J. 581 (1966) The Commissioner finds no evidence of an abuse of discretion in the matter herein controverted.

The Board in this instance has imposed a penalty, short of expulsion, which will exclude petitioner from the privilege of participation in a promotion ceremony which is separate and apart from the privilege to academic enrollment. *John H. Bartlett, Jr. v. Board of Education of the Township of West Orange,* 1938 *S.L.D.* 697 (1912)

The Commissioner finds no reason to substitute his discretion for that of the Board in the instant matter; accordingly,

IT IS ORDERED that the temporary restraint requested by petitioner against the Lower Camden County Regional Board of Education is hereby denied.

Entered this 13th day of June 1975.

COMMISSIONER OF EDUCATION

Darnell Holmes,

Petitioner,

v.

Board of Education of the Lower Camden County Regional High School District, et al., Camden County,

Respondents.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Marie White Bell, Attorney at Law

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

This matter having been opened before the Commissioner of Education (Daniel B. McKeown, Assistant Director, Division of Controversies and Disputes) by Marie White Bell, counsel for petitioner, on a Notice of Motion for Interim Relief received June 13, 1975, requesting a restraint against the Board of Education of the School District of Lower Camden County Regional, hereinafter "Board," to prevent said board from excluding petitioner from participation in the twelfth grade commencement exercises scheduled to be held Sunday, June 15, 1975; John D. Wade, Esq., counsel for the School District of the Lower Camden County Regional; and

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The arguments of counsel and testimony of witnesses having been heard regarding the allegation by petitioner that irreparable harm may result if respondent Board is not restrained from its intention to exclude petitioner from the twelfth grade commencement exercises, which argument is grounded upon the allegation that such exclusion constitutes an excessively harsh penalty for the disciplinary infraction of insubordination as allegedly committed by petitioner and upon the allegation that petitioner was denied due process, and the Brief filed by the Board in support of its position having been reviewed; and

It appearing that Board policy 5127-A (G) provides: "Seniors who have been suspended four (4) times during their Senior year will not be permitted to participate in the graduation ceremonies"; and

It appearing that petitioner was in fact suspended from school attendance four times during the 1974-75 academic year (his senior year); and

It appearing from the record herein that petitioner was in fact afforded a preliminary hearing by the school administrators; and

It appearing that petitioner's parents were notified of each and every suspension; and

It appearing that petitioner had complete knowledge of Board policy 5127-A (G), *ante;* and

It appearing that the Board will grant petitioner a certificate of promotion even though it has indicated its intention to exclude him from the promotion exercises;

The Commissioner finds that, under the circumstances of this matter, the penalty imposed by the Board upon petitioner is not excessively harsh in view of the disciplinary record established by him during the school year. The Commissioner has previously held that, under certain circumstances, a local board of education may withhold a public award privilege in the interest of maintaining an orderly and efficient school system. *R.H., a minor, by his parent and guardian ad litem v. Board of Education of the Township of Delanco, Burlington County,* 1974 *S.L.D.* 655

In the previous case of *Gustave M. Wermuth et al. v. Board of Education of the Township of Livingston, et al., Essex County,* 1965 *S.L.D.* 121, the Commissioner stated the following:

> "*** An effective school is an orderly one, and to be so it must operate under reasonable rules and regulations for pupil conduct. 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. ***" (at p. 129)

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The basic fact in the instant matter is that the Board has exercised its discretionary authority to impose what it considers an appropriate penalty as a deterrent against future abuse of the kind alleged and, in all instances but one, admitted by petitioner.

The Commissioner will not set aside a discretionary action taken by a local board of education, acting within its statutory authority, unless he finds that the board's exercise of its discretion constituted an arbitrary, capricious, or unreasonable action. *Thomas v. Board of Education of the Township of Morris,* 89 *N.J. Super.* 327, 328 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966) The Commissioner finds no evidence of an abuse of discretion in the matter herein controverted.

The Board in this instance has imposed a penalty, short of expulsion, which will exclude petitioner from the privilege of participation in a promotion ceremony which is separate and apart from the privilege to academic enrollment. *John H. Bartlett, Jr. v. Board of Education of the Township of West Orange,* 1938 *S.L.D.* (1912) 697

The Commissioner finds no reason to substitute his discretion for that of the Board in the instant matter; accordingly,

IT IS ORDERED that the temporary restraint requested by petitioner against the Lower Camden County Regional Board of Education is hereby denied.

Entered this 13th day of June 1975.

COMMISSIONER OF EDUCATION

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Kathy A. Wolf,

Petitioner,

v.

Board of Education of the Borough of Norwood, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Joseph T. Skelley, Esq. (Robert T. Tessaro, Esq., of Counsel)

Petitioner, a permanently certified elementary school teacher, alleges that she was a tenured teacher and was illegally terminated by the Board of Education of the Borough of Norwood, hereinafter "Board." She petitions the Commissioner of Education to order the Board to reinstate her to a suitable teaching position and to compensate her for her lost earnings. The Board denies that petitioner was tenured at the time her employment was terminated or that her termination was in any way improper or illegal.

A hearing in the matter was conducted on October 22, 1974 at the office of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner. Briefs were subsequently filed by counsel. The report of the hearing examiner is as follows:

The relevant facts show that petitioner first taught in the Borough of Norwood School District for ten days at a per diem rate of $24 from June 7, 1971 through June 18, 1971. She continued to teach until the end of the academic year at a daily rate of $26.40 for four additional days from June 21, 1971 through June 24, 1971. (R-4; R-5) The sole issue in controversy is whether this continuous period of fourteen days of teaching service may properly be added to her subsequent three years of teaching service with the Board in order to qualify her as a tenured employee pursuant to *N.J.S.A.* 18A:28-5(c) which requires "***the equivalent of more than three academic years within a period of any four consecutive academic years***."

The Board's administrative principal arranged for petitioner to come to the school on May 31, 1971 to sign a contract to teach a second grade class during the forthcoming 1971-72 academic year. (Tr. 9) When she did so, he informed her of a second grade class, then being taught by a temporary substitute (Tr. 35), whose regular teacher had been absent because of illness during the last ten school days of May 1971. (R-1; R-2) This teacher, having learned that she was pregnant, had notified the school that she would not return during June 1971 and applied for maternity leave. Maternity leave was granted her by the Board

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on June 7, 1971 to become effective retroactively to May 23, 1971, from which date no salary was paid to her for the remainder of the school year. (C-1; C-2; C-3) At the time petitioner signed her 1971-72 contract, the administrative principal offered petitioner the opportunity to complete the school year in June 1971 in charge of this second grade class. Petitioner testified in this regard as follows:

> "***I agreed and he also stated that I would be paid as a substitute and will be paid until the end of June and I agreed to that. I graduated June second and***observed the classroom on a Friday and the following Monday I began teaching and I taught until the end of June***." (Tr. 6)

The hearing examiner finds that the duties performed by petitioner during the controverted fourteen-day period were substantially the same as those of any teacher or substitute teacher at the close of the school year. They were typical of those which she was called upon to perform in the ensuing three years, with the exception that she was required to rely upon the records of others in completing pupil grades and records in June 1971.

Petitioner was paid during this period at the daily rate of pay detailed in the Board's salary policy for substitute teachers. (Tr. 40-41) The Board itself took no formal action at any time to approve her employment of June 1971 as either a teacher or a substitute teacher. Nor did its agents enroll her in the New Jersey Teachers' Pension and Annuity Fund for that period. (Tr. 46) It did, however, approve the issuance of her teaching contract for the 1971-72 school year at its regular June meeting. (Tr. 47)

During the fourteen days she worked in June 1971, petitioner prepared her own lesson plans, occasionally conferring with the teacher who was on maternity leave. (Tr. 15, 23) She did not submit these plans to the principal for approval, nor was she observed or evaluated during that time. However, it was not the practice in that school to evaluate any teacher nor to require that lesson plans be submitted for approval during June. (Tr. 30-32) Additionally, petitioner taught the class, conducted testing, recorded grades on report cards and permanent record folders, conferred with parents, and did those numerous duties attendant upon the closing of the school year. (Tr. 12) It was further testified by the assistant principal that in the event of a substitute completing a school year it was customary for that person to complete report cards, making reference to those pupil records which were available. (Tr. 32) She further stated that free time was provided teachers to complete such duties. (Tr. 30)

Petitioner, thereafter, taught a second grade class in the same classroom during the 1971-72 school year and second grade classes in a different building during the academic years 1972-73 and 1973-74. On April 2, 1974, petitioner was notified by the Board that her employment would be terminated at the end of the school year in June 1974.

Petitioner argues that the tolling of time for tenure began on June 7, 1971, since she was required to perform during those fourteen days not merely the limited work of an itinerant substitute but all the duties of a regular teacher. She

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further alleges that, since she was a certified teacher for an uninterrupted period in excess of three years in the Board's employ in a position which required that she hold an appropriate teaching certificate issued by the State Board of Examiners, she had attained tenure prior to her termination date. Thus, she avers that the mere facts that she was paid as a substitute, denied certain fringe benefits, and not appointed by Board resolution for the fourteen days in June 1971 in no way invalidate that period from partially fulfilling the probationary requirement for tenure. Petitioner contends that the Board had ample opportunity to evaluate her as a teacher both during this period and the three years which followed.

In support of her contention that she was tenured and thus illegally terminated by the Board, petitioner cites *Juanita Zielenski v. Board of Education of the Town of Guttenberg, Hudson County,* 1970 *S.L.D.* 202, reversed State Board of Education 1971 *S.L.D.* 664, affirmed Docket No. A-1357-70, Superior Court of New Jersey, Appellate Division, February 16, 1972, wherein it was said by the State Board of Education that:

> "***[It is] 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 an employing board, but by an examination of the factual picture presented.***" (at p. 665)

Additionally, petitioner cites, among other cases, *Jack Noorigian v. Board of Education of Jersey City, Hudson County,* 1972 *S.L.D.* 266, aff'd in part/rev'd in part State Board of Education 1973 *S.L.D.* 777; *Lorraine Ewing v. Board of Education of the Township of Cedar Grove, Essex County,* 1968 *S.L.D.* 125; *Mildred Givens v. Board of Education of the City of Newark, Essex County,* 1974 *S.L.D.* 906; *Nicoletta Biancardi v. Board of Education of the Borough of Waldwick, Bergen County,* 1974 *S.L.D.* 360, aff'd State Board of Education 368; *Board of Education, Jersey City v. Wall et al.,* 119 *N.J.L.* 308 (*Sup. Ct.* 1938); *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962); *Gordon v. State Board of Education,* 132 *N.J.L.* 356 (*E.&A.* 1944); and *Schulz v. State Board of Education,* 132 *N.J.L.* 345 (*E.&A.* 1945).

Finally, petitioner contends that, for the above reasons and in the light of the cases cited, it must be concluded that the regularity and responsibility of her employment are the material factors which determine that she was a teacher and not a substitute teacher during June 1971, and that she is entitled to reinstatement to her position with back pay.

Conversely, the Board maintains that petitioner was employed in June 1971 to complete the last fourteen days of the school year as a daily substitute for an absent teacher and worked an insufficient number of days that year (20) to qualify for its third and highest step of the substitute pay scale which provides for compensation in accordance with the regular teachers' salary guide. The Board contends that her duties substantially differed from those of regular teachers in that her report card grades and pupil evaluations were largely based on records of both the previous substitute and the regular teacher. The Board

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contends that her duties during the fourteen days in June were largely mechanical chores to close the classroom at the end of the school year.

The Board avers that petitioner was during that period employed in a substitute teaching position which did not require a teaching certificate issued by the State Board of Examiners. In support of this contention, *N.J.A.C.* 6:11-4.7 is cited as follows:

> "Persons who do not hold a teaching certificate issued by the State Board of Examiners and who are not eligible to receive one, but who can present a minimum of 60 semester-hours credits completed in an accredited college, may be granted a county substitute certificate for day-to-day substitute teaching. The certificate will be issued for a three-year period, but the holder may serve for no more than 20 consecutive days in the same position in one school district during the school year. Such certificates, which are issued by the county superintendent of schools, are designed only for emergency purposes when the supply of properly certificated substitutes is inadequate to staff the school. They carry none of the accrued benefits, such as pension and tenure, to which a regularly employed teacher is entitled, and are intended only for persons temporarily performing the duties of a fully certificated and regularly employed teacher."

The Board thus maintains that it was entitled to employ petitioner during the controverted fourteen days in a position which, for that limited period of time, did not require that the employee hold a certificate issued by the State Board of Examiners. It argues that *Biancardi, supra,* is importantly distinguishable from the instant matter in that Biancardi was hired for a period exceeding two months and thus could not legally serve uninterruptedly in her position for a period in excess of twenty days on a county substitute certificate. The Board states that petitioner, serving a period of only fourteen days in June 1971, was not required to hold a certificate from the State Board of Examiners for that period.

Finally, the Board asserts that petitioner for the disputed period of fourteen days was merely acting as a substitute in the place of an absent teacher and that this period did not entitle her to the benefits of the tenure laws. In support of this contention, *Schulz, supra,* is cited wherein the Court stated:

> "***The three year period which is, unless shortened by the employing board, a necessary antecedent to the acquisition of tenure, gives, if served under conditions of regular employment, an opportunity for demonstration of character, teaching qualities and ultimate influence upon the personality and mentality of the student *which is not afforded by the exigencies and distractions of substitute teaching****."
>
> (*Emphasis supplied.*) (at p. 354)

The hearing examiner notes that the provision of *N.J.A.C.* 6:11-4.7 which provides that a substitute teacher who holds only a county substitute certificate may serve no more than twenty consecutive days, also provides that:

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"***Such certificates, which are issued by the county superintendent of schools, are designed only for emergency purposes *when the supply of properly certificated substitutes is inadequate to staff the school.****"
(*Emphasis supplied.*)

In that petitioner was eligible for, and in fact issued, a permanent elementary teaching certificate in June 1971, and was available to staff the class, there appears to be no pertinence to the Board's application of the twenty-day rule, *ante.* The administrative principal, acting on the Board's behalf, was under obligation, pursuant to State Board rules, to staff the class with the available regularly-certified teacher and properly did so.

The hearing examiner further notes that the within dispute contrasts with *Biancardi, supra,* and *Zielenski, supra,* in that their controverted service extended over a period in excess of two and five months respectively, as compared to petitioner's service of fourteen days in June 1971. However, it is clear that petitioner herein, as well as Biancardi and Zielenski, all served in positions which had been vacated by previous teachers. Petitioner, however, served in a position from which the previous teacher had been absent because of sickness in May 1971 and, when it became known to her, was absent in June 1971 because of complications attendant upon pregnancy for which she requested and was granted leave effective May 23, 1971.

It was stated by the Commissioner in *Josephine DiSimone v. Board of Education of the Borough of Fairview, Bergen County,* 1966 *S.L.D.* 43 that:

"***It is clear that 'all teachers' does not include substitute teachers, student teachers, or others who are not regularly employed by a board of education. *Schulz v. Newark Board of Education,* 132 *N.J.L.* 345 (*E. & A.* 1945) It is also clear that teachers who are regularly and steadily employed are entitled to tenure protection. *Wall v. Jersey City Board of Education,* 1938 *S.L.D.* 614, 119 *N.J.L.* 308***." (at p. 45)

Similarly the Court stated in *Schulz, supra,* that:

"***The conception that the classification 'teacher,' as used in the school law and in school practice, is not comprehensive of the classification 'substitute teacher' has support in our statutes, in school practices and decisions, and in the opinions of our courts.***" (132 *N.J.L.* at 350)

"***That the legislative mind was not a stranger to the distinction between teachers and substitute teachers is shown by the precise language in the 1919 amendment (chapter 80, *Pamph. L.* 1919) incorporating the pension fund feature in the general public school statute of 1903 (chapter 1, *Pamph. L., Special Session,* 1903): 'No person shall be deemed a teacher within the meaning of this article who is a substitute teacher***' (now *R.S.* 18:13-25) [now *N.J.S.A.* 18A:66-2(p)]. We find significance in the legislative recognition, in any respect, of 'substitute teachers' as a class distinct from 'teachers' and particularly in a respect which carries in favor of teachers a benefit or a protection which is denied to substitute teachers.

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> The pension fund legislation and the Tenure Act (chapter 243, *Pamph. L.* 1909) were not isolated statutes; they were both enacted as integral parts of the same school law and therefore may be said to be *in pari materia*.***" (*Id.* at 351-352)

> "***The word 'substitute' usually presents the idea of something or some one substituted for another—not the real thing or the real person, but a 'substitute.'***" (*Id.* at 355)

It is stated in *Biancardi, supra,* that:

> "****The Commissioner has consistently construed the tenure statutes not to include substitute teachers employed to do particular substitute work for absent teachers.* Herein, there was no absent teacher, however, and no evidence that the Board sought to replace petitioner from April 27, 1970 through June 19, 1970. Rather, the evidence leads to the conclusion that the Board properly evaluated her teaching performance during the controverted period and on June 8, 1970, offered her a contract for the subsequent school year.***" (*Emphasis supplied.*) (1974 *S.L.D.* at 366)

Clearly then, it must be determined whether petitioner, who performed substantially the same work in June 1971 as did any other teacher or substitute teacher, was indeed a teacher or a substitute teacher for the controverted fourteen-day period.

The hearing examiner leaves to the Commissioner to determine whether petitioner's service in June 1971 triggered the tolling of time required for tenure, and whether, as of the date of her termination in June 1974, she was clothed with the protection of tenure.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the herein controverted matter, the hearing examiner report, and the objections thereto filed by the respective parties pursuant to *N.J.A.C.* 6:24-1.16. He addresses himself to the single narrow issue of whether petitioner's service of fourteen days during June 1971 may properly be added to her subsequent three continuous academic years of service as a teacher under contract with the Board.

The Commissioner, the State Board of Education, and the courts have spoken plainly that a board of education may not subvert the accrual of time required for tenure of one of its teaching staff members by the ruse of designating as a substitute one who in fact is employed as a teacher. *Biancardi, supra; Zielenski, supra; Wall, supra* It is likewise clear that the Legislature, the courts and the Commissioner recognize that there is a distinction between a teacher and a substitute teacher. *DiSimone, supra; Schulz, supra; Gordon, supra*

Herein, the Board was faced during the last ten school days of May 1971

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with an emergency situation in staffing its second grade class while its regular teacher was absent because of a sudden illness. A substitute teacher was assigned to this class until the end of May. Thereafter, at a time coinciding with petitioner's visit to the school relative to her employment in the ensuing year, the absent second grade teacher applied for maternity leave effective retroactively to May 23, 1971, *ante.* On June 7, 1971, this leave was granted by the Board. Meanwhile, petitioner had agreed to fill the vacancy created thereby until the end of the school term. She likewise agreed to be paid as a substitute for this period of fourteen days. (Tr. 6)

The Commissioner finds in the entire record no evidence that the Board or the Superintendent acted in any way to establish petitioner as other than a substitute teacher during this period. It appears that the Superintendent did not place on the June 7, 1971 agenda for Board approval the arrangement to which he and petitioner had previously agreed that she would complete the school year. Therein, the instant matter is clearly distinguishable from *Biancardi, supra,* and *Zielenski, supra*. Both Biancardi and Zielenski were employed for periods of two months and five months respectively by action of their respective boards at salaries of either a beginning teacher or a salary intermediate between that of a substitute teacher and a regular teacher.

Herein, the Board's sole action was to pay petitioner for the fourteen day period at the rate of a substitute to which rate she had previously freely agreed in consultation with the Superintendent. As was said by the State Board in *Zielenski, supra*:

> "***[O]ther 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 an employing board, but by an examination of the factual picture presented.***" (1971 *S.L.D.* at 665)

The factual picture presented in such cases must include the work performed, the degree of responsibility assigned, and the circumstances, contracts, and agreements attendant upon the employment itself.

When parties enter into agreements of employment, they are free agents seeking a meeting of the minds regarding such matters as responsibilities, duties, compensation and other involvements pertaining to such employment. While neither party may properly resort to a subterfuge, they are bound by such agreements as they have entered into for the duration of such employment. Herein, petitioner entered into an agreement to teach the second grade for fourteen days in June 1971 and to receive pay as a substitute for such services. This is clear from petitioner's own testimony wherein she stated:

> "***I agreed and he also stated that I would be paid as a substitute and would be paid until the end of June and I agreed to that.***" (Tr. 6)

The Commissioner has carefully weighed and considered the arguments of the respective parties in the light of past decisions of the Commissioner, the State Board, and the courts. He finds no evidence herein of intent on the part of

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the Board or the Superintendent to subvert, deceive, defraud or by subterfuge deprive petitioner of her tenure entitlement. Rather, it is determined that the Board, through its agent the Superintendent, faced with an emergency situation, employed petitioner as a substitute teacher for the brief period of fourteen days during June 1971.

Accordingly, it is determined that, absent a showing of impropriety on the part of the Board or its agent, the controverted period of fourteen days may not be counted toward the required period of time for tenure. To hold otherwise would extend the statutory protection of the tenure statutes beyond the intent of the Legislature which enacted them.

Petitioner was not clothed with tenure when her service terminated with the Board in June 1974. The Commissioner so holds.

The Commissioner is constrained to comment that in the day to day operation of the public schools numerous emergencies arise that require boards of education and their agents to fill vacancies temporarily with substitute teachers for longer or shorter periods of time than that described herein. The Commissioner will not interpret the tenure statutes in such fashion as to extend tenure rights beyond that which he believes was the legislative intent. Nor will he interpret them in such way as to lead to a ludicrous conclusion. He is further constrained to comment that boards of education should be fully informed by their agents of the filling of temporary vacancies which occur and that accurate written records should be made and maintained of any agreements and understandings that pertain thereto.

There being no relief which may properly be afforded to petitioner, the within Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 30, 1975

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"G.G." and "L.G.,"

Petitioners,

v.

Board of Education of the Borough of New Providence, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, "G.G." and "L.G.," *Pro Se*

For the Respondent, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

Petitioner L.G., parent of a pupil, Petitioner G.G., formerly enrolled in the New Providence High School, avers that G.G. was unfairly and arbitrarily denied an entitlement to attend a class in physical education during the 1973-74 school year. Such denial, petitioners allege, was grounded in a policy of the Board of Education of the Borough of New Providence, hereinafter "Board," which they aver was, and is, illegal. They request judgment to this effect. The Board defends the policy which resulted in the removal of G.G. from a class in physical education and has filed a Motion for Summary Judgment in which it avers the Petition is moot.

The matter is submitted directly to the Commissioner for decision on the Motion. Both parties have filed Briefs and/or Memoranda of Law. The basic facts of the matter are not in dispute.

G.G. was enrolled as a pupil in the twelfth grade at the New Providence High School during the 1973-74 school year. Included in his program of studies was a regular required course in physical education.

In the fall of the year he failed to report for the class on three separate occasions. Such improper absences from class are generally characterized as "cuts." He was then excluded or suspended from further participation by school officials. The exclusion from further class attendance was grounded in a written policy of the school which was evidently promulgated by school administrators. This policy is attached to the Petition of Appeal and provides, *inter alia*, the following:

"5. Cutting (unauthorized absence from class)

"a. Students who are absent from class without authorization while recorded as being in attendance on the day of that absence shall be referred to the office for cutting class.

"b. ***

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"c. The disposition of cutslips shall be handled as follows:

"The office will examine the circumstances relating to the referral. If the absence proves to be unauthorized, a registered letter of notification will be sent to the parents, the student will be assigned a detention and no credit will be received in that course for that period of time.

"The second cut will result in a conference involving parents, student, administrator and teacher. At this conference the parent shall be advised that the next cut will result in a suspension from school; three cuts in any course will result in withdrawal from the course. If a student is failing at the time of withdrawal, he shall receive a WF. If passing at the time of withdrawal he shall receive a WP. Neither a WF or WP grade will result in the acquisition of credit. In all instances of repeated cutting, a personal conference is recommended. If time does not permit a personal conference, a telephone conversation with the parents will suffice."

Such suspension of G.G. from physical education class continued for the balance of the 1973-74 school year. In school year 1974-75, however, G.G. enrolled in two physical education classes to make up the credits he had lost and it is stipulated that he completed his course requirements for a high school diploma in January 1975. Such diploma was scheduled to be awarded at commencement exercises in June 1975.

On January 16, 1975, however, the Petition of Appeal, *sub judice,* was filed and it contains, as a principal prayer, a request that the Commissioner direct the Board to rescind its policy and strike from the pupil's record any mention of suspension. (Petition of Appeal, at p. 2) The Petition also avers that the policy with respect to suspension from class because of a fixed number of cuts is contrary to the statutory prescription of *N.J.S.A.* 18A:37-5 and 18A:38-26. Such statutes are recited as follows:

N.J.S.A. 18A:37-5

"No suspension of a pupil by a teacher or a principal shall be continued longer than the second regular meeting of the board of education of the district after such suspension unless the same is continued by action of the board, and the power to reinstate, continue any suspension reported to it or expel a pupil shall be vested in each board."

N.J.S.A. 18A:38-26

"Such regular attendance shall be during all the days and hours that the public schools are in session in the district, unless it is shown to the satisfaction of the board of education of the district that the mental condition of the child is such that he cannot benefit from instruction in the school or that the bodily condition of the child is such as to prevent his attendance at school, but nothing herein shall be construed as permitting the temporary or permanent expulsion from school by the

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board of education of any district of any child between the ages of five and 20, except as explicitly otherwise provided by law."

These are the basic facts and contentions which are central to consideration of the Motion. Other contentions are concerned with whether or not the Board or school administration complied with the policy recited, *ante*, whether such policy was ever formally adopted by the Board, and whether petitioner was or was not afforded an opportunity to make up physical education course credits in summer school. Such contention need not be considered here, however, since the principal issue raised by the Board's Motion is that the Petition is moot.

The Board's Brief in support of its avowals that the Petition should be dismissed by reason of mootness is founded on the fact that the events of which petitioners now complain occurred in the fall of 1973 whereas the Petition was filed in January 1975. Further, the Board argues that G.G. has now completed his school program and, thus, there is no relief which the Commissioner can afford. In support of its argument that the Commissioner should dismiss the Petition as moot the Board cites *Sharon Ann Pinkham v. Board of Education of the Borough of South River et al., Middlesex County,* 1974 *S.L.D.* 1103. The Board does, however, advance arguments in support of its controverted policy with respect to unauthorized absences from class. It avers that the policy is in conformity with the dicta of the Commissioner in *Wheatley et al. v. Board of Education of the City of Burlington, Burlington County,* 1974 *S.L.D.* 851. The Board also maintains that the policy has been extremely effective in improving class attendance in New Providence High School.

Petitioners argue that the true question herein is not whether the policy with respect to unauthorized class absences is effective but "***whether its concept is in opposition to the guidelines of Title 18A and the Commissioner's opinion of 1965, whether its application was detrimental to the student, and whether that application conformed to the rules of the policy." (Brief of Petitioners, at p. 2) (Note: The referenced opinion of 1965 is not identified by petitioners.) Further, petitioners aver they believe the controverted policy to be punitive in nature and a denial of the rights of pupils to participate fully in school programs. Petitioners' argument with respect to mootness is that they did not know, at the time of the withdrawal or suspension of G.G. from physical education, the ramifications of such withdrawal in the context of the school law or prior decisions of the Commissioner.

The Commissioner has reviewed all such facts and arguments and determines that in practical terms the instant Petition is indeed moot. G.G. has now completed his high school program. Included in such program, according to an affidavit of the New Providence High School Principal were the courses in physical education from which he was withdrawn by school authorities in 1973, pursuant to the written policy, *ante*. Such policy, the Commissioner determines, essentially comports with the decision of the Commissioner in *Wheatley, supra,* wherein it was said:

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"***The Commissioner is well aware that the Board's purpose in adopting the controverted policy was to shift the responsibility for classroom attendance to the pupils and their parents. The Commissioner is also aware that this Board and every other local board of education experience difficulty in enforcing compulsory attendance requirements, and that school administrators expend a great deal of time and effort in this task. Notwithstanding these kinds of reasons, the public schools have the consistent obligation to require that their pupils be present in school in order that they may be taught. This policy is for the benefit of the pupils, their parents, and the community at large.

"The Commissioner is constrained to issue a caveat to all local boards of education in this State to review their policies and rules regarding pupil attendance in order that such policies conform to the State policy and also provide the most effective methods of insuring maximum school attendance.***" (at pp. 864-865)

Accordingly, the instant Petition is dismissed.

COMMISSIONER OF EDUCATION

June 30, 1975

Weehawken Education Association and John J. Corbett,

Petitioners,

v.

Board of Education of the Town of Weehawken, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Rothbard, Harris & Oxfeld (Doane Regan, Esq., of Counsel)

For the Respondent, Le Roy D. Safro, Esq.

Petitioner, a teaching staff member in the employ of the Board of Education of the Town of Weehawken, hereinafter "Board," avers he attained a tenured status in such employment in May 1973, and that a subsequent decision by the Board to dismiss him was illegal. He demands judgment to this effect and full restoration to his position. The Board denies petitioner's claim to the protection of tenure and maintains that its action to dismiss him was a legal exercise of its discretion.

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A hearing in this matter was conducted on September 30, 1974 by a hearing examiner appointed by the Commissioner of Education at the office of the Hudson County Superintendent of Schools, Jersey City. Briefs were filed by each of the parties subsequent to the hearing. The report of the hearing examiner is as follows:

The primary facts with respect to petitioner's employment by the Board are not in dispute, although the Board contends that during the initial period of such employment, April 20, 1970 through the end of the school year in June 1970, petitioner served as a substitute engaged by school administrators and not as a regular teacher. Thus the hearing was principally concerned with testimony pertinent to that contention.

The primary facts of the matter may be succinctly set forth as follows:

Petitioner was first engaged by school administrators on April 20, 1970 (Tr. 77) for work in a position classified by the Board as that of a substitute and he continued in such employment for the balance of the 1969-70 school year. (PR-6) This employment was not contractual. (Tr. 73) The position petitioner held during that period had been most recently vacated by a teacher who had requested and been granted a maternity leave by the Board. (Tr. 10) (R-2H)

Petitioner testified, and there was no testimony to the contrary, that he performed all the duties of a "regular" teacher during that period. (Tr. 9-39) In fact, the Superintendent of Schools agreed that petitioner's recital of his duties was an accurate account. (Tr. 76) Petitioner was paid for such work on a per diem basis in the period April-June 1970 although this compensation evidently approximated that of a beginning teacher. (Tr. 11) He was not, however, afforded any of the fringe benefits customarily given regular teachers (*i.e.* pension coverage, paid holidays, insurance protection, sick leave). (Tr. 12, 18, 74)

Petitioner was issued a permanent teaching certificate as a teacher of business education by the State Board of Examiners in May 1970. (P-2) His assignment as a teacher in the Board's employ was within the authorization of this certificate.

On May 12, 1970, the Board formally approved petitioner's employment as a contracted regular teacher for the full 1970-71 academic year at a salary level appropriate for a beginning teacher. (R-2A) The contract for this employment was, however, dated retroactively to April 17, 1970. (P-1A) Petitioner fulfilled all requirements pursuant to this contract and was then issued similar contracts for the 1971-72 and 1972-73 academic years. (P-1B,C)

Thus, at the end of the 1972-73 academic year petitioner's continuous service as an employee of the Board comprised a period of approximately three full academic years, two months and ten days, which, petitioner argues, had earned for him a tenured entitlement. The Board, while not disputing the

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continuity of the service, avers that the two month, ten day period in 1970 may not be added to the subsequent three-year period for tenure accrual since, the Board avers, petitioner was clearly engaged for that work as a substitute teacher. (Tr. 66, 71)

In any event, on April 6, 1973, the Superintendent of Schools addressed a letter (R-2C) to petitioner which stated, *inter alia,* that petitioner would not be "***offered a contract for the 1973-74 school year." (R-2C) Subsequently, however, a second letter to petitioner dated August 29, 1973 (P-3) did offer petitioner employment as a "substitute" for the 1973-74 school year "***for the sole purpose of mitigating any damages you [petitioner] may recover, or other compensation you may receive, as a result of a matter [*sub judice*] presently pending before the Commissioner of Education wherein you are the petitioner and the Weehawken Board of Education is the respondent." (P-3) Petitioner refused such offer and testified that he earned no income at all during the 1973-74 academic year. (Tr. 56)

The Superintendent of Schools testified that he had clearly explained to petitioner at his initial employment in April 1970 that the assignment was to be that of a substitute teacher. (Tr. 66) The Superintendent's subsequent testimony and that of the Board's Secretary was, in effect, that petitioner's treatment for all of that period was the treatment customarily afforded substitutes as distinguished from regular teachers, although the Superintendent did admit, as noted *ante,* that petitioner's duties were those which petitioner characterized as duties of a "regular" teacher. (Tr. 9, 76)

Petitioner avers that on the basis of such facts he has attained a tenured status as an employee of the Board and in support of this view he cites *Nicoletta Biancardi v. Board of Education of the Borough of Waldwick, Bergen County,* 1974 *S.L.D.* 360, affirmed State Board of Education 368, and other cases cited therein. *Juanita Zielenski v. Board of Education of the Town of Guttenberg, Hudson County,* 1970 *S.L.D.* 202, reversed State Board of Education 1971 *S.L.D.* 664, aff'd Docket No. A-1357-70, Superior Court of New Jersey, Appellate Division, February 1972; *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (*E.&A.*), 19 *A.2d* 656 (1941); *Canfield v. Board of Education of the Borough of Pine Hill,* 97 *N.J. Super.* 483 (*App. Div.* 1967); *Cornelius T. McGlynn v. Board of Education of the Township of Lumberton, Burlington County,* 1972 *S.L.D.* 28

The Board argues, to the contrary, that petitioner's initial service as an employee of the Board was clearly defined for him as that of a substitute and not a regular teacher and that the distinction is significant in the determination which is now required. Furthermore, the Board argues that pursuant to the statute *N.J.S.A.* 18A:27-4 it has authority to assign teaching staff members in ways which it deems appropriate, subject only to a test of reasonableness and the strictures of the tenure statutes. *N.J.S.A.* 18A:28 In the Board's view its employment of petitioner to perform teaching duties the Board characterized as those of a substitute was a reasonable exercise of discretion in the context of the statutes, *ante,* and, therefore, there is no reason for the exercise of discretion by the Commissioner of Education. In support of this view, the Board cites *Quinlan*

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v. Board of Education of North Bergen, 73 *N.J. Super.* 40 (*App. Div.* 1962); *Joseph J. Dignan v. Board of Education of Rumson-Fair Haven Regional High School, Monmouth County,* 1971 *S.L.D.* 336 affirmed State Board of Education September 11, 1974; *Rebecca Mayes v. Board of Education of the City of Bridgeton, Cumberland County,* 1971 *S.L.D.* 575; *Deborah Jean Capen et al. v. Board of Education of the Town of Montclair, Essex County,* 1971 *S.L.D.* 301; and a series of other decisions of the Commissioner and the Courts. The statute of specific reference, *N.J.S.A.* 18A:27-4, is recited in its entirety 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 hearing examiner has considered and reviewed such facts and arguments and sets forth the following findings:

1. Petitioner's initial service as an employee of the Board was clearly that of a regular teacher although he was afforded none of the usual emoluments for such position. He had a regular, identical assignment for each day of the period April – June 1970. (Tr. 8) He was totally responsible for planning daily lessons, making tests, preparing final examinations, grading report cards, etc. (Tr. 8 *et seq.,* 36)

2. Petitioner's initial service was rendered in a position which was otherwise vacant.

3. There followed a period of three consecutive academic years during which petitioner served as a fully-contracted regular teacher in the employ of the Board.

4. Such total period of three years, two months and ten days of service performing the duties of a regular teacher have clearly earned for petitioner the right to the protection which the statutes afford to tenured teaching staff members in the employ of local boards of education. *N.J.S.A.* 18A:28-5

This latter finding is grounded in the precise authority of the tenure statutes and prior decisions of the Commissioner, the State Board of Education, and the Courts. The primary statute of reference is *N.J.S.A.* 18A:28-5 which states in pertinent part:

> "The services of all teaching staff members including all teachers*** and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners serving in any school district or under any board of education*** shall be under tenure***after employment in such district or by such board for:
>
> ***

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

The State Board of Education considered just this statute in *Zielenski, supra,* and it said:

"These statutes lead us to conclude that it was not intended to deny tenure to a teacher, otherwise eligible, who *taught continuously and performed all the duties of a regular teacher because the formality of a roll call vote may not have been undertaken* where, as here, the Board had full knowledge of the details of petitioner's employment, assignment and benefits, and where the actions of its Superintendent were ratified and concurred in by the Board. We find support for this position in *Board of Education of Jersey City v. Wall, supra.* [119 *N.J.L.* 308 (*Sup. Ct.* 1938)]. There, the teacher was employed by the local board as a 'so-called substitute' and was paid on a per diem basis. She was assigned to a regular position in the same manner as teachers having tenure and taught continuously from 1931 to 1936. In holding that tenure was acquired, the Court stated:

'The device adopted cannot defeat the purpose of the act, which was designed to give a measure of security to those who served as teachers three consecutive academic years. A mere occasional absence of a teacher by reason of illness or excuse could not disturb this right, and the local board of education cannot evade the statute, *notwithstanding the alleged employment by the day if a teacher actually serves for the requisite period of years.****

'Had the proofs not shown continuous employment for the statutory period, the result would have been otherwise.' (119 *N.J.L.* at 309)***" (*Emphasis supplied.*) (1971 *S.L.D.* at 668)

The Commissioner also had reason to review such tenure statutes in *Biancardi, supra.* He said:

"The Commissioner observes that the Legislature in its wisdom was not totally reliant upon nomenclature but was purposefully comprehensive regarding who should be clothed with the benefits of tenure wherein it included in *N.J.S.A.* 18A:28-5:

'***such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners***.'

"It is clear that a certificate was required for petitioner to teach as either a substitute or as a teacher. Since the Board first agreed to employ her for an uninterrupted period from April 27, 1970 through June 1970, it follows that a certificate issued by the State Board of Examiners was required, since she could serve uninterruptedly for no more than twenty days on a substitute certificate issued by the County Superintendent of Schools. Such finding alone, however, is not totally dispositive of the matter.

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"The Commissioner has consistently *construed the tenure statutes not* to include *substitute teachers* employed to do particular substitute work for *absent teachers. Herein* there was *no absent teacher,* however, and no evidence that the Board sought to replace petitioner from April 27, 1970 through June 19, 1970. Rather, the *evidence leads to the conclusion that the Board properly evaluated her teaching performance during the controverted period* and on June 8, 1970, offered her a contract for the subsequent school year. (P-4)

"The recognized purpose of the probationary period prior to acquisition of tenure is to afford the employing board an opportunity to properly evaluate its employee. As was said by the Court in *Schulz v. State Board of Education et al.*, 132 *N.J.L.* 345 (*E.&A.* 1944):

> '***The three year period which is, unless shortened by the employing board, a necessary antecedent to the acquisition of tenure, gives, if served under conditions of regular employment, an opportunity for demonstration of character, teaching qualities and ultimate influence upon the personality and mentality of the student *which is not afforded by the exigencies and distractions of substitute teaching*****.' (*Emphasis supplied.*) (at p. 354)

"In the instant matter, the Commissioner, having weighed the evidence herein presented, concludes that the necessary probationary period in excess of three academic years within a four-year period was served by petitioner as a regular teacher. *Nomenclature chosen at the convenience of the Board, attendant emoluments connected with employment, or the lack thereof, may in no way deprive petitioner of the statutory cloak of protection provided by tenure resulting from her years of service.*

"The Board could easily have avoided the acquisition of tenure by petitioner, had it so chosen, by the termination of her employment at any time prior to April 27, 1973. As was said by the Court in *Canfield v. Board of Education of the Borough of Pine Hill,* 97 *N.J. Super.* 483, 490 (*App. Div.* 1967); reversed 51 *N.J.* 400 (1968):

> '***tenure is statutory and arises only by passage of the time fixed by the statute, and the discharge of an employee before the passage of the required time bars tenure***.' (at p. 490)

"It was likewise stated by the Commissioner in *Cornelius T. McGlynn v. Board of Education of the Township of Lumberton,* 1972 *S.L.D.* 28 that:

> '***where service of a teaching staff member has been rendered for the complete period required by statute a tenure status is accrued at the precise moment when the requisite period has expired. From that time forward, in the Commissioner's view, the teaching staff member has tenure.***' (at p. 33)***" (*Emphasis supplied.*)
> (1974 *S.L.D.* at 366-367)

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The primary recommendation of the hearing examiner that petitioner in the instant matter did acquire a tenure status as an employee of the Board is founded on these previous decisions. The factual situation herein is almost identical to that of *Biancardi, supra.* An initial period of service performing the duties of a regular teacher may be added to three full subsequent years of contracted employment for tenure consideration.

Finally, the hearing examiner observes that the statute *N.J.S.A.* 18A:66-14 expressly sets forth the mandate that an initial temporary period of employment as a teacher may be added by the teacher to his period of pension coverage if he is then permanently employed. The statute in its entirety provides:

> "Any person employed temporarily as a teacher and whose temporary employment resulted in permanent employment or any person employed as a substitute immediately prior to permanent employment shall be permitted to make contributions covering such service in accordance with the rules and regulations of the board of trustees and receive the same annuity and pension credits as if he had been a member during such service."

The primary finding herein is that such initial service may be added in a parallel manner for purposes of tenure accrual as well.

Accordingly, the hearing examiner recommends that the Commissioner restore petitioner forthwith to his position as a regular tenured teaching staff member in the employ of the Board.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the replies pertinent thereto which have been filed by petitioners and the Board. It is noted that neither reply takes exception to the basic conclusions of law set forth by the hearing examiner or to the recited essential facts on which such conclusions were based. Nor does the Commissioner. He determines, therefore, that petitioner is indeed a tenured employee of the Board and the Commissioner directs that he be restored to his position forthwith.

There remains, however, an argument by the parties herein with respect to petitioner's entitlement to salary compensation and other emoluments retroactive to the beginning of the 1973-74 school year. In the Board's view "***the issue of damages *** becomes the most important question to be determined by the Commissioner.***" (Reply of the Board to Report of the Hearing Examiner) The Board maintains, in this regard, that its offer of employment to petitioner as a "substitute" during school year 1973-74 (P-3), and petitioner's refusal to accept such employment, bars a recovery by him of salary compensation on a retroactive basis. The Board avers that "***should the question of improper termination of employment be resolved in his [petitioner's] favor***" a recovery of damages "***would be patently unfair

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and inequitable and would unjustly penalize respondent***." (Reply of the Board to Report of the Hearing Examiner)

The Commissioner does not agree. The issues in this matter were rendered *stare decisis* by the prior litigation in *Zielenski, supra; Canfield, supra*; and *McGlynn, supra.* In 1973 the Board knew, or should have known, that the continuous service of a fully certified teaching staff member in a teaching position for a period of three years, two months and ten days was sufficient to satisfy the clear statutory requirement for the accrual of tenure. *N.J.S.A.* 18A:28-5 Thus, in September 1973, petitioner had an entitlement to the position from which he was summarily removed and had no obligation to perform the duties of a substitute. The Commissioner so holds.

Accordingly, having directed that petitioner be restored to his teaching position forthwith, the Commissioner further directs that petitioner be afforded all the salary benefits and other emoluments that are due him retroactive to the date of September 1, 1973.

COMMISSIONER OF EDUCATION

June 30, 1975

Weehawken Education Association and John J. Corbett,

Petitioners-Appellees,

v.

Board of Education of the Town of Weehawken, Hudson County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 30, 1975

For the Respondent-Appellant, LeRoy D. Safro, Esq.

For the Petitioners-Appellees, Rothbard, Harris & Oxfeld (Doane Regan, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. The State Board of Education directs that Petitioner-Appellee Corbett be afforded all salary benefits and other emoluments due him retroactive to the date of September 1, 1973, mitigated only by the amount of his earnings subsequent to that date.

December 3, 1975
Pending before Superior Court of New Jersey

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Stella and Ermand Centofanti, Sue and Victor Scianimanico, Edna and Ronald Burdge, Joan and Frank Seems, Doris and George Yurcho, Mr. and Mrs. Robert McGhee and Mr. and Mrs. Alton,

Petitioners,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Stella Centofanti, *Pro Se*

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

Petitioner Centofanti, on her behalf and on behalf of the other named petitioners herein, alleges that an action taken by the Wall Township Board of Education, hereinafter "Board," with respect to a transportation policy, was improper. The Board denies the allegations set forth herein and avers that its action in all respects was, and is, proper and legal.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner of Education on February 5, 1975 in the office of the Monmouth County Superintendent of Schools, Freehold. The report of the hearing examiner is as follows:

The Board's policy in regard to pupil transportation to and from its schools (R-5), adopted October 1950, is general in nature. That four-page policy sets forth, at page one, the Superintendent's responsibility regarding the assignment of pupils to school buses. While pages two and three describe the standards for pupil behavior while riding on school buses, page four specifies the Board's policy in regard to pupil educational field trips.

As a result of that policy, the Board determined to establish four bus stops (R-1) for pupils in the elementary grades. Those bus stops were located at (1) Catherine Street and Marshall Road; (2) Kelly Lane and Marshall Road, both of which are one block removed from Highways 33 and 34, hereinafter "Highway"; (3) Bowman Avenue; and (4) the last stop, approximately 150 feet on the Highway north of Bowman Avenue.

Thereafter, the Board determined to consolidate and to alter the aforementioned four bus stops. (R-2) At its February 1974 meeting, the Board adopted the following resolution (R-4) in regard to pupil transportation:

> "Motion by Mrs. White, seconded by Mr. Koffler, approving the changes in the Transportation Routing for the school district, effective Feb. 22, 1974, on the P.M. run***."

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The effect of the Board's adoption of the resolution set forth above is that the bus stops originally designated for Catherine Street and Kelly Lane (intersecting at Marshall Road) are now designated for Catherine Street and Kelly Lane immediately on the Highway. The bus stop originally designated 150 feet north of Bowman Avenue on the Highway is now consolidated with the bus stop originally designated, and remaining so, at Bowman Avenue and the Highway.

Petitioner argues that by virtue of the Board's altering its school bus stops for pupils in the areas hereinbefore set forth, it has acted improperly and without due regard for the physical safety of the pupils. Petitioner has children who are affected by the change in the Board's policy. The Wall Township Supervisor of Traffic Safety testified, on the basis of one formal visit to the sites in question (Tr. 40-41), that a safety hazard for the pupils was created by the Board's action. (P-6) The Wall Township traffic bureau officer opined that, *inter alia,*

> "***This opinion is based on the fact that the children in question are being required to wait along side of a very high traffic volume highway carrying large commercial vehicles and, it should be noted, that the school bus stop is also adjacent to a diner.***" (P-6)

Additionally, a Board member testified that while the Board "***had not in fact visited the site in question [the school bus stop in question herein] ***" (Tr. 18), he did testify that "***the routes were changed [because of the] *** gas crisis and notices were distributed to the [parents of affected pupils] ***." (Tr. 16)

Elsewhere, the same Board member testified: (Tr. 17)

> "***at the time the route was changed [the action of the Board controverted herein] I was not aware, formally, of any conditions other than the gas crisis that forced us to change the routes.***"

Petitioner relies on the testimony of two other parents who support her contention that the stops on the existing bus route (R-2) are hazardous for their children. One parent stated that she now has to supervise her children while they wait for the bus at the corner of Catherine Street and the Highway:

> "***we live on a dead end street off the highway and I feel that my children aren't of the age to know heavily trafficed (sic) areas and being so young as they are I just consider I have to be there [at the bus stop with her children].***" (Tr. 112)

It was stated further that the only school pupils who are not affected by the revised bus route between Catherine Street, Kelly Lane, and the Highway are the kindergarten pupils (Tr. 14) who are transported by a minibus, a vehicle some eighteen feet shorter than a regular school bus. (Tr. 122)

Another parent testified similarly that his children were exposed to traffic

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safety hazards as a result of the revised bus route. (R-2) This is so, he testified, because his four children previously were picked up in front of their house on the Highway. This parent indicated that the original bus stop afforded his children the protection of a fenced-in area, whereas they are now required to walk to the new locations at Bowman Avenue and Kelly Lane which intersect with the Highway. Furthermore, he testified, his children now have to walk along the shoulder of the Highway because there are no paved sidewalks. (Tr. 104)

The Board maintains that its decision to revise its bus schedule was predicated upon a shortage of gasoline as a result of the energy crisis. Consequently, the Board determined to reduce bus stops in order to conserve the available supply of gasoline for its school buses.

In this regard, the Board distributed the following memorandum: (P-2)

"***TO: Students and Parents of Wall Township

"FROM: Superintendent of Schools

"DATE: February 14, 1974

"RE: Transportation and the Energy Crisis – Bulletin #3

"This is a follow up to the two previous Bulletins which informed you that the school system was in process of evaluating its busing program and would be implementing a change in bus routes and bus stops.

"The new revised schedule will be instituted on the *P.M. run, Friday, February 22, 1974.* Each student will receive a slip from his Bus Driver on Thursday or Friday of that week telling him of the new bus stop. All students will be let off on the Friday afternoon at the stop where they will be picked up on Monday morning and each day thereafter.

"We are aware that anytime there are changes, someone will be upset. We need your understanding and cooperation. Any further changes will only be made under extreme conditions.

"We appreciate your cooperation.

"Sincerely yours,

"PAUL W. BENNETT
Business Administrator in Charge of Transportation
WALL TOWNSHIP PUBLIC SCHOOLS***" (*Emphasis in text.*)

Subsequent to the issuance of the above memorandum, petitioners met with the Board in an unsuccessful attempt to resolve their areas of disagreement. Thereafter, petitioners communicated with the State Department of Education through the Monmouth County Superintendent of Schools and the Bureau of Pupil Transportation.

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After a tour of the bus routes controverted herein was personally made by a representative of the Bureau of Pupil Transportation, the County Superintendent of Schools advised petitioners by letter dated July 17, 1974, as follows:

> "***After carefully evaluating all the circumstances involved in the change of these bus routes, it is [the Bureau representative's] opinion that the local board made the changes in the best interest of the safety of the boys and girls who will ride these buses, and the new stops should remain as designated by the board of education.***" (P-1)

This opinion is reinforced by the representative's testimony adduced at the hearing. (Tr. 62-98)

Succinctly stated, the issues raised in this dispute are the following:

1. Did the Board exceed its authority in revising its bus routes as set forth above, and

2. By virtue of the existence of "traffic hazards" in regard to the revised bus stops, should the Commissioner intervene in regard to the Board's determination, thereby granting petitioners' requested relief?

Each local board of education is authorized to establish school bus transportation for its pupils when in its judgment it determines to do so. *N.J.S.A.* 18A:39-1 In instances where pupils live remote from the schoolhouse, boards of education are required to provide such pupils with transportation to and from school. The New Jersey State Board of Education defines the term "remote from the schoolhouse" at *N.J.A.C.* 6:21-1.3(a) which provides:

> "(a) The words 'remote from the schoolhouse' shall mean two and one half miles or more for high school pupils (grades 9-12) and 2 miles or more for elementary pupils (grades K-8), except for pupils suffering from physical or organic defects. State aid for shorter distances for the sole reasons of traffic hazards should not be given, inasmuch as traffic hazards are a local responsibility.***"

While there appears to be no question that the pupils herein are entitled to such transportation, the issue of whether vehicular traffic generated by the existence of the highways is sufficient cause for the Commissioner to set aside the Board's action revising school bus stops remains to be determined.

It has been consistently held that while parental concern for the safety of their children to and from school is understandable, the legal responsibility for the removal of traffic safety hazards does not rest with the local board of education. The Commissioner has on many occasions expressed his concern for conditions affecting the safety of pupils enroute to and from school. In *Schrenk v. Board of Education of Ridgewood,* 1960-61 *S.L.D.* 185, the Commissioner stated:

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> "***The provision for safe conditions of travel is a municipal function. A board of education is limited to educational functions. It can provide instruction in safety in order to inculcate habits of safety. It is not within its authority to enforce traffic laws, to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, etc., to meet the requirements of safe travel for school children.***" (at p. 187)

Other decisions of the Commissioner over the years have produced no elements which would influence him to a contrary judgment. They include *Read et al. v. Board of Education of Roxbury Township,* 1938 *S.L.D.* 763 (1927); *Iden et al. v. Board of Education of West Orange,* 1959-60 *S.L.D.* 96; *Frank v. Board of Education of Englewood Cliffs,* 1963 *S.L.D.* 229; *Livingston v. Bernards Township Board of Education,* 1965 *S.L.D.* 29; *Trossman et al. v. Board of Education of Highland Park,* 1969 *S.L.D.* 61; *Locker et al. v. Board of Education of the Township of Monroe,* 1969 *S.L.D.* 178; *Tolliver et al. v. Board of Education of the Borough of Metuchen,* 1970 *S.L.D.* 415; *Bocco v. Board of Education of the City of Camden,* 1971 *S.L.D.* 71; *Concerned Parents of Howell Township School Children v. Howell Township Board of Education,* 1972 *S.L.D.* 600; *Beggans et al. v. Board of Education of the Town of West Orange,* 1974 *S.L.D.* 829, affirmed State Board of Education, February 5, 1975.

In regard to the propriety of the Board's actions herein, the hearing examiner points out that *N.J.S.A.* 18A:11-1 empowers boards of education to:

> "***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***."

That the Board acted to revise its school bus stop policy is clear. There is no showing that the Board acted beyond its legislative authority.

On prior occasions the Commissioner has stated that when a board does not act improperly or go beyond its statutorily prescribed authority, the Commissioner will not intervene in that body's determination. *Boult and Harris v. Passaic Board of Education,* 135 *N.J.L.* 329 (*Sup. Ct.* 1947), affirmed 136 *N.J.L.* 521 (*E.&A.* 1947)

The hearing examiner finds no substantive basis for petitioners' stated cause of action. He therefore recommends that the Petition be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in this matter including the hearing examiner's report and the exceptions and objections filed by petitioners.

Petitioners complain that a letter from the Wall Township traffic officer was not included as evidentiary by the hearing examiner, when in fact, such

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letter (P-6) has been made part of the findings and reviewed by the Commissioner.

The Commissioner finds that petitioners' failure to initially obtain representation of counsel in the instant matter cannot serve as a basis for granting a new hearing. Accordingly, petitioners' request for a new hearing is denied.

The Commissioner has stated in previous decisions that local boards of education are not designated by statute to provide for the safety of children reaching school, inasmuch as traffic hazards are a local responsibility; therefore, the Commissioner adopts the findings of fact and conclusions of law of the hearing examiner, while not commenting on the wisdom of the action of the Board controverted herein. The Commissioner must once again point out that local boards of education have the statutory authority to establish rules and regulations for their day-to-day management and operation. Accordingly, having found no basis to intervene in the actions taken by the Board in the instant matter, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

June 30, 1975

Joseph Banick,

Petitioner,

v.

Board of Education of the Township of Riverside, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, James Logan, Jr., Esq.

For the Respondent, Christopher N. Peditto, Esq.

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Township of Riverside, hereinafter "Board," avers he was suspended for a two-week period without pay by action of the Board and without a certification of charges against him pursuant to the prescription of the Tenure Employees Hearing Law. *N.J.S.A.* 18A:6-10 *et seq.* He requests the Commissioner of Education to dismiss the charges against him which served as the basis for the Board's action and to clear his record. The Board avers that petitioner was engaged in an illegal activity and relies on equitable principles to sustain its action.

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At this juncture, petitioner has submitted a Motion for Dismissal of the charges against him and grounds the Motion on arguments contained therein. Neither petitioner nor the Board has filed a Brief. The matter is directly before the Commissioner for a decision.

The principal skeletal facts of this matter may be concisely stated.

On January 11, 1974, an altercation occurred at an unspecified time and place within the Riverside School System, and it is alleged by the Board that petitioner participated in it. Petitioner denies such participation and avers he was the "***victim of an assault and battery inflicted upon him by another teacher without provocation.***" (Petition of Appeal, at p. 2)

In any event, on January 15, 1974, petitioner was notified by the Superintendent of Schools of Riverside Township that the Board had directed petitioner's suspension without pay for the two-week period commencing January 16, 1974. The reason for such suspension, according to petitioner, was his alleged participation in the "altercation" of reference, *ante,* and a judgment by the Board that the participation constituted conduct unbecoming a teaching staff member.

Further, petitioner avers that no written charges against him were ever certified by the Board to the Commissioner pursuant to the statutory mandate (*N.J.S.A.* 18A:6-10, 11), and he also maintains that the Board has refused to even consider such certification. Such avowal is nowhere denied by the Board.

The Board's Answer to the Petition of Appeal is an extremely limited one. As stated, *ante,* it is the Board's contention that petitioner's participation in the alleged altercation was illegal. The Board also states, as a second separate defense, that it was "***led to believe that matters raised by Petitioner would be abandoned.***" (Answer of the Board)

The statutes on which petitioner relies are recited 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, or a person appointed by him to act in his behalf,* after a written charge or charges, of the cause or 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

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member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

"Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law." (*Emphasis supplied.*)

N.J.S.A. 18A:6-11

"If written charge is made against any employee of a board of education under tenure during good behavior and efficiency, it shall be filed with the secretary of the board and the board shall determine by majority vote of its full membership whether or not such charge and the evidence in support of such charge would be sufficient, if true in fact, to warrant a dismissal or a reduction in salary, in which event it shall forward such written charge to the commissioner, together with certificate of such determination."

N.J.S.A. 18A:6-13

"If the board does not make such a determination within 45 days after receipt of the written charge, or within 45 days after the expiration of the time for correction of the inefficiency, if the charge is of inefficiency, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon."

N.J.S.A. 18A:6-14

"Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, pending final determination of the same, and if the charge is dismissed, the person shall be reinstated immediately with full pay as of the time of such suspension."

N.J.S.A. 18A:6-15

"The board shall forthwith serve a copy of every written charge which is determined to be sufficient and to be supported by sufficient evidence, if true in fact, to warrant dismissal or a reduction in salary and a copy of its certification of determination upon the employee against whom charge has been made personally or by certified mail directed to his last known address immediately after such determination and the commissioner shall forthwith serve a copy of every written charge made lawfully to him upon the person against whom the charge has been made in the same manner immediately after receipt thereof."

Thus, it is clear that local boards of education are not empowered by law to render a final decision with respect to charges against tenured employees or to fix a penalty. The authority, instead, is for local boards to conduct a preliminary review "within 45 days" after receipt of a written charge to determine whether or not such charge "would be sufficient if true in fact" to warrant one of the prescribed penalties. (See *In re Fulcomer,* 93 *N.J. Super.* 404 (*App. Div.* 1967).)

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Measured by such specific statutory direction, it is clear that the Board's action in the instant matter was patently illegal and that the action exceeded the parameters of its authority. Petitioner was, in effect, charged, tried, convicted and penalized without a hearing and in the wrong forum. Such an action may not be sustained. The Commissioner so holds.

Accordingly, the Commissioner directs the Board to remove all reference to petitioner's alleged unbecoming conduct from his personnel file, to restore to him the salary which was withheld, and to afford him all other emoluments which may have been denied.

COMMISSIONER OF EDUCATION

June 30, 1975

Brick Township Education Association and Donald Cook,

Petitioners,

v.

Board of Education of the Township of Brick, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, Anton and Ward (Donald H. Ward, Esq., of Counsel)

The Brick Township Education Association, hereinafter "Association," and Donald Cook, hereinafter "petitioner," employed as a classroom teacher by the Brick Township Board of Education, hereinafter "Board," allege that the Board has refused to recognize petitioner's total academic credentials in establishing his salary for an unspecified number of school years. The Board denies the allegations and avers that its determinations in establishing petitioner's salary have in fact, recognized his academic credentials.

The pleadings in this matter were joined on December 4, 1973, subsequent to which a conference among the parties was set down for January 16, 1974. By letter dated January 14, 1974, counsel to the parties requested and were granted an adjournment of the conference, and were also granted their request to have the matter submitted to the Commissioner of Education for adjudication on a joint stipulation of facts and Briefs in support of their respective positions. By letter dated January 18, 1974, the hearing examiner assigned to the matter directed the parties to file their stipulation by February 15, 1974. Not having

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received the stipulation by that date, the hearing examiner telephoned counsel to petitioner on April 8, 1974, and again on July 16, 1974. On both occasions the hearing examiner was informed that the stipulation was forthcoming. Not receiving any information nor communication from the parties, the hearing examiner, by letter dated October 2, 1974, requested a status report on the matter from the parties. On March 20, 1975, the hearing examiner, not receiving any response, informed petitioner that unless the matter was moved by April 15, 1975, he would recommend to the Commissioner that the matter be dismissed, with prejudice, for failure to prosecute.

In response, petitioner, by letter dated April 4, 1975, moved to have the Commissioner decline jurisdiction in the matter, originally opened before the Commissioner by petitioner on the grounds that the dispute herein is a term and condition of employment and therefore is subject to arbitration. In support of this position, petitioner cites *Dunellen Board of Education et al. v. Dunellen Education Association et al.*, 64 *N.J.* 17 (1973).

Thereafter, the Board filed its Brief (1) in opposition to petitioner's Motion to decline jurisdiction and (2) in support of its position that the dispute herein is without merit and should be dismissed with prejudice.

The record of the entire matter is now before the Commissioner for adjudication of the following two issues:

1. Does the Commissioner have jurisdiction in the matter?

2. If so, does the record herein reflect a circumstance which would require the Commissioner's intervention and grant relief to petitioner?

The Commissioner observes that petitioner complains that he

> "*** is a chiropractic physician duly licensed by the State Board of Medical Examiners to practice chiropractic in the State of New Jersey and possessed of a degree of Doctor of Chiropractic from the Columbia Institute of Chiropractic with 4490 hours of actual course work, representing 145 semester hours, as required by the State Board of Medical Examiners. Petitioner Cook holds a Bachelor's degree from Upper Iowa University which he received in January, 1959. He has completed all of the necessary courses and holds a valid degree of Doctor.***"
>
> (Petition of Appeal)

Continuing, petitioner complains that

> "***Pursuant to the terms of a collective bargaining [negotiations] agreement negotiated between the parties a salary schedule and increment guide was established, which provides that for 'earned doctorate: $600 above place on guide on Schedule E'. Your petitioners, both the Association and Donald Cook, have constantly requested the Board to make payment to Donald Cook of $600 above his teaching position on the

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guide by virtue of his possession of the doctorate, but the Board refuses and continues to refuse to do the same.***" (Petition of Appeal)

The Commissioner observes that petitioner prays that the Board be directed to "***make payment to Donald Cook of $600 for each year in which the salary guide has provided for payment to such persons as held a doctorate." (Petition of Appeal)

At this juncture, the Commissioner observes that boards of education have the statutory authority to adopt a salary policy, including salary schedules, for its teaching staff members. *N.J.S.A.* 18A:29-4.1 In regard to salary schedules which may be part of a salary policy adopted by a board, the Commissioner notices that the Legislature set forth "salary schedules" as part of the minimum salary law. *N.J.S.A.* 18A:29-7 The controversy herein emerges from the application of the Board's salary schedule to petitioner, which has as its source *N.J.S.A.* 18A:29-7. Furthermore, the Legislature has vested in the Commissioner the authority to hear and determine controversies and disputes arising under school law. *N.J.S.A.* 18A:6-9 Clearly the dispute herein is one within the jurisdiction of the Commissioner because it does arise under education law, Title 18A, and is not a "term and condition of employment" as contemplated by the Court in *Dunellen, supra.* Consequently, petitioner's Motion to have the Commissioner dismiss the matter and remand for arbitration is denied. The Commissioner asserts jurisdiction.

In regard to the merits of the dispute, the Commissioner observes that petitioner demands compensation according to the rates set forth in the Board's "doctorate" schedule of its salary policy by virtue of a degree from the Columbia Institute of Chiropractic. The Board asserts, however, and petitioner does not refute, that he does not possess a master's degree. The Board asserts that for a person to be compensated according to its doctorate schedule one must first possess a master's degree. Moreover, the Board points out that a doctoral degree must be one which is awarded by an accredited institution recognized as having the authority to grant such degrees. The institution must be acceptable to the New Jersey State Board of Examiners as the basis for issuing appropriate teaching certificates. *N.J.S.A.* 18A:6-38

The Commissioner observes that the record before him is devoid of any evidence, documentary or otherwise, that petitioner possesses a doctorate which would require the Board to determine his compensation according to the rates set forth in the doctorate schedule of its salary policy. Furthermore, the Commissioner finds that the possession of a degree of Doctor of Chiropractic is not the substance of a "doctorate" as contemplated by the Legislature in *N.J.S.A.* 18A:29-7.

Accordingly, the Commissioner finds and determines that neither the Association nor petitioner has supported the complaint of improper salary establishment against the Board. The Petition is dismissed.

COMMISSIONER OF EDUCATION

July 2, 1975

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Brick Township Education Association and Donald Cook,

Petitioners-Appellants,

v.

Board of Education of the Township of Brick, Ocean County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 2, 1975

For the Petitioners-Appellants, Joseph N. Dempsey, Esq.

For the Respondent-Appellee, Anton and Ward (Donald H. Ward, Esq., of Counsel)

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

October 1, 1975
Pending before Superior Court of New Jersey

Marilyn Stein,

Petitioner,

v.

Board of Education of the Township of North Bergen, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Sauer, Boyle, Dwyer and Canellis (George W. Canellis, Esq., of Counsel)

For the Respondent, Joseph V. Cullum, Esq.

Petitioner is a guidance counselor who was employed for two academic years by the Board of Education of the Township of North Bergen, hereinafter "Board," and was not reemployed for a third academic year.

She alleges that the determination not to reemploy her is arbitrary,

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discriminatory, and grounded on reasons which deny her rights guaranteed by the United States Constitution.

She prays for reinstatement in her position along with all back pay to which she is entitled, the other relief which the Commissioner of Education deems appropriate.

The Board denies that her termination was improper and asserts that it exercised its statutory discretion by not renewing her contract, in accordance with Title 18A, Education. The Board asserts further that her contract expired by its own terms and her termination is, therefore, valid and legal in all respects.

A hearing in this matter was held on May 29 and June 5, 1974 in the office of the Union County Superintendent of Schools, Westfield, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

Petitioner filed a Petition of Appeal with the Commissioner on May 24, 1971. At the request of her counsel, and absent any objection by the Board, the hearing examiner agreed to postpone further proceedings pending the outcome of similar matters before the Commissioner and the courts, which all parties agreed might have significant relevance to the instant matter. Subsequently, the following decisions were rendered: *Patricia Meyer v. Board of Education of the Borough of Sayreville,* 1970 *S.L.D.* 188, remanded State Board of Education 1970 *S.L.D.* 192, decided by the Commissioner 1971 *S.L.D.* 140, reversed State Board of Education 1972 *S.L.D.* 673, affirmed Docket Number A-2466-71, New Jersey Superior Court, Appellate Division, March 29, 1973; *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974); *Pietrunti v. Board of Education of Brick Township,* 128 *N.J. Super.* 149 (*App. Div.* 1974), *cert. denied* 65 *N.J.* 573 (1974), *cert. denied* United States Supreme Court, December 9, 1974; *Winston v. Board of Education of South Plainfield,* 64 *N.J.* 582 (1974); and *Klein v. Board of Education of the Township of Weehawken,* 1971 *S.L.D.* 242, whereupon petitioner proceeded with her Appeal on December 5, 1973, and the last Brief was filed on December 6, 1974.

The parties are in substantial agreement regarding the facts in this matter and submit that its determination is primarily a question of law.

Petitioner was employed for the academic years 1969-70, 1970-71, but was not offered a contract for the 1971-72 academic year.

She was called to the office of the high school principal in January 1971, whereupon he told her that "he was not going to renew [her] contract for the following school year." (Tr. I-76) There was a great deal of testimony about petitioner's professional performance which, in the hearing examiner's judgment, need not be detailed here. An undisputed summary would reveal that she was never formally observed in the performance of her duties by the principal nor any other school administrator (Tr. I-94; Tr. II-24-25), and that the observations and evaluations which were made by her immediate supervisor, the guidance

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director, were favorable. The guidance director recommended that petitioner be reemployed. (Tr. II-3, 90-91, 99)

The principal recommended to the Superintendent of Schools, however, that petitioner not be offered a contract for the 1971-72 academic year. Petitioner avers that when she asked why, the principal replied that he could terminate her because "he was the principal." (Tr. II-77) There is no corroboration of this testimony, but the Board gives as a reason for her termination "that petitioner differed sharply with the basic philosophy of the educational system of the respondent." (Board's Answer, No. 8)

The principal testified that the evaluations made by the guidance director (P-1; P-2) were "satisfactory." (Tr. II-3) Therefore, it is reasonable to conclude that the recommendation not to reemploy petitioner was made for reasons other than petitioner's performance with pupils and other staff members.

The record shows that there were three rather outstanding incidents during which petitioner expressed opinions which differed from those of the principal. These incidents will be detailed, because they form the essence of the instant controversy.

I

Petitioner accompanied a pupil and her mother to the principal to consider having her graduate from high school at the end of three rather than four years. The principal insisted that the pupil complete four years in high school, and petitioner testified that she agreed with him in this particular case. Her educational philosophy differed from the principal's in that she believed selected pupils could go on to college after three years of high school. (Tr. I-78-80) A similar incident occurred when petitioner sought early entrance to Rutgers for an eleventh grade pupil; however, this occurrence was in April 1971 (Tr. I-80-82), and it could not have been a reason for alerting petitioner in January 1971 that she would not be recommended for reemployment. It does, however, emphasize a difference in educational philosophy.

II

Petitioner testified that a school dance was held in January 1971 and pupils who attended the dance were excused from attending school the next day. Many other pupils felt that this was unfair, and many of them were absent the following day. The guidance staff was informed by the principal that they were to telephone all of the pupils to see if they were, in fact, sick or truant. Petitioner questioned the principal about that assignment because she felt that it was unprofessional and could be done better by a truant officer. Furthermore, petitioner believed that the delicate relationship between pupil and counselor would be jeopardized by checking on those assigned pupils. She testified that she did not refuse to carry out the assignment; however, she told the principal that she "still needed some time to think further on this." Thereafter, she and the members of the guidance staff exchanged lists of the pupils they were assigned and made the requested telephone calls. Petitioner notified the principal of their

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decision. (Tr. I-83-85, 120-123) The guidance director testified that all of the counselors objected to telephoning pupils who were suspected of being truant after school dances; however, only petitioner voiced her objections to the principal. (Tr. II-117-119)

III

Petitioner, as a member of the pupil-faculty committee, made it known that she favored a change in the pupil dress code, whereas the school administration opposed any revision of its established dress policies. (Tr. II-63) One of the criticisms of petitioner (P-1) was that her cooperation with the administration should be improved. The guidance director testified that petitioner performed well as a counselor (Tr. II-50), and that she was not the only counselor who suggested a change in the dress code. (Tr. II-63-64) The guidance director told the principal, when asked, that petitioner's cooperation with the administration had improved so that she would recommend petitioner for reemployment. (Tr. II-90-91)

The principal testified that he and petitioner had a difference in professional opinion, although he admitted that some of her opinions were constructive. He could not recall any of her "destructive" opinions. (Tr. II-14-18) He testified further that it was his recommendation that she not be reemployed because her educational philosophy was different from that of the administration. (Tr. II-31) He testified also, that the Superintendent accepted his recommendation, and that he believed the administration could select a better counselor. (Tr. II-22-25)

The record shows that petitioner spoke freely concerning matters which involved her professional performance. She chose not to remain silent, but asked questions and offered opinions about situations she thought should be changed. Because she differed philosophically with the principal on educational matters, he did not recommend her reemployment. Nowhere does the record show that she could not, or refused to, perform all the tasks she was assigned, or that she performed them poorly. It is unnecessary to speculate whether or not petitioner was right or wrong in the opinions she expressed. The facts in this matter show that, right or wrong, her opinions differed from those of the principal.

When the principal was asked how petitioner disagreed with Board policy, the Superintendent's policies, or his policies, he replied:

> "***I think primarily from the point of view of psychological handling of the youngsters rather than the determining [of] their needs and trying to put it within the framework of school. Those are not the main reasons. Those opinions, that you just–disagreements of that kind. There are many teachers ***[who] disagreed on things of that type. But, that was an administrative part within the school. This thing [referring to P-1] says, "Board policies," as well.***" (Tr. II-40-41)

The hearing examiner finds this testimony to be unclear and at variance

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with the guidance director's testimony and the evidence supporting petitioner's ability to deal with pupils. (P-1)

In *Patricia Meyer, supra,* Meyer was not reappointed to her teaching position after the superintendent recommended to the board of education that she not be reemployed. In reversing the Commissioner's decision, the State Board of Education concluded that the superintendent's recommendation to the board was based on the fact that he disagreed with Meyer's involvement with teacher union activities. The State Board of Education commented as follows:

> "***If the Board members, as they testified, merely followed the Superintendent's recommendation without any inquiry or other independent judgment, then an examination of the Superintendent's reasons for his recommendation is clearly proper in these circumstances. *We cannot conceive that there is any less an unconstitutional deprivation of reemployment where a Superintendent, for an unconstitutional reason, makes a recommendation that is automatically approved, for all practical purposes, than a determination made by a Board itself for an unconstitutional reason. The constitutional protection to petitioner, in either case, is destroyed. The fear of administrative difficulty***does not stand tall against the constitutional rights of persons in public employment* to organize. *New Jersey Constitution of 1947, Art.* 1, *Par.* 19; *Zimmerman v. Board of Newark,* [38 *N.J.* 65 (1962), *cert. den.* 371 *U.S.* 956, 83 *S.Ct.* 508, 9 *L.Ed.* 2 *d* 502 (1963)]; *Burlington County Evergreen Park Mental Hospital v. Cooper,* 56 *N.J.* 579 (*Sup. Ct.* 1970)***" (*Emphasis added.*) (1972 *S.L.D.* 673, 678)

Neither can the fear of administrative difficulty stand tall against the constitutional right of petitioner to express her opinions about matters pertaining to her professional employment.

The hearing examiner finds also that *Pietrunti, supra,* is in sharp contrast to the instant matter. In the Appellate Division decision, Pietrunti was found to have uttered statements and spoken publicly in such a way as to go beyond her constitutionally protected right of free speech. She vilified her superiors publicly and used obscenities in describing them. She was also found to have made other uncorroborated charges against her superiors. In *Pietrunti,* the Court commented:

> "***We do not suggest that any teacher may not legally or constitutionally believe that a board of education or a superintendent of schools is not carrying out their functions properly, and may not speak out publicly with respect to such belief, or resort to political activities to defeat the members of such a board of education. These are rights which need not be emphasized since they are inherent in our democratic process. Indeed, *the failure to exercise such rights, on proper occasion, might well constitute unprofessional conduct.* What we do suggest is that the exercise of these rights be accomplished professionally.***"
>
> (*Emphasis added.*) (at pp. 165-166)

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The hearing examiner finds that petitioner was not reemployed because she spoke up about matters concerning her professional employment. Such a termination is a violation of her constitutionally protected right to free speech. In *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962), *cert. den.* 371 *U.S.* 956, 83 *S. Ct.* 508, 9 *L.Ed.2d* 502 (1963), the Court held that a board of education had a right to refuse reemployment to any teaching staff member subject to statutory, contractual, or constitutional limitations. In *Donaldson, supra,* the Court held that reasons must thereafter be furnished teachers, on request, when they are not reemployed. Although the instant matter preceded *Donaldson,* petitioner was given as a reason by the principal alleged philosophical differences. He commented:

> "***[W]hy should I recommend someone who is going to disagree with policy?" (Tr. II-31)

The findings of the hearing examiner are summarized as follows:

1. Petitioner was terminated by the Board solely on the recommendation of the high school principal who had never evaluated her in the performance of her duties.
2. Her evaluations by her immediate supervisor were satisfactory.
3. Her termination was brought about because she spoke openly about matters concerning her professional employment and duties.
4. Because her expressed opinions in some matters differed philosophically with those of the principal, he did not recommend her reemployment.

The hearing examiner recommends (1) that petitioner be reinstated in her position, and the time of her service toll as if it had never been broken; (2) that petitioner not be awarded retroactive pay since the delay in this matter was at her request; and (3) that she be placed on the appropriate step of the salary guide which would reflect the third year of employment with the Board, together with any credit for teaching experience recognized by the Board when she was first hired.

This concludes the report of the hearing examiner.

* * * *

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

The Board's exceptions deal primarily with the hearing examiner's understanding and interpretation of certain witnesses' testimony, which upon review, the Board asserts, will show that petitioner was not reemployed for good and just reason. The Board asserts, also, that a rating of "satisfactory" given to petitioner by her immediate superior was *"not good enough"* and actually indicated a need to improve. (Board's Exceptions, at p. 4)

The Commissioner finds, however, that the record has been fairly

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evaluated by the hearing examiner. The Board's own exceptions (at p. 4) in relying on the principal's testimony, reveal that he could not recall one specific instance where he and petitioner differed philosophically about Board policy; however, he testified that they did have such differences concerning the handling of boys and girls. This difference of philosophy is really the heart of the instant matter.

On the one hand, petitioner was hired as a guidance counselor, whose very job is the handling of the affairs of her pupils in school, and, on the other hand, she was not reemployed, based on the principal's recommendation because the kinds of changes she sought were not in total accord with Board policy at that time. (Board's Exceptions, at p. 5)

The record shows that petitioner and her principal did differ philosophically, but that in each instance the difference involved petitioner's concern for her pupils' educational needs, their futures, and the delicate relationship she had established with them. School dress code policies have long been a subject of concern and constant review by school personnel. The fact that only two cases involving pupil dress have ever been adjudicated by the Commissioner is indicative of the constant local review and modification of school dress code because of the fast changing styles and modes of dress of present day society. *Singer v. Collingswood, et al.*, 1971 *S.L.D.* 594; *"S.V." v. Sea Girt, et al.*, 1974 *S.L.D.* 346 Petitioner's suggested dress code changes were opposed by the principal. Her objection to telephoning pupils thought to be truant was grounded on the relationships she had established with her pupils. She did not wish to be cast in the role of "checking" on them as a truant officer would do. The record shows that all of the counselors objected to this task, even though petitioner was the only counselor who voiced her objection to the principal. (Tr. II-117-119) When the counselors solved their dilemma by exchanging lists of pupils' names so they would not have to call their own pupils, the task was carried out by all, including petitioner. Petitioner's request for early college placement for pupils, although opposed at the time, is now part of a recognized program throughout the state for gifted youngsters.

For these reasons and others expressed, *ante,* the Commissioner, therefore, adopts the findings of the hearing examiner as his own.

Donaldson, supra, clearly stated that decisions not to reemploy need not be based on classroom performance; however, the right to refuse reemployment is subject to certain statutory, contractual, and constitutional limitations. A fair review of this matter shows that petitioner performed her duties and completed all assigned tasks; however, she questioned certain policies and suggested changes. A denial of a contract award on those bases is a violation of her constitutionally protected right to free speech. *Zimmerman, supra* Moreover, her differences with her principal were all pupil-related. It appears that the Board would have her work in this guidance role, without questioning its policies. The record does not show that petitioner used subterfuge or other unprofessional means to express her opinions; rather, she went directly to the school principal in keeping with her professional responsibilities. Her termination will, therefore, be set aside.

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Regarding the relief to be awarded petitioner, the Commissioner directs that she:

1. be reinstated in September 1975 in a position as guidance counselor;
2. be placed on the appropriate step of the salary guide reflecting the total number of years' experience in teaching, beginning with her first year of employment with the Board;
3. be granted retroactive pay from the date of December 5, 1973, the date when this Appeal was moved, less mitigation of moneys earned in other employment.

Petitioner will begin her third academic year of employment starting September 1975, as though there were no interruption of her service with the Board.

COMMISSIONER OF EDUCATION

July 7, 1975

Marilyn Stein,

Petitioner-Appellee,

v.

Board of Education of the Township of North Bergen, Hudson County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DISMISSAL OF NOTICE OF APPEAL

Decided by the Commissioner of Education, July 7, 1975

For the Respondent-Appellant, DeBona, Goldberg & Johnson (Joseph J. Ryglicki, Esq., of Counsel)

For the Petitioner-Appellee, Sauer, Boyle, Dwyer and Canellis (George W. Canellis, Esq., of Counsel)

In accordance with and pursuant to *N.J.A.C.* 6:2-1.1, Notice of Appeal filed with the State Board of Education on September 8, 1975, from the decision of the Commissioner of Education dated July 7, 1975, is hereby dismissed.

October 1, 1975
Dismissed Superior Court of New Jersey February 18, 1976

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Walter E. Reutter,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruhlman and Butrym (Cassel R. Ruhlman, Esq., of Counsel)

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

Petitioner, a tenured employee of the Borough of Roselle, hereinafter "Board," avers he was illegally denied salary payment by the Board in May 1973 at a time when he was required to spend two weeks on active duty with the Naval Reserve. He requests judgment to this effect and reimbursement by the Board. The Board answers that its controverted action to withhold petitioner's salary was a legally correct one and requests that the Petition be dismissed.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner of Education on December 5, 1974 at the office of the Union County Superintendent of Schools, Westfield. The report of the hearing examiner is as follows:

Petitioner has been employed by the Board as an elementary school principal since 1966 (Tr. 4) and has been a member of the United States Naval Reserve since 1967. This membership has required him to spend a period of two weeks a year on an active duty status and, prior to the 1972-73 school year, he evidently fulfilled such requirement during the summer months. (Tr. 63) He is a ten-month employee.

During the 1972-73 school year, however, petitioner made application (P-2) to fulfill his duty requirement in either one of the months of March, April or May and eventually received orders from the Navy to report for active duty training for a fourteen-day period beginning May 6, 1973. He did so report and serve, but the Board, by majority vote on March 13, 1973 (see P-4), resolved that such leave for active duty service was to be without pay. Thereafter the Board deducted the sum of $997.20 from the salary to which petitioner would otherwise have been entitled and petitioner appealed the decision to the Union County District Court. The Court remanded the matter to the Commissioner for exhaustion of administrative remedies.

The issue in this matter is whether or not petitioner's service with the armed forces may qualify under the statute *N.J.S.A.* 38:23-1 as "field training"

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and entitle him to compensation for the period of his leave of absence. Both parties to this dispute cite *Lynch v. Borough of Edgewater,* 8 *N.J.* 279 (1951) as a case on point with the issue.

The statute, *R.S.* 38:23-1, is recited in its entirety as follows:

> "An officer or employee of the State or a county, school district or municipality, who is a member of the organized reserve of the Army of the United States, United States Naval Reserve, United States Air Force Reserve or United States Marine Corps Reserve, or other organization affiliated therewith, shall be entitled to leave of absence from his respective duty without loss of pay or time on all days on which he shall be engaged in *field training.* Such leave of absence shall be in addition to the regular vacation allowed such employee." (*Emphasis supplied.*)

The decision of the Court in *Lynch, supra,* set forth an interpretation of this statute. In an interpretation of "field training" the Court said:

> "***[W]e hold that *R.S.* 38:23-1, *supra,* must be construed to intend by 'field training' only that training which consists of participation in *unit training* in field operations.***" (*Emphasis supplied.*) (at p. 285)

And,

> "***[R]eferences to state and federal legislation are not exhaustive. They serve, however, to illustrate the clear distinction, made in both realms of legislative effort between 'field' training or instruction and other types of military or naval duty, service or instruction. There is no doubt that the Legislature of this State had this distinction in mind when *L.* 1931, *c.* 347, *secs.* 1, 2, now *R.S.* 38:23-1, was enacted and while we may not be certain as to the motivation of the Legislature in applying that distinction it is probable that at least one consideration was that the organized units of the National Guard and other reserve forces are those primarily to be considered as necessary to the defense of the State, ready to fight on very short notice and required by law to undergo field training, i.e., *training for battle as a unit,* without the consent of the individual serviceman to support or prepare for that defensive effort.***"
>
> (*Emphasis supplied.*) (at p. 290)

Thus in the Court's judgment the statute *R.S.* 38:23-1, applies only when employees enter periods of service "as a unit" for field training without their consent.

It is in this context that the facts of the instant case may be set. Testimony pertinent to the adjudication was given by the Group Commander at the Elizabeth Naval Reserve Center, Elizabeth, and by petitioner.

According to the Group Commander, naval regulations provide that members enrolled in the Naval Reserve must participate in 44-48 drills a year, be

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a member of an active reserve component, and "***go on two weeks active duty each year.***" (Tr. 11; see P-1.) He also testified that while each naval reservist is a member of a unit at the home training center, the unit to which he and petitioner are attached has not, in the past, been called as a group to serve together during the two-week period of active duty. (Tr. 15) Instead, he testified, naval reservists in his unit have been assigned as individuals for their active duty periods to a variety of activities; to a ship one year, to a school the next year, etc. (Tr. 18) He also testified that in addition to a relationship to a home training center unit, each naval reservist, such as petitioner, has a mobilization station assignment unit to which it is generally preferred that he report for active duty periods (Tr. 18-19), and that in petitioner's case the specific mobilization station is in Washington, D.C. (Tr. 22)

Petitioner testified that he had been a member of the Naval Ready Reserve attached to a naval security group as a mobilization station assignment and that on May 6, 1973, he reported to this assignment in Washington, D.C. (Tr. 51-52) He stated he remained there for the two-week period of training and that such training fulfilled his duty requirement for the 1972-73 fiscal year which ended on June 30, 1973. (Tr. 52) Petitioner further testified that in the past he had been compensated by the Board for such periods when the periods were required to be served during the school year. (Tr. 58)

The arguments set forth by the parties are pertinent to such facts.

Petitioner argues that an interpretation of the statute *R.S.* 38:23-1 to mean that his service of two weeks of active duty may not be classified as "field duty" is an "unreasonable" one. (Tr. 69) He avers that the requirements of the Navy are unique to it and that these requirements often make necessary the individual assignment that petitioner had in this instance. He maintains that *Lynch, supra,* is not specifically at point herein since in that case Lynch's service was voluntary, longer than the fourteen-day period that Petitioner Reutter is required to serve each year, and gained for Petitioner Lynch a personal benefit.

The Board argues, to the contrary, that *Lynch, supra,* is applicable and that it clearly delineates active training as field unit operations. (Tr. 74) In the Board's view, the statute *R.S.* 38:23-1 may apply only in instances wherein an entire unit is mobilized and "***sent out to Washington or on a ship or wherever the Naval unit may go***." (Tr. 77) In the absence of such unit assignments, the Board avers, there is no entitlement to be paid by both a public employer such as a board of education and by the federal government as well.

In summary of the principal facts herein, the hearing examiner finds that petitioner is a tenured employee of the Board. He is a member of the Naval Reserve forces who was required during the 1972-73 school year to serve a period of two weeks of active duty. Petitioner fulfilled this requirement at and with his mobilization station unit in Washington, D.C., as the result of a specific order to him as an individual; and he was denied salary compensation by the Board.

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The hearing examiner finds from a review of such facts, arguments, and applicable law that petitioner is entitled to the relief he seeks. This finding is grounded in the fact that petitioner herein, unlike Petitioner Lynch, was "required" to serve two weeks in active training per year and that such service was performed with one of two units to which petitioner was attached, the permanent mobilization station unit in Washington, D.C. Thus, it would appear that petitioner is entitled to classify such services as "field training" within the context of both the statute (*R.S.* 38:23-1) and *Lynch, supra.*

Accordingly, the hearing examiner recommends that the Commissioner grant petitioner's prayer for relief and award him the salary payment which was denied by the Board, if, after consultation with legal counsel the Commissioner is in agreement with this interpretation of applicable law.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the primary findings, conclusions of law and recommendation contained therein. Petitioner, as an active member of the Naval Reserve, was required during the 1972-73 school year to serve for a two-week period with a unit designated as his permanent duty station in the event of a national mobilization of the armed forces. Such service in the context of the statutory mandate of *R.S.* 38:23-1 and the decision of the Court in *Lynch, supra,* may be classified as "field training" and entitled petitioner to "***leave of absence***" from his post as an employee of the Board of Education "***without loss of pay or time***." (*R.S.* 38:23-1) The Commissioner so holds.

Accordingly, the Commissioner directs the Board of Education of the Borough of Roselle to reimburse petitioner in the amount of the salary payment and other emoluments which may have been denied him subsequent to his performance of such military service.

COMMISSIONER OF EDUCATION

July 29, 1975

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Board of Education of the Township of Oxford,

Petitioner,

v,

Township Committee of the Township of Oxford, Warren County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Schumann & Seybolt (William R. Edleston, Esq., of Counsel)

For the Respondent, Kathryn Becker, Township Clerk

Petitioner, the Board of Education of the Township of Oxford, hereinafter "Board," appeals from an action of the Township Committee of the Township of Oxford, hereinafter "Committee," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Warren County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The matter is submitted directly to the Commissioner of Education for Summary Judgment on the pleadings and written documentation of the parties.

At the annual school election, held March 11, 1975, the Board submitted to the electorate proposals to raise $377,231 by local taxation for current expense costs of the school district. These items were rejected by the voters, and, subsequent to the rejection, the Board submitted its budget to the Committee for its determination of the amounts necessary for the operation of a thorough and efficient school system in Oxford Township during the 1975-76 school year, pursuant to the mandatory obligation imposed on the Committee by *N.J.S.A.* 18A:22-37.

After consultation with the Board, the Committee made its determinations and certified to the Warren County Board of Taxation the amount of $346,231 for current expenses. The pertinent amount in dispute is shown as follows:

	Current Expense
Board's Proposal	$377,231
Committee's Certification	346,231
Amount of Reduction by Committee	$ 31,000

The Board contends that the Committee's action was arbitrary, unreasonable, and capricious and supports its need for restoration of the recommended reductions with written documentation. The Committee maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are not necessary for a thorough and

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efficient educational system. The Committee also supports its position with written documentation. As part of its determination, the Committee suggested two specific areas of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Committee's Proposal	Reduction
J213	Teachers - Salaries	$230,000	$225,000	$ 5,000
	Current Expense Surplus			26,000
	Committee's Reduction			$31,000

The Commissioner observes the Board's assertion in its written documentation (P-4) that it originally had proposed an amount of $240,000 for teachers' salaries prior to its public hearing on the then-advertised budget. (P-6) This amount reflects a $5,000 increase over the 1974-75 teachers' salary line item as set forth in the 1974-75 budget. (P-2) The Board points out that subsequent to holding a public hearing on the proposed budget (P-6), the Board reduced its proposed 1975-76 budget by $21,000, $10,000 of which came out of the teachers' salary line item.

The Board employs twenty teaching staff members, in addition to a Superintendent of Schools, and has a September 1975 projected enrollment of 299 pupils. (P-5) The Board avers that at this juncture negotiations between it and the teachers have not concluded in regard to a salary policy for 1975-76. Furthermore, the Board argues that its present salary policy is among the lowest in Warren County. The Board asserts that it needs the $5,000 recommended for reduction by the Committee in an effort to increase salaries to attract quality teachers and to provide incentives to its present teaching staff members to continue their education through tuition payments.

The Committee states in its written documentation (R-1, R-2) that the Board could still operate its schools with a $5,000 reduction in its teachers' salary line item.

The Commissioner observes that the amount of $230,000 for teachers' salaries projected for 1975-76 is $5,000 less than was expended in 1974-75. The Commissioner also observes that the Board will have one less teaching staff member next year because of a pupil enrollment reduction. It is the Commissioner's judgment that for the Board to reduce its teachers' salary line item below the $230,000 it proposed would place it in an extremely dangerous situation. Consequently, the Commissioner finds that reinstatement of the $5,000 curtailment of teachers' salaries recommended by the Committee is necessary to insure an adequate school program.

In regard to the current expense unappropriated balance, the Board argues that if it applies $26,000 of its balance to its 1975-76 budget it would have a balance of $538. The Board does anticipate an accumulated balance of $15,000 from its 1975-76 budget.

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The Commissioner observes that the proposed total current expense budget of the Board for 1975-76 is $377,231. A $26,000 unappropriated balance to cover unanticipated emergencies would be somewhat less than seven percent, and this amount is merely marginal for such contingencies.

The Commissioner cannot agree with the Committee that a budget of more than a quarter of a million dollars should operate with a $538 free balance. Consequently, the Commissioner finds the reinstatement of the recommended reduction of $26,000 in the current expense balance by the Committee to be necessary to the Board.

The Commissioner finds and determines that the certification of the appropriations necessary for school purposes for 1975-76 made by the Committee is insufficient by an amount of $31,000 for the maintenance of a thorough and efficient system of public schools in the district. He directs, therefore, that the Warren County Board of Taxation add to the certification of appropriations for school purposes made by the Committee, the sum of $31,000, so that the total amount of the local tax levy for current expenses of the school district for the 1975-76 school year shall be $377,231.

COMMISSIONER OF EDUCATION

July 29, 1975

Sandra Kensicki,

Petitioner,

v.

Board of Education of the Passaic County Regional High School District, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, John Koribanics, Esq.

For the Respondent, Francis R. Giardiello, Esq.

Petitioner, a nontenured teaching staff member in the employ of the Passaic County Regional High School Board of Education, hereinafter "Board," through the month of June 1972, alleges that the Board refused to renew her contract for the 1972-73 school year without good cause and without a hearing. On April 29, 1975, she filed the instant Petition of Appeal which requests the Commissioner of Education to review the Board's action.

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The Petition was received in the Division of Controversies and Disputes, State Department of Education, Trenton, on May 2, 1975, and on May 14, 1975, the Director of the Division addressed the following letter to petitioner:

> "We are in receipt of your letter of April 29, 1975, and of the attached Petition of Appeal. This Petition requests the State Commissioner to review an action of the Passaic Valley Board of Education which was taken on or about March, 1972. However, it appears to us that the decision of the Court in the *Joan Sherman* case together with the delay in filing a Petition constitutes sufficient reason for our rejection of it for consideration at this time. A copy of the *Sherman* decision is enclosed for your perusal."

Petitioner filed an Appeal from such rejection directly to the Commissioner on June 4, 1975.

The Commissioner has considered the allegations recited, *ante,* and the entirety of the instant Petition and sustains the action of the Director of the Division of Controversies and Disputes in rejecting it. Nontenured teaching staff members have, from the date of June 10, 1974 forward, been entitled to a statement of reasons and an "appearance" before local boards of education when contracts of employment failed to be renewed. *Donaldson v. Board of Education of the City of Wildwood,* 65 *N.J.* 236 (1974) Such entitlement, however, has been held by the Superior Court of New Jersey to be prospective and not retrospective from that date. *Joan Sherman v. Malcolm Connor, Acting Superintendent of Schools and Board of Education of the Borough of Spotswood,* affirmed Docket No. A-2122-73 New Jersey Superior Court, Appellate Division, January 28, 1975

Accordingly, the instant Petition is rejected by the Commissioner for adjudication.

COMMISSIONER OF EDUCATION

July 31, 1975

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Richard Dooley and the Keansburg Teachers Association,

Petitioners,

v.

Board of Education of the Borough of Keansburg, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Healy & Falk (Patrick D. Healy, Esq., of Counsel)

Richard Dooley, hereinafter "petitioner," having been employed as a teaching staff member for two and one-half academic years by the Board of Education of the Borough of Keansburg, hereinafter "Board," is joined by the Keansburg Education Association, hereinafter "Association," in alleging that the Board's failure to reemploy petitioner was arbitrary, without basis of fact, and a breach of the negotiated agreement. Petitioner seeks an order from the Commissioner of Education reinstating him to his teaching position, together with lost salary.

The Board disclaims that its nonrenewal of petitioner's contract violated the negotiated policy agreement or that it was in any way improper or illegal.

A plenary hearing was conducted on February 14, 1975 at 18 Court Street, Freehold, by a hearing examiner appointed by the Commissioner. Memoranda of Law were filed thereafter by the respective parties. The report of the hearing examiner is as follows:

Petitioner was employed as the Board's distributive education (D.E.) coordinator in January 1972, and served in this capacity until the autumn of 1973 when he was assigned additional responsibility for the Board's cooperative industrial education (C.I.E.) program. (Tr. 86, 136) He taught the classroom phase of these work study programs one half of each day and supervised the enrolled pupils at their places of employment during the remainder of his working day. (Tr. 8) During the 1972-73 school year he was formally evaluated three times by the chairman of the business education department to whom he was then directly responsible. (Tr. 10) In the 1973-74 school year he was made directly responsible to the principal who, although he saw petitioner daily, at no time prior to April 30, 1974, made any classroom observation or formal written evaluation of either petitioner's classroom performance or his on-the-job supervision of pupils. (Tr. 74) It is this fact that constitutes the principal basis for this controversy before the Commissioner.

Petitioner was notified in writing by the Board Secretary by letter dated

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April 25, 1974, that he would not be reemployed by the Board for the next school year. (P-2) Eleven other nontenure staff members received similar nonrenewal notices. Of this group eight were eventually reemployed. No such offer, however, was extended to petitioner. (Tr. 51) He filed a grievance pursuant to Paragraph 6 of the section, "Hours and Teaching Loads," of the negotiated policy which states:

> "It is recognized by the Board of Education and the Keansburg Teachers Association that four evaluations will be given on each teacher every year. Due to unavoidable circumstances the minimum evaluations accepted each year will be three for nontenure teachers and two for tenure teachers."
> (P-1)

The grievance was denied.

Thereafter, on May 6, 9, and 21, 1974, petitioner was observed in his classroom and evaluated in writing three times by the principal. (Tr. 14) Petitioner requested and received the following statement of the reasons why he was not reemployed by the Board:

"***1. The method in which you ran your program was contrary to the philosophy of the school. It is the school's philosophy that it is the co-ordinator's responsibility to find positions for students, and that the program accept all students, especially those who have various disadvantages and need opportunities to succeed. It has been evidenced that you do not uphold either viewpoint.

"2. As a result of the aforementioned it is felt that the program could not improve as planned with these divergent philosophies.

"3. With a 50% rejection of students who requested the program initially and a desire to accept only students with no problems, before you were placed on tenure, we could not see any great desire on your part to help our students in the manner we wished them helped.

"4. Not being certified in any other area, should funding be discontinued for your program, you would not be suitable to transfer to another position.

"5. Informal appraisals showed only marginal performances.

"6. By law we had to make a decision by April 30, 1974. At this time we had no idea how much we would receive in funding.

"7. You are not the quality teacher the board feels they need for this position, and the board feels that at the present time they are able to get better quality teachers.

"In light of these seven points, it is determined that your being extended a

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contract for the 1974-1975 school year would definitely not be in the best interest of the Board of Education.***" (P-3)

These listed reasons for nonrenewal substantially embrace the relevant testimony of the principal and the Superintendent at the hearing as to why petitioner was not reemployed. (Tr. 16, 47, 50, 75, 88, 107, 123) The Superintendent additionally testified that he was under instructions from the Board to reduce the financial obligations it was incurring from reduced funding in its three work-study type vocational programs. (Tr. 105) He stated that of these three programs one has since been discontinued and the D.E. and C.I.E. programs combined into one operating program. (Tr. 105) Further testimony of the Superintendent leads to the conclusion that the Board reviewed its Superintendent's recommendations and reasons why petitioner should not be reemployed, questioned him thereon, and made its determination not to reemploy petitioner in accord therewith. (Tr. 102) It is further revealed that the available amount of State and Federal funding of which the Board was advised in August 1974 proved to be sharply reduced for these programs for fiscal year 1974-75. (Tr. 114-115, 118)

Additional testimony of the principal and Superintendent reveals that classroom instruction for the remaining program in 1974-75 is provided by two different teachers for a total of three periods daily and that on-the-job supervision is conducted by yet another teacher who is available approximately one-half day for this duty and is paid an additional $1,000 annually, for performing this service. (Tr. 20, 91-92, 94, 99, 104, 127) While this has resulted in considerable changes of staff assignments, the hearing examiner concludes that the end result has been some reduction in assigned staff time to the D.E. and C.I.E. programs to which performer was formerly assigned. (Tr. 124)

Petitioner grounds his principal claim of entitlement to reinstatement on the fact that no formal classroom observations or written evaluation were made by the principal prior to the determination by the Board not to reemploy him in April 1974. He argues that this was a serious breach of the negotiated policy provision, *ante,* which requires three annual evaluations of nontenure teachers. He contends such a breach may be rectified only by his reinstatement. The hearing examiner finds that there was indeed no formal written or oral evaluation of petitioner made during the 1973-74 school year by the principal prior to the notice of petitioner's non-reemployment. The negotiated policy, however, is silent as to when such evaluations must be made within the school year. Similarly, the education laws are silent regarding the frequency, duration, or times when teachers are to be evaluated by their supervisors. However, uncontested testimony of the Association president leads the hearing examiner to conclude that it was the intent of the negotiating parties to require that such evaluations be made prior to April 30 of each year in fairness to those being considered for reemployment at that time. (Tr. 31) It is clearly apparent, however, that the negotiating parties placed no such deadline in the wording of the policy agreement. (P-1)

Petitioners argue in their Memorandum of Law that individual teachers are entitled to periodic notification if their supervisors believe they are not

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performing in accord with expectations. In support of this contention, they cite *Board of Regents v. Roth,* 408 *U.S.* 564, 33 *L.Ed. 2d* 548, 92 *S.Ct.* 2701 (1972) and *Perry v. Sindermann,* 408 *U.S.* 593, 33 *L.Ed.* 2*d* 570, 92 *S. Ct.* 2694 (1972) which interpret the rights of nontenure teachers in the context of nonrenewals.

Petitioner contends that three "hurry up" evaluations in May 1974, after notification of non-reemployment, are contrary to the spirit and provisions of both the negotiated policy and the cited Supreme Court cases. Additionally, petitioner asserts that the Board's action in re-evaluating twelve teachers and rehiring eight of them subsequent to the April 30 deadline of *N.J.S.A.* 18A:27-10 *et seq.* is a violation of the statutory provisions sufficient to require his reinstatement with back pay.

Conversely, the Board argues that its determination not to reemploy petitioner should be upheld, absent a show of arbitrariness or abuse of discretionary power. In support thereof, the Board cites *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962); *Roth, supra; Perry v. Sindermann, supra; Donaldson v. Board of North Wildwood,* 65 *N.J.* 236 (1974). The Board holds that no constitutional violation is so much as alleged and that its discretionary power was not abused but was exercised in accord with *Donaldson,* wherein it was said by the Court that:

> "***The Legislature has established a tenure system which contemplates that the local board shall have broad discretionary authority in the granting of tenure and that once tenure is granted there shall be no dismissal except for inefficiency, incapacity, unbecoming conduct or 'other just cause.' *N.J.S.A.* 18A:28-5. The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nontheless equally valid reasons why a board, having had the benefits of observation during the probationary period, may conclude that tenure should not be granted. See *Association of New Jersey State College Faculties v. Dungan,* 64 *N.J.* 338, 351-352 (1973)***." (at pp. 240-241)

The Board asserts that in the instant matter there is only the bare allegation of arbitrariness which must fall before the dicta set forth in *George H. 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; aff'd New Jersey Superior Court, Appellate Division, 1969 *S.L.D.* 202 which was cited by the Court in *Donaldson, supra,* as follows:

> "***In *Ruch* a teacher failed to receive his fourth contract and consequently did not obtain tenure. During the course of his employment his department chairman had submitted reports which outlined weaknesses in his teaching methods and techniques and which stated that he failed to meet the standards of the school district. He appeared before the board and was permitted to speak but was not reengaged. He appealed to the Commissioner and though he acknowledged that he had duly received a report adequately setting forth the reasons for dissatisfaction with his

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teaching, he contended that the reasons 'were arbitrary, capricious and discriminatory and were based on his teaching of a subject for which he was not certified.' The board moved to dismiss his appeal and its motion was granted in an opinion by the Commissioner which set forth substantive and procedural principles which appear to have been well designed towards protecting the teacher's legitimate interests without impairing the board's discretionary authority and without unduly encumbering the administrative appellate process.

"The Commissioner first noted that the board's discretionary authority was not unlimited and that its action could be set aside if it was 'arbitrary, unreasonable, capricious or otherwise improper.' He then pointed out that the board could not resort to 'statutorily proscribed discriminatory practices, *i.e.*, race, religion, color, etc., in hiring or dismissing staff' nor could it adopt employment practices 'based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served.' 1968 *S.L.D.* at 10. He held that, procedurally, the burden of sustaining the appeal was on the teacher and that the teacher's 'bare allegation' of arbitrariness was 'insufficient to establish grounds for action.' He declined to enter into a reevaluation of the teacher's classroom performance and teaching competence, pointing out that the matter involved the supervisor's professional judgment which was highly subjective and which was not charged to have been made in bad faith. With respect to the teacher's assertion that he was assigned to teach economics without certification the Commissioner found that, even if true, it was immaterial to the central issue before him. Finding no affirmative showing of 'unlawful, arbitrary or capricious motivation' and finding no requirement for a plenary hearing before the board, the Commissioner dismissed the petition; his action was sustained by the State Board of Education and further review was not pursued.***" (at pp. 247-248)

The Board further contends that the clear language of the negotiated policy agreement makes no requirement that evaluation must be completed prior to April 30 in a given school year and that the Commissioner may not properly, within the framework of determining the dispute, rewrite the policy agreement. *Varriano v. Miller,* 58 *N.J. Super.* 511 (*App. Div.* 1959)

Finally, the Board asserts that nothing in the law prohibits a Board's reconsideration of teachers to whom it has given notices of non-reemployment pursuant to *N.J.S.A.* 18A:27-10 *et seq.* and that to forbid such reconsideration would degrade the very purpose of the statute.

For these reasons the Board avers that its decision not to offer petitioner a contract for the 1974-75 school year is proper and should be affirmed.

The hearing examiner leaves to the Commissioner the determination of whether, within the above factual context, petitioner's statutory rights were violated, whether his rights under the negotiated policy were abrogated, or whether there is a showing of bad faith or improper action on the part of the Board or its agents. In the event of an affirmative finding, the Commissioner

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must also determine what relief may be accorded to petitioner. This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter, the Memoranda of Law, the report of the hearing examiner and the exceptions thereto filed by the respective parties pursuant to *N.J.A.C.* 6:24-1.16. Petitioner takes exception to the finding of the hearing examiner that:

> "***there had been a sharp reduction in funds which in part accounted for the nonrenewal of the petitioner.***" (Petitioner's Exceptions)

The finding of the hearing examiner was, more accurately stated, that State and Federal funding for the Board's work-study programs was, in fact, sharply reduced. No statement is made in the hearing examiner's report that this reduction accounted, in part, for the nonrenewal of petitioner. Reason alone dictates that, although there was apprehension that such funds might diminish, such a conclusion could not properly have been drawn by reason of the fact that the Board's decision in April 1974 to reemploy petitioner preceded its receipt of notification of the amount of such funds in August 1974. (P-2; Tr. 114)

It is further observed that respondent's exception is valid, wherein it is stated that the final denial of petitioner's grievance was in June 1974 *after* the three listed classroom observations and written evaluations of May 1974.

Petitioner charges that the Board's nonrenewal of petitioner was arbitrary and without basis in fact. The Commissioner has carefully examined the entire record and is unable to conclude that the Board's determination was arbitrary or made without proper grounding in fact. The Superintendent made his recommendation to the Board that petitioner not be reemployed for the school year 1974-75. Thereafter, the Board discussed the merits of his recommendation and concurred therewith. Among such considerations was the concern that petitioner's philosophy was divergent with that of the school's administrators. The Board was likewise apprehensive over possible diminishing financial support from State and Federal funding in support of the work-study programs.

It must therefore be concluded that the Board did not, in fact, make its determination in a vacuum but exercised its statutory discretion in consideration of those facts and concerns provided by its chief administrator.

Petitioner further grounds his claim to reinstatement upon the fact that he was not formally observed and provided written evaluations during the 1973-74 school year prior to notice of nonrenewal on April 25, 1974. A careful reading of the negotiated agreement fails to reveal a written requirement that the observations and evaluations be completed by any specified date within the school year. While there is good reason to conduct such evaluations prior to the consideration of contract renewals, the negotiating parties failed to make such a requirement in the text of the agreement and merely required that they be made "every year." (P-1) The Commissioner will not extend as the result of surmise or

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conjecture the requirements of the agreement as set forth in its clear and unambiguous language. Nor did the education laws in April 1974 require that a specified number of observations and evaluations be made of teaching staff employees by supervisors or administrators of the school.

Absent such requirements either in the Board's negotiated policy or the statutes of this State, and absent a showing of bad faith, illegal or capricious action on the part of the Board, petitioner's argument must fail. The determination of the Board is entitled to a presumption of correctness. Given the aforementioned findings, the Commissioner will in no way excise or modify that determination resulting from an exercise of the discretionary powers of the Board.

As was said in *Donaldson, supra,* a board of education may for reasons other than unsatisfactory classroom performance make valid determinations not to renew the contracts of its reaching staff members.

In consideration of the aforementioned conclusions and the relevant facts herein, and in the light of *Ruch, supra,* it is determined that petitioner's charge of arbitrariness on the part of the Board, relative to petitioner's nonrenewal, stands only as a bare allegation devoid of a preponderance of evidence that the Board acted illegally in bad faith. The Commissioner so holds.

The Commissioner is constrained, however, to comment on one facet of the Board's *modus operandi,* herein. Twelve nontenured teachers were notified, pursuant to *N.J.S.A.* 18A:27-10 *et seq.,* prior to April 30, 1974, that their contracts would not be renewed. Thereafter, upon further consideration, eight of these teaching staff members were rehired. While good reason may have existed for the reconsideration of renewal of contracts of each of these teachers, the Commissioner opines that the better way is to avoid the necessity for such reconsiderations, especially in substantial numbers. To do so gives the appearance of possible circumvention of the law. *N.J.S.A.* 18A:27-10 *et seq.* Even the appearance thereof should be assiduously avoided.

The Legislature has recently enacted *N.J.S.A.* 18A:27-3.1 through 3.3, effective July 1, 1975. It requires that three evaluations be provided each nontenured teaching staff member "***during each school year but not less than once each semester***" each evaluation to be followed by a conference between the teaching staff member and his superior or superiors. It is incumbent upon all efficient school supervisors and administrators to give proper and timely priority to this important function intended to strengthen the thorough and efficient education of the pupils in this State.

In conclusion, the Commissioner finds no merit in the Petition of Appeal. Accordingly, it is dismissed.

COMMISSIONER OF EDUCATION

August 5, 1975

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Roy E. King,

Petitioner,

v.

Board of Education of the Atlantic County Vocational School, Atlantic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, John Bertman, Esq.

For the Respondent, Lashman & Kupperman (Shelley B. Lashman, Esq., of Counsel)

Petitioner alleges that he was a tenured employee of the Board of Education of the Atlantic County Vocational School, hereinafter "Board," and that his employment was improperly terminated by the Board on June 30, 1974. The Board denies that petitioner was at any time its tenured employee or that his termination was improper or illegal.

A hearing to determine the relevant facts was conducted on December 19, 1974 at the Burlington County Extension Service Building, Mount Holly, by a hearing examiner appointed by the Commissioner of Education. Respondent moved at the hearing for a determination that petitioner had not in fact served in the employ of the Board for a continuous period of three years. (Tr. 83-85) The hearing examiner declined to rule with finality on the Motion and required that respondent present a defense relative to petitioner's allegation that he had been employed by the Board for a continuous period of three years. (Tr. 85) The report of the hearing examiner is as follows:

Petitioner was employed at the State Department of Education as Atlantic County Coordinator of Occupational Education, having been interviewed and recommended by the Assistant Commissioner of Education in charge of Vocational Education. (Tr. 81) He began work in Atlantic County on May 15, 1971 with office space provided at the facilities of the Atlantic County Superintendent of Schools. (Tr. 30) In September 1971 he was assigned additional duties as the County Coordinator of Occupational Education of Cape May County. (R-9; Tr. 29) Petitioner continued to serve these two counties in that capacity until February 15, 1972, when he was appointed to the position of principal of the Atlantic County Vocational School which was then being constructed. He was thereafter provided an office in the Board's facilities until its new vocational school was ready for occupancy. (Tr. 9, 78) He served the Board without written contract from February 15, 1972 through June 30, 1972, after which contracts were executed covering his employment for the school years 1972-73 and 1973-74. (P-1; P-2)

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Petitioner was notified on April 16, 1974, that he would not be employed for the 1974-75 school year. He contends that during the entire period from May 15, 1971 to June 30, 1974, he performed the responsibilities and exercised the authority of a vocational school principal for the Board and was paid by that Board for performing these duties. Petitioner argues that it is the substance of his duties from May 15, 1971 through February 14, 1972, that must control rather than the technicalities of title and certification.

Additionally, petitioner asserts that the Board by its resolution of April 16, 1973 (P-3) conferred tenure upon him which, even in the event of a determination that his employment with the Board began on February 15, 1972, would invalidate the Board's unilateral termination of his services. He therefore prays that the Commissioner determine that he is a tenured employee of the Board and order appropriate relief.

Conversely, the Board maintains that petitioner was employed by the State of New Jersey from May 15, 1971 through February 14, 1972, and that the Board served only as a fiscal agent for transmittal of State funds when it issued his salary checks during this period. The Board argues that it exercised no function in interviewing, hiring or supervising the work of petitioner during this period and was likewise without power to terminate his employment. The Board avers that under such circumstances petitioner could not and did not serve for that period as its principal and therefore lacked the three calendar years required for tenure pursuant to *N.J.S.A.* 18A:28-5 (a).

Additionally, the Board contends that petitioner's duties prior to his appointment as its principal on February 15, 1972, were dissimilar to his duties thereafter as a vocational principal and encompassed no direct responsibility for the vocational programs it then maintained in the County. (Respondent's Summation, at pp. 3-6)

The Board denies that it granted early tenure to petitioner by its resolution of April 16, 1973, and cites in support thereof *Rall v. Board of Education of the City of Bayonne,* 104 *N.J. Super.* 236, 249 *A.2d* 616 (*App. Div.* 1969); rev'd on other grounds at 45 *N.J.* 373, 255 *A.2d* (*Sup. Ct.* 1969) wherein it was said by the Appellate Court:

> "***(3) We regard the foregoing construction of the statute as so obvious from its language and apparent purpose as to defy the contention that it authorizes a local board to simply select an individual member of an employment category who has served less than three years and confer tenure upon him alone, by name, *ad hoc,* without in any way undertaking to fix a specific, generally applicable, shorter-than-three-years term of service for achievement of tenure by members of that individual's staff category or of any category inclusive of his.
>
> "(4) This is not a matter of elevating form over substance. Far from it. The statute, as we see it, contemplates that before acting *** to fix a tenure period shorter than three years, the board will give consideration to

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whether such shorter period is suitable for *general application* to all present and future members of the category coming into the system until such time, in the indefinite future, as that or a later board amends or repeals the provision***. The intent was plainly not to authorize *exemptions* from the three-year probationary term on an *ad hoc* basis in individual cases.***" (*Emphasis in text.*) (104 *N.J. Super.* at 243)

The Board asserts that no such general application of early tenure to its principal's category was made or contemplated as that which would be required to legally confer early tenure upon petitioner short of three calendar years of service.

For these reasons the Board urges that the Commissioner dismiss the Amended Petition of Appeal.

It is apparent that the matter revolves about two issues:

1. Did petitioner serve in the Board's employ as a principal from May 15, 1971 through February 14, 1972?

2. Did the Board by resolution confer early tenure upon petitioner on April 16, 1973?

Petitioner's job description as County Coordinator of Occupational Education specified that he was to work under the administrative direction of the Director of the Bureau of Area Vocational-Technical and Private Schools of the State Department of Education and that he was to create, organize, implement and evaluate a countywide system of occupational education from kindergarten through adult levels. (R-1) It is clear, therefore, that he was answerable to and under the supervision of his superiors in the State Department of Education. An analysis of the testimony at the hearing leads to the conclusion that petitioner at that time was not hired by, supervised by, nor in any way answerable to the Board or its Director of Vocational Education. (Tr. 31, 33, 66, 127) Rather, he was required to act as a liaison between county vocational schools, secondary schools and elementary schools and develop short and long range plans of vocational education in Atlantic and Cape May Counties. Additionally, he was to establish county advisory committees, and to develop public relations programs involving businesses, industries and educational agencies. (R-1)

Petitioner was paid from May 15, 1971 through February 14, 1972 by the Board which acted as the fiscal transmittal agent for the State Department of Education which provided 100 percent of the funds for his salary, health benefits, employer's social security payments and other expenses. (R-2; R-13; R-14; Tr. 126, 142, 159, 168, 169) His salary and title were fixed by the State Department of Education during this period. (R-4) During this period petitioner reported monthly on his activities to his superiors at the State Department of Education. (R-5; R-6; R-7; R-8; R-9) An analysis of these reports leads to the conclusion that his work in part consisted of planning for the Atlantic County Area Vocational-Technical Center then under construction, but in greater

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measure was that of a coordinator and liaison person assisting public schools of the two counties in the improvement and staffing of their vocational and guidance programs and the TC-4 introductory programs in the elementary schools. Petitioner's own description of the work he did during this period bears little resemblance to the job description of principal of the Atlantic County Area Vocational-Technical Center approved by the Board on March 7, 1972. (R-10) Importantly, this job description specifies that the principal report directly to the Board's Director of Vocational Education, a relationship which both petitioner and the Director denied as existing prior to February 15, 1972.

Testimony by both petitioner and the Director, supports the conclusion that petitioner did not serve the Board as a principal during the period prior to February 15, 1972. (Tr. 62, 63, 74, 139, 163) Nor could he legally have served for this period of nine months as a principal without a principal's certificate, which admittedly he did not possess. He himself testified that the position he held during this time did not require a principal's certificate. (Tr. 37-38) It is well-recognized that teaching staff members may not serve in positions for which they are not certified. *N.J.S.A.* 18A:27-2 Nor may they be appointed except by roll call vote of the majority of the full membership of a board. *N.J.S.A.* 18A:27-1

N.J.S.A. 18A:28-5 limits the benefits of tenure to those teaching staff members who:

> "***are in positions which require them to hold appropriate certificates issued by the board of examiners***."

Petitioner was not in such a position. Accordingly, he is not entitled to count toward the required probationary period his service prior to February 15, 1972.

For the foregoing reasons the hearing examiner recommends that the Commissioner determine that petitioner did not serve the Board as a principal in whole or in part for the period from May 15, 1971 through February 14, 1972.

Petitioner's remaining claim is that the Board by resolution on April 16, 1973, conferred upon him early tenure pursuant to *N.J.S.A.* 18A:28-5 which reads in pertinent part as follows:

> "The services of all teaching staff members including *** superintendents *** shall be under tenure during good behavior and efficiency and they shall not be dismissed *** except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause *** 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.***."
> >
> > (*Emphasis supplied.*)

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The April 16, 1973 resolution of the Board reads in its entirety as follows:

"It was moved by Dr. Winchell, seconded by Mr. Ditmire, that the contracts outlined on the attached report be approved for issuance next year for the next school year with the exception of the salaries, which will be discussed at the next meeting. Also the Secretary is instructed to write to the employees who will not be receiving contracts for the 1973-74 school year prior to the 30th of April, 1973. The Secretary called the roll, all aye." (P-4)

The attached report referred to in the resolution shows the following information pertinent to the within controversy:

"It is the recommendation of the Director that the following employees be offered contracts for the school year 1973-74. *Will receive tenure during contract year.

Position	Name	Date First Emp.	***
***	*King	5-15-71	***
***			

(P-3)

Testimony of the Director was that he had instructed his secretary to prepare this document, and that he had not thoroughly reviewed it prior to presenting it to the Board about five months before the meeting of April 16, 1973. (Tr. 150) He further testified that there had been no discussion of the document by the Board prior to the time the resolution adopting its contents was approved. (Tr. 131) This testimony was corroborated by the then County Superintendent and two other members of the Board. The Director stated that it had not been his intention to recommend that petitioner be granted early tenure. In this regard he testified that he was unaware at the time of the fact that a Board could grant early tenure to anyone other than a superintendent. (Tr. 133, 150)

Two members of the Board testified that they had taken no notice of the asterisk, that there had been no previous discussion of early tenure for petitioner, and that they were unfamiliar that such could be granted and had no intention of doing so when they voted for the resolution, *ante.* (Tr. 88, 96, 99, 100, 101, 108, 109, 115) The then County Superintendent testified that as a member of the Board he was familiar with the provisions for awarding early tenure, but in voting for the resolution, *ante,* had no intention to confer early tenure on petitioner. (Tr. 154, 161)

The hearing examiner concludes that it was not the intent of those members of the Board who testified at the hearing to confer early tenure on petitioner when they voted for the resolution, and that no discussion relative to early tenure had taken place at any time prior to passage of the resolution.

In the light of this finding and in the complete absence of any showing that the Board had passed a prior resolution to grant early tenure to its

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principals, pursuant to the Court's requirement in *Rall, supra,* the hearing examiner recommends that the Commissioner determine that the Board did not confer early tenure upon petitioner.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and observes that neither party filed objections nor exceptions thereto. *N.J.S.A.* 6:24-1.16

It is clear from the record herein and the Commissioner so holds that petitioner was in the employ of the New Jersey Department of Education from May 15, 1971 through February 14, 1972. As such, the amount of time served in that employment is not counted toward the acquisition of a tenure status in the employ of the Board. In this regard, boards of education of county vocational school systems have statutory authority to "*** [e]mploy *** principals, teachers ***" for their schools. *N.J.S.A.* 18A:54-20 Furthermore, such persons so employed "***shall have all rights and privileges of teachers, principals *** in school districts." *N.J.S.A.* 18A:54-22

In order to acquire a tenure status in the employ of a local board of education the precise conditions must be met as set forth in the statutes. *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962), *cert. den.* 371 *U.S.* 956 (1963); *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (*E.&A.* 1941) Such precise conditions require, at a minimum, three successful calendar or school years of employment with a local board of education. Petitioner's employment with the Board herein does not meet that basic requirement.

In regard to petitioner's allegation that the Board conferred early tenure upon him by virtue of its adoption of the April 16, 1973 resolution (P-4), the Commissioner adopts as his own the hearing examiner's finding that that resolution was not and is not intended by the Board to confer early tenure upon petitioner.

The Commissioner having found no basis to intervene, hereby dismisses the Petition.

COMMISSIONER OF EDUCATION

August 5, 1975

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Union County Regional High School Teachers Association, Inc.,

Petitioner,

v.

Board of Education of the Union County Regional High School District #1, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris and Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, Weinberg, Manoff and Dietz (Irwin Weinberg, Esq., of Counsel)

The Union County Regional High School Teachers Association, hereinafter "Association," brings this action on behalf of three of its members who are employed as school nurses by the Board of Education of the Union County Regional High School District #1, hereinafter "Board." The Association alleges that the Board has violated the provisions of *N.J.S.A.* 18A:29-4.2 in its establishment of salaries for the three school nurses since the academic year 1972-73. The Association seeks judgment in favor of the school nurses in the form of moneys allegedly due them from the Board for underpayment of their salaries since that time. The Board denies the allegations set forth herein and asserts that its actions in regard to the establishment of salaries for the three nurses were and are, in all respects, proper and legal.

A hearing was conducted in this matter on January 16, 1975 at the office of the Essex County Superintendent of Schools, East Orange, by a hearing examiner appointed by the Commissioner of Education. Because of the stipulations spread on the record by the parties and the limited testimony educed, the parties have waived receipt of the hearing examiner's report. (Tr. 17) The matter is referred directly to the Commissioner for adjudication.

The Board employs eight school nurses (J-1), each of whom possesses a standard school nurse certificate (Tr. 6) and all of whom, except three, possess at least a baccalaureate degree. This matter deals specifically with the salaries of the three school nurses who do not possess a baccalaureate degree: Catherine Astley, Henrietta Brown, and Phyllis Jarman.

The record discloses that the Board has employed, since at least the late 1960's (Tr. 13), two vocational education teachers who do not possess baccalaureate degrees. One person is certified for and teaches beauty culture (J-6) while the other person is certified to teach industrial arts (J-5) and teaches auto mechanics. (Tr. 4) The Assistant Superintendent of Schools testified that since at least 1971 both of these persons have had their salaries determined

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according to the appropriate step on the bachelor's degree scale of the Board's Teachers' salary policy. (J-7; Tr. 12)

The Association argues that by virtue of *N.J.S.A.* 18A:29-4.2 and the Commissioner's holdings in *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, Passaic County,* 1972 *S.L.D.* 577 and *Julia Ann Sipos et al. v. Board of Education of the Borough of Manville, Somerset County,* 1973 *S.L.D.* 434, the yearly salaries for the three school nurses must also be established according to the rates set forth in the bachelor's degree scale of the Board's salary policy. The Association complains that for 1972-73, 1973-74, and the Commissioner presumes for 1974-75, the salaries of the three nurses were established according to the lower rates set forth in the Board's "Non-Degree Nurses' Salary Guide" (J-7) for each of the respective years.

The Board itself relies on the Commissioner's holdings in *Lenahan, supra,* and *Sipos, supra,* as authority for its negotiation to establish a non-degree nurses' salary guide. (Tr. 8) Furthermore, the Board argues that because the non-degree nurses' salary scale is part of its agreement (J-7) with the Association and because the agreement provides for arbitration, the proper forum for this dispute is arbitration.

The Commissioner does not agree that he lacks jurisdiction herein. The statute *N.J.S.A.* 18A:6-9 provides the Commissioner with the authority to hear and determine controversies and disputes arising under school law. The pertinent statute herein is *N.J.S.A.* 18A:29-4.2 which requires boards of education to compensate school nurses who hold a standard school nurse certificate according to the provisions of the teachers' salary guide in effect. Consequently, this dispute does arise under school law and it is within the Commissioner's jurisdiction.

It is true that in *Lenahan, supra,* and *Sipos, supra,* it was held that if a board of education employed school nurses who possessed a standard school nurse certificate but did not possess a baccalaureate degree it might negotiate for a non-degree guide to be included in its teachers' salary policy. The Commissioner also held in *Lenahan,* however, that "*** a school nurse holding a standard school nurse certificate shall be paid according to the experience steps and training levels that apply to teachers in each respective district.***"

(at p. 581)

The issue here is whether this Board may compensate two teaching staff members without a degree (the vocational education teachers) according to the bachelor's degree scale while compensating three other teaching staff members without a degree (the three school nurses) according to the lower rates set forth in the non-degree nurses' salary guide.

In *Pearl Schmidt v. Board of Education of the Passaic County Regional High School, Passaic County,* 1975 *S.L.D.* 19 (decided January 21, 1975), the Commissioner held that:

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> "***[O]nce a board compensates a teaching staff member according to a salary guide which recognizes educational achievement, all teaching staff members similarly situated must be compensated accordingly; *i.e.*, non-degree teachers on the non-degree guide, and degree teachers on the degree guide.***" (at p. 24)

It is clear and the Commissioner so holds that in this instance the Board has established each of petitioners' salaries for 1972-73, 1973-74, and presumably for 1974-75 in contravention of *N.J.S.A.* 18A:29-4.2. There is no question that the Board employs five teaching staff members who do not possess baccalaureate degrees, but, all of whom are properly certificated. For the Board to compensate two of these five persons, excluding the three who are school nurses, according to the higher rate set forth in the bachelor's scale of its salary policy, while, on the other hand, confining the three nurses to the lower rates of the "non-degree nurses' salary guide" is, on its face, discriminatory. The Commissioner recognizes that local boards of education may establish a non-degree salary schedule as part of their salary policies through proper negotiations. Once such a salary schedule is established, however, all teaching staff members who do not possess degrees are to be compensated according to its terms. In the instant matter, the Board discriminated against three persons by holding them to a non-degree salary schedule while compensating the remaining two according to the bachelor's degree schedule when, in fact, these latter did not possess bachelor's degrees.

Consequently, the Commissioner hereby directs the Board of Education of Union County Regional to compensate school nurses Catherine Astley, Henrietta Brown, and Phyllis Jarman the difference between their actual salaries for 1972-73 and 1973-74 and the amounts their salaries would have been according to the bachelor's degree schedule of its salary policy. Furthermore, the Board is directed to adjust each of petitioners' salaries for 1974-75 according to the bachelor's scale now in effect, retroactive to September 1, 1974.

Finally, the Commissioner points out that, for 1975-76, the Board may negotiate for a non-degree salary scale to be incorporated into its salary policy. The rates set forth therein may not diminish the tenure protection afforded its teaching staff members, and the non-degree scale must be implemented pursuant to the provisions of *N.J.S.A.* 18A:29-4.2 and the Commissioner's determination in *Lenahan, supra.*

COMMISSIONER OF EDUCATION

August 5, 1975

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In the Matter of the Annual School Election Held in the School District of the Township of Mount Olive, Morris County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainants, James W. Broscious, Esq.

For the Respondent, Arnold H. Chait, Esq.

Pursuant to a letter request filed by defeated candidates Robert I. Elms, Mary Brentnell, and Raymond Wasilewski, alleging certain irregularities in the conduct of the annual school election held March 11, 1975 in the School District of the Township of Mount Olive, an inquiry was conducted by a hearing examiner designated by the Commissioner of Education, at the State Department of Education, Trenton, on April 10, 1975. The announced results of the balloting for the election of school board members was not challenged; however, allegations of improper conduct of the election by complainants are as follows:

1. The PTA monthly newsletter, *Megaphone,* contained a president's message to vote "yes" for the school budget. This newsletter was sent home with the school pupils in violation of *N.J.S.A.* 18A:42-4.

2. Posters were placed in the Township favoring the election, stamped "Printed by Mt. Olive School" in violation of *N.J.S.A.* 18A:14-97.

3. Voters were turned away from one polling place and sent to others miles away instead of using affidavits.

The fourth complaint was withdrawn by the complainants.

N.J.S.A. 18A:42-4 reads as follows:

"*No literature which in any manner and in part thereof promotes, favors or opposes the candidacy of any candidate for election at any annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election shall be given to any public school pupil in any public school building or on the grounds thereof for the purpose of having such pupil take the same to his home or distribute it to any person outside of said building or grounds,* nor shall any pupil be requested or directed by any official or employee of the public schools to engage in any activity which tends to promote, favor or oppose any such candidacy, bond issue, proposal, or public question. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section." (*Emphasis added.*)

Regarding the first complaint, two witnesses, mothers of elementary school pupils, testified that their children brought home the PTA newsletter, *Megaphone* (Exhibit A), and told them that it was distributed in school. Their

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testimony was supported by the Board Secretary who stated that the school principals distributed copies to teachers who in turn gave them to their pupils to take home. This procedure was common practice. That document reads in pertinent part as follows:

"MT. OLIVE PTA
NEWS
Volume III Megaphone Issue 4
THE EXECUTIVE BOARD OF THE
MT. OLIVE PTA URGES YOU TO --
VOTE YES X
FOR THE SCHOOL BUDGET
March 11 2-9 P.M." (Exhibit A)

There was no testimony educed to deny this complaint or refute the supporting evidence. The hearing examiner finds, therefore, that the complaint is true in fact and in violation of *N.J.S.A.* 18A:42-4.

In *Peter P. Lucca v. Lower Camden County Regional High School District #1, Camden County,* 1968 *S.L.D.* 166, the Commissioner commented as follows:

> "***The Commissioner finds no reason to question the purity of respondent's motives or the honesty of its intention to serve an essential public purpose by the preparation and distribution of the letter at issue herein. The Commissioner cannot escape the conclusion, however, that the tenor of the letter does promote and favor the approval of the proposal before the voters, and its distribution by the pupils of respondent's schools is, therefore, inconsistent with the law. Respondent would have been better advised to have confined its dissemination of information to those media whose use is legally proper. The use of school pupils for the purpose was an error of judgment which cannot be supported, in the Commissioner's opinion.
>
> "The Commissioner wishes to emphasize, however, that his decision in this case is based solely on the fact that the letter was distributed by the pupils of respondent's school and does not constitute a criticism of respondent's efforts to inform the voters concerning the proposal to be voted upon and to seek approval. The Commissioner has held previously in a similar case that while a board of education cannot legally utilize pupils of its schools to distribute to voters materials which promote or favor the adoption of election proposals, it can and should avail itself of reasonable promotional media to explain and interpret such proposals to the people. See *Halligan v. Board of Education of the Borough of Rutherford,* 1959 *S.L.D.* 198. A board of education not only has the right, but it also has the duty to disclose fully and fairly all relevant facts to the voters in its endeavor to inform and to secure approval of its proposals. *Cf. Citizens to Protect Public Funds and Dudley Kimball v. Board of Education of the Township of Parsippany-Troy Hills,* 13 *N.J.* 172 (1953)***." (at pp. 167-168)

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The second complaint, concerning a disputed poster of the school budget, is true in that it was posted in the Township and favored adoption. It reads as follows:

"PROTECT YOUR CHILD'S EDUCATION

"VOTE FOR THE SCHOOL BUDGET ON MARCH 11

"Printed by
"Mt. Olive School" (Exhibit B)

Complainants aver that this poster is in violation of *N.J.S.A.* 18A:14-97, and that the offending poster was exhibited at the start of the election at one polling place, closer than the one hundred foot minimum distance required by *N.J.S.A.* 18A:14-81.

N.J.S.A. 18A:14-97 reads as follows:

"*No person shall print, copy, publish, exhibit, distribute or pay for printing,* copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, *any circular,* handbill, card, pamphlet, statement, advertisement or other printed matter having reference to any election or to any candidate or to the adoption or rejection of any public question at any annual or special school election *unless such circular, handbill, card, pamphlet, statement, advertisement or other printed matter shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied or published or of the name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published.*" (*Emphasis added.*)

N.J.S.A. 18A:14-81 reads as follows:

"If a person shall distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or public question, to be voted upon at any election, within the polling place or room or within a distance of 100 feet of the outside entrance to such polling place or room, he shall be a disorderly person."

The poster (Exhibit B) is clearly in violation of *N.J.S.A.* 18A:14-97 in that it does not bear upon its face the name, address, and other pertinent information required by *N.J.S.A.* 18A:14-97.

The hearing examiner finds, therefore, that this complaint is also true in fact.

Testimony alleging that the poster (Exhibit B) was posted during the first ten minutes of the election at one polling place was refuted by the judge of elections who testified that she removed the offending poster ten minutes before the election. The testimony revealed that other posters in the school were

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removed earlier. The hearing examiner finds that the testimony of the judge of elections is persuasive and that the offending poster was removed prior to the election.

A second poster (Exhibit C) measuring five and one-half by seven inches, and printed on both sides, was displayed on the door of a Board truck near one polling place. It was not determined which side of Exhibit C was displayed; however, both sides favored four Board candidates. No evidence was offered to support the contention that the poster was placed there by the Board. The poster on the truck may have been placed there by a misguided employee or other interested person. A challenger for Candidate Wasilewski testified that he saw this poster on the Board truck, fifteen feet from the polling place, and removed it at 1:40 p.m. Therefore, it could not have been displayed during the election.

The defeated candidates' third complaint is without merit. Voters must vote in their proper polling district. *N.J.S.A.* 18A:14-49; *N.J.S.A.* 18A:14-52 See also *In the Matter of the Annual School Election Held in the District of the Township of Wayne, Passaic County,* 1974 *S.L.D.* 1071; affirmed in part, reversed in part, State Board of Education 1077; affirmed New Jersey Superior Court, Appellate Division 1078.

There was no evidence that any affidavits were handed out improperly and the complainants' contention that they should have been issued as a convenience to voters is groundless. Nor was there any evidence to show that any voter who wished to vote did not do so in his proper polling district. The hearing examiner recommends that the third complaint be dismissed.

Testimony was offered alleging other minor irregularities such as:

1. The wife of one candidate failed to sign the poll list. (The judge of elections testified that she called this person and she returned to sign the poll list.)
2. A challenger testified that she overheard one person being instructed for whom to vote.
3. An unregistered person voted.

(Exhibit D)

In the hearing examiner's judgment, nothing in the testimony or evidence submitted is sufficiently flagrant to suggest that the will of the voters has been thwarted or that the election should be set aside. Nor do complainants request that the election be voided; rather, they opine that the process has been tainted and that the Board and its officials should be admonished by the Commissioner to prevent the recurrence of such irregularities.

This concludes the report of the hearing examiner.

* * * *

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The Commissioner has reviewed the hearing examiner's report and the replies of the parties pertinent thereto. The Board asserts in its reply that the findings of fact as set forth by the hearing examiner with respect to the first two allegations by complainants are subject to certain exceptions. Although the findings of fact concerning the claimants' first allegation of improper conduct pursuant to *N.J.S.A.* 18A:42-4 is not denied by the Board, it avers that the impropriety of distributing the PTA newsletter (Exhibit A) to its elementary school pupils was not a deliberate act of unlawful intent. The Board relies on the Commissioner's decision *In the Matter of the Annual School Election in the School District of Madison Township,* 1974 *S.L.D.* 744 in support of its position. (Board's Letter Reply to the Report of the Hearing Examiner, at p. 1)

The Commissioner does not question the Board's intentions with respect to the distribution of the materials as controverted herein. However, using pupils and teaching staff members in this manner is clearly a violation of statutory prescription (*N.J.S.A.* 18A:42-4) and cannot be condoned. The Commissioner directs the Board to notify all of its teaching staff members regarding the statutory restrictions set forth therein.

Accordingly, the Commissioner adopts that portion of the hearing examiner's findings with respect to the first allegation in the instant matter.

The Board also takes exception to the hearing examiner's findings concerning the claimants' second allegation of improper conduct related to certain violations of the statutory provision of *N.J.S.A.* 18A:14-97 and *N.J.S.A.* 18A:14-81.

The Board avers that it was in substantial compliance with the law (*N.J.S.A.* 18A:14-97), inasmuch as the art poster (Exhibit B) contained on its face "PRINTED BY MOUNT OLIVE SCHOOL." Additionally, the Board relies on the testimony produced at the hearing which indicates that the poster was made by the school staff and located within the school building. (Board's Letter Reply to the Report of the Hearing Examiner, at p. 2)

Moreover, the Board maintains that "***[t]he production and exhibiting of the poster [Exhibit B] by the school district does not violate any statute***" since it is the type of activity which the Commissioner deemed to be appropriate in *Lucca, supra,* with respect to the efforts of a board of education to inform voters in seeking approval of its budget. (Board's Letter Reply to the Report of the Hearing Examiner, at p. 2)

The Commissioner finds and determines that the information contained on the face of the poster (Exhibit B) is insufficiently specific to initially satisfy the statutory requirements of *N.J.S.A.* 18A:14-97. Additionally, the Commissioner cannot agree that the location of the poster controverted herein would not constitute a violation of the statute, if it was intended to *** offer any suggestion or solicit any support for any *** public question, to be voted upon at any election, [and located] within the polling place or room or within a distance of 100 feet of the outside entrance to such polling place or room***."

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N.J.S.A. 18A:14-81. In the Commissioner's judgment, were it not for the action taken by the judge of elections in removing the offending poster prior to the time of the election (Tr. 106), the charge as set forth herein would be sustained. The Commissioner finds that the prompt action taken by the judge of elections was correct with respect to the instant matter, and he cautions the Board to refrain from such practice in the future.

The Commissioner also notices that a campaign poster of unknown origin (Exhibit C) was removed from its location outside the entrance to the polling place prior to the election, and he deems such action to be appropriate in order to insure statutory compliance with school election procedures.

Accordingly, the hearing examiner's findings in this regard are adopted by the Commissioner as his own.

The findings and conclusion of the hearing examiner with respect to the third and final allegation of the claimants, that voters must vote in their proper polling district, is sustained by the Commissioner and determined to be in compliance with *N.J.S.A.* 18A:14-49 and *N.J.S.A.* 18A:14-52, as well as prior case law.

Although the Commissioner cannot condone the Board's action with respect to the first two allegations as stated herein, he finds nothing in the record before him which would lead him to the conclusion that the circumstances of these irregularities as determined herein resulted in the will of the voters being thwarted.

Accordingly, the Commissioner finds and determines that the results of the annual school election will stand as previously announced.

COMMISSIONER OF EDUCATION

August 5, 1975

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Samuel E. Appel,

Petitioner,

v.

Board of Education of the City of Camden, Dr. Charles Smerin, Superintendent of Schools, Camden County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Samuel E. Appel, *Pro Se*

For the Respondents, M. Allen Vogelson, Esq.

Petitioner, a member of the Board of Education of the City of Camden, hereinafter "Board," alleges that respondents failed to comply with legal requirements relative to the certification and appointment by the Board of certain administrative personnel in June 1974. He seeks an order from the Commissioner of Education directing that respondents fully comply with the statutory and State Board of Education regulations and that the employment of any personnel whose certification is inappropriate be discontinued.

Conversely, respondents deny that the Board's action was illegal, improper, or contrary to the public interest.

At a conference of counsel held October 31, 1974, conducted by a hearing examiner appointed by the Commissioner, it was agreed that the relevant facts would be jointly stipulated. The parties proved unable to arrive at a total stipulation, but it was determined that the matter would proceed as planned without the necessity of an evidentiary hearing. Oral argument was conducted by the hearing examiner at the State Department of Education, Trenton, on January 17, 1975. Reliance was placed on documentary evidence submitted at the oral argument regarding the single fact in dispute. The report of the hearing examiner is as follows:

The Board and the municipal government of the City of Camden in 1973 entered into an agreement that the Board would thereafter assume responsibility for the program of recreation and community services that had previously been a function of the municipal government. Pursuant thereto, on September 10, 1973, over the objections of petitioner, the Board adopted the following resolution:

> "WHEREAS the Board of Education of the City of Camden recognizes that a need exists for an additional Assistant Superintendent for recreation and community services,
>
> "NOW THEREFORE BE IT RESOLVED that there is created the title of

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Assistant Superintendent for recreation and community services, effective immediately." (P-1)

Thereafter, on October 8, 1973, upon recommendation of the Superintendent, the Board appointed an Assistant Superintendent for Recreation and Community Services, effective October 15, 1973. (P-2)

The minutes of this meeting show that petitioner strongly opposed the appointment on the basis that he believed more important priorities existed and on grounds that it was in non-compliance with *N.J.S.A.* 18A:17-17 which provides that:

> "No person shall be appointed, or act as, or perform the duties of, superintendent or assistant superintendent of schools, unless he holds an appropriate certificate as prescribed by the state board."

Thereafter, on June 3, 1974, job descriptions were approved by the Board for three additional supervisory positions for the recreation and community services program. Candidates' names were submitted to the Board for appointment on June 24, 1974. Thereupon petitioner advanced the following motion which was defeated by a majority vote of the Board:

> "***It is recommended that the following job descriptions of unrecognized titles be submitted to the County Superintendent of Schools for a determination of the appropriate certification for each position as per [*N.J.A.C.* 6:11-10.5]. The positions are the Assistant Superintendent for Recreation and Community Services, Director of Recreation, Supervisor of Recreation and Coordinator of Community Services.***" (P-3)

Nevertheless, the Superintendent did in fact submit job titles and specifications for the latter three of these four positions to the County Superintendent on June 26, 1974. (R-4, 5, 6) He, in turn, reviewed these with and forwarded them to the Director of the Bureau of Academic Credentials at the State Department of Education. (R-2) On June 28, 1974, the County Superintendent, by letter, advised the Superintendent, *inter alia,* as follows:

> "***Since there does not appear to be any major discrepancies, I would suggest that you continue your programs with the employees that you have on your staff and, as you recommend new employees, follow your recommendations in accordance with our discussions on June 26, 1974.***" (P-5)

No submission of a job title or job description was at any time submitted by the Board or its agents to the County Superintendent for the position of Assistant Superintendent for Recreation and Community Services. The appointee to this position was in possession of no certificate at the time of the appointment, but was issued, upon the recommendation of the Certification Appeals Committee and the approval of the State Board of Examiners a

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conditional principal's certificate to serve as a principal in the school year 1973-74. (C-1) Thereafter, he was issued a permanent principal's and supervisor's certificate in August 1974. *N.J.A.C.* 6:11-10.4(b) provides that the holder of a principal's certificate may also serve as an assistant superintendent of schools. It is on this fact that the Board relies when contending that it was not required to submit a job description or request an evaluation of the job title from the County Superintendent.

The facts relative to certification for the positions held by the remaining three appointees are as follows:

1. Director of Recreation:
   - A. At time of appointment: Supervisor's Certificate and Principal's Certificate (R-7; R-8)
   - B. Subsequently issued: None
2. Coordinator of Community Services:
   - A. At time of appointment: None
   - B. Subsequently issued: Conditional Supervisor's Certificate issued April 1975, to serve as coordinator of community services in the City of Camden only; issuance based on recommendation of the Appeals Committee and approval of the State Board of Examiners. Application for review by Appeals Committee made June 1974. (C-1)
3. Supervisor of Recreation:
   - A. At time of appointment: Teacher of Health and Physical Education
   - B. Subsequently issued: None; he has been advised that a Supervisor's Certificate and/or a Principal's Certificate requires the fulfillment of corollary requirements. (C-1)

Petitioner contends that the job titles of the four controverted positions, bearing as they do distinguishing words which do not appear in the listing of authorized titles, were indeed unauthorized titles and were required to be submitted with job descriptions in advance of the appointments pursuant to *N.J.A.C.* 6:11-10.5(a) which states:

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

Petitioner contends that the Board, having been fully apprised of this regulation of the State Board, seriously erred by making the controverted appointments prior to carrying out the preliminary requirements of the State Board. He further asserts that failure to do so is contrary to the spirit and intent

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of the regulation which seeks to insure that properly qualified personnel conduct the school programs of the State. (Tr. 36)

Petitioner avows that in each instance the Board's action was premature and not in compliance with *N.J.A.C.* 6:11-3.1(a) which provides that:

> "No teacher shall be entitled to any salary unless such teacher shall be the holder of an appropriate teacher's certificate. (N.J.S.A. 18A:26-2)."

He further charges that the Superintendent and the County Superintendent of Schools were likewise derelict in their duty for non-compliance with *N.J.A.C.* 6:11-3.5(a) and (b) which states:

> "(a) The local superintendent of schools shall ascertain if professional staff members are properly certificated and shall report to the appropriate board of education those who are not properly certificated.
>
> "(b) The county superintendent shall take measures necessary for the enforcement of the State law requiring boards of education to employ only those professional staff members who are properly certificated for the positions held."

Petitioner seeks redress in the form of an order of the Commissioner requiring that job descriptions be formulated for each of the controverted positions and forwarded to the County Superintendent to be evaluated by the appropriate State agency. He further seeks a directive that the Board, Superintendent, and County Superintendent be required to exercise their respective functions to insure compliance with the law by employing or continuing to employ only those persons who are properly qualified and certificated.

The Board, in defense, asserts that it is common practice in a large city school system such as Camden to incorporate distinguishing terminology into the titles of its assistant superintendents, coordinators, supervisors and other personnel. (Tr. 15-17) It contends, however, that such incorporation of title words in no way alters or affects the appropriate certification which must be issued. In support of this contention, it points out that the title of Assistant Superintendent for Recreation and Community Services was well known to the State Board of Examiners which issued first a temporary and then a permanent certificate to the one who now holds the position. The Board emphasizes that this was done without its submitting or being required to submit a job description therefor.

The Board further asserts that the delay common to procurement of certification compelled it to adopt the practical course of first making the controverted appointments and thereafter in timely fashion applying for certification for those persons. (Tr. 22, 27)

Additionally, the Board argues that *N.J.A.C.* 6:11-10.5 and *N.J.A.C.* 6:11-3.6 merely state that in the event that unrecognized titles are necessary, "a

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job description *should* be formulated and submitted to the county superintendent." It is contended that the use of the word *should* does not make this a mandatory requirement. Therefore it concludes that these personnel were legally employed.

The Board contends that, faced with the municipality's abolishment of its recreation program and the impending warm weather, it was compelled to act quickly to implement a program to accomplish the desired objectives.

Finally, the Board points out that job titles were in any event formulated and submitted with job descriptions to the County Superintendent prior to the filing of the written Petition. For these reasons the Board requests that the Petition of Appeal be dismissed.

The hearing examiner observes that *N.J.A.C.* 6:11-4.6 makes adequate provision for the employment of an individual who is believed to possess the qualifications for, but is not the holder of, an appropriate certificate. It provides that:

> "A certificate may be given for a period of two months by a county superintendent of schools to legalize the employment of an applicant for a teaching position who appears to have the qualifications for a teaching certificate but who must have time to secure credentials and complete his application."

There is no evidence herein that the Board, even when challenged by petitioner on the propriety of its actions, availed itself of this provision whereby a valid two months' certificate could have been procured in a matter of a few days at the discretion of the County Superintendent. Had it done so, the four employees, if deemed eligible, could have been clothed with certification upon their appointment.

The hearing examiner recommends that the Commissioner determine that this mode of action should have been followed by the Board within the framework of the heretofore described factual context. See *Mildred Givens v. Board of Education of the City of Newark,* 1974 *S.L.D.* 906. He leaves to the Commissioner the determination whether the controverted personnel were illegally employed.

Additionally, the Commissioner is called upon to interpret the meaning of the word *should* in *N.J.A.C.* 6:11-10.5(a) as to whether its application is mandatory or merely recommended. He is further required to determine whether there was, as charged, dereliction of statutorily imposed duties on the part of administrative personnel or of the Board.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and

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the replies and objections pertinent thereto filed by petitioner and the Board. Petitioner reasserts prior arguments with respect to the job title "Assistant Superintendent for Recreation and Community Services" and avers such position should include "*** academic credentials in Recreational Administration.***" (Petitioner's Objections, Exceptions and Replies to Hearing Examiner's report, at p. 2) He asserts a similar view with respect to the job title "Director of Recreation" and maintains that there was no evident and pressing need for the Board, at the time of its controverted appointments "*** to act hastily and without basic information and monies.***" (*Id.* at p. 2) Petitioner further maintains that the Board's submission of job descriptions to the County Superintendent prior to the time when the instant Petition was filed is irrelevant since *N.J.A.C.* 6:11-3.6 and *N.J.A.C.* 6:11-10.5 provide that such description must be filed prior to the time of appointment of persons to such position.

The Board argues that *N.J.A.C.* 6:11-4.6 is not applicable to the instant matter, as determined by the hearing examiner. In support of this view the Board notes the fact that the County Superintendent made no mention of this rule in his letter of June 28, 1974, *ante.*

The Commissioner has reviewed such arguments in the context of the facts which are not in basic dispute. It is observed that there is no contention by either party that the establishment of appropriate titles for positions of employment in the public schools is not required. There are, instead, contentions concerned with whether the Board, in this instance, titled positions correctly, advertised them in timely manner, and employed personnel for them who were properly certificated.

In this respect the Commissioner finds no significance in the fact that the job titles bear distinguishing words other than Assistant Superintendent, Coordinator, Director or Supervisor. It is clear that each of the positions embraced responsibility which was district-wide in scope and that each required a certificate other than that of teacher. Specifically, the latter three titles should appropriately require a supervisor's certificate and the title "Assistant Superintendent" required either a certificate as a principal or school administrator.

The applicable rule is *N.J.A.C.* 6:11-10.4 which provides in sections a, b, and c:

N.J.A.C. 6:11-10.4 Authorization

"(a) School administrator: This endorsement is required for the position of superintendent of schools. The holder of this endorsement may also serve as assistant superintendent of schools, principal, or supervisor.

"(b) Principal: This endorsement is required for positions of principal or vice-principal. Holders of this endorsement may also serve as assistant superintendent of schools.

"(c) Supervisor: This endorsement is required for supervisors of instruction who do not hold a school administrator endorsement. The

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> supervisor shall be defined as any school officer who is charged with *authority and responsibility for the continuing direction and guidance of the work of instructional personnel.* This endorsement also authorizes appointment as an 'assistant superintendent in charge of curriculum and/or instruction.' (*Emphasis supplied.*)

The Commissioner cannot agree with petitioner's contention that qualifications for such positions should include preparation in "Recreational Administration." There is no such mandated specificity in the rules of the State Board of Education with respect to specialized administrative positions but instead a broad mandated program of studies generally and practically applicable to a great variety of administrative duties. *N.J.A.C.* 6:11-10.2, 10.7, 10.8, 10.9 Specific subject field preparation is required of teachers. *N.J.A.C.* 6:11-8.3 *et seq.*

It follows that the Commissioner determines from a review of the credentials listed by the hearing examiner that the Assistant Superintendent with a conditional principal's certificate was eligible to assume his duties on October 15, 1973, and that the Director's certification as a supervisor was similarly appropriate. It is further determined, however, that the Coordinator of Community Services and the Supervisor of Recreation were not appropriately certified for their respective positions at the time of their appointment and that the latter incumbent still remains uncertified. The Commissioner holds, therefore, that the Supervisor may not continue in the position unless appropriate certification is obtained. In the context of the letter of the County Superintendent dated June 28, 1974 (P-5), however, which at least by indirection gave tacit approval to a continuation of the employment of the Supervisor and Coordinator, the Commissioner finds no reason for retroactive monetary penalty, if indeed one is even possible in the circumstances.

There remains the matter of an interpretation of the word *should* as it is used in *N.J.A.C.* 6:11-10.5(a) and a consideration of the hearing examiner's recommendation with respect to *N.J.A.C.* 6:11-4.6. In this regard the Commissioner holds that *should* in the context of its use in the rule must be interpreted as mandatory whenever an "unrecognized" title is considered for adoption. Although, as herein, there may be a question with respect to whether a title is or is not "recognized," the principle remains. The Commissioner further holds that *N.J.A.C.* 6:11-4.6 must be read, as a temporary expedient, *in pari materia* with *N.J.A.C.* 6:11-3.1 (the requirements with respect to the certification of a "teacher") and that such a reading does not connote an applicability to the situation herein, an employment of persons for positions other than "teacher."

The Petition is dismissed, with the exception of the ruling previously stated.

COMMISSIONER OF EDUCATION

August 5, 1975

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

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