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NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1986 to December 31, 1986

VOLUME 3

PAGES 1579-2378

Saul Cooperman
Commissioner of Education

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BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions, as well as reply exceptions, filed by both parties were not submitted within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

The pivotal issue in the instant matter is whether the selection process developed by Haddon Heights High School (HHHS) for the admission of pupils to the National Honor Society (NHS) is arbitrary, capricious, unreasonable or administered inconsistently and in violation of the guidelines of the NHS. Having carefully studied the record, including the six days of hearing transcripts in the matter, the Commissioner finds that it is, and affirms the initial decision, with modification, for the reasons that follow.

Initially, the Commissioner adopts from the initial decision the ALJ's explanation of the procedure used for the selection of pupils to the NHS at HHHS, which is set forth below for clarity of discussion:

> The procedure utilized for the selection of pupils to the NHS was described by its advisor. An announcement was made to seniors over the school's public address system in September 1983 that the NHS selections would be made in spring 1984 and that all pupils with a grade point average (GPA) of 85 or above at the end of the junior year would be considered. After checking the GPA of all eligible pupils for accuracy a mandatory meeting of those eligible seniors was held to explain the selection process. Each pupil was given a form to fill out (R-1) on which they were asked to list the activities in which they were involved and any other activity they wished considered, in or outside of the school. S.S. submitted her completed form (R-3).
>
> The NHS handbook establishes four criteria against which each eligible pupil is measured when being considered for membership. Those criteria are: Scholarship,* Service, Leadership, and Character

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(R-6). Rating points are awarded in each category as follows:

"4," outstanding - highly worthy of membership
"3," superior - worthy of consideration
"2," average - but worthy of consideration
"0," weak - not worthy of consideration
(J-1, #3)'

These ratings are then applied to the four criteria by each of the pupils' teachers and a numerical sum is derived. When divided by the number of teacher's ratings the individual pupil's numerical average is determined (J-1, #6). S.S. received a total of 175 points given in 54 evaluations by a number of her teachers. Her point average was 3.24 (J-1, #6).

At this juncture an overview of the NHS selection procedures, as outlined in its handbook - Appendix II, is in order (P-2). Each school is encouraged to develop its own selection procedures designed to meet the school program.

'The NHS procedures use the figures 4, 3, 2, 1, HHS uses a 0 in place of the 1.

* The Commissioner notes, by way of clarification, that ratings as they relate to scholarship do not take GPA into account, but rather allow the faculty to assign ratings on the basis of effort. Thus, students with the best GPAs may receive lower ratings than students perceived as working up to their ability.

The schools are also encouraged to be as objective as possible and cautioned that subjective methods may be suitable only for small schools in which the faculty is well acquainted with all of the pupils. HHHS followed the NHS guidelines in general with modifications designed for local use. However, there was a significant departure from an objective evaluation in the area of scholarship. Pupils' GPA's were not ranked or rated other than meeting the minimum requirement of an 85 to be eligible for NHS consideration. The faculty advisor testified that a pupil with an 86 average in scholarship who was working to his/her maximum potential could get a 4 (four) in scholarship. Therefore, even a scholarship rating was highly subjective. GPA's were not available to the selection committee when it evaluated pupils' scholarship. As shown above, the sums of the scores in the four areas evaluated were divided by the number of evaluators to reach each pupil's final point average, which was 3.24 for S.S. The pupils' point averages were then plotted on a frequency distribution

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> chart. (R-5 is a sample. The actual chart was destroyed). After examining this chart the selection committee decided on a cut-off point of 3.5 prior to reviewing any candidates. The pupils' identities were not known prior to establishing the cut-off point. After the cutoff point was decided, the faculty advisor(s) read to the selection committee the information sheets for all pupils whose average evaluation was 3.5 or higher. These pupils were voted on separately and all pupils with a 3.5 average or higher were selected for induction into the NHS.
>
> Pupils whose evaluations ranked between 3.5 and 3.0 were then read to the selection committee by the advisors. Three pupils below 3.5 were also selected for induction into the NHS. All three had average evaluations higher than S.S. Their selection was based on "outstanding" service which each had performed. Class rank was not considered by the selection committee. The class ranking of the pupils inducted was 1, 2, 3, 4, 9, 12, 13, 15, 18, 23, 26, 31, 33, 34, 51, and 67 (J-4).
>
> As earlier stated, in addition to the four criteria utilized for evaluating pupils, the selection procedure also included the evaluation of pupils' activities in the school and in the community. (Initial Decision, ante)

Appendix II of the NHS Handbook issued for use beginning with the September 1984 school year, but which was implemented at HHHS for the 1984 graduating class (see Tr. II-157) of which S.S. was a part, states:

> Examples of Member Selection Procedures
>
> Each school is encouraged to develop its own selection procedure designed to fit the school program and to meet the local needs. To show the range of possibilities, the following are cited as examples of plans that schools have used.
>
> Method of Selection. As a rule, the more objective a selection plan, the easier it is to administer. Parents and students alike seem to approve of the objective method. Subjective methods may be appropriate for small schools in which the faculty is well acquainted with all of the students. (at p. 81)

Although technically HHHS followed the NHS Handbook Appendix in developing a selection procedure, it selected from the "objective methods" (NHS Handbook Appendix II, at p. 81) offered as samples in Appendix II those factors which allowed greatest subjectivity. Notwithstanding any reservations regarding the HHHS's

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preference for entirely disregarding grades as a basis for scholastic evaluation once the GPA screening was tallied, generally, the process was relatively objective until the point when the selection committee also chose three more students from among the "at least 15" candidates who did not fall above a 3.5 average in its staff evaluations (Tr II-184) At that point, all objectivity was abandoned.

Much of the argument at the hearing centered upon whether the evaluations of teachers were accurate in assessing S.S.'s leadership and service. The issue here is not the 3.24 rating petitioner received. Rather, the Commissioner is concerned with the separate and distinct criteria the committee applied to those students who fell below 3.5. That the committee had set a criterion that all students eligible for NHS participate in three extra-curricular activities is not in itself objectionable. That it failed to adhere to that single, objective criterion with the 3.5 - 3.0 group, and applied instead a totally subjective criterion by determining that these students' admission was contingent upon "unique" or "extraordinary" or "outstanding community service" is repugnant to the spirit and the letter of the NHS guidelines and rules. (Tr. III-41, see also Tr. II-160-162.)

Nowhere in the NHS Handbook is there mention of admitting students in addition to those above the cutoff point. Assuming arguendo that it was appropriate to select students from below the cut-off point, one wonders why the selection committee did not simply choose the next three highest point achievers for admission to NHS. Instead, the committee evaluated each student's written statement of activities and decided on the basis of factors entirely personal and subjective that participation in a work-study program at a local hospital, raking leaves for senior citizens, announcing football games, and practicing with the Philadelphia Orchestra were contributions deserving greater recognition than any of those services the other candidates proffered on their activity sheets. In the Commissioner's opinion, assessing any of the above-mentioned fine community services as being better service to HHHS than service as a basketball scorekeeper or achieving the singular distinction of being HHHS's sole Rutgers Scholar for 1984 allows for selection to become highly personalized and subject to the whim of the selectors.

S.S. is a student who not only met the criteria for admission to NHS based on her sterling scholastic record, but she is also one who far exceeded the requisite three extracurricular involvements required for eligibility. Significantly, the Commissioner notes that had S.S. participated in fewer activities, she might have fared better in her rating.

Consider, as an example, A.K., who was selected for admission to NHS from among the group of candidates whose staff evaluation averages totaled between 3.0 and 3.5. The committee selected her from among the "at least 15" others because it felt hers was a "unique program," participating in a medical-type program coexisting during the school year. (Tr. III-41) The two other

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activities in which A.K. participated were Scribe, the school newspaper, and library aide. However, both Scribe and the hospital program were year-long contributions. Thus, no evaluation would have been forthcoming from teachers on those activities until the end of the year, months after the NHS selections were made. Also, the record is unclear as to whether out-of-school, community activities were even subject to evaluations by school staff. Evidently, then, the only extracurricular activity for which A.K. would have been evaluated at the time the matter was before the selection committee was as a library aide. If she were to receive all "4's" in her evaluation from the faculty member who was advisor to that organization, she would have a rating higher than a student whose contributions were more numerous, but for which the candidate received scores lower than all "4's." Further, if indeed there were no evaluations submitted on community activities, such as involvement in an after-school medical program, then, in fact, the basis upon which the committee made its determination was the more egregiously flawed in that the only basis for her being selected was predicated on the student's own report of that activity.

The record is replete with examples already cited by the ALJ indicating that the selection committee was unfamiliar with the NHS Handbook, the Rutgers Scholar program and with the individual candidates who were in that group between 3.0 and 3.5. (See Initial Decision, ante) The Commissioner finds, as did the ALJ, that the committee's lack of information represents a further breach of its duty to evaluate candidates fully and fairly.

Furthermore, and most distressing to the Commissioner, is the blatant admission of counsel for the Haddon Heights Board that the information provided in her April 15, 1985 letter, reconstructing faculty evaluation of S.S. which counsel provided only under an Order, from two ALJ's was

> from my work product and information as reasons for teacher evaluations. No teacher has purported to give reasons why she was not admitted, but merely reasons why they evaluated the students the way they did. (Tr. VI-164-165)

The import of this admission is made clear in context of the procedural history of discovery in the instant matter. In accord with J.B.A. and A.M.A. v. Board of Education of the Borough of Bernardsville, 1981 S.L.D. 321, State Board 339, aff'd Superior Court, Appellate Division, May 12, 1983, counsel for Lawnside requested of the Haddon Heights Board reasons for S.S.'s nonselection. The Haddon Heights Board refused to do so, citing teacher confidentiality and indicating that the records in the matter had been destroyed. It is unclear as to whether the records were, in fact, destroyed in March 1984, as Lawnside avers, or in June 1984, as the Haddon Heights Board avers. Nevertheless, following the filing of a Petition of Appeal, counsel for Lawnside served the Haddon Heights Board with interrogatories. Interrogatory No. 6 stated:

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> 6. With sufficient explectness (sic) to inform [S.E.S.] of any alleged deficiencies so that she could correct them, state with specificity the reasons for the non-election of [S.E.S.] to the Haddon Heights Honor Society in her Senior Year.
>
> The answer from the Haddon Heights Board was as follows:
>
> A. [S.E.S.]'s scores in Leadership and Service were not high enough to bring her overall total score to 3.50.

Thereafter, on January 4, 1985, a written order by former ALJ Judith Wizmur was issued compelling more specific answers to interrogatories and compelling the Haddon Heights Board to answer supplemental interrogatories propounded by Lawnside. On February 11, 1985, ALJ August Thomas ordered the Haddon Heights Board to supply more specific answers to Interrogatory No. 6. The April 11, 1985 letter from counsel to the Board followed, providing information from S.S.'s teachers, among them her advisor's recommendations on clubs that endured throughout the senior year. Thus, it is clear that such information is irrelevant as it relates to reasons why S.S. was not admitted to NHS for two reasons:

> 1. The information provided was not in response to the interrogatory because it did not purport to be reasons why S.S. was not admitted but, rather, merely reconstructed faculty recollections as to what their evaluations of S.S. were; and
>
> 2. Some of the above reconstructed evaluations were submitted for activities which were never a part of the original process because they were year-long activities not subject to inclusion in the original selection process.

On the fourth day of hearings in this matter, Lawnside, having become aware of the above, made a motion for summary judgment, based upon the revelation that the matter had proceeded to trial without the discovery required by J.B.A., supra, and ordered by two ALJs. ALJ Thomas denied the motion and directed the Haddon Heights Board's counsel to respond to it in her post-hearing brief. The Board failed to do so, but did comment at the next day of hearing stating:

> I don't think there has been any deception on our part. I think that just as discovery in this case can provide more information than is required for the trial, I think that's what happened here. I don't see why Mr. Johnson or certainly [S.S.], in assisting him in preparing this case, could not have said to him, why

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> basketball is something that happened after the selection committee, these are things that happened after the induction of the members to the Society.
>
> It certainly is clear that because this evaluation and selection occurs in February of the school year, that anything that happens after those dates is not something that is going to be considered by the selection committee. I don't think that is an obligation of discovery, to point out the time frames to counsel.
>
> I think they were obvious. I think the student knew what they were. I think the student handbook is clear. I think, certainly by participating in the system, she knew what information she had placed on her information sheet, which was one of the exhibits in this matter.
>
> While I requested all of the teachers who evaluated [S.S.] to provide their evaluations, I did not and never represented that all of those evaluations were available at the time the Honor Society selection committee met, because they clearly were not.
>
> That's not different than it is for any other student who participated in the yearbook in his or her senior year, or who participated in activities that would not have been evaluated as of the time that the selection committee met.
>
> (Tr. V-18-19)

Since the Commissioner is deciding the matter on its merits, as did the ALJ, there is no need to consider Lawnside's motion for summary judgment.

The Commissioner finds the Haddon Heights Board's conduct in failing to furnish discovery reprehensible. At every juncture it has been recalcitrant in providing clear explanation for the reasons why S.S. was not selected for induction into the NHS. It has obfuscated Lawnside's attempt to obtain that which S.S. was entitled to have. See J.B.A., supra. Notwithstanding this finding, the Commissioner must agree with the ALJ that Lawnside has failed to meet its burden of proving that the Board deliberately discriminated against S.S. based on race. As the ALJ stated,

> As far as the allegations of racial discrimination are concerned, I FIND no evidence of such in the record. The president of the Lawnside Board of Education testified without

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> refutation about a pattern of discrimination and denied opportunity for blacks in the Haddon Heights School district. However, even accepting the totality of his testimony as being true, this is not evidence of discrimination against S.S.
> (Initial Decision, ante)

The Commissioner concurs and adopts these findings as his own. Yet, the obfuscation of the Haddon Heights Board in failing to meet the requirements of the discovery orders evidences bad faith. Further, the selection committee's actions and practices in making a determination as to the admission of students into the NHS from below the established cut-off point of 3.5 were entirely arbitrary, capricious and unreasonable.

Accordingly, the Haddon Heights Board is directed to induct S.S. into the Haddon Heights High School National Honor Society by resolution, retroactive as of the date of induction of other members of her class, February 1984, without comment on her record as to these proceedings. The Board is further directed to conform its selection process in the future to the requirements of the NHS Constitution, Handbook and Appendix and to eliminate from the process those subjective elements that formed the basis of the instant appeal. Finally, given the factual circumstances in this matter, the Commissioner cannot but express his concern about the overly hasty destruction of the evaluations of the NHS candidates herein, particularly in light of the recognition by school authorities at HHHS that a challenge was raised. The Commissioner is aware of the argument raised by the Haddon Heights Board as to why it felt it was appropriate to destroy all the records one day after graduation in June 1984. The Board avers that Ms. Lewis, the then NHS advisor, had heard nothing further from S.S.'s mother following the meeting held "about a month" (Tr. I-168) after Mrs. S. initially made contact with the principal expressing her concern in a letter dated March 23, 1984 that her daughter, S.S., had not been inducted into the NHS. Thus, claims the Board, it found no reason to maintain the records any longer.

The Commissioner finds this argument to be without merit. Given the fact that petitioner in this matter had, pursuant to N.J.A.C. 6:24-1.2, the right to bring an action before the Commissioner within ninety days of that last meeting at which its request for reconsideration by the Board was finally rejected, the action of the Haddon Heights Board's representative in destroying that which was necessary to totally reconstruct the record was premature and placed S.S. at an extreme disadvantage.

Accordingly, the Commissioner further directs that the Haddon Heights Board maintain all documents related to the NHS selection on each and every candidate for a period of time which would assure the right of any person seeking to challenge the selection process to seek due process before the Commissioner.

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Consequently, the initial decision is affirmed, as modified herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 18,1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 623-86

AGENCY DKT. NOS. 17-1/86 &
18-1/86

RAHWAY EDUCATION ASSOCIATION,

Petitioner,

v.

RAHWAY BOARD OF EDUCATION,

Respondent,

and

NANCY LAZUR,

Petitioner,

v.

RAHWAY BOARD OF EDUCATION,

Respondent.

Stephen B. Hunter, Esq., for petitioners (Klausner & Hunter, attorneys)

Leo Kahn, Esq., for respondent (Magner, Orlando, Kahn, Schnirman, Hamilton, Kress & Charney, attorneys)

Susan Enste Holley, Esq., for intervenor Fred Stueber (Ruhlman, Butrym and Friedman, attorneys)

Record Closed: March 27, 1986 Decided: May 8, 1986

BEFORE **BRUCE R. CAMPBELL, ALJ:**

The Rahway Education Association and Nancy Lazur (petitioners) seek an order of the Commissioner of Education directing the Rahway Board of Education (Board) to rescind all layoff notices and all involuntary transfer notices issued in connection with a reduction in force (RIF), effective at the close of the school day on January 31, 1986, and directing the Board to comply with N.J.S.A. 18A:28-9 et seq. (RIF) and N.J.A.C. 6:3-1.10 et seq. (Standards for determining seniority).

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These matters were filed as one case with the Commissioner of Education on January 29, 1986. The file was transmitted to the Office of Administrative Law, without answer, on the same day because the petitions contained a request for emergent relief. N.J.S.A. 52:14B-1 et seq.; N.J.S.A. 52:14F-1 et seq.; N.J.A.C. 6:24-1.5.

Oral argument on the motion for emergent relief was set down for January 30, 1986, at the Office of Administrative Law, Trenton. On the appointed day, counsel met for approximately five hours. A tentative settlement was spread on the record. The teachers' union representative and the superintendent both stated that they would recommend approval to their respective bodies. On January 31, counsel advised me that the Board had rejected the settlement. I then set the matter down for hearing commencing February 3.

The matter was heard on February 3, 5, 7, 10, 11 and 24. On motion duly made and no objections heard, Fred Stueber was admitted as an intervenor in this matter.

The issues tried are (1) whether the RIF is both legal and proper under statutory law, case law, administrative code and applicable sections of the collective bargaining agreement between the Board and the Rahway Education Association, and (2) if so, whether the seniority lists upon which the RIFs and transfers are based are true and correct reflections of the seniority entitlements of the persons affected.

I

During the course of hearing, the Board at its February 6 meeting unanimously voted to retain Mr. Stueber. The original seniority dispute between petitioner Lazur and intervenor Stueber no longer existed. Lazur has greater seniority in the category of secondary physical education teacher than does Stueber. The Board restored Lazur to her physical education position in the Intermediate School effective February 10, and agreed to restore all pay and benefits from the date of the RIF. Lazur's employment history shall not reflect any interruption in service as a result of this one-week hiatus.

This agreement was memorialized in a consent order that I signed on February 25. A copy of the consent order is attached to this decision and incorporated herein.

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II

On February 5, I granted the petitioners' motion for partial summary judgment relating to the failure of the Board to comply with N.J.S.A. 18A:28-11. That statute requires that the Board of Education shall determine, in any reduction in force, the seniority of the persons affected and shall notify each such person as to his seniority status. The Legislature chose to use the imperative "shall."

The assistant superintendent for curriculum and instruction testified that he made up seniority worksheets (P-4a, P-4b) in May 1985, following reduction of the Board's proposed budget by the municipal governing body. N.J.S.A. 18A:22-37. No RIFs were made at the beginning of the 1985-86 school year. This witness reviewed personnel records and made up other worksheets showing the seniority of virtually all staff as of June 30, 1985 (P-1). He gave this information to the superintendent of schools and to the president of the local teachers union in May.

In November, he, the superintendent and the business administrator began discussions concerning RIFs. He and the superintendent, with cooperation of the building principals, began to develop seniority lists by areas. On or about November 22, notices were sent to certain staff of possible RIFs. By letter dated January 13, 1986 (P-2), the superintendent notified the union president of the 18 persons who could be affected. The assistant superintendent stated that none of the persons preliminarily noticed ever received seniority lists in whole or in part.

Each of the 18 potentially affected staff members had been advised of possible Board action at the Board's November 25 meeting. Each signed a receipt acknowledging receipt of the notice. No seniority information was sent with the notices. Fewer than 18 persons were RIFed but the Board had a duty to warn all persons who might be affected.

The Board voted on November 25 to reduce force by 12 positions (P-3). Each affected person received a 60-day notice of RIF. None of the notices contained seniority information. The witness stated that 5 of the 12 noticed persons were tenured teaching staff members. He also stated he recalls no one asking him for any seniority data after the administrators issued the November 25 notices.

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The Board has not adopted a resolution designating departmentalized instruction in grades seven and eight as secondary instruction. N.J.A.C. 6:3-1.10(l)16i.

At the conclusion of this witness' testimony, the petitioners moved for partial summary judgment on the issue of the Board failing to comply with N.J.S.A. 18A:28-11 and N.J.A.C. 6:3-1.10. After hearing the arguments of counsel I ruled as follows:

> Concerning failure to adhere to N.J.A.C. 6:3-1.10 et seq. in the determination of seniority, I must receive more evidence.
>
> There is no issue of material fact as to the Board's failure to adhere strictly to the provisions of N.J.S.A. 18A:28-11. The conditions for summary judgment, whether full or partial, as set forth by Mr. Justice Brennan in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954) apply. I **FIND** and **CONCLUDE** as to the notification of each affected person of his seniority status required by N.J.S.A. 18A:28-11 that the Rahway Board of Education failed to do so in the present matter.
>
> SUMMARY JUDGMENT in favor of the petitioners is entered on this limited issue. A remedial order will abide the event of an initial decision in this matter. It is so **ORDERED.**

This order was memorialized on February 10, 1986, and served upon all parties.

III

Testimony tended to show that the Board had budgeted only five percent for salary increases. As late as October 10, 1985, the Board believed that if a contract agreement could be reached with the teachers' association resulting in an increase of not more than eight percent, staff cuts could be avoided. The school business administrator testified that the 1984-85 audit was not received until November 1985. Until that time, the business administrator believed that with transfers from other accounts he could cover salary increases.

However, after receipt of the audit and before November 25, additional factors came into play, resulting in a deficit projection of $532,000. The Board and teachers' association settled on a nine-percent salary increase for 1985-86. Athletic and extra services salaries added something more than $90,000. Transporation costs for

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special education pupils increased dramatically. The original figure anticipated was "grossly underestimated." Further, a tuition problem developed with the Union County Vocational School. This added approximately $57,000 in costs to an already overburdened budget.

All of these matters came to a head between October 10, 1985, when the Board conducted a public meeting to discuss the negotiation situation and November 25, 1985, when the Board RIFed. This resulted in a freeze on spending and the recommended reductions in staff in order to try to finish the 1985-86 year without a deficit.

The school business administrator also testified that as of November 25, he could use $300,000 from Free Balances (out of a total of $346,000) and $55,000 in the Special Schools Account. Further, as a sound fiscal precept, he wanted to maintain a minimum balance of about $100,000. He anticipated receiving approximately $30,000 from the State under the new teachers' minimum salary legislation. He hoped, with a reduction in spending, he could generate $50,000 to $60,000 in savings. Therefore, a $140,000 deficit still existed. The Board determined that this amount should be made up by staff reductions.

As of the time of hearing, the status of the budget indicated the business administrator's projections to be accurate. The budget shows a balance of unencumbered usable funds of only $115,000. Some contracted sums still must be paid from that amount. The business administrator stated that the potential deficit was now $676,000. After use of all balances and all transfers, and with a freeze on spending, there is a net projected deficit of $29,163 (P-9, R-15).

The teachers' association claimed there was money hidden in the budget. However, after a complete review by their expert, no contradiction of the business administrator's conclusions was offered.

The business administrator also stated that support staff was reduced by three clerical positions at the end of June 1985. There have been no further reductions since that time. The 810 Accounts, school district contributions to employee retirement, show an anticipated negative balance of $90,000. The present unencumbered balance of

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approximately $115,000 does not include all contractual obligations or items such as lease-purchase monthly payments or weekly and monthly supplies for industrial arts and home economics classes.

This witness also testified that, although aware of many ways to approach a deficit, his and the Board's knowledge of conditions in the City of Rahway indicated a request for an emergency appropriation would not be granted. The mayor, city counsel and city business administrator have indicated they believed the Board should cut staff. The City has its own fiscal problems.

It is also the Board's judgment that a referendum to transfer Capital Outlay funds to the Current Expense account would fail. The district has a history of never or rarely passing budgets. Unless the governing body backs a school referendum, it has no chance.

The present free balance is too small. The district should have a minimum of one payroll period's amount, approximately $450,000, in free balance. The school business administrator believed the district could manage its way out of a deficit when that figure was estimated at $532,000. Now, however, it is potentially $676,000. A mistake was made in projecting transportation costs for 1985-86. There were additional placements of special pupils and transportation costs increased.

All available surplus will be appropriated forward. Even the $100,000 to $115,000 balance forecast is eroding daily. Only necessary spending is authorized.

The business administrator stated that if the district had to take back the RIFed teachers, it would destroy any chance of avoiding deficit spending. He met with a member of the New Jersey Education Association staff. He had developed P-9 beforehand. In January 1985, he asked to meet with the union staff member and review the budget problems. The local and state unions had made public comments about hidden monies in the budget. Ultimately, he met with a consultant of the NJEA staff and gave him all information and analyses concerning the budget. The analysis was purely of the deficit and what could be done to alleviate it. The local and state unions knew of these problems through negotiations. They also knew that settlement over the budgeted percentage increase could mean staff cuts. The school business administrator never received the NJEA analysis of the Rahway school budget.

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On April 30, 1985, the Board directed appeal of the $415,000 reduction of Current Expense (R-11). The Board and Council had met prior to April 30. The Council represented it might cut as much as $800,000 if no agreement were reached between the Board and Council. At this point, the county superintendent of schools called for a meeting with the Board and Council. A practice of many years standing, under which the Board paid to the City certain amounts for gasoline for its vehicles drawn from City pumps and refuse collection by City vehicles, was discussed. It was agreed between the two bodies that changes in the budget should stand on their own and bear no relationship to the agreement between City and Board.

The two bodies reached an agreement as a result of this meeting (R-12, R-13). As a result of these negotiations, the business administrator's perception of the Council's attitude toward the Board diminished considerably. Up to this year, the Council seemed to believe that all problems could be worked out. This witness saw a hardening of attitudes. Neither body could agree to the other's terms. The Council seemed to believe the Board was recalcitrant. The spirit of cooperation born in 1981 disappeared.

This witness also testified about the district's multi-year comprehensive maintenance plan (R-14). Certain contracts have been let. If these expenditures are deferred, prices will only increase. Perhaps more importantly, the contracts are to replace windows in the Madison School that are large, wooden, original equipment. They are extremely heavy. The cost of repairing them is quite high. Replacement of these is a top priority both for health and safety reasons. In addition, the new windows can be expected to offer some fuel economies.

IV

Having considered all of the evidence and the arguments of the parties, I FIND:

1. The Rahway Board of Education faces a budget shortfall for 1985-86.

2. The Board has taken several steps to alleviate the crisis, including freezes on spending, transfers of free balances and a reduction in force.

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3. Even with the reduction in force, it remains to be seen if the Board can avert completely a deficit situation.

4. With the reduction in force, some schedules and coverages (as of school nurses) were rearranged but not to such an extent to be considered excessive or abnormal.

5. There has been no affirmative showing that the reduction in force was improper, unreasonable or arbitrary.

6. The Board failed to notify each affected person as to his seniority status in his category or categories as required by N.J.S.A. 18A:28-11. See, Order Partial Summary Decision, February 10, 1986.

7. The tenured persons ultimately reduced in force are the least senior in their respective categories.

Even though the RIF has not been shown to be improper, unreasonable or arbitrary, and even though the tenured persons ultimately RIFed are the least senior in their respective categories, the failure of the Board to timely prepare accurate seniority lists has caused incalculable upheaval. The law is clear that the Board had the right to give 60-days' notice to the nontenured persons involved and further that the RIF of tenured persons was a matter within the exercise of its discretionary authority. The Commissioner of Education and, hence, an administrative law judge, will not substitute his judgment for that of a local board of education in matters that lie within the exercise of its discretionary authority. Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966).

The remedy sought here by the education association is excessive. In many cases the Commissioner has held that a corrective action by a board of education on a technical, procedural matter can have retroactive effect and serve to permit the original, procedurally defective action to stand. Winson v. Ridgewood Board of Ed., 1981 S.L.D. 102.

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More to the point, Kornett v. Sayreville Bd. of Ed., OAL DKT. EDU 7109-84 (Apr. 29, 1985), aff'd Comm'r of Ed. (June 14, 1985), directed the Board "in any subsequent reduction in force to notify every affected individual as to his or her seniority status. . . ." (slip opinion at 15).

A similar direction is appropriate in this case. The Rahway Board of Education is **DIRECTED** to inform each RIFed person of his or her status on each and every preferred eligible list applicable. It is further **DIRECTED** that the Rahway Board of Education keep and maintain up-to-date seniority lists for every teaching category. In consideration of the foregoing findings of fact, the balance of the petition is **DISMISSED.** It is so **ORDERED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

8 MAY 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

MAY 9 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 13 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

ij/ee

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RAHWAY EDUCATION ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,

RESPONDENT.

AND

NANCY LAZUR,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

It is observed that the Association, as one of the petitioners in this matter, has filed exceptions to the initial decision and the Board has filed a reply to those exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Six points of exception to the initial decision are taken by petitioner, hereinafter "Association," as follows:

The Association contends that the ALJ erred in failing to conclude that the Board violated the statutory provisions of N.J.S.A. 18A:28-9 and 10, as well as all of the substantive applicable prescriptions of N.J.A.C. 6:3-1.10 et seq. in effectuating a reduction in force of certain of its tenured teaching staff members. (Exceptions Nos. 1 and 2, at pp. 2, 4)

The Association further contends that the ALJ erred in limiting the remedy in the instant matter to a cease and desist order against the Board with no appropriate provision for compensatory damages. (Exception No. 3, at p. 5)

It is claimed by the Association that the ALJ erred in failing to conclude that the Board did not comply with the negotiated agreement in effect which requires appropriate notification given to tenured teaching staff members of their contract and salary status. (Exception No. 4, at p. 9)

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Regardless of the legitimacy of any economic rationale relied upon by the Board to give affected nontenured teaching personnel sixty days notice of contract termination during the 1985-86 school year, the Association contends that the ALJ erred in concluding that the reduction in force caused by the Board was not arbitrary, unreasonable or improper. (Exception No. 5, at p. 10)

Finally, the Association argues that the ALJ erred in concluding that there was no evidence brought forth which supports a finding that the midyear reductions in force and the involuntary transfers of teaching personnel interfered with the Board's obligations to provide for the maintenance and support of a thorough and efficient system of education in the Rahway School District. (Exception No. 6, at p. 11)

The Commissioner has reviewed the arguments advanced by way of the exceptions filed by the Association and finds and determines them to be without merit.

Initially, the Commissioner observes that the ALJ properly concluded in his order granting the Association's motion for partial summary judgment on February 5, 1986 that the Board's action in causing a reduction in force on November 25, 1985, effective sixty days later, was in violation of the provisions of N.J.S.A. 18A:28-11. The Board failed to notify, as required by that statute, those affected tenured teaching staff members of their seniority status at the time it caused a reduction in force.

Of the potential twelve teaching staff members who were involved in the reduction in force, approximately seven were nontenured, without seniority protection and, therefore, the provisions of N.J.S.A. 18A:28-11 or N.J.A.C. 6:3-1.10 et seq. had no application. Of the remaining five tenured teaching staff members, the record discloses that two have been retained by the Board without loss of salary, seniority or other benefits owing and due them.

Moreover, the Association does not dispute the fact that the tenured teaching staff members who ultimately were affected by a reduction in force were the least senior in their respective categories in accordance with the provisions of N.J.A.C. 6:3-1.10 et seq.

The Board in its reply exceptions rejects the arguments advanced by the Association and urges the Commissioner to affirm the initial decision for the reasons expressed therein.

In the Commissioner's judgment, it appears that the thrust of the Association's argument is grounded upon the Board's alleged failure to adhere to the negotiated contractual provisions of its agreement which extends the same notification provisions of N.J.S.A. 18A:27-10 to tenured teaching staff members as well as nontenured teaching staff members. The actual negotiated agreement upon which the Association relies, as well as the transcripts of the testimony of certain witnesses, has not been included in the record before the

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Commissioner. The Association further claims that any tenured or nontenured teacher terminated after April 30 of the previous school year is entitled to full salary for the succeeding school year pursuant to Article 12 of its agreement.

The Commissioner notes that the aforesaid contention of the Association and the relief requested is grounded upon the findings of the New Jersey Supreme Court in Old Bridge Twp. Board of Education v. Old Bridge Education Association, 98 N.J. 523 (1985) wherein the Court ordered the board to pay 61 days of compensation to the plaintiff teacher for failure to abide by the negotiated agreement which required notice by April 30 of employment status of tenured teachers for the ensuing school year. In that particular matter, the teacher involved was continued in employment for the ensuing school year prior to April 30 but was subsequently riffed on June 29. The Association filed a grievance which ultimately resulted in an arbitration award of one year's salary which was subsequently reduced by the Court to 61 days of salary coinciding with the number of days of late notice. The Association seeks a remedy of payment of the balance of the 1985-86 school year salary for each tenured teacher riffed pursuant to the alleged contract violation.

Upon consideration of the foregoing argument, the Commissioner finds the circumstances in the two cases inapposite. In Old Bridge, supra, the teacher involved was terminated prior to the onset of the ensuing school year and thus failed to receive 60 days notice of employment status for the ensuing school year. In the circumstance herein, the contractual notice provisions relative to the ensuing school year were met by the Rahway Board of Education for the school year 1985-86. The RIF situation which ultimately arose in this matter occurred during the 1985-86 school year was precipitated by a projected budget deficit, the existence of which is uncontradicted on the record. Under these circumstances, the only notice provision applicable was the standard 60 day notice which was accorded to the tenured teaching staff members herein and not payment of the balance of the entire year's salary as sought by petitioners. To find otherwise could result in interference with the major management prerogative of the Board to effectuate economies. Support for such determination is to be found in the very case cited by petitioners in support of their claim, wherein the Court said:

> The question comes down to this: what sanction will accommodate the teacher's interest in fairness with effectuation of the managerial decision? The majority of the Appellate Division quite correctly concluded that awarding a full year's pay (even with potential mitigation) would make a nullity of the Board's necessary power to reduce forces in the face of fiscal emergency. It is inevitable, with the existing budgetary process, that unanticipated changes will occur in a local school district's plans. The local budgets are now presented to the voters in

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> April. They are sometimes defeated; but amounts may be restored later by the Commissioner. Anticipated state aid may not be known until the state budget is adopted in late June. Federal appropriations measures are rarely concluded now before September 1. With the fiscal uncertainty built into the process, we must balance the interest of the parties by allowing damages for some period of late notice rather than all the damages occasioned by the late notice. This latter resolution exposes the Board to a potential award for a full year's salary, an event that would, in effect, nullify the fiscal decision to abolish the position. The award of a full year's salary would eliminate the fiscal benefit of abolishing positions in times of economic crisis and would eviscerate the central purpose of the statute.
>
> Accordingly, we modify the judgment of the Appellate Division insofar as it would allow a full year's damages if they were occasioned by the late notice. Since, as we have seen, the Commissioner and the State Board have measured the sanction in terms of length of breach, we believe it appropriate in these circumstances to invoke a comparable allowance of damages for the 61 days of late notice actually given in this case. In this fashion there is no substantial impact on the managerial and statutory policy of effecting [economies] by layoffs. Had the late notice been for some period less than 60 days, damages for the full 60-day notice period, less mitigation, have generally been accepted by the Commissioner and the State Board, and would not appear to offend educational policy. (emphasis supplied) (98 N.J. at 533-34)

Thus, the Commissioner rejects the relief requested by petitioners for the reasons cited above.

Similarly, the Commissioner finds and determines that any agreement which extends salary benefits to nontenured teachers beyond the sixty-day termination provision included in their employment contracts is contrary to law. Additionally, the Association's attempt to nullify the Board's action of November 25, 1985 and to cause the Board to reemploy and compensate all nontenured members who were terminated, relying on the provisions of N.J.S.A. 18A:27-10, is equally misplaced and without basis in law.

Finally, it is the Association's contention that the Board's failure to pursue its appeal of the reduction of $415,000 imposed by the local governing body upon its 1985-86 school budget made it impossible for the Board to operate a thorough and efficient system of education for the year in question.

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The Commissioner does not agree. The record of this matter, as well as the ALJ's finding in the initial decision which stands unrebutted, establishes that the Board as late as October 10, 1985 believed that if a contract agreement could be reached with the Association with salary increases not to exceed 8 percent, staff reductions could be avoided. Prior to November 25, 1985, the Board became aware that it was confronted with a budget deficit for the 1984-85 school year as indicated by its annual audit report. It was at that juncture that the Board was compelled to take action to overcome its deficit by reducing its current expenditures for the 1985-86 school year.

It is evident from the proofs presented in the record of this matter that one of the resultant actions taken by the Board on November 25, 1985 was a reduction in force for reasons of economy pursuant to the provisions of N.J.S.A. 18A:28-9.

It is clear that the Board failed to notify the three affected tenured teaching staff members of their seniority status pursuant to the applicable provisions of N.J.S.A. 18A:28-10. However, as indicated by the ALJ there has been no affirmative showing that the reduction in force was improper, unreasonable or arbitrary. Moreover, it is undisputed that the three tenured teaching staff members reduced in force were the least senior in their respective seniority categories.

Finally, the Commissioner observes that the ALJ makes no specific finding of fact with respect to the issue of whether the Board has violated certain provisions of the seniority regulations N.J.A.C. 6:3-1.10 et seq. It is clear that such conclusion was generally reached in the initial decision, ante, which states that

> ***the failure of the Board to timely prepare accurate seniority lists has caused incalculable upheaval.*** (emphasis supplied)

However, in the Commissioner's judgment the Board's failure to strictly adhere to the provisions of N.J.A.C. 6:3-1.10 et seq. in this instance is not fatal to the outcome of these proceedings. There has been no affirmative showing that the three tenured teaching staff members who were ultimately reduced in force had any right to continued employment by virtue of a greater seniority entitlement.

The Commissioner does not condone the Board's failure to develop timely and accurate seniority lists pursuant to the provisions of N.J.A.C. 6:3-1.10 et seq. However, given the specific nature of the circumstances involved in the matter controverted herein, the Commissioner finds no irreparable harm caused upon any affected tenured teaching staff member as a result of the Board's action complained of herein. In this regard the Commissioner concurs with the ALJ's conclusion that the monetary relief sought by the Association is unwarranted.

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The Commissioner hereby affirms the ALJ's recommendation that the Board in this matter be directed to inform each riffed person of his or her seniority status on each and every preferred eligibility list applicable. The Board is further directed to update its seniority lists for each affected teaching category pursuant to the applicable provisions of N.J.A.C. 6:3-1.10 et seq.

Accordingly, the initial decision is hereby affirmed and the instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 19, 1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7053-85
AGENCY DKT. NO. 367-10/85

HENRY R. PRZYSTUP,

Petitioner

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY,

Respondent

Robert M. Schwartz, Esq., for petitioner

William A. Massa, Esq., for respondent

Record Closed: April 7, 1986 Decided: May 8, 1986

BEFORE **WARD R. YOUNG, ALJ:**

Petitioner alleged he is tenured in the position of Chief Administrator of the Bureau of Pupil Personnel Services; was illegally transferred to the position of principal of the Regional Day School by the Jersey City Board of Education (Board); and was improperly compensated for his services as Interim Superintendent of Schools.

The Board denies all allegations and seeks dismissal of the petition.

The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on November 6, 1985. A prehearing conference was held on January 3, 1986, and the matter proceeded to a plenary hearing on March 5, 1986. Post-hearing briefs were submitted and the record closed on April 7, 1986, the date established for final submission.

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I.

Procedural matters incorporated in petitioner's responsive letter memorandum will be addressed before proceeding on the substantive issues. Petitioner objects to untimely filings of post-hearing submissions by respondent as well as "R" exhibits attached to respondent's brief that were not submitted at plenary hearing as evidentiary documents.

The following is quoted on pp. 99 and 100 of the certified transcript of the plenary hearing held on March 5, 1986:

THE COURT: Let the record reflect that a side bar discussion on a schedule of post-hearing submissions was held, and the following has been agreed to.

Simultaneous briefs will be filed no later than March 28th, 1986. Simultaneous responses shall be filed no later than April 7th, 1986 at which time the Record will close. Replies are waived and the parties are hereby advised that untimely briefs will be rejected.

Mr. Schwartz, do you find the schedule to be reasonable?

MR. SCHWARTZ: Yes, your Honor.

THE COURT: Mr. Massa?

MR. MASSA: Yes, your Honor.

Petitioner's brief and response were filed on March 27 and April 7, respectively. They are deemed herein to be timely filed.

Respondent's brief and response were filed on April 1 and April 8, respectively. Both are deemed herein to be untimely. However, counsel for respondent requested approval of the undersigned to file his reply on April 8, which was granted. Respondent's initial brief is hereby rejected. Respondent's reply is hereby accepted for consideration in the adjudication of this dispute.

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Concerning the "R" exhibits attached to respondent's brief, the certified transcript states at p. 98:

> THE COURT: . . . Let the Record reflect that a side bar conference was held and at that conference an agreement was reached whereby the Respondent Board of Education rests with the approval to submit all Board records for Petitioner for the dates from August 24, 1983 through August 31, 1985 that are all inclusive. What is meant by "all inclusive" is how much he was compensated and what for. Those Board records will be transmitted to Counsel for the Petitioner as soon as they become available and will be marked as Exhibit J-6 in Evidence, but will only be sent to the Administrative Law Judge with the filing of the Board's brief on the tenure issue, on all issues, as a matter of fact.
>
> Is that the understanding at the side bar, Mr. Massa?
>
> MR. MASSA: That is correct, your Honor.
>
> THE COURT: Mr. Schwartz?
>
> MR. SCHWARTZ: Yes, your Honor.

Counsel for respondent attached 13 "R" exhibits to his brief. A review of the attached documents results in the determination herein that only those marked by respondent as R-11, R-12, and R-13 relate to compensation. They are hereby jointly marked as J-6 in evidence. All other attached exhibits are excluded from the record.

Further, however, copies of 1983 and 1984 payroll records of petitioner and two checks dated of September 30, 1983 and October 14, 1983 were forwarded to petitioner's counsel and filed with the undersigned. They are also incorporated in the J-6 packet as evidentiary documents pursuant to the agreement at hearing.

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II.

The following admissions in the pleadings are adopted herein as **FINDINGS OF FACT:**

1. The petitioner is a tenured teaching staff member in the respondent school district.

2. Petitioner presently serves as principal of the "Regional Day School" at Jersey City which is a division of direct services of the Department of Education. Petitioner was assigned to said position on August 28, 1985 and was so advised on August 29, 1985.

3. Prior to his assignment as principal of the Regional Day School . . ., petitioner had been an elementary principal on assignment to the Superintendent, a position to which petitioner had been "transferred" after having been dismissed from the position of Interim Superintendent. Said transfer took place on or about July 10, 1985.

4. From the period May 16, 1984 until at least July 10, 1985, petitioner served as the Interim Superintendent.

A thorough review of the transcript of hearing and all documentary evidence results in the following **FINDINGS OF FACT** concerning petitioner's employment with respondent and his annual salaries since September 1, 1982:

EMPLOYMENT:

1963-1966	High school teacher
1966-1973	Learning disability teacher consultant
1973-1975	Elementary assistant principal
1975-1976	Assistant supervisor of special education in the Bureau of Pupil Personnel Services (BPPS)
1977-1983	Elementary school principal

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August 24, 1983—May 16, 1984	Principal assigned to BPPS (Chief Administrator of BPPS)
May 16, 1984—July 10, 1985	Interim Superintendent of Schools
September 1, 1985—present	Principal of Regional Day School (Special Education)

(NOTE: The school year 1976-1977 unaccounted for but irrelevant; it is presumed petitioner was not employed by respondent from July 10, 1985 to September 1, 1985).

ANNUAL SALARIES:

1982-83:	$36,000
1983-84:	40,752
1984-85:	45,692
1985-86:	46,092

III.

The title of Chief Administrator of the Bureau of Pupil Personnel Services is indisputably an unrecognized title. The record is void of any evidence that the Board complied with N.J.A.C. 6:11-3.6(b) for the use of this unrecognized position title.

The testimony of witnesses Matthews, Murphy, and DiTursi was indeed credible. They testified that the title Cheif Administrators was created by then Superintendent Ross because of litigation concerning the tenure status of former Assistant Superintendents Williams and DiNardo, and was utilized for Curriculum and Instruction, Personnel, and Pupil Personnel Services. The rationale offered was to provide status for those holding the positions and allegedly to avoid any confusion with the ongoing litigation.

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A corollary issue inevitably arose as to whether petitioner's service as Chief Administrator of the BPPS was in fact that of an Assistant Superintendent in charge of the Pupil Personnel Services. The testimony of Matthews, Murphy, and DiTursi is again found to be credible. They testified that in his position of Chief Administrator of BPPS, petitioner filled the same role in the Board's Table of Organization as did his predecessors, Falciccio, Chrisimalis, and Williams, as Assistant Superintendents. They further testified that "Job Description Locator 1.08" for the position of Assistant Superintendent, Bureau of Pupil Personnel Services, P-1 in evidence, governed the responsibilities of petitioner as well as the three aforementioned Assistant superintendents.

I FIND petitioner to have served in the position of Assistant Superintendent, Bureau of Pupil Personnel Services, during the time he served under the title of Chief Administrator of BPPS.

Although not directly on point because there was no position abolishment in the instant matter, the abridgement of tenure rights is not countenanced if it is found that the duties of an abolished position have been transferred to another position so as to defeat the rights of an employee who is tenured in the abolished position. Lingelbach v. Board of Education of the Borough of Hopatcong, decided by the State Board of Education on May 4, 1984, aff'd by the Appellate Division, May 17, 1985, A-4783-83T7.

IV.

It must now be determined if petitioner acquired tenure as an Assistant Superintendent BPPS.

It has been determined herein that petitioner served as Assistant Superintendent BPPS from August 24, 1983 to May 16, 1984, and also as Interim Superintendent from May 16, 1984 to July 10, 1985. Granting petitioner total credit for the time period he served as Assistant Superintendent and Interim Superintendent toward tenure acquisition in the

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position of Assistant Superintendent BPPS does not provide the requisite pursuant to N.J.S.A. 18A:28-6 which states:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose . . . .

Tenure is obtained only when the precise conditions of the statutes are met. Ahrensfeld v. State Board of Education, 126 N.J.L. 543 (E. & A. 1941).

I FIND that petitioner has not acquired tenure as Assistant Superintendent BPPS. I FURTHER FIND the Board's transfer of petitioner to the position of principal of the Regional Day School to have been a proper exercise of discretionary authority pursuant to N.J.S.A. 18A:11-1(d).

It is noted that petitioner's own compensation memo of July 16, 1985 for summer work indicates he did not work beyond July 19, which would still be short of the tenure time requisite even if he were assigned as Assistant Superintendent BPPS from July 10 to July 19.

V.

Petitioner's compensation claim for his services as Interim Superintendent will now be addressed.

The gravamen of this dispute is to be found in the nexus between the salary payment schedule for ten-month employees, the compensation practice for the employment of said employees during July and August, and the intent of the Board's July 18, 1984 resolution 6.10 concerning petitioner's salary, effective June 26, 1984. See, J-3.

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It is undisputed that ten-month employees in Jersey City are compensated over a twelve-month period running from September 1 through August 31.

It is also undisputed that such employees who provide services to the school district during the months of July and/or August are compensated at the rate of one-tenth of the employees' annual salary for every twenty days of service. This compensation is in addition to the salary payments received in July and August for services already rendered as a ten-month employee.

Petitioner was indisputably compensated properly during July and August of 1984 and that portion of July 1985 that he served as Interim Superintendent, having been paid at the rate of $4,569.20 (one-tenth of his of his annual 1984-85 salary of $45,692) for each 20 days worked in addition to the normal bi-monthly payments on his annual salary.

Since petitioner was compensated from September 1, 1984 to June 30, 1985 for his services as Interim Superintendent at the same salary he would have received as principal, the intention of the Board's July 18, 1984 resolution must be determined. It reads:

> **WHEREAS**, the negotiations of a salary for the Interim Superintendent, Dr. Henry R. Przystup, have not been concluded to date, now therefore,
>
> **BE IT RESOLVED**, that this Board of Education does hereby confirm, ratify and approve compensation for Dr. Przystup based on one-tenth of his annual salary, effective June 26, 1984, and **BE IT FURTHER RESOLVED**, that said compensation is to continue until negotiations are completed.

The resolution, by design or otherwise, does not state if petitioner's one-tenth of his annual salary is on a monthly basis. He was paid on that basis in July and August, and it would be absurd not to believe that was the intent. The resolution does not state that that rate of pay was to be in addition to annual salary received in July and August, but he received both. The dispute centers on whether the Board intended petitioner's one-tenth to be in addition to his monthly rate of pay based on his annual salary as a principal from September 1, 1984 to June 30, 1985.

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Petitioner argues it would be inequitable to believe the Board intended to compensate petitioner for his services as Interim Superintendent during the 1984-85 academic year at the principal's rate of pay.

Petitioner buttresses his argument on resolution 7.89 proposed by the Personnel Committee with an attached contract negotiated by it and petitioner for the latter's service as Superintendent of Schools. The contract continues petitioner in his position as Superintendent to July 1, 1987 and provides retroactive salary of $70,000 to May 16, 1984, and $72,000 from July 1, 1985 to July 1, 1986, and $75,000 from July 2, 1986 to July 1, 1987. See, P-4. The resolution and contract were approved as to legal form on June 21, 1985, and were to be presented for Board ratification at its scheduled continued meeting on June 26, 1985. The compensation issue arises from the indisputable fact that the Board did not meet on that date for lack of a quorum.

Witnesses for petitioner testified that the lack of a quorum on June 26, 1985 resulted from the intervention of the newly elected Mayor in persuading a number of Board members to be out of town in order for the new Board to deal with issue of the superintendency. No findings of fact or conclusions can be made on pure hearsay evidence, however, but is reasonable to surmise that, if true, the concern would have been more with the continued services of petitioner as Superintendent rather than the compensation associated with those services.

Nevertheless, it is an indisputable fact that the Board in authority during 1984-1985, whose Personnel Committee negotiated a retroactive salary for petitioner in good faith, never met again to act on the Committee's proposed resolution.

It is well established that the Commissioner will not substitute his judgment for that of a local Board unless its action is arbitrary, capricious, or unreasonable. In this instance, the clear intention of the respondent Board in its resolution of July 18, 1984 was never carried out (J-3), and no action was taken on its own Personnel Committee's recommendation concerning petitioner's 1984-85 salary as Interim Superintendent.

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I **FIND** sufficient bad faith exhibited by the respondent in its failure to act to require a remedy on the compensation issue. Accession to petitioner's argument for a continuation of the monthly compensation received by petitioner in July and August 1984 would yield a salary rate far in excess of that which petitioner would have achieved at the bargaining table. On the other hand, compensating petitioner for his services as Interim Superintendent at the principal's salary rate is indeed inequitable.

The language in the Board's resolution 6.10 on July 18, 1984 clearly establishes the intent of the Board to establish an equitable 1984-85 salary for petitioner through the negotiations process. I **FIND** the Board's failure to do so to be an act of omission reflective of its bad faith. I **FURTHER FIND** the recommended annual salary of $70,000 as proposed by the Personnel Committee to be just, reasonable, and equitable.

VI.

In summary, I **FIND** that petitioner has not acquired tenure as an Assistant Superintendent BPPS; that his transfer to the position of principal of the Regional Day School was a proper exercise of the Board's discretionary authority; and that petitioner is entitled to equitable compensation for his services as Interim Superintendent. I **CONCLUDE**, therefore, that the Jersey City Board of Education shall compensate petitioner for his services as Interim Superintendent from September 1, 1984 to July 10, 1985 at the annual rate of $70,000, mitigated by the compensation paid to him during that period, and shall do so forthwith. **IT IS SO ORDERED.**

I **FURTHER CONCLUDE** that this Petition of Appeal shall be and is hereby otherwise **DISMISSED.**

I leave for the Commissioner any commentary on the practice of the Jersey City Board of Education in assigning principals to district-wide responsibilities in the central office under the title of principal.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

8 May 1986
DATE

WARD R. YOUNG, ALJ

MAY 12 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 13 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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HENRY R. PRZYSTUP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

I. TENURE

Petitioner excepts to the ALJ's conclusion that he did not serve the requisite period of time to attain tenure as assistant superintendent. Upon a thorough examination of the record in this matter including the parties' exceptions, the Commissioner excepts to the ALJ's determination that petitioner has not attained tenure as assistant superintendent but for reasons other than those expressed in the initial decision.

Petitioner bases his claim to tenure as assistant superintendent for service arising out of the period he filled a position entitled Chief Administrator, Bureau of Pupil Personnel Services, an unrecognized title which the record fails to show was ever approved by the county superintendent of schools pursuant to N.J.A.C. 6:11-3.6(b) or a job description ever adopted by the Board.

The Commissioner is cognizant of the fact that petitioner's service in the pupil personnel services position has been the subject of prior litigation before the Commissioner and State Board. Figurelli v. Board of Education of the City of Jersey City, decided by the Commissioner July 23, 1984, aff'd State Board December 5, 1984. As such, he strongly questions why so important a factor was not brought to the attention of the ALJ by the Board during the hearing proceedings. The Figurelli case challenged the propriety of the Board's involuntary transfer of Figurelli, from a position entitled director of pupil personnel services while engaging the services of Przystup in the position under dispute herein.

It was determined, inter alia, that the pupil personnel services position petitioner held was essentially the same as Figurelli's and that petitioner was unqualified for the position because he had not taken the competitive examination required by contract for the filling of the position and he did not possess the requisite certification stated in the Board-adopted job description. Figurelli, supra, at page 8

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The Figurelli decision reads in pertinent part:

> Both sides stipulate that Figurelli had not attained tenure in the position of director of pupil personnel services at the time of her transfer by the Board [August 24, 1983]. Contemporaneously, the Board also voted to appoint one Henry Przystup to a position described as "principal assigned to Bureau of Pupil Personnel Services." Until then, Przystup had been employed by the Board as an elementary school principal. Regardless of the Board's choice of words, Przystup preferred to use the title "chief administrator" of the Bureau of Pupil Personnel Services to describe his new position. All of the evidence, including the testimony of Przystup himself, suggests that his duties in the position were indistinguishable from those performed by Figurelli in her capacity as director of pupil personnel services. No job description exists for the position currently held by Przystup. Unlike the position of director which has a contract year of 11 months, the position of principal has a contract year of only 10 months***. (emphasis supplied) (at p. 5)
>
> ***
>
> From the evidence, I FIND that the Board's action in transferring Figurelli to a lower position constitutes discrimination based on sex. In making this finding, I expressly reject the Board's argument that Przystup's assumption of Figurelli's duties was not a promotion from building principal. What happened was that the Board removed a fully qualified female from a supervisory position and replaced her with an unqualified male. Figurelli's successor did not possess the necessary certificate which the Board's job description makes a qualification for the position. Nor did he take the contractually-mandated competitive examination, on which Figurelli had received the highest score among all candidates.*** (at pp. 8-9)

Figurelli was ordered to be reinstated to the pupil personnel services position from which she was impermissibly transferred.

It having been previously determined by the Commissioner and State Board that petitioner did not possess the certification required for the position for which he is disputing tenure acquisition herein, there is no question that he cannot and did not acquire tenure as Chief Administrator, Bureau of Pupil Personnel Services (the relief sought in his Petition of Appeal and the issue framed in the prehearing order). Lack of proper certification precludes acquisition of tenure even if one serves the requisite period of time. Spiewak v. Bd. of Ed. of Rutherford, 90 N.J. 63 (1982)

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Having determined that petitioner did not possess the requisite certification for the disputed position, there is no need for the Commissioner to determine if petitioner served the requisite period of time for tenure acquisition, N.J.S.A. 18A:28-6. Nor is it necessary to determine if the duties of the pupil personnel position were those of assistant superintendent.

Upon examination of the instant matter and other cases pertinent to it involving Jersey City, the Commissioner cannot but express his grave concern and displeasure over the long history of litigation arising out of the disputed position herein, a position apparently known by a variety of titles. The ALJ determined in the present matter that the testimony of the witnesses was credible that the title "chief administrator" was created because of litigation concerning the tenure status of former assistant superintendents Charles Williams and Margaret DiNardo. (Tr. 80-84) The position was also known as director (Tr. 90, 96; Figurelli, supra) and acting director (Charles Williams v. Board of Education of Jersey City, decided by the Commissioner August 30, 1984, filed October 19, 1981).

Thus, it would appear that since July 1981 the position has been filled by a least five different people under four titles as illustrated below:

Staff Member	Date of Service	Title
C. Williams	?-July 1981	Assistant Supt.
C. Williams	July 1981-circa January 1982	Acting Director
J. Figurelli	January 1982-August 1983	Director
H. Przystup	August 1983-May/June 1984	Chief Administrator (Principal assigned to Pupil Personnel Services)
N. Chrisimalis	July 1984-?	Chief Administrator
F. Falciccio	August 1985-Present	Assistant Supt.

Meanwhile in July 1984, Figurelli was ordered by the Commissioner to be reinstated to the position as director. Her reinstatement apparently did not occur until the beginning of the 1985-86 school year with the position being abolished a matter of weeks after her reinstatement. (Tr. 90) A petition of appeal was filed with the Commissioner with respect to this and is currently before the Office of Administrative Law, Figurelli v. Board of Education of Jersey City, Agency Dkt. No. 55-2/86 filed February 27, 1986, OAL Dkt. No. EDU 2003-86 wherein Figurelli alleges violation of her tenure and seniority rights in the appointment of Falciccio and that the duties he performs are identical to those of the

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director position she previously filled and to which she was ordered to be reinstated by the Commissioner.

Focal to the instant matter is the absence of a Board-approved job description and the use of unrecognized titles unapproved by the county superintendent pursuant to N.J.A.C. 6:11-3.6(b) as was true in Figurelli, supra, and Margaret DiNardo v. Board of Education of Jersey City, decision on remand January 19, 1984. In addition, DiNardo is frought with bad faith motivation on the part of the Board reminiscent to that determined by the ALJ herein relative to petitioner's compensation.

When coupling the above cases with such cases as Howard v. Bd. of Ed. of Jersey City, decision on remand May 27, 1986; James Jencarelli et al. v. Bd. of Ed. of Jersey City, decided by the Commissioner November 20, 1985; Flood v. Bd. of Ed. of Jersey City, decided January 17, 1984; Ross v. Bd. of Ed. of Jersey City, 1981 S.L.D. 307, the Commissioner determines it necessary to direct the county superintendent to conduct a comprehensive review of all supervisory and administrative positions in the district, specifically their titles, duties, certification and job descriptions to assure that all are in compliance with relevant statutes and regulations.

II. SALARY

The Board strenuously objects to the ALJ's determination that petitioner is entitled to the salary adjustment ordered in the initial decision. More specifically, the Board contends that there is no legal basis for the ALJ's determination and that there is no authority by which he can invoke what he deems to be an equitable resolution of the issue. The Board argues that Resolution 6.10 unquestionably established the intent to increase petitioner's salary by one-tenth. Further, it asserts that the $70,000 figure was a proposed salary, not presented for consideration and that, even if it were, there is no guarantee the Board would have acquiesced.

Resolution 6.10 reads:

> WHEREAS, the negotiations of a salary for the Interim Superintendent, Dr. Henry R. Przystup, have not been concluded to date, now therefore,
>
> BE IT RESOLVED, that this Board of Education does hereby confirm, ratify and approve compensation for Dr. Henry Przystup based on one-tenth of his annual salary, effective June 26, 1984, and BE IT FURTHER RESOLVED, that said compensation is to continue until negotiations are completed. (J-3)

The Board objects to the ALJ's findings cited below with respect to that resolution. The findings read:

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> The language in the Board's resolution 6.10 on July 18, 1984 clearly establishes the intent of the Board to establish an equitable 1984-85 salary for petitioner through the negotiations process. I FIND the Board's failure to do so to be an act of omission reflective of its bad faith. I FURTHER FIND the recommended annual salary of $70,000 as proposed by the Personnel Committee to be just, reasonable, and equitable. (Initial Decision, ante)

It believes the findings to be in contradiction to the ALJ's statement which reads:

> It is well established that the Commissioner will not substitute his judgment for that of a local Board unless its action is arbitrary, capricious, or unreasonable. In this instance, the clear intention of the respondent Board in its Resolution of July 18, 1984 was never carried out (J-3), and no action was taken on its own Personnel Committee's recommendation concerning petitioner's 1984-85 salary as Interim Superintendent. (Initial Decision, ante)

Upon review of the record with respect to the Interim Superintendent salary issue, the Commissioner concurs with the ALJ's findings and order concerning said salary. Contrary to the Board's assertion, such conclusion is not in conflict with the statement above. The Board failed to quote the ALJ's finding immediately following the statement. It reads, "I FIND sufficient bad faith exhibited by the respondent in its failure to act to require a remedy on the compensation issue" (Initial Decision, ante) and is followed by the findings of the ALJ objected to by the Board quoted previously.

The Board is not entirely incorrect, however, in questioning the legal basis for the ALJ's determination regarding the salary dispute. Ordinarily, the Commissioner would not act with respect to a dispute about the salary of an Interim Superintendent. However, he does have the right to review the actions of a board wherein bad faith is alleged as herein and where a board has failed in its obligation to act on a matter it has promised to act upon by way of prior board resolution.

There is no doubt from the record that the Board intended to compensate petitioner for his Interim Superintendent service at a rate other than that of principal (J-3) and that its personnel committee had engaged in negotiations with him relative to the salary. It was also clearly established that those negotiations had culminated in a proposed salary agreed to by petitioner and the Board's personnel committee which never was acted upon by the Board as a whole. Said omission was found by the ALJ to have been motivated by bad faith. Therefore, the Commissioner is in full agreement with the ALJ that petitioner was denied appropriate compensation as a result of the Board's bad faith and should be made whole.

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The Commissioner agrees with the ALJ's rejection of petitioner's argument that he be compensated one tenth of his principal's salary for each month of his period of service as Interim Superintendent. To accept such an interpretation of J-3 would impermissibly enrich petitioner. To accept the Board's interpretation of entitlement to only one tenth above the principal's salary should likewise be rejected. Petitioner already earned at least two tenths above his principal's salary for July and August 1984 which he would have received anyway had he performed a principal's duties during that time frame. Another option could be to base his compensation on the current superintendent's salary.

After consideration of the above, the Commissioner concurs with the ALJ's determination that the just, reasonable and equitable compensation figure is the one drawn up in the proposed contract (P-4), a figure which resulted from actual negotiations with the Board and on which the Board would have had an opportunity to act but for its bad faith.

Accordingly, the ALJ's recommended order to compensate petitioner the sum equal to the difference earned by him from September 1, 1984 to July 10, 1985 and what he actually received is hereby adopted.

COMMISSIONER OF EDUCATION

June 23, 1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4326-85
AGENCY DKT. NO. 161-6/85

PLUMSTED TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
UPPER FREEHOLD REGIONAL BOARD OF EDUCATION,
Respondent.

Wayne J. Oppito, Esq., for petitioner

Peter P. Kalac, Esq., for respondent (Kalac & Newman, attorneys)

David W. Carroll, Esq., for participant, Washington Township Board of Education

Record Closed: March 28, 1986 Decided: May 9, 1986

BEFORE **DANIEL B. MC KEOWN**, ALJ:

INTRODUCTION

The Plumsted Township school district, governed by the Plumsted Township Board of Education (Board), contains elementary grades kindergarten through eight. The Board has a sending-receiving relationship with the Upper Freehold Township Board of Education (Upper Freehold) by which Upper Freehold provides a high school education for Plumsted pupils on a tuition basis. The Plumsted Board claims the tuition demand made upon it by the Upper Freehold Board is calculated in a manner contrary to law under the State Board rule, N.J.A.C. 6:20-3.1, Method of Determining Tuition Rates. After the

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Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted September 23, 1985 at which time it was agreed a hearing would be scheduled and conducted February 18, 1986. Thereafter, the Washington Township Board of Education, another elementary school district which has a sending-receiving relationship with the Upper Freehold Township Board of Education, was granted leave to participate in the case under N.J.A.C. 1:1-12.5. It is noted that the time between the date of the prehearing conference and the date of the hearing which occurred as scheduled was intended to be used by the parties to secure the assistance of the Department of Education to resolve this matter. Obviously, whatever efforts were expended were not successful. The record closed March 28, 1986, after receipt of the Board's reply brief and participant Washington Board's election not to respond.

STATEMENT OF THE CASE

The boards of education of Plumsted Township, Washington Township, and Millstone Township, the latter of which is not a party to this action, operate elementary school districts. Each district has a sending-receiving relationship with the Upper Freehold Regional School District by which Upper Freehold provides high school education on a tuition basis to pupils who are sent there from each of the three municipalities. N.J.S.A. 18A:38-11 and N.J.S.A. 18A:38-19.

Tuition charged boards of education lacking high school facilities within their districts and who send their pupils to an outside of district high school is determined by the outside of district high school, or receiving district. N.J.S.A. 18A:38-19 provides in full as follows:

> Whenever the pupils of any school district are attending public school in another district, within or without the state, pursuant to this article, the board of education of the receiving district shall determine a tuition rate to be paid by the board of education of the sending district to an amount not in excess of the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the state board, and such tuition shall be paid by the custodian of school monies of the sending district out of any monies in his hands available for current expenses of the district upon order issued by the board of education of the sending district, signed by its president and secretary, in favor of the custodian of school monies of the receiving district.

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Under State Board rules, the sending districts and the receiving district agree upon an estimated per pupil tution for each school year. At the conclusion of that year, a detailed report of actual expenses incurred by the receiving district is submitted to the Department of Education which, in turn, audits the report and certifies a final tuition cost per pupil for that year. The sending districts and the receiving district then make appropriate transfers of funds or credits to correct any differences between the estimated tuition payments and the final per pupil cost as audited by the Department of Education. Petitioner Plumsted Township Board and participant Washington Township Board seek reimbursement from the Upper Freehold Regional Board for what they claim have been inflated per pupil tuition rates as the result of Upper Freehold including in its per pupil costs fringe benefit expenditures for attendance and transportation personnel. Plumsted Board and Washington Board contend that the inclusion of these expenses are specifically prohibited by State Board rule at N.J.A.C. 6:20-3.1(c)3 and 4.

N.J.A.C. 6:20-3.1, Method of Determining Tuition Rates, readopted by the State Board of Education and published in the New Jersey Register, 17 N.J.R. 144, provides two bases for the establishment of tuition rates; actual cost per pupil or if actual cost cannot be determined then a ratio cost basis may be used in calculating tuition. N.J.A.C. 6:20-3.1(a) defines "actual cost per pupil" as "* * * the cost per pupil in average daily enrollment, based upon audited expenditures for that year for the purpose for which the tuition rate is being determined * * *". If the tuition rate is calculated on a ratio basis, N.J.A.C. 6:20-3.1(c)3 and 4 excludes attendance officer salary and expenses and y and other expenses for transportation curricular activities from the calculation of such tuition rate. While attendance officer salary and expenses were to be excluded from the calculation of tuition on a ratio basis prior to the readoption of the rule by the State Board, the exclusion of transportation salaries and other expenses attributable to transportation curricular activities was added to the rule at the time of its readoption. 17 N.J.R. 146.

According to the detailed report (A4-1) filed by the Upper Freehold Board with the Department of Education for its 1984-85 expenditures which the Department has not yet reviewed, attendance salaries and other attendance expenses (J320) are not used in the calculation of Upper Freehold's asserted actual 1984-85 per pupil grades 9-12, or high school, tuition costs. According to the same report, transportation salaries listed in account J510 are not included nor are other expenses, J550, chargeable to transportation included in the calculation of 1984-85 grades 9-12 per pupil tuition cost by Upper

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Freehold. Fringe benefits for attendance officers and transportation personnel, accounts J810 and J820, are included in the Upper Freehold Board's calculation of 1984-85 per pupil grades 9-12 tuition costs.

PROOFS OF PETITIONER AND PARTICIPANT

Petitioner Plumsted Board called its school auditor to testify in support of its position, and in support of the position of participant, that the Upper Freehold Board miscalculates the per pupil tuition cost it charges through a misapplication of N.J.A.C. 6:20-3.1(c)3 and 4. The auditor's testimony shows that while he is concerned about the inclusion of fringe benefits for attendance and transportation personnel in the calculation of the actual per pupil cost, he has never taken the position, nor did he at hearing, that the inclusion of such costs is in violation of the cited rule. In fact, at hearing the auditor testified that he is not certain whether the fringe benefits for attendance and transportation personnel are not properly included in the actual per pupil grade 9-12 tuition costs.

The Upper Freehold assistant superintendent for business and Board secretary testified that the Department of Education certified a per pupil grades 9-12 tuition cost for 1983-84 based on the A4-1 report he submitted for that year. The assistant superintendent explained that he filed the A4-1 report for 1983-84 which included fringe benefits, the costs disputed here, for attendance and transportation. The assistant superintendent explained he followed the instructions issued by the Department of Education for the completion of the A4-1 report (R-5). The instructions for calculating the amounts charged to J810 and J820 in the A4-1 report state: "Follow the instruction for the 2114, 2115 and 2116 accounts" (R-5, at p. 3). The instructions for the 2114, 2115 and 2116 accounts state: "Use the 2C ratio to prorate costs * * *" (R-5, at p. 2). The 2C ratio is defined in the instructions as follows:

> This [the 2C ratio] is the proportional relationship of the average daily enrollment in each grade plan and of special education average daily enrollment to the total average daily enrollment for the system * * *

This concludes a recitation of the proofs brought forward by petitioner Plumsted Board and participant Washington Board.

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BOARD'S DEFENSE

The Board, in support of its position that its grade 9-12 actual per pupil tuition costs for 1983-84 and 1984-85 have been accurately calculated consistent with the law and State Board rules promulgated thereunder, called the Plumsted superintendent of schools who testified that he brought his view that the Plumsted Board was paying to Upper Freehold an inflated per pupil tuition rate to the attention of Department of Education representatives. The superintendent testified that he brought his concerns first to the Ocean County superintendent of schools after which he communicated in writing to the assistant commissioner of Education in charge of the Division of Finance. The assistant commissioner responded by letter dated April 2, 1985 to the superintendent about the inclusion of fringe benefits for transportation and attendance in the calculation of tuition rates charged to Plumsted. The letter is reproduced here in full:

> I have reviewed your letter concerning the inclusion of fringe benefits of transportation and attendance and building use charges, in the calculation of tuition rates. [No allegation is made here concerning "building use charges".]
>
> In my opinion, the current state board code is clear and the tuition rates calculated for your district were consistent with the code. The points you raise, however, deserve further study to assure that the code is fair to both sending and receiving districts.
>
> By copy of this letter, I am requesting [a member of the Division of Finance] to reconvene the committee of sending and receiving districts that advised us on the current code. I would hope that you would be willing to serve on that committee. I will also request representation from Upper Freehold Regional school district.
>
> Please contact [the representative] directly if you, or a representative of your choice, is willing to serve on the committee. (R-4)

The superintendent testified that no committee was ever formed to his knowledge.

This concludes a recitation of the Board's proofs in support of its position.

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DISCUSSION

It is the burden of petitioner Plumsted Board and participant Washington Board to show by a preponderance of credible evidence that the calculation of per pupil grades 9-12 tuition costs charged by the Upper Freehold Board are erroneous under the law or under State Board rules and that they are entitled to reimbursement from 1983-1984 forward. The proofs brought forward establish that Upper Freehold includes fringe benefits for attendance and for transportation personnel in its calculation of per pupil tuition rates, grades 9-12, and that the per pupil tuition charges assessed against Plumsted and Washington are calculated with such fringe benefits so included. The cited regulation, N.J.A.C. 6:20-3.1(c)3 and 4, specifically excludes attendance officer salary and expenses as well as transportation salaries and other expenses in the calculation of per pupil tuition rates. While not argued by any of the parties, it must be noted that neither petitioner nor participant submitted any proof to demonstrate that fringe benefit costs are properly chargeable as attendance officer expenses or for transportation other expenses. Furthermore, neither petitioner Plumsted nor participant Washington called any representative from the Department of Education, Division of Finance, to explain the judgment already made that Upper Freehold is not misapplying the State Board rule. The absence of such testimony is particularly curious in light of the uncontroverted response from the assistant commissioner of Education in charge of the department's Division of finance that Upper Freehold calculates its high school tuition rates chargeable to Plumsted and to Washington in a manner consistent with the regulations.

I have reviewed the briefs filed by Plumsted and by Washington, both of which present alternative ways that the regulation could be applied. As an example, Plumsted contends fringe benefits are other expenses and must be excluded. Washington contends that it is improperly being charged fringe benefit costs of Upper Freehold transportation employees who provide absolutely no service to its pupils. Washington contends fringe benefit costs for transportation personnel and for attendance personnel, not chargeable to it as a sending district, should be excluded from the per pupil tuition rate it is charged. Washington asserts it should not be assessed costs by Upper Freehold which provides no benefits to its pupils.

The Upper Freehold Board contends it followed the instructions of the Department of Education, Division of Finance to the letter in completing the A4-1 report. Upper Freehold also points to the fact that its 1983-84 A4-1 reported figures were audited

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and certified to accurately reflect Upper Freehold's 1983-84 high school per pupil tuition cost. Finally, Upper Freehold notes that the assistant commissioner of Education has already confirmed to the Plumsted superintendent that the method used by Upper Freehold in calculating its high school per pupil tuition rate is consistent with the State Board regulation.

CONCLUSION

In my view, petitioner Plumsted Board of Education and participant Washington Board of Education failed in their proofs to demonstrate that the Upper Freehold Board is calculating its actual per pupil tuition costs for high school in a manner inconsistent with law or with the State Board rule. The instructions issued by the Department of Education for the completion of the A4-1 report which reported data provides the basis for a certified high school per pupil tuition rate has been followed faithfully by Upper Freehold authorities. Neither Plumsted nor Washington brought forth any evidence to demonstrate that it has been overcharged tuition by Upper Freehold for 1983-84 or for 1984-85. The Department of Education itself has already endorsed the manner in which Upper Freehold authorities complete its A4-1 report and the Plumsted superintendent of schools has already been advised in writing that the Plumsted Board is not being overcharged tuition by Upper Freehold. Whether the rule should be revised is a matter not for discussion here.

For all the foregoing reasons, I **CONCLUDE** petitioner Plumsted Board of Education and participant Washington Board of Education failed, individually and jointly, to demonstrate that the Upper Freehold Township Board of Education is erroneously calculating high school per pupil tuition costs assessed against Plumsted and Washington in violation of N.J.S.A. 18A:38-19 or N.J.A.C. 6:20-3.1. The petition of appeal is **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

May 9, 1986
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

MAY 12 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 13 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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EXHIBIT LIST

J-1	1984-85 A4-1 report
J-2	1984-85 transportation costs
J-3	1983-84 A4-1 report
J-4	1983-84 transportation costs
R-1	Letter, March 7, 1985
R-2	Letter, May 4, 1984, January 24, 1983, March 23, 1982
R-3	Letter, August 25, 1982, with tuition audit
R-4	Letter, April 2, 1985

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BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, OCEAN COUNTY, PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY, RESPONDENT.	:	

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

It is observed that exceptions to the initial decision have been filed by the Plumsted Board and participant Washington Board pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Both Plumsted and Washington Boards do not dispute the factual circumstances giving rise to the matter controverted herein. The parties argue that these facts establish that respondent Upper Freehold Regional Board has included in its per pupil tuition costs fringe benefit expenditures for attendance and transportation personnel which are specifically prohibited by the provisions of N.J.A.C. 6:20-3.1(c) 3 and 4. The parties argue, further, that the ALJ's conclusions are therefore in error in rejecting their claim that such tuition costs charged to the Plumsted and Washington Boards be adjusted downward commencing with the 1984-85 school year.

The essential thrust of the exceptions to the initial decision entered by both parties (Plumsted and Washington Boards) is set forth in pertinent part as follows:

> ***The regulation is clear. NJAC 6:20-3.1(c)(4) [and likewise (c) 3 respecting attendance officers] expressly excludes "transportation salaries and other expenses" from actual cost calculations, and therefore requires that the fringes for such salaries also be excluded. Upper Freehold should be required to re-do line items 810 and 820, with a specific exclusion from columns 7 and 9 of any retirement or insurance premiums for transportation or attendance employees. The 810 and 820 costs for these employees should be broken out and separately listed in column 9, undistributed (and non-chargeable) costs.
>
> The contention of respondent that the Division of Finance in the Department of Education has

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endorsed Upper Freehold's interpretation of the regulations is evidential, but hardly conclusive, on the question of interpreting the State Board regulation 6:20-[3.1](c) (3) and (4). The fact is that neither the Commissioner himself, nor the State Board, has ever ruled on this issue. This case will provide him and them with that opportunity.

Lastly, respondent's contention that the calculations which would be necessary if petitioner's interpretation were adopted cannot be performed, is simply untenable. First, with respect to line item 810, there is included only employer social security and pension contributions. These are simple percentages set by law or regulation, and are readily determinable for each transportation and attendance employee. Similarly, the workers compensation and employee health benefits premiums for Upper Freehold's transportation and attendance officers are easily calculable on a per employee basis and could readily be broken out from line 820, column 3, and the result put in column 9, undistributed.

In sum, the regulations, in requiring the exclusion from tuition cost calculations of all "[attendance and t]ransportation salaries and other expenses" (NJAC 6:20-3.1 (c) (3) and (4)), compels Upper Freehold to exclude the fringe benefits of these employees, as well as their salaries, from its A4-1, column 7 calculation of actual costs. The fringes constitute "other expenses", and are properly excluded under the regulation. Accordingly they should be broken out and put in column 9, lines 810 and 820 of J-1 and J-3.*** (Post-hearing Brief, Washington Township, at pp. 9-12)

The Commissioner has reviewed the exceptions to the initial decision and he cannot agree with the positions taken by the Plumsted and Washington Boards in the instant matter.

The specific provisions of N.J.A.C. 6:20-3.1(c) 3 and 4 relating to the method of calculating tuition rates read as follows:

3. Attendance and health services: Ratio of average daily enrollment in each program. Attendance officer salary and expenses shall be excluded.

4. Transportation curricular activities: Ratio of average daily enrollment in each program. Transportation salaries and other expenses shall be excluded. (emphasis supplied)

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Financial Accounting for New Jersey School Districts. The Chart of Accounts (C-1) is directly related to the budgetary J320 and the J550 current expense line items which delineate those specific expenses attributed to "Attendance and health services" (N.J.A.C. 6:20-3.1(c)(3) and "Transportation curricular activities" (N.J.A.C. 6:20-3.1(c) 4).

There is nothing in the record of this matter to establish that the Upper Freehold Board included these "other expenses" set forth in the above-cited budgetary line items in determining its per pupil cost tuition rates assessed to the Plumsted and Washington Boards in violation of the provisions of N.J.A.C. 6:20-3.1(c) 3 and 4.

Consequently, what is at issue are the fixed charges (Line Item 800 (C-1), at pp. 19-20) which are permitted by the provisions of N.J.A.C. 6:20-3.1(c)7 to be included by the Upper Freehold Board to be calculated in determining its per pupil cost tuition rates. The method of calculating these costs reads as follows:

> 7. Fixed charges: Ratio of average daily enrollment in each program.

It is evident from a review of The Chart of Accounts that the expenses to which the parties take issue herein are to be included in the calculation of pupil tuition costs in the 800 line item series.

This line item series includes, but is not limited to, the following expenditures:

1. State or County Retirement Funds
2. Social Security
3. Pension Payments
4. Employee Insurance

Consequently, the Commissioner finds and determines that the ALJ properly concluded that the Board was not in violation of the provisions of N.J.A.C. 6:20-3.1(c) 3 and 4 in calculating its per pupil tuition costs for the Plumsted and Washington Boards. The initial decision is hereby affirmed.

In rendering the above determination, it is unnecessary for the Commissioner to reach a determination regarding the merits of the arguments presented by the Plumsted and Washington Boards.

The Commissioner deems it to be appropriate that the entire record of this matter be made available to the Tuition Code Committee under the supervision of the Department's Assistant Commissioner of Finance. This committee will reconvene in the near future to review and recommend any possible changes in the regula-

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tions governing the methods for determining tuition rates affecting local public school districts.

Accordingly, for the reasons set forth herein the Commissioner affirms the initial decision.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

June 24, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7847-85
AGENCY DKT. NO. 397-11/85

EAST BRUNSWICK EDUCATION ASSOCIATION, ROSALIE TRIOZZI, and SUE DREIFUS,
Petitioners,
v.
EAST BRUNSWICK TOWNSHIP BOARD OF EDUCATION,
Respondent.

Richard A. Friedman, Esq., for petitioners (Ruhlman, Butrym and Friedman, attorneys) Mary Jane Cullen, Esq., on the brief

David B. Rubin, Esq., for respondent (Rubin, Rubin & Malgran, attorneys)

Record Closed: March 28, 1986 Decided: May 12, 1986

BEFORE **DANIEL B. MC KEOWN,** ALJ:

The East Brunswick Education Association, the majority representative of all teachers employed by the East Brunswick Township Board of Education (Board), and Rosalie Triozzi and Sue Dreifus, members of the East Brunswick Education Association (petitioners), filed a Verified Petition of Appeal before the Commissioner of Education by which they allege an attendance policy adopted by the Board governing certificated personnel is in violation of N.J.S.A. 18A:30-1 et seq., beyond the Board's authority at N.J.S.A. 18A:11-1 and 27-4 and is in violation of petitioners' protections under the Fifth and Fourteenth Amendments to the United States Constitution and is in violation of their due process and equal protection rights under the New Jersey Constitution. After the Commissioner transferred the matter to the Office of Administrative Law as a contested

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case under the provisions of N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was conducted on February 21, 1986 during which the parties agreed to submit the matter on cross-motions for summary decision based on a stipulation of fact and briefs or letter memoranda of the parties. The record closed March 28, 1986, upon simultaneous receipt of letter memoranda from the parties.

BACKGROUND FACTS

While the parties did not execute a stipulation of fact, petitioners make a facial attack upon the propriety of the controverted attendance policy. Consequently, a stipulation of material fact is not necessary other than to recite that on or about July 10, 1985 the Board adopted the following attendance policy for its certificated personnel:

> GUIDELINES
>
> To ensure that absences are not excessive to the point of being harmful to students' education, the following administrative guidelines shall apply:
>
> I. Administrators shall review the monthly attendance reports and shall conduct a conference with any employee whose record indicates . . .
>
> 1. a pattern of absences taking place on the same day or days of the week
>
> 2. a pattern of absences before or after non-working days
>
> 3. the number of absences is approaching the yearly allocation
>
> 4. the allowed sick leave has been habitually exhausted or nearly exhausted, and for any other related just reason.
>
> II. A written summary of all conferences, excluding the initial informal discussion, will be recorded and . . .
>
> 1. may be used in an evaluation
>
> 2. may become part of the employee's permanent personnel file
>
> 3. may result in procedures which lead to the withholding of salary increments
>
> 4. the employee may attach a response in accordance with the negotiated agreement.

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III. After any of the conditions listed in section I are identified, a physician's written statement certifying disability may be required for:

1. any day or days of sick leave claimed in accordance with Title 18A

2. any absence which exceeds five (5) consecutive work days.

PROCEDURES

Once a determination has been made to address the matter of an employee's absence, the following shall apply:

I. The administrator shall conduct an informal discussion with a staff member whose absence is excessive. The purpose of this initial step is to bring the matter to the employee's attention with the hope that improvement will be made. Continuous debilitating illness will obviate the need for this meeting.

II. At any time during the school year, the administrator may conduct a formal conference with an employee whose absence is deemed excessive. Prior written notification of this conference shall be given and shall include all pertinent facts and documents.

III. The administrator shall write a summary report of the formal meeting. The summary shall include documents, records and items discussed. The summary report will be signed by the employee and the administrator and placed in the Employee's Personnel File. The employee shall have the right to attach written comments and documents to the report.

IV. Three school months after the formal meeting, the administrator shall place in the Employee's Personnel File either a letter noting improvement or a letter noting continuing excessive absences.

V. If the excessive absences continues, the administrator shall, in conjunction with the employee, design and implement a Professional Improvement Plan (PIP) for purpose of improving the employee's attendance.

IV. Regular excessive absence may be cause for disciplinary action and employees whose absences are excessive may be recommended for salary increment withholding or non-renewal of a contract.

VII. These guidelines and procedures will be administered both individually and collectively in a uniform and consistent manner by the administrative staff.

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No claim is made by petitioners that the policy has been applied in an arbitrary or unreasonable manner to any particular teacher. Rather, the thrust of petitioners' argument is that the policy is illegal on its face which contention comports with the issue agreed upon during the telephone prehearing conference conducted in the matter. That issue is whether the Board's teacher attendance policy is illegal as a matter of law.

PETITIONERS' ARGUMENTS

Petitioners admit that the Board has discretionary authority to make, amend and repeal rules for the government and management of the public schools, for the employment, regulation of conduct and discharge of its employees, N.J.S.A. 18A:11-1, and to make rules 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, N.J.S.A. 18A:27-4. While petitioners do not contest such broad authority vested in the Board, they note that the Board's discretionary authority may not be exercised in violation of Title 18A, Education Law, or with rules of the State Board of Education.

Petitioners contend that the controverted attendance policy is illegal because its terms are in violation of N.J.S.A. 18A:30-2 and 30-3 which provide certain sick leave benefits to local board of education employees. Specifically, N.J.S.A. 18A:30-2 provides in full as follows:

> All persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the state who were steadily employed by the board of education or who are protected by tenure in their office, position or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.

Furthermore, N.J.S.A. 18A:30-3 provides in full as follows:

> If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilizied that year shall be accumulative to be used for additional sick leave as needed in subsequent years.

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Petitioners assert that the Board's controverted attendance policy is in violation of these two statutes in a manner similar to the violations of such statutes by other attendance policies as were found in Montville Twp. Educ. Assoc. and Montville Twp. Educational Secretaries Association v. Montville Twp. Bd. of Ed., N.J. App. Div., Dec. 6, 1985, A-1178-84T7 (unreported), the State Board's ruling in Kuehn v. Teaneck Bd. of Ed., 1983 S.L.D. — (Feb. 1, 1983) and its ruling in City of Burlington Ed. Assoc. v. Bd. of Ed. of City of Burlington, 1985 S.L.D. - (Nov. 8, 1985).

Petitioners contend that category I of the attendance policy Guidelines admits of no standard for determining excessive absence under the terms of the policy which, in turn, may subject the policy to an arbitrary interpretation by school administrators. The whole of category I of the policy Guidelines, petitioners contend, does not allow for consideration of the underlying reasons for employees absence, that the policy on its face has the potential for employee discipline even when the employee's total attendance pattern is overall acceptable, that there is no standard which requires school administrators to review attendance over a reasonable period of time in order to determine an asserted pattern of abuse, that a conference could be called under the terms of the policy even if the teacher exercises their statutory benefits of legitimate sick leave use under N.J.S.A. 18A:30-2 and, that, the conduct of such a conference may only be seen as the initial step in a disciplinary process such may affect the teacher's performance evaluation.

Petitioners contend that because category II allows for conferences and reports, and reports thereon without restriction as to the use to be made of such reports, the policy is an arbitrary exercise of the Board's authority because such reports has a potential adverse impact upon the person's employment possibilities, assignments, or earnings. Petitioners also contest the validity of category II because a person who has been subjected to a conference under the terms of the policy, but who thereafter becomes legitimately ill within a three month period of time, may according to petitioners be subjected to a second conference and a second report without regard to the underlying reasons for the absence or absences. Despite the fact an affected employee may file a written response to a conference report, petitioners say that because there is no required weight or consideration to be given such response the mere opportunity to respond, without more, does not render an otherwise unreasonable policy reasonable.

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Petitioners raise no arguments against category III of the policy guidelines.

Petitioners reiterate each and every argument raised regarding the policy Guidelines to attack the policy Procedures. As examples, petitioners assert that Procedures I and II are vague and arbitrary because excessive absence is defined not by a clear standard but by the whim of an administrator. Petitioners complain that the triggering factors for excessive absence are merely numbers of absences and the absences themselves. Consequently, petitioners assert absences used for legitimate illness may be included within an administrator's view of excessive absence. Petitioners contend that Procedures III require a formal conference report be filed in the employee's personnel record without a requirement that the circumstances surrounding the absence be included within that report. While petitioners admit that the employee has the right to attach a written response to any report placed in their file regarding absences, petitioners explain that the teacher's comments would be worthless unless the policy allows legitimate absences to negate the asserted negative impact of the mere presence of the report in the file. Procedure IV is attacked by petitioners as being arbitrary and unreasonable in that legitimate sick days taken within three months after the initial formal meeting can trigger a second conference report which petitioners characterize as a "prejudicial document" (Petitioners' brief, p. 16). No attack is made by petitioners upon Procedure V.

Procedure VI is unreasonable according to petitioners because it permits "* * * punishment or penalty based upon the number and dates of absences, without consideration of the reasons therefor or the fact that the absences may be well within the bounds of statutory allotment." (Id. p. 17).

BOARD'S ARGUMENTS

The Board contends its adoption of the controverted policy is within its management prerogative and that the policy is designed to identify the cause of teacher absenteeism in a positive manner. That is, the Board explains the policy is not designed to be applied in a mechanical fashion without regard to the underlying reasons for teacher absences; it is not designed to automatically deprive a teacher of an increment; it is not designed to assign an automatic rating to a teacher's performance evaluation based solely on the number of days missed; it is not designed to automatically apply when a teacher exceeds a certain number of absences per year without regard to underlying reasons; and, the policy on its face is intended to emphasize that teachers' attendance is continuously

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under review and that the Board is indeed concerned with regular attendance in order to ensure all its pupils have the opportunity to receive a thorough and efficient program of education through regular teacher attendance.

LAW AND DISCUSSION

While employees, including teachers, of local boards of education have certain statutory benefits regarding sick leave, the use of sick leave must be seen within the context of how the Legislature defines sick leave. N.J.S.A. 18A:30-1, Definition of sick leave, provides in full as follows:

> Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.

In Kuehn v. Bd. of Ed. of Tp. of Teaneck, 1983 S.L.D. — (St. Bd. Feb. 3, 1983) the State Board held that a board of education may not adopt an attendance policy which disregards the reasons for or the cause of absence. An attendance policy adopted by a local board of education may not be applied in a mechanical fashion without regard to the underlying reasons for an affected person's absence. A policy may not automatically assign a performance rating based solely on an employee's absence record without regard to underlying circumstances.

In this case, Procedures 1 clearly states "Continuous debilitating illness will obviate the need for this [initial informal discussion with employee regarding absence] meeting." This, in my view, is the critical element in the entire controverted policy which renders the entire policy a valid expression of the Board's discretionary authority to ensure regular attendance of its certificated professional staff personnel.

In Montville Twp. Educ. Assoc., supra, the Appellate Division quoted with favor the Commissioner's view of the propriety of attendance policies adopted by local boards of education as follows:

> * * * [T]he Commissioner cannot accept as reasonable an attendance evaluation system which would determine a teacher's

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> attendance evaluation rating solely upon the basis of the accumulative number of days of absence, regardless of the circumstances of the absences or a teacher's previous attendance history. A board may certainly take steps to implement a policy to improve the attendance of its professional staff; to do so would constitute a reasonable exercise of its discretionary powers. However, if such a policy goes so far as to ignore legitimate extended illness or confinement at home or hospital by a physician in determining an unsatisfactory evaulation rating for attendance, such a policy must be deemed arbitrary, even if said policy allows for teacher reaction to the rating through narrative statements.

There is nothing on the face of the controverted policy which allows for mechanical application of its terms to any and all absences incurred by teachers. Rather, category I of the policy requires a pattern of absences taking place on the same day or days of the week, before or after non-working days, or absences approaching the yearly allocation, or habitual exhaustion of sick leave to be manifested prior to any administrator conducting a conference with any employee. Category I of the Guidelines, however, must be seen in light of Procedure I which eliminates the institution of the policy terms when there is debilitating illness. Surely it cannot be seriously disputed that a board should be concerned over the attendance record of one who uses statutory sick days only on Mondays, Fridays, or days before or after other holidays. Given this kind of a pattern of asserted sick days it is reasonable to question whether the person is in fact sick under the terms of N.J.S.A. 18A:30-1 or is simply using the statutorily authorized sick days as a means for taking a day off. There is nothing improper nor arbitrary for a board to direct its administrators to question a person whose attendance record reflects the foregoing pattern. Category II of the policy Guidelines merely advise all certificated personnel that if such a pattern of absences which gives rise to a possibility of sick day abuse is manifested, the conference which follows shall be memorialized by the administrator together with a statement from the employee. Category II of the Guidelines merely provide notice that the conference record "may" be used in evaluation or become part of the employee's permanent personnel file, or lead to the withholding of a salary increment. These use possibilities, however, would occur only after the application of Category III of the Guidelines which provide for a physician's written statement certifying disability. This is nothing more than the reasonable exercise of authority already granted boards of education to make, amend and repeal rules for the government and management of its public schools and for the employment, regulation of conduct and discharge of its employees at N.J.S.A. 18A:11-1.

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Contrary to the policy controverted in City of Burlington Education Association v. Burlington City Board of Education, 1985 S.L.D. — (July 1, 1985), aff'd St. Bd. of Ed. 1985 S.L.D. - (Nov. 13, 1985), this policy is not mechanically applied nor is it a policy which admits of no legitimate absence but for professional days. Rather, this policy recognizes that teaching staff members are entitled to 10 days of sick leave per year, cumulative, for use in "* * * the absence from his or her post of duty * * * because of personal disability due to illness or injury * * *". Clearly, Category III of the Guidelines provide that upon submission of a physician's written statement certifying disability the terms of the policy shall not be applied.

Petitioners' argument that Procedures IV by which a follow up letter is placed in an employee's file after three months of a formal administrative conference regarding sick leave is not persuasive that that provision is arbitrary or unreasonable. When an employee's attendance pattern is such that the policy terms are to be applied, it is reasonable to believe that administrators will closely monitor that person's future attendance. It is also reasonable, in my view, for the administrator to put into the affected person's file a follow up statement which would tend to document either improvement or no improvement in the person's attendance patterns.

Finally, petitioners advance no argument to support their allegation that the policy as written is some how in violation of either their federal or constitutional rights.

CONCLUSION

Petitioners carry the burden of persuasion to demonstrate by a preponderance of credible evidence that the attendance policy of the East Brunswick Township Board of Education is on its face arbitrary, capricious, unreasonable or in violation of N.J.S.A. 18A:1-1, Education Law. Petitioners, I **CONCLUDE**, have failed to demonstrate the truth of their allegations. Contrary to the assertions made by petitioners, I **CONCLUDE** that the controverted attendance policy is a proper exercise of the Board's discretionary authority and that the policy is designed to serve a legitimate purpose of ensuring regular attendance by certificated personnel to the tasks for which they are employed. Of course, petitioners may have a cause of action in the future should the policy, proper on its face, be applied in an arbitrary or unreasonable manner.

The petition of appeal is dismissed.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

May 12, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

MAY 12 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 14 1986
DATE

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EAST BRUNSWICK EDUCATION ASSOCIATION, ROSALIE TRIOZZI AND SUE DREIFUS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioners within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

Petitioners' exceptions contend that the provision of the herein attendance policy, suggesting that "Continuing debilitating illness will obviate the need for this meeting" (see East Brunswick Attendance Policy, Subsection 1) renders the entire policy a valid expression of the Board's authority, does not rectify or mitigate the arbitrariness of the Board's policy. Petitioners aver that the guidelines are "still plagued by vagueness which renders the attendance policy vulnerable to significant abuse and the staff vulnerable to its arbitrary application" (Petitioners' Exceptions, at p. 1) for the following reasons:

1. There is no definition of excessive absence.

2. There is no provision for consideration of the circumstances or reasons for absences.

3. There is no provision compelling the Board to consider legitimate explanations for absences to minimize or negate the impact of the presence of absenteeism reports in one's personnel file.

4. The policy, through its general tenor of not distinguishing between those who legitimately use and those who abuse sick day benefits, tends to discourage the use of legitimate sick leave.

For the above reasons and those in petitioners' brief, incorporated herein by reference, petitioners pray that the East Brunswick policy be viewed by the Commissioner as an arbitrary and unreasonable exercise of the Board's discretion and therefore be modified to allow for consideration of all of the above or be invalidated.

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Having carefully reviewed the record herein, including the controverted attendance policy, the Commissioner affirms the findings and determination in the initial decision substantially for the reasons stated therein. He adds the following. While not fatal to the policy, the Commissioner notes some inconsistencies. Under "Guidelines," Section II indicates that:

> A written summary of all conferences, excluding the initial informal discussion, will be recorded***. (emphasis added)
> (Initial Decision, ante)

While this language indicates that a written report must follow a formal conference and thereby also implies that said report will be placed in the employee's personnel file, in the same Section II, No. 2 it is stated that

> [a written summary of all conferences] may become part of the employee's permanent personnel file***. (emphasis added)
> (Initial Decision, ante)

Later, under "Procedures," Section III states:

> The administrator shall write a summary report of the formal meeting. The summary shall include documents, records and items discussed. The summary report will be signed by the employee and the administrator and placed in the Employee's Personnel File.*** (emphasis added)
> (Initial Decision, ante)

Thus, it would appear that notwithstanding the permissive nature of a written report being placed in an employee's file under the "Guidelines" segment of the policy, it gives the appearance of being mandatory "Procedure" under the procedures section. Such inconsistencies create ambiguity and should be made consistent throughout the policy.

The Commissioner finds, as did the ALJ, that the policy, as written, provides considerable flexibility for administrators to determine when sick day use becomes sick day abuse. Contrary to the allegation of petitioners, the "Guidelines," Section I elaborate on the standards to be applied in determining what "excessive" means, tempered by the "Procedures," Section I language which states that:

> Continuous debilitating illness will obviate the need for this meeting.
> (Initial Decision, ante)

The Commissioner concurs with the ALJ that the above language is at the crux of the policy's viability. The Commissioner also finds that there is language in the policy addressing the issue of an employee's past history of attendance as a means of mitigating

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what might otherwise appear to be excessive absences in any single year. On the basis of the existence of such language in the policy, the Commissioner finds no merit in petitioner's arguments that there is 1) no definition of excessive absence, 2) no provision for consideration of the circumstances or reasons for absences, and 3) no provision for consideration of legitimate use and abuse of sick day benefits.

It cannot be stated too strongly that while the minimum number of sick days allotted annually is an entitlement, the law clearly intends that the entitlement apply only to the use of the days for sick leave purposes. An unwarranted use of sick days is impliedly discouraged; employees are encouraged to use sick leave only when necessary. If the policy in question allows for consideration of "continuous debilitating illness" as obviating the need for further review by the administration of the employee's use of said leave, then the Board has met its obligation to its employees and to its students so long as the policy is applied even-handedly. As stated in Gilchrist v. Board of Education of the Township of Livingston, 1959-60 S.L.D. 90, aff'd State Board 1961-62 S.L.D. 203:

> *** On the one hand, [the board] has the obligation to be patient and to show consideration and kindness and, on the other hand, it must ever be mindful of its obligation to maintain the efficiency of school work. Eventually the latter obligation becomes paramount. At what time this obligation becomes paramount is a matter of the board's judgment, honestly and fairly exercised.*** (at 94)

See also, In the Matter of the Tenure Hearing of Paula M. Grossman, a/k/a Paul M. Grossman, School District of the Township of Bernards, 1972 S.L.D. 144, aff'd in part/rev'd and rem. in part 127 N.J. Super. 13 (App. Div. 1974), cert. denied 65 N.J. 292 (1974).

The Commissioner notes, however, that notwithstanding the language of the instant policy allowing that "continuous debilitating illness will obviate the need for this meeting," it should be recognized that the Appellate Division held in Trautwein v. Board of Education of Bound Brook, 1978 S.L.D. 445, aff'd State Board 1979 S.L.D. 876, rev'd N.J. Superior Court 1980 S.L.D. 1539 that chronic absenteeism over a period of years may be a basis for disciplinary action of staff members, even if "there were no absences exceeding *** entitlement." Id., at 1540

Equally clear from the case law dealing with absenteeism policy and guidelines is that a board of education may not use sheer number to set attendance policies/guidelines.

The State Board's decision in Kuehn v. Board of Education of Teaneck, 1981 S.L.D. 1290, rev'd State Board February 1, 1983 overturned an increment withholding of a teacher. Because of "serious illness" (Slip Opinion, at p. 1), Petitioner Kuehn was

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absent more than 90 school days during the 1979-80 school year. The State Board held:

> To simply state that a teacher by sheer number exceeds the 90-day maximum allowance for absence and forfeits an increment, without considering the particular circumstances for absence, is not good cause for the withholding of increment as required by N.J.S.A. 18A:29-14. (at p. 4)

Further, the Appellate Division recently affirmed the Commissioner's decision which had been overturned by the State Board in Montville Twp. Education Association et al., decided by the Commissioner April 16, 1984, rev'd State Board November 7, 1984, rev'd N.J. Superior Court, Appellate Division, December 6, 1985. In Montville, as in the instant matter, an attendance policy's guidelines were at issue, not the Board's application of the policy to any specific individual. In Montville, the Appellate Division determined that the policy assigning evaluation ratings solely on the basis of number of days absent, an "attendance component" (Slip Opinion, at p. 2), was arbitrary because

> *** the simple fact remains that the assigned rating is a merely mathematical consequence and unaffected by the reason for the absence. (at p. 4)

The Court also found that such a policy had a chilling effect on a teacher's use of statutory entitlement to sick leave. The Court cited Kuehn, supra, noting that the same principles relied on by the State Board in that decision applied in Montville. (at p. 5)

Sheer number, it is noted, was also at issue in Burlington City Education Association v. Board of Education of Burlington City, decided by the Commissioner July 1, 1985, aff'd State Board November 8, 1985. Therein, while commending the Board's desire to develop and implement a policy to improve staff attendance, "particularly occasional absences," (Commissioner's Decision, at p. 22) the policy was struck down because it used the state's monitoring criteria, which assess district-wide occasional absences, rather than individual teacher absences. Further, the Commissioner found the policy in Burlington unacceptable because it relied on sheer number of absences over a limited period of time to rate a teacher without consideration of the teacher's total record of attendance. The Commissioner found, as did the ALJ, that:

> *** the policy disputed in this matter does not distinguish between those who are legitimately ill, injured, or otherwise justifiably absent

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> from those who may, in fact, abuse leave benefits.*** (at p. 24)

The Commissioner in Burlington relied upon both Montville, supra, and Kuehn, supra, in reaching his determination.

One decision dealing with absenteeism guidelines or policies has withstood the "sheer number" prohibition, however, Bialek and Meehan v. Board of Education of Teaneck, decided by the Commissioner July 19, 1985, aff'd State Board December 4, 1985. In Bialek, the Commissioner distinguished Kuehn, supra, and found that the allotment of 50 additional days absences beyond accrued sick days, which was used as a criterion for withholding an increment, was so far beyond any possible statutory entitlement as not to be arbitrary or likely to impinge on a person's use of statutorily-granted sick leave. The Commissioner found that the fact that the policy did not take into consideration individual circumstances

> *** is not, in the Commissioner's judgment, in violation of Kuehn, supra, because the standard of excessive absenteeism impacting upon the petitioners is (1) reasonable, (2) arrived at and formally adopted after careful deliberation and public hearings and (3) does not impinge upon any statutory leave entitlement.
>
> (Slip Opinion, at pp. 23-24)

In affirming the Commissioner's decision, the State Board cautioned that the policy must conform to Kuehn, supra.

Petitioners' exceptions bring nothing new to the record. The Commissioner is in accord with the ALJ that:

> There is nothing on the face of the controverted policy which allows for mechanical application of its terms to any and all absences incurred by teachers. Rather, category I of the policy requires a pattern of absences taking place on the same day or days of the week, before or after non-working days, or absences approaching the yearly allocation, or habitual exhaustion of sick leave to be manifested prior to any administrator conducting a conference with any employee. Category I of the Guidelines, however, must be seen in light of Procedure I which eliminates the institution of the policy terms when there is debilitating illness. Surely it cannot be seriously disputed that a board should be concerned over the attendance record of one who uses statutory sick days only on Mondays, Fridays, or days before or after other holidays. Given this kind of a pattern of asserted sick days it is reasonable to question whether the person is in fact sick under the terms of

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N.J.S.A. 18A:30-1 or is simply using the statutorily authorized sick days as a means for taking a day off. There is nothing improper nor arbitrary for a board to direct its administrators to question a person whose attendance record reflects the foregoing pattern. Category II of the policy Guidelines merely advise all certificated personnel that if such a pattern of absences which gives rise to a possibility of sick day abuse is manifested, the conference which follows shall be memorialized by the administrator together with a statement from the employee. Category II of the Guidelines merely provide notice that the conference record "may" be used in evaluation or become part of the employee's permanent personnel file, or lead to the withholding of a salary increment. These use possibilities, however, would occur only after the application of Category III of the Guidelines which provide for a physician's written statement certifying disability. This is nothing more than the reasonable exercise of authority already granted boards of education to make, amend and repeal rules for the government and management of its public schools and for the employment, regulation of conduct and discharge of its employees at N.J.S.A. 18A:11-1.

Contrary to the policy controverted in City of Burlington Education Association v. Burlington City Board of Education, 1985 S.L.D. __ (July 1, 1985), aff'd St. Bd. of Ed. 1985 S.L.D. __ (Nov. 13, 1985), this policy is not mechanically applied nor is it a policy which admits of no legitimate absence but for professional days. Rather, this policy recognizes that teaching staff members are entitled to 10 days of sick leave per year, cumulative, for use in "***the absence from his or her post of duty*** because of personal disability due to illness or injury***." Clearly, Category III of the Guidelines provide that upon submission of a physician's written statement certifying disability the terms of the policy shall not be applied.

Petitioners' argument that Procedures IV by which a follow up letter is placed in an employee's file after three months of a formal administrative conference regarding sick leave is not persuasive that that provision is arbitrary or unreasonable. When an employee's attendance pattern is such that the policy terms are to be applied, it is reasonable to believe that administrators will closely monitor that person's

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> future attendance. It is also reasonable, in my view, for the administrator to put into the affected person's file a follow up statement which would tend to document either improvement or no improvement in the person's attendance patterns.
>
> Finally, petitioners advance no argument to support their allegation that the policy as written is some how in violation of either their federal or constitutional rights.
>
> (Initial Decision, ante)

As noted by the ALJ, petitioners carry the burden of persuasion to demonstrate by a preponderance of credible evidence that the attendance policy of the East Brunswick Township Board of Education is on its face arbitrary, capricious, unreasonable or in violation of N.J.S.A. 18A:1-1, Education Law. See Angelucci et al. v. Board of Education of West Orange, 1980 S.L.D. 1066, 1077, aff'd State Board 1981 S.L.D. 1386. The Commissioner finds, as did the ALJ, that petitioners have failed to demonstrate that the herein attendance policy is arbitrary, capricious or unreasonable on its face for the reasons stated herein.

Accordingly, the Commissioner affirms the initial decision, as modified herein. The Board is directed to review the policy language to assure greater clarity as to what is required and what is permissive. In all other ways, it is the conclusion of the Commissioner that the controverted attendance policy is a proper exercise of the Board's discretionary authority and that the policy is designed to serve a legitimate purpose of ensuring regular attendance by certificated personnel to the tasks for which they are employed.

Accordingly, the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 24, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1125-86
AGENCY DKT. NO. 19-1/86

IN THE MATTER OF THE TENURE HEARING OF RONNIE LEE JOHNSON, SCHOOL DISTRICT OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY

Ernest N. Sever, Esq., for the petitioner (Sever & Hardt, attorneys)

No appearance by or on behalf of respondent

Record Closed: April 28, 1986 Decided: May 13, 1986

BEFORE **AUGUST E. THOMAS**, ALJ:

The Board of Education of the Township of Pemberton (Board) filed tenure charges of insubordination and unbecoming conduct against one of its teachers, Ronnie Lee Johnson, with the Commissioner of Education.

The Commissioner transmitted the matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was conducted on April 22, 1986, in the Hainesport Township Municipal Building, Hainesport.

PROCEDURAL HISTORY

1. Respondent was notified by the Board on December 2, 1985, that formal action on the Certification of Tenure Charges would be taken against him at the Board's meeting on December 10, 1985. Respondent was sent

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a letter detailing his rights to representation and demand for a public session to discuss his employment. He opened his letter; however, he refused acceptance and returned it to the Board (P-2).

2. The tenure charges contain eleven counts of insubordination and/or conduct unbecoming a teaching staff member.

3. Respondent did not file any written statement in response to the charges (N.J.S.A. 18A:6-11).

4. On December 11, 1985, the Board attempted to notify respondent by personal delivery that the charges would be considered by the Board on January 14, 1986. Respondent threw the letter at the sheriff, refusing delivery (P-1, #36, #37).

5. On January 14, 1986, the Board voted 9-0 in executive session to certify the charges to the Commissioner and to suspend him without pay effective January 15, 1986 (P-1, #38).

6. On January 15, 1986, the Board mailed the certification of charges to the Commissioner with a copy to respondent (P-1, #39).

7. The Department of Education notified respondent of its receipt of the charges on February 10, 1986, and advised him to Answer the charges within 10 days. Respondent signed the post office return receipt but he did not file an Answer. (Return receipt in file.)

8. On March 10, 1986, the Office of Administrative Law notified respondent that a prehearing of his tenure matter would be conducted in Mercerville on March 31, 1986. He did not attend.

9. On April 2, 1986, the undersigned administrative law judge notified respondent in writing that the matter would be scheduled for hearing. Respondent signed the post office return receipt, but did not answer the letter (return receipt in file).

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I adopt the foregoing as my FINDINGS of FACT.

DISCUSSION

After notification by the Office of Administrative Law, a hearing on the tenure charges was conducted on April 22, 1986. Respondent did not attend. The high school principal testified concerning the facts and the truth of each of the eleven charges as filed.

The superintendent testified about his directives to respondent and his responsibility to follow school procedures. At times respondent refused to meet with the superintendent. Respondent was also advised to undergo a psychiatric examination pursuant to statute. He refused to accept the letter sent to his home and the letter placed in his school mailbox.

Submitted in evidence are P-1 which contains 39 exhibits detailing the incidents of insubordination, unbecoming conduct and the certification of charges; P-2 contains six unclaimed or refused letters (unopened); P-3, an unopened, internal letter which respondent would not accept; and C-1 the administrative law judge's letter with return receipt requested.

Based on the foregoing, I am satisfied that:

1. The Board has satisfied the notice requirements to respondent (P-1, P-2, and P-3).

2. Respondent received and failed to answer my letter to him (C-1 with return receipt requested).

3. Respondent failed to appear at the hearing to defend the charges against him.

Accordingly, I **FIND** and **CONCLUDE** that the charges are uncontradicted and, therefore, true in fact. I also **CONCLUDE** that the charges of insubordination and conduct unbecoming a teacher are sufficient to warrant respondent's dismissal as a tenured teacher.

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The Board proffered an oral motion to at hearing to continue respondent's suspension without pay beyond the 120 days from the date of his suspension. This motion is grounded on the fact that the Board committed no delay in these proceedings. I **GRANTED** the motion orally at hearing and commit it to writing here. Any delay in these proceedings was caused by respondent's refusal to answer correspondence which caused additional attempts to correspond with him in the interest of due process. Respondent cannot deliberately delay the tenure process then be rewarded by the protection otherwise due him pursuant to (N.J.S.A. 18A:6-14).

Based on all of the above, Ronnie Lee Johnson is **DISMISSED** from his position as a tenured teacher as of the date of this decision, May 13, 1986. Further, he is to receive no salary beyond the 120th day of his suspension without pay by the Board.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

13 May 86
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

MAY 14 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAY 16 1986
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF RONNIE LEE JOHNSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF PEMBERTON, BURLINGTON COUNTY.	:	

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

Upon review of the record, the Commissioner adopts the recommendation of the ALJ dismissing respondent from his position as of the date of the Commissioner's decision, however, not that of the initial decision as stated therein. Further, the Commissioner adopts the ALJ's determination that respondent is not entitled to pay commencing on the 121st day of his suspension for the reasons expressed by the ALJ in the initial decision.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7642-85
AGENCY DKT. NO. 360-10/85

JAMES F. BOYLAN,

Petitioner

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY,

and

LOUIS LANZILLO,

Respondent

James F. Boylan, pro se, petitioner

William C. Gerrity, Esq., for respondent Board of Education

William A. Massa, Esq., for respondent Lanzillo

Record Closed: April 28, 1986 Decided: May 13, 1986

BEFORE **WARD R. YOUNG, ALJ:**

Petitioner, a tenured teaching staff member, alleged impropriety by the Jersey City Board of Education (Board) when it acted to effect his involuntary transfer from the position of Dean of Students to teacher of social studies. Petitioner claims tenure in the position of Dean of Students. Petitioner further claims an abuse of discretion by the Board due to harassment when it transferred him from his classroom position at the Lincoln High School to a similar position at Dickinson High School. The allegations of impropriety and harassment stem from petitioner's belief that the Board's actions resulted from the unsuccessful candidacy of the one receiving his support in the mayoral election.

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The Board avers its actions at all times were proper exercises of its discretionary authority and seeks dismissal of the Petition of Appeal.

The matter was transmitted to the Office of Administrative Law as a contested case on December 2, 1985 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on January 10, 1986, at which the following issues were framed:

1. Is the position of Dean of Students one in which tenure may be acquired?

2. Was the involuntary transfer of petitioner from the position of Dean of Students to that of classroom teacher an abuse of the Board's discretionary authority or otherwise illegal due to political animus?

3. Was the involuntary transfer of petitioner from the classroom position at Lincoln to a similar position at Dickinson an abuse of the Board's discretionary authority or otherwise illegal due to harassment?

The Board was ordered to notice all staff members holding positions as Deans of Students of the instant litigation and transmit copies of the Prehearing Order entered on January 10, 1986 to provide the opportunity for them to apply for intervention and/or participation pursuant to N.J.A.C. 1:1-12.1 et seq., which counsel for the Board did in a memorandum under date of February 18, 1986. No applications were filed. The matter proceeded to plenary hearing on March 24 and 25, 1986. Post-hearing briefs were filed and the record closed on April 28, 1986, the date established for final filing.

I.

Since the issue of whether one may acquire tenure in the position of Dean of Students is basically an issue of law, it will be addressed first.

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It is undisputed that the creation of positions entitled Deans of Students by the Board resulted from a need to provide staff personnel status charged with responsibilities of pupil discipline. Said staff members are teachers assigned to the principals in the high schools of the district. The qualifications to hold such a position are incorporated in a job description presumably adopted by the Board. See, J-6. A valid certificate as a high school teacher and at least five years of successful experience as a senior high school teacher are incorporated therein.

The undisputed testimony of petitioner reveals that the Dean counsels pupils on a one-to-one basis; counsels parents; works with teachers concerning alternative disciplinary programs; works with a parent council, the courts and representatives of the Division of Youth and Family Services; and communicates in the community with business people in seeking information on particular pupils who cut classes. The only teaching done by a Dean is substituting for an absent teacher in an emergency.

Counsel for the Board stipulated on the record that the Board never submitted the job description to the County Superintendent of Schools or requested permission to use the title of Dean of Students, which is unrecognized in either the statutory scheme or rules of the State Board of Education promulgated by it, duly adopted, and incorporated in the New Jersey Administrative Code, Title 6.

The tenure statute, N.J.S.A. 18A:28-5 states:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure . . . . [emphasis added]

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The State Board of Education has charged local Chief School Administrators and County Superintendents with certification enforcement responsibilities through the adoption of N.J.A.C. 6:11-3.5, which states:

> (a) The local Chief School Administrator shall ascertain if professional staff members are properly certificated and shall report to the appropriate district board of education those who are not certificated.
>
> (b) The county superintendent shall take measures necessary for the enforcement of the State law requiring district boards of education to employ only those professional staff members who are properly certificated for the positions held.
>
> (c) The county superintendent shall notify the appropriate district board of education and the Commissioner of Education immediately when he or she learns of a professional staff member holding a position in violation of the State certification laws and rules.

The State Board also adopted rules concerning the assignment of titles which provide a process for a local board to use a position title not recognized in the rules and also for the determination of appropriate certification required for the person to qualify for said position to enable the county superintendent to fulfill his responsibilities pursuant to N.J.A.C. 6:11-3.5(b) and (c). N.J.A.C. 6:11-3.6 states:

> (a) District boards of education shall assign position titles to teaching staff members which are recognized in these rules.
>
> (b) If a district board of education determines that the use of an unrecognized position title is desirable, or if a previously established unrecognized title exists, such district board of education shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his or her discretion regarding approval of such request, and make a determination of the appropriate certification and

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> title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year. Decisions rendered by county superintendents regarding titles and certificates for unrecognized positions shall be binding upon future seniority determinations on a case-by-case basis.

N.J.A.C. 6:11-6.2 embodies the authorization for holders of the instructional certificate to teach in accordance with the endorsements therein. A careful review of this regulation reveals the absence of an endorsement and authorization for the appropriateness of the instructional certificate for pupil personnel services. The requirement for the endorsement for student personnel services is stated in N.J.A.C. 6:11-12.13:

> (a) This endorsement is required for any person assigned to perform student personnel services such as study and assessment of individual pupils with respect to their status, abilities, interest, and needs; counseling with teachers, students, and parents regarding personal, social, educational, and vocational plans and programs; and developing cooperative relationships with community agencies in assisting children and families.

Eligibility requirements for the student personnel services endorsement are incorporated in N.J.A.C. 6:11-12.13(b) but need not be listed herein because of the stipulation on the record by petitioner that he does not meet said requirements.

It is not the intention of the undersigned to substitute his judgment for either the Chief School Administrator or the County Superintendent of Schools in determining the appropriate certificate required for the position of Dean of Students. The analysis above and findings that follow have become necessary in order to determine if the position of Dean of Students, under current circumstances, is one in which the holder of same may acquire tenure with a concomitant right to prohibit nonconsensual transfer.

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The following **FINDINGS OF FACT** are adopted herein upon review of stipulations placed on the record, documentary evidence, and the applicable statute and regulations cited herein:

1. The Chief School Administrator has erred or failed to fulfill his responsibilities pursuant to N.J.A.C. 6:11-3.5(a) in the ascertainment of proper certification by staff members assigned as Deans of Students.

2. The Board has failed to assign a position title recognized in the rules of the State Board pursuant to N.J.A.C. 6:11-3.6(a) and has failed to submit a request to the County Superintendent for permission to use the unrecognized title of Dean of Students and determine the appropriate certificate for same pursuant to N.J.A.C. 6:11-3.6(b).

3. Due to the Board's violation of N.J.A.C. 6:11-3.6, the County Superintendent was unable to fulfill his responsibilities pursuant to N.J.A.C. 6:11-3.5(b) and (c).

4. The certificate to teach in the high school is an inappropriate certification requirement for the position of Dean of Students.

It is now well established that under tenure statutes, all teaching staff members who work in positions for which certification is required, who hold a valid certificate, and who have worked requisite number of years are eligible for tenure unless they come within explicit statutory exceptions. N.J.S.A. 18A:1-1, 18A:28-5, 18A:28-9. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982).

It is undisputed that petitioner herein served as Dean of Students from September 1981 until his involuntary transfer by the Board on August 7, 1985 (excepting a break during the 1983-84 school year when petitioner acted in the capacity of assistant principal on appointment by the principal, which will not be addressed herein). The

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petitioner has indeed met the statutory time requirement for the acquisition of tenure. I FIND, nevertheless, that petitioner is not tenured as Dean of Students, nor can any teaching staff member acquire tenure in said position as it is now constituted, for the reasons expressed below.

Petitioner comes within the explicit statutory exception established for the acquisition of tenure. Spiewak. N.J.S.A. 18A:28-5 expressly states that employees be in positions "which require them to hold appropriate certificates" and further that "those who are not the holders of proper certificates" are excepted from the statute for tenure acquisition.

This is not to say that the position of Dean of Students could not be one in which tenure could be acquired. The use of a recognized title and determination of the appropriate certificate to be held for same or in the event the Board deems the use of an unrecognized title desirable, compliance with N.J.A.C. 6:11-3.5(b) with approval for said use being granted by the County Superintendent with a determination made of the appropriate certificate required, and the criteria of Spiewak being satisfied, would indeed make it possible for the acquisition of tenure.

It is noted that petitioner was issued the certificate of Principal/Supervisor in August 1977 (J-5). In the event the Commissioner deems this certificate appropriate for the performance responsibilities pursuant to the job description for a Dean of Students (J-6), notwithstanding the Board's use of an unrecognized title and noncompliance with the regulatory scheme, petitioner should be reinstated to the position of Dean of Students with tenure acquired therein as long as the position is permitted to exist.

II.

It is stipulated by the parties that the holders of the positions of Deans of Students are compensated on the teachers salary guide with no additional compensation. Therefore, the involuntary transfer of petitioner did not result in any change in petitioner's compensation.

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There is considerable support in the record that petitioner has met his burden of proof by a preponderance of credible evidence that his involuntary transfer was triggered by political animus. Associated with the findings of fact to support such a finding would be the lack of credibility attached to testimony adduced from the current Superintendent, Board President, and assistant superintendent in charge of personnel. However, in light of the creation of positions as Deans of Students deemed herein to be unlawful due to regulatory violations and inappropriateness of the certificate required, there is no relief that could be granted. It would certainly seem to be improper to reinstate petitioner to an unlawfully created position for which an inappropriate certificate is required and the proper certification is not held. I, therefore, find no compelling reason to overburden this decision with supporting evidence to substantiate a finding of fact that the Board's involuntary transfer action was arbitrary and triggered by political animus.

It is suggested herein that the Commissioner consider the remediation of the abolishment of all positions of Dean of Students, reassignment of all personnel holding said positions in accordance with tenure and seniority rights and within the scope of certification possessed, and the recreation of positions deemed by the Board to be necessary to fulfill their statutory responsibilities pursuant to N.J.S.A. 18A:11-1 that would be consistent with statutory and regulatory law.

III

Concerning the issue of petitioner's transfer from Lincoln to Dickinson within the scope of his certification, I **FIND** that action of the Board to be within its discretionary authority in the absence of a preponderance of credible evidence that said reassignment was made for the sake of harassment.

IV.

I **CONCLUDE**, therefore, that the Petition of Appeal shall be and is hereby **DISMISSED**.

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I leave for the Commissioner's consideration any commentary concerning the practice of the Jersey City Board of Education in reassigning teachers to the principal to fulfill responsibilities outside the scope of certification held.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

13 May 1986
DATE

WARD R. YOUNG, ALJ

MAY 19 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
MAY 20 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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JAMES F. BOYLAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, AND LOUIS LANZILLO, HUDSON COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply exceptions were filed within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c. However, the Board's primary exceptions were untimely.

Petitioner contends in exceptions that the ALJ held that petitioner proved by a preponderance of credible evidence that his involuntary transfer was triggered by political animus and that the involuntary transfer was arbitrary. Petitioner further states that, according to the ALJ, there was no relief granted because the dean of students position was deemed to be unlawful due to regulatory violations and the inappropriateness of the certificate required. Further, petitioner recites that the ALJ stated that the position was declared unlawful because the Board failed in its responsibilities pursuant to N.J.A.C. 6:11-3.5(a), 6:11-3.6(a), and 6:11-3.6(b), and because the certificate required was inappropriate for the duties which were performed.

Petitioner contends that if the Board fails to meet its obligations under law, petitioner should not be penalized by relegating his services to an "amorphous limbo", quoting Boeshore v. No. Bergen Board of Education, 1974 S.L.D. 805.

Petitioner posits three justifications for why he is entitled to a tenured position as dean of students:

1. Petitioner cites N.J.A.C. 6:3-1.10(f) [now 6:3-1.10(g)] for the proposition that the duties of the position of dean of students are "extremely similar" to those of vice principal, a position petitioner held for one year. Petitioner prays to be classified as a vice principal, an area in which he holds certification.

2. Petitioner requests that the certificate of principal/supervisor be deemed the appropriate certificate for the performance responsibilities pursuant to the job

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description for dean of students. Were the Commissioner to do so, asserts petitioner, then petitioner could be reinstated to his former position as dean of students and the proper certification would be applied to the position.

3. Petitioner avers the reason he was not returned to the position, according to the ALJ, was because it was deemed unlawful. Petitioner contends this unlawful position continues in existence, and petitioner logically asserts that if it is to continue in existence, then he should be returned to the position. Petitioner avows that the Commissioner can set aside an action taken by a board when it is affirmatively shown the action was arbitrary. He further avers he should not suffer because the Board acted illegally and then was permitted to compound the illegality by continuing a position which the court has deemed unlawful. Petitioner states that he does not wish to become part of the illegal action, but the Board should not be permitted to benefit from its arbitrary actions and its failure to fulfill legal obligations.

In conjunction with the above and citing N.J.A.C. 6:24-1.16 and 6:24-1.19 [now 1.15 and 1.17], petitioner, in his exceptions, motions for summary judgment. Petitioner requests the Commissioner to consider the issue of appropriate certification and determine the matter on the basis of the total record including the submitted briefs and the court's holding.

The Board's reply exceptions initially disagree with petitioner's exceptions as follows:

1. [That] [t]he OAL Judge made the statement "[Preponderance] of credible evidence that his (petitioner's) involuntary transfer was triggered by political animus" is not a fact required for the judge's decision in finding whether the position Dean of Students was a tenured position. Also, it should be noted that no facts are recited in the decision for such dicta.

2. The petitioner is neither penalized nor are his services relegated to a "morphous limbo" (sic) since before taking the position Dean of Students he was a teacher, continued to be a teacher while performing Dean's duties and is presently a teacher. He has lost no salary and he has continued to acquire

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tenure and seniority. He would like to think he had a greater position than a teaching position. As cited by the OAL Judge under the Spiewak case, his position is no greater than the teaching certificate required for the position. He may have an inappropriate title. A new tenured position cannot be created for him that is greater than a teacher merely because there is a title being used that has not been authorized. If it is authorized he will still require a teacher certificate. The duties of a Dean of Students only requires a teacher certificate. He has suffered no loss by the respondent making use of the title Dean of Students.

3. Petitioner's request that the Commissioner classify him as a vice-principal has no more merit than the OAL Judge's suggestions that the Commissioner make the position Dean of Students one requiring any of the following: principal/supervisor, pupil personnel services, guidance counsellor, or a new category certificate. The duties of Dean of Students are obviously not the duties of a vice-principal as alleged by the petitioner. It would be improper for the Commissioner to hold that the Dean of Students must have a certificate of vice principal. For the same reasons the Commissioner should reject the petitioner's request and suggestion that perhaps he should have tenure to the title Dean of Students because he holds a certificate principal/supervisor. The Commissioner in rejecting any such suggestion has common knowledge that the duties of a principal/supervisor are vastly different and greater than the duties of Dean of Students.

(Board's Reply Exceptions, at pp. 1-2)

The remainder of the Board's submission addressed exceptions to the initial decision and are thus deemed primary exceptions. Because the Board failed to file said primary exceptions in a timely fashion pursuant to N.J.A.C. 1:1-16.4a, b and c, they will not be considered herein.

The initial issue posited before the ALJ was whether petitioner had acquired tenure in the position of dean of students at the time he was involuntarily transferred to a position as classroom instructor. Because it is stipulated that the Board never submitted the job description for the position of dean of students, which is an unrecognized title, to the county superintendent, it is clear that the Board was in violation of N.J.A.C. 6:11-3.6(a) and

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(b). Due to the Board's violation of N.J.A.C. 6:11-3.6, the county superintendent was unable to fulfill his responsibilities pursuant to N.J.A.C. 6:11-3.5(b) and (c). The Commissioner is in accord with the ALJ in his findings of fact Nos. 1, 2 and 3 in this regard. However, the Commissioner, in all other respects cannot agree with the findings and determination of the ALJ in this matter.

The ALJ found that petitioner "has indeed met the statutory time requirement for the acquisition of tenure" in the position of dean of students, but denied petitioner was tenured in that position because he fell "within the explicit statutory exception established for the acquisition of tenure" in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). (Initial Decision, ante)

Notwithstanding the fact that the proper certification for the position has not been established at this juncture, petitioner served in the capacity of dean of students under the teaching certificate required by the Board in the job description. Consequently, the period petitioner served as dean of students merely attaches to the tenured teaching position petitioner already enjoyed with the district. See Lori Boehm v. Board of Education of the Township of Pennsauken, Camden County, decided by the Commissioner June 19, 1984. See also Michael Furst v. Board of Education of the Township of Rockaway, decided by the Commissioner May 18, 1984, aff'd State Board October 24, 1984.

Accordingly, it was entirely appropriate, absent bad faith, that the Board transfer him back to his former position of classroom instructor, a simple reassignment within the scope of his endorsement. Further, in light of the above, it is entirely clear that the position of dean of students is not a separately tenurable one, although it is accurate for the ALJ to conjecture that:

> This is not to say that the position of Dean of Students could not be one in which tenure could be acquired. The use of a recognized title and determination of the appropriate certificate to be held for same or in the event the Board deems the use of an unrecognized title desirable, compliance with N.J.A.C. 6:11-3.5(b) with approval for said use being granted by the County Superintendent with a determination made of the appropriate certificate required, and the criteria of Spiewak being satisfied, would indeed make it possible for the acquisition of tenure.
> (Initial Decision, ante)

However, the Commissioner soundly disagrees with the finding of fact established by the ALJ which states:

> 4. The certificate to teach in the high school is an inappropriate certification requirement for the position of Dean of Students.
> (Initial Decision, ante)

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It is not within the realm of the ALJ's purview to determine what certification is appropriate for the unrecognized title controverted herein; that power is vested in the county superintendent of schools. It is not the intention of the Commissioner to substitute his judgment for that of the county superintendent in determining the appropriate certificate required for the position of dean of students. Neither ought the ALJ to conjecture as to what might be appropriate, no matter how well-intentioned he might be. The Commissioner, instead, defers to the county superintendent in this regard and admonishes both him and the Board to forthwith take what measures are necessary to properly establish the qualifications and certification for the position, should the Board determine to retain the positions of dean of students in the district. In the meantime, petitioner cannot be heard to complain that he is placed in an "amorphous limbo" (Petitioner's Exceptions, at p. 1) since he has forfeited neither tenure nor seniority status with the Board. Further, as noted by the ALJ,

> it is stipulated by the parties that the holders of the positions of Deans of Students are compensated on the teachers salary guide with no additional compensation.
>
> (Initial Decision, ante)

Therefore, petitioner suffered no loss of compensation as a result of said reassignment.

Finally, on the issue of harassment and bad faith as motivating factors in petitioner's being reassigned, the Commissioner does not agree with petitioner, who states in his exceptions that:

> According to the holding of the court petitioner proved by a "preponderance of credible evidence that his involuntary transfer was triggered by political animus" and that the involuntary transfer was "arbitrary."
>
> (Petitioner's Exceptions, at p. 1)

Rather, the Commissioner notes that the ALJ stated instead that

> There is considerable support in the record that petitioner has met his burden of proof by a preponderance of credible evidence that his involuntary transfer was triggered by political animus. Associated with the findings of fact to support such a finding would be the lack of credibility attached to testimony adduced from the current Superintendent, Board President, and assistant superintendent in charge of personnel.*** (emphasis supplied)
>
> (Initial Decision, ante)

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Despite the fact that the Commissioner has been provided transcripts of the proceedings below which he has perused, he is without sufficient development of the record below, most especially in regard to the credibility of witnesses, to form a reasoned determination regarding political animus and harassment in petitioner's reassignment.

Consequently, the instant matter is remanded for further conclusions on the second and third issues relating to such finding of fact and credibility necessary for reaching a conclusion on the issues of political animus and harassment. It is with grave concern that the Commissioner does so, observing that yet another case has arisen in Jersey City wherein there is "substantial evidence in the record" to support the allegation that political machinations were the motivation behind the Board's action.

During the continuation of the proceedings below, the Board is directed to submit the job description on the dean of students position to the county superintendent immediately for a determination as to whether the Board's designation requiring a teacher's certificate is consistent with what his own determination would have been.

Accordingly, the instant Petition of Appeal is remanded consistent with the decision herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 7019-85
EDU 7054-85
AGENCY DKT. NOS. 362-10/85
353-10/85
(CONSOLIDATED)

BOARD OF EDUCATION OF WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,
Petitioner,
v.
WILLIAM GRAMLICH,
Respondent.

Kenneth S. Kunzman, Esq., for petitioner
(Connell, Foley & Geiser, attorneys)

Arnold M. Mellk, Esq., for respondent
(Katzenbach, Gildea & Rudner, attorneys)

Record Closed: April 4, 1986 Decided: May 16, 1986

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BEFORE **SYBIL R. MOSES**, ALJ:

I
Procedural History

This matter comes before the Office of Administrative Law (OAL) as the result of the filing of certified tenure charges of incapacity by the Board of Education of the West Essex Regional School District (Board) against William Gramlich on October 18, 1985, pursuant to N.J.S.A. 18A:6-11. Mr. Gramlich filed a response denying the charges on October 31, 1985. The matter was forwarded to the OAL on November 4, 1985 for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. and N.J.S.A. 52:14B-1 et seq.

Mr. Gramlich filed a petition on October 16, 1985 asserting that the Board had reduced his salary for the 1985-86 school year in violation of N.J.S.A. 18A:29-14 and N.J.S.A. 18A:6-10 and asserting that his placement on the salary guide for the 1985-86 school year by the Board was in violation of N.J.S.A. 18A:28-9. The Board denied these allegations on November 1, 1985. The matter was forwarded to the OAL on November 6, 1985 for determination as a contested case.

Counsel for Mr. Gramlich filed a notice asking for emergency relief, dismissal of the tenure charges and reinstatement, which was argued before me on November 26, 1985. An Order denying Mr. Gramlich's application for emergent relief was entered on December 6, 1985 and is attached to this Initial Decision and incorporated herein as if set forth at length.

A prehearing conference took place on November 27, 1985. On that date, an Order of Consolidation of the above-captioned matters was entered by me without objection from either party. It is attached to this Initial Decision and incorporated herein as if set forth at length.

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At the prehearing conference, counsel agreed that the nature of the consolidated proceeding was twofold. This proceeding must determine whether tenure charges certified against Mr. Gramlich by the Board are sustainable and whether, even if the tenure charges are upheld, Mr. Gramlich was appropriately placed on the salary guide prior to removal. The legal issue in regard to tenure is whether Mr. Gramlich is able to perform his duties as a teacher or is incapable thereof. The legal issue in regard to placement is whether Mr. Gramlich was on the appropriate place on the teachers' salary guide as of September 1985. Counsel agreed that the Board of Education has the burden of proof in the entire case by a preponderance of the competent and credible evidence.

The hearing was held on March 10 and 11, 1986, at the Office of Administrative Law in Newark. Testifying for the Board of Education was Charles Paglieri, superintendent of schools, West Essex Regional Board of Education, and Dr. Joseph J. O'Connor, an expert in orthopedic surgery. Testifying on behalf of Mr. Gramlich was William Gramlich, himself, and Dr. Richard J. Glavin, an expert in psychiatry. A list of documents marked into evidence is attached to this decision and designated Appendix I.

Briefs were timely filed, and the record closed on April 4, 1986.

II

Uncontroverted Facts

After a review of the testimony and evidence and the statement of facts in the Board's brief, I have concluded that the ensuing version of the background of this dispute is basically uncontroverted and is therefore adopted as fact.

William Gramlich has been employed by the West Essex Regional School District since September 1966 as an industrial arts teacher. Mr. Gramlich injured his back on January 21, 1976, when breaking up a fight between two students at the school. He saw Drs. Santoro, Crescente and Baines in 1976 and 1977 for pain in his lower back.

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On May 20, 1981, Mr. Gramlich was knocked into a wall by a student as he was unlocking his classroom door, causing his shoulders and lower back to be wrenched backwards. This caused lower back pain to the extent that he did not teach for the remainder of that school year. In fact, he was admitted to St. Joseph's Hospital on June 15, 1981 complaining of neck and back pain and was in the hospital until July 3, 1981. He returned to work in September 1981.

In February 1982, while using a foot pedal to demonstrate a squaring shears to students, he felt a sharp pain in his lower back. He was physically incapacitated and missed the remainder of the school year. He returned to school in September 1982 and was assigned lighter or minimal duties. Initially, he covered for other teachers and did cafeteria and library work. Mr. Gramlich was then assigned audiovisual work and assembly programs, which he carried out until September 1985.

Dr. Stanley Knep treated Mr. Gramlich from 1979 to January 1984. It is undisputed that in January 1984, Mr. Gramlich had extensive lower lumbar pain, which radiated to both buttocks. His feet were swollen, burning and numb and he had difficulty standing and walking, climbing up and down stairs and bending. His symptoms were chronic, and Dr. Knep's prognosis for further improvement was poor. Dr. Knep found that he had a mild to moderate degree of depression reactive to his situation. In March 1984, Dr. Abraham Effron examined Mr. Gramlich and determined that he could not do lifting and could not coach fencing.

On March 14, 1985, the Board notified Mr. Gramlich that it wanted him to submit to a physical examination, pursuant to N.J.S.A. 18A:16-2. Pursuant to that statute, Mr. Gramlich appeared before the Board with his counsel, and a hearing concerning that requirement was held. On April 3, 1985, the Board determined that Mr. Gramlich had to submit to a physical examination and so advised Mr. Gramlich and his attorney. Joseph J. O'Connor, M.D., examined Mr. Gramlich on April 30, 1985 and submitted a written report to the Board (P-17). On June 3, 1985, Mr. Gramlich received notice that the Board would consider Dr. O'Connor's report at private session on June 10, 1985. On that date, the Board determined that proceedings for incapacity should be instituted. Formal written

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charges were filed on September 6, 1985, to which Mr. Gramlich filed a written response on September 20. On September 23, the Board determined that probable cause existed for Mr. Gramlich's dismissal. Mr. Gramlich was notified of the Board's determination on September 24, 1985, and was suspended by the Board without pay.

In September 1985, Mr. Gramlich did receive two salary checks, at his rate and placement on the 1984-85 teachers salary guide. Mr. Gramlich never received notice that his increment was to be withheld. His 1984-85 salary was $35,500; if he had received his increment, he would have been paid at the rate of $37,600 for the 1985-86 school year.

It is uncontroverted that Dr. O'Connor's report states that "from a pure orthopedic point of view I see no reason why this man could not return to his previous duties as a manual arts teacher, rather than staying on his present and limited status." It is further uncontroverted that Dr. O'Connor's report continues, "However, because of the severe psychological overlay, I doubt if he would ever return to his previous occupational level."

The ultimate fact in issue is whether the accidents and resulting pain and illness have led to Mr. Gramlich's incapacity and inability to teach industrial arts.

III

Analysis of Testimony re Controverted Facts

Mr. Paglieri, the superintendent of schools, was aware of all of Mr. Gramlich's injuries, not only the two in 1981 and 1982, but also the injury Mr. Gramlich suffered while breaking up a fight between two students. In September 1982 when Mr. Gramlich returned to work, Mr. Paglieri had already hired another industrial arts teacher to handle the same responsibilities. In view of Mr. Gramlich's three prior incidents, Mr. Paglieri could not assign Mr. Gramlich to duties that might exacerbate his already existing physical problems. He determined to assign Mr. Gramlich lighter duties, including responsibility for audiovisual aids and monitoring the hall and cafeteria. Mr. Gramlich did not say anything about the new assignment, although an N.J.E.A. representative did ask

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for a meeting on his behalf. The meeting was canceled two days later. Mr. Gramlich functioned in this limited capacity between September 1982 and June 1985.

In the spring of 1985, the Board requested a physical examination of Mr. Gramlich by Dr. O'Connor. After reviewing Dr. O'Connor's report and all the other medical records and reports from doctors who had treated Mr. Gramlich since 1977-78, Mr. Paglieri decided to ask the Board to certify tenure charges of incapacity against Mr. Gramlich.

Mr. Gramlich testified that his physical condition is much improved since March 1984, when he was deposed as part of the lawsuit he filed against the student who ran into him in the hall. He said he has resumed running and coaching sports and has continued physical therapy at his own expense. Mr. Gramlich was the fencing coach at West Essex from 1980 to 1982 and the football coach at Paterson Catholic from 1981 to 1983.

It was Mr. Gramlich's testimony at this hearing that the squaring shears are used only once or twice a year. At the deposition of March 9, 1984, he said they were used almost on a daily basis. His responses to cross-examination questions were evasive and contradicted what he had stated in the 1984 deposition (P-157). Mr. Gramlich conceded that coaching football did not require any physical activity on his part because he sat on the bench during practice. He also conceded that he has had no therapy since July 1, 1985.

It was his bottom-line opinion that there is no reason why he should not be able to perform his duty as a teacher, especially since the manual arts program does not involve heavy physical effort since he is able to teach mechanical drawing or wood shop. He insisted he never asked to be relieved of his duties as an industrial arts teacher.

Dr. O'Connor did not deny he had concluded, from a purely orthopedic point of view, that there was no reason why Mr. Gramlich could not return to work. However, Dr. O'Conner was firm in stating that he always treats the whole patient, not just the orthopedic area, and therefore has to look into the general medical health of the person,

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including the person's job and family situation and any anxieties the person may have. As a result of this approach, Dr. O'Connor's report contained the following information.

> He [Gramlich] still states that he has continuous back pain, that it is necessary for him to receive out patient physiotherapy on at least a twice a week basis and that the pain is persistent. He complains of weakness in both lower extremities.
>
> ...
>
> He complained of pain on attempted straight leg raising at approximately 70 degrees.
>
> ...
>
> Strength testing while seated and in the supine position were met with hesitation, jerks and inability to sustain a position.
>
> ...
>
> The patient was allowed to kneel and lean forward and complained of pain in this position.
>
> ...
>
> He has persistent complaints of pain. (P-17)

When looking at Mr. Gramlich's entire persona, Dr. O'Connor concluded he had acute anxiety superimposed on his orthopedic problem, which was manifested in his inability to perform the bench test, in his hesitation in strength testing against resistance, and in his intermittent jerky motions and movement of his body parts. Dr. O'Connor said that these objective criteria determine whether there was an organic or psychological cause of his pain. Dr. O'Connor concluded Mr. Gramlich had a psychological basis for his pain.

Mr. Gramlich voluntarily submitted to an examination on September 19, 1985 by Richard J. Glavin, M.D., a psychiatrist. Dr. Glavin reviewed only Dr. O'Connor's and Dr. Effron's reports; he reviewed no other documents or medical records of Mr. Gramlich. It was his responsibility to determine Mr. Gramlich's current mental status as of September 1985. Dr. Glavin concluded that there was no evidence, as of the date of his examination, of a severe psychological overlay or anxiety that would prevent Gramlich from returning to work. Dr. Glavin felt that Mr. Gramlich's history and the prior medical records were

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not important because he wanted to determine only his current mental status, which he wanted to do independently. Glavin found no evidence of a conversion disorder.

IV
Findings of Fact re Controverted Facts

1. In 1984, Mr. Gramlich had lower back pain radiating to both buttocks, which symptoms were increased by movement and lifting. He had swollen, burning and numb feet; difficulty standing and walking after sitting; difficulty climbing up and down stairs; difficulty bending; and lower back pain when doing raises. In January 1984, Mr. Gramlich had a depression reactive to his situation.

2. By March 1984, Mr. Gramlich could not do any lifting and was in pain. He had pains in his back and was very uncomfortable.

3. In April 1985, Mr. Gramlich complained of pain in straight leg raising. He was unable to sustain a position or do strength testing. When sitting in a chair and kneeling and leaning forward, Mr. Gramlich complained of pain. By April 1985, he had severe anxiety superimposed upon mild to moderate lumbar sacral pain. This anxiety is a severe psychological overlay; it is not a mental illness, per se. However, the existing pain is caused by the anxiety reaction superimposed upon mild back pain which occurred as a result of his preexisting problems.

4. Mr. Gramlich's testimony at the hearing differed markedly from testimony given during a deposition in March 1984, at which time he felt he could not teach in the metal shop.

5. From 1981 to 1985, Mr. Gramlich had subjective complaints concerning his neck and back, difficulty walking up and down stairs and inability to lift

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objects. He received extensive physiotherapy and was frequently absent from school.

6. There is no current medical report, document or opinion that Mr. Gramlich's symptoms no longer exist and that he is able to teach in the metal shop.

7. Mr. Gramlich is presently physically incapacitated and unable to carry out his duties as a teacher of industrial arts.

V

Conclusions of Law

In cases involving tenure charges, the board of education bringing the charges has the burden of proving that those charges are true, by a preponderance of the competent and credible evidence. See, In the Matter of the Tenure Hearing of Arlene Dusel, School District of the Borough of Sayreville, 1978 S.L.D. 526; In the Matter of the Tenure Hearing of Madeleine Ribacka, Sussex-Wantage Regional School District, Sussex County, 1978 S.L.D. 929 and In the Matter of the Tenure Hearing of Fred Brown, School District of the City of Bayonne, 1970 S.L.D 239. That standard of proof must be met by a preponderance of the believable evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962) and In re Tenure Hearing of Grossman, 127 N.J. Super. 13 (App. Div. 1974).

The applicable statute, N.J.S.A. 18A:6-10, provides, in pertinent part, that:

> No person shall be dismissed . . . if he is or shall be under tenure of office . . . 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 [the statute] . . .

After the Board required Mr. Gramlich to submit to a physical examination, pursuant to N.J.S.A. 18A:16-2, the Board determined that it had probable cause that Mr. Gramlich should be dismissed because of incapacity to carry out his duties as a tenured industrial arts teacher in the West Essex Regional School District.

The term "incapacity" must be given a reasonable and sensible interpretation. It should be considered in conjunction with "just cause." In re Tenure Hearing of Grossman,

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127 N.J. Super. at 28. A standard to determine incapacity is sufficient if it is measured by the common understanding so that it fairly and adequately conveys its meaning to all concerned. Laba v. Newark Bd. of Ed., 23 N.J. 364, 384 (1957). Basically, it is an inquiry into whether the teacher is fit to discharge the duties and functions of his or her office or position. Grossman, 127 N.J. Super. at 29. Fitness to teach is based on a broad range of factors. Id. at 30. Those factors include a review of whether the teacher is both physically and mentally capable of performing his or her normal duties and obligations and a review of frequency of absences from regular classroom duties.

An analysis of the record before me leads me to conclude that the Board has shown by a preponderance of the evidence that Mr. Gramlich is not physically capable of performing his duties as an industrial arts teacher. I have reached this conclusion after considering the testimony and evidence presented by Dr. O'Connor and Dr. Glavin and after considering the basis upon which Dr. O'Connor reached his opinion. The kind of evidence presented in this case differs markedly from that presented in West New York Bd. of Ed. v. Mary Tonnarello, OAL DKT. NO. EDU 7783-84 (March 29, 1985), on which respondent relies. In that case, the administrative law judge and the Commissioner rejected testimony of the superintendent of schools, who relied on an oral discussion with a doctor in determining physical incapacity. In that case, the doctor upon whose statement the superintendent relied did not arrange for an examination of Tonnarello but only spoke to another doctor who reported to him certain features of Tonnarello's condition. Furthermore, the doctor upon whom the superintendent relied was not called to testify. The administrative law judge determined that "...a judgment cannot be made as to what Dr. Rodriguez accurately reports as Dr. Ortiz's words, as compared with Dr. Rodriguez's own conclusions based on what Dr. Ortiz may have said to him." Tonnarello, slip opinion at 10-11.

In the instant case, Dr. O'Connor, upon whose report the school Board and superintendent relied in filing the charges, personally examined Mr. Gramlich and personally reviewed written reports and documentation of all of Mr. Gramlich's prior medical history, including x-rays. Dr. O'Connor's testimony was more than credible. His experience is vast, and I accept his opinion that as an orthopedic surgeon he cannot

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merely give an orthopedic opinion but must treat the whole patient. It was his medical opinion that, while from a strictly orthopedic point of view there was nothing organically wrong with Mr. Gramlich, Mr. Gramlich would not be able to return to work because of a severe psychological overlay of anxiety, which, in fact, caused him pain. This, in and of itself, is sufficient to sustain the Board's burden of proof. It is perfectly permissible for Dr. O'Connor to base his opinion on facts or data not only which he perceived but which were made known to him at or before the hearing. The bases for his opinion need not be admissible in evidence if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." See, Evid. R. 56(2) and Comment 7 to Evid. R. 56. Respondent's argument that all prior medical history, reports and documents not in evidence at the trial must be disregarded is inapposite to the current state of the law regarding expert opinions. This data is certainly the type of information relied upon by experts in forming opinions on the same subject. Ibid.

Respondent's argument that opinions of other doctors must be discarded because they are hearsay is without merit. N.J.A.C. 1:1-15.8(a) specifically provides:

> Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.2(a) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

In addition, the Board is entitled to rely on the inconsistencies between Mr. Gramlich's testimony at the hearing and his testimony on March 9, 1984 during a deposition, which damage his credibility. Mr. Gramlich testified before me that the squaring shears were used very infrequently. In the deposition, he stated that they are a piece of equipment he used "about every day, every other day, once or twice." I also take note that in April 1985 Mr. Gramlich never mentioned to Dr. O'Connor that he jogged and did other types of exercise, although he testified before me he was engaged in such activities in April 1985. To the contrary, Mr. Gramlich told Dr. O'Connor of continuous back pain and weakness in both lower extremities. Because of the inconsistencies and

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lack of candor, I do not accept the entirety of Mr. Gramlich's testimony, especially in regard to his being perfectly fit to teach industrial arts and to carry out athletic endeavors.

Dr. Glavin's testimony that Mr. Gramlich had no mental illness is not really controverted here. Dr. Glavin made no findings whatsoever in regard to orthopedic pain, whether from organic causes or from anxiety. All he did was determine that Mr. Gramlich's current mental status, as of September 1985, was good. The fact that Mr. Gramlich has subjective feelings of pain which may be the result of a psychological overlay of anxiety as a result of his prior history does not mean he has mental illness. The testimony of Drs. O'Connor and Glavin is not contradictory. It is clear that the Board has shown that several doctors found respondent's range of motion to be considerably restricted and noted that he complains of continuous pain. Whether such symptoms are due to physical or psychological causes is irrelevant for purposes of determining incapacity. The duties of an industrial arts teacher include handling heavy machinery on a regular basis. The preponderance of the evidence suggests that respondent is incapable of performing such a function. Respondent's dismissal is therefore warranted by the evidence.

My decision in this case is particularly difficult because there is no suggestion that Mr. Gramlich was not an efficient and competent teacher prior to 1981-82, when he suffered the two accidents which caused the pain from which he has suffered during the last five years. I have considered the language in Grossman endorsing a direction from the Commissioner of Education to the Board that that teacher should be considered disabled within the meaning of the Teachers Pension Law, N.J.S.A. 18A:66-1 et seq. In re Grossman, 27 N.J. at 32, 33. I have also considered In re Carlson, 174 N.J. Super. 603 (App. Div. 1980), which stands for the proposition that a teacher's injury resulting from a fall when opening a door for students was a compensable injury within the meaning of N.J.S.A. 18A:66-39(d). Carlson clearly holds that a teacher's injury which results from activities during and as a result of performance of regular or assigned duties entitles that teacher to accidental disability retirement benefits. N.J.S.A. 18A:66-39 subd. c. Id. at 604. In Carlson, that petitioner was leaving a pre-school social gathering of teachers in

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order to proceed to the playground to lead her students to the classroom when she fell while opening a door. The question there was whether the accident/fall took place while she was in the course of her duties. The court held that it was. Ibid.

In the case at bar, it is clear that Mr. Gramlich was in the "actual performance" of his duties at the time of all three incidents: unlocking his classroom door, breaking up a fight and operating and exhibiting the squaring shears. The facts here are undoubtedly more compelling than in Carlson. This is legitimately the type of case where the Board of Education should submit a disability retirement application on behalf of Mr. Gramlich, since the injuries he sustained in 1981 and 1982 (and in 1977) were all sustained during performance of his regular and assigned duties and were a result of the performance of same.

I have reviewed the facts in In re Bernstein, 1967 S.L.D. 73, where the Commissioner held that even where incapacity was proved, dismissal was inappropriate in the circumstances, and that tenured teaching staff member would only be held ineligible for further teaching service pending satisfactory proof of recovery. It is inapposite to the case at bar. In Bernstein, the charges dealt with a personality disturbance suffered by respondent during a short one-year period, where that respondent never submitted to the required physical examination directed by the Board. The facts there are so different, both in period of time and type of incapacity, as to make the conclusion of the case, ineligibility for further service until satisfactory proof of recovery is furnished, inapplicable to the case at bar.

The Board concedes that any payments to which Mr. Gramlich was entitled for the 1985-86 school year should have been paid at the appropriate 1985-86 step and at the appropriate salary range. Any back pay due and owing which was withheld from the September checks should be forwarded to him.

Accordingly, based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the tenure charges filed against Mr. Gramlich on the grounds of incapacity have been proved; and

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It is further **ORDERED** that Mr. Gramlich shall be dismissed from his duties as a tenured teacher within the West Essex Regional School District; however,

It is further **ORDERED** that the West Essex Regional School District Board of Education shall submit a disability retirement application on behalf of Mr. Gramlich to the Board of Trustees of the Teachers Pension Fund pursuant to N.J.S.A. 18A:66-1 et seq.

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

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

May 16, 1986
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

MAY 19 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 21 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM GRAMLICH,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF WEST ESSEX	:	DECISION
REGIONAL, ESSEX COUNTY,	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were received from respondent pursuant to N.J.A.C. 1:1-16.4a, b and c

Respondent alleges that the ALJ erred in finding him incapacitated and his dismissal as a tenured teacher warranted. More specifically, he argues that the determination was grounded upon what he characterizes as a "fatal misperception" that the Board's expert, Dr. O'Connor, an orthopedic specialist, was qualified to render an expert opinion outside of his area of practice, experience and expertise. With respect to this, respondent believes it was patent error for the ALJ to rely on an orthopedist's "unsupported and unqualified opinion ***concerning a so-called 'psychological overlay of anxiety', as precluding [him] from effectively working within his certification" when a psychiatric expert testified that he had no psychiatric disability whatsoever. (Exceptions, at p. 2)

Respondent avers that there is nothing in the record which allows a finding that he is unfit either physically or mentally to teach. He points to the ALJ's finding that there was no suggestion he was not an efficient and competent teacher prior to 1981-82. Further, he contends that from the time he was assigned new duties in 1982, he performed satisfactorily until the time of his suspension in 1985 and he draws specific attention to the fact that he was absent for illness only three days during 1984-85 with none being for his past injuries. Citing In re Grossman, supra, he avows that the initial decision must be rejected, not only because it results in fundamental unfairness to him, but because in the specific context of "incapacity," one can be removed from the teaching profession only upon a showing of unfitness to discharge the duties and functions of one's office or position.

Upon careful and thorough consideration of the record in this matter, the Commissioner does not accept the determination of the ALJ that the Board has borne its burden of proof in relation to the incapacity charge herein for the following reasons.

The Commissioner fully concurs with the ALJ that the record amply supports respondent was injured on three occasions during the actual performance of his duties. The record also fully demonstrates that respondent's absenteeism associated with the injuries was indeed numerous, particularly during the 1981-82 school year

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with some 86 of 89 "ill" days being attributed to workers' compensation. (P-158) That respondent was disabled as a result of work-related injury was determined by the Workers' Compensation Bureau in October 1984 when it found a 30% permanent disability. (P-9)

The Commissioner also accepts that there are inconsistencies between respondent's testimony at the hearing and that of two years earlier which was provided during deposition for his lawsuit against the student involved with his 1981 accidental injury.

Notwithstanding the above, the Commissioner believes that the Board has not borne its burden of proof essentially on two bases. The first concerns the fact that respondent was never returned to an industrial arts position once he was medically cleared to return to work in September 1982. The record is barren as to any medical determination that respondent should not or could not return to his instructional position or that it was necessary to place him on limited or light duties. The July 1982 letter from Liberty Mutual places no restrictions on respondent's return to work (P-155) nor does there appear to be any such restriction requested by either respondent or any of his physicians.

Having never resumed his duties as an industrial arts teacher, there is no direct knowledge available to the Board that respondent could not perform industrial arts duties. Further, there does not appear to be any allegation that he was unable to perform his "light" duties from 1982 to the time of his suspension in 1985. While his attendance could hardly be deemed exemplary in 1982-83 (14 "ill" days) or in 1983-84 (18 "ill" days), during 1984-85 his "ill" days (exclusive of 5 court appearances relative to his work-related injury) were reduced to 3. (P-158) Thus, in the year immediately preceding his suspension for incapacity, respondent's attendance had improved dramatically albeit in terms of performance of non-industrial arts duties.

The second basis relates to the medical testimony with respect to his current or present capacity or fitness to function as an industrial arts teacher. The expert opinion of Dr. O'Connor, an orthopedic surgeon, indicates that no orthopedic reason exists that would prevent respondent from assuming his previous duties rather than the "limited status" he was then performing. It was Dr. O'Connor's belief, however, that "because of the severe psychological overlay I doubt if he will ever return to his previous occupational level." (P-17, at p. 3)

Dr. O'Connor's conclusion that it was doubtful if respondent would ever return to his previous occupational level rests on psychological rather than physical causation. So, too, does his conclusion that respondent "***appears to be suffering from a severe anxiety state superimposed upon a previous mild to moderate lumbosacral sprain." (P-17, at p. 3) When determining the weight to be accorded Dr. O'Connor's medical opinion and Dr. Glavin's, a psychiatrist, the Commissioner believes that the latter medical

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expert must be accorded greater weight with respect to psychological diagnoses as opposed to an orthopedic specialist. This is not to say that an orthopedic specialist as a medical doctor does not have any expertise in the psychological area; however, it is the Commissioner's belief that such expertise is not to the degree or extent as a psychiatrist whose specialization is devoted to that domain.

Dr. Glavin's psychiatric examination revealed "***no evidence to suggest any kind of conversion disorder or psychogenic pain disorder" nor did respondent "***meet any of the criteria for Dysthymic Disorder (depression) or generalized Anxiety Disorder (anxiety)." (R-1, at p. 2) His conclusion was that no evidence was present of a "diagnosable mental illness that would interfere with his work." This conclusion was reached after review of Dr. O'Connor's report and the reports of Dr. Effron (Initial Decision, ante) which provides a comprehensive history of respondent's work-related injuries.

Therefore, the Commissioner rejects the initial decision because of the Board's failure to demonstrate that respondent was, at the time of his suspension, incapable of fulfilling the duties of an industrial arts teacher for the reason expressed herein.

Accordingly, respondent is to be reinstated to an industrial arts position, not limited status. The salary denied him during the first 120 days of his suspension is to be paid to him. Further, his salary level for 1986-87 shall be as though he had satisfactorily served during the period of suspension. It is noted that the Board has conceded that respondent was entitled to be at the appropriate step of the salary guide for 1985-86. (Initial Decision, ante). Any monies owing to him as a result of withholding are to be paid to him.

The Commissioner wishes to stress that this decision should in no way serve to preclude the Board from pursuing tenure charges against respondent in the future once he resumes his industrial arts duties if it believes respondent has shown himself incapable of performing those duties. Any action taken by the Board in that circumstance would not be based on the "doubtfulness" of his ability to perform duties never assigned him after medical clearance was granted for him to return to work and a 30% disability determined. Rather it would be based on documented evaluation of actual teaching performance in the industrial arts area.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 27, 1986

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IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM GRAMLICH,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF WEST ESSEX	:	DECISION
REGIONAL, ESSEX COUNTY.	:	
	:	

Decided by the Commissioner of Education, June 27, 1986

For the Petitioner-Appellant, Connell, Foley and Geiser
(Kenneth S. Kunzman, Esq., of Counsel)

For the Respondent-Respondent, Katzenbach, Gildea and Rudner
(Arnold M. Mellk, Esq., of Counsel)

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

S. David Brandt, Alice Holzapfel, Robert Marik, Deborah Wolfe opposed.

Affirmed N.J. Superior Court June 20, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. EDU 5735-85
AGENCY DKT. NO. 279-8/85

MICHELLE SAVINO CARON,
Petitioner,

v.

BOARD OF EDUCATION OF MIDLAND PARK, BERGEN COUNTY,
Respondent.

Nancy Iris Oxfeld, Esq., for petitioner (Oxfeld, Cohen & Blunda, attorneys)

Alfred F. Maurice, Esq., for intervenor, Lynn Marie Giacalone

Robert M. Jacobs, Esq., for respondent (Winne, Banta, Rizzi, Hetherington & Basralian, attorneys)

Record Closed: April 11, 1986 Decided: May 20, 1986

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

Petitioner Caron claims that the Board of Education of Midland Park (Board) violated her seniority rights pursuant to N.J.S.A. 18A:28-10 when it reduced her full-time position by 20% for the 1985-86 school year. She also claimed a business education supervisory position. The matter was transmitted to the Office of Administrative Law on September 11, 1985 pursuant to N.J.S.A.5 2:14F-1 et seq.

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The case was heard on October 29, 1985. Board counsel was directed to provide notice to one teacher who might wish to intervene and a trial date was set for December 6. At some point in November, the name of another intervenor was received and I instructed the clerk to send her a notice, but this did not occur. Counsel for the new intervenor contacted me on or about December 5. I adjourned the hearing at his request as a result of discovery that the new intervenor did not have timely notice. On December 10, 1985, I granted intervention to Lynn Marie Giacalone, the holder of the position sought by petitioner. A new hearing date of March 17, 1986 was scheduled.

On November 18, 1985, the Board filed a motion for partial summary judgment to dismiss petitioner's claim for any supervisory position as out of time. For purposes of that motion, the facts as stated in the petition were not disputed. I granted the motion on December 30, 1985 for the reasons set forth in my order of that date. A hearing was held in Midland Park on March 17, after denial of motions to compel discovery and for further adjournment. The record closed with receipt of the last brief on April 11, 1985. A list of exhibits entered into evidence is attached to this decision.

THE TESTIMONY

Petitioner testified concerning her complete educational background and teaching experience. There is no dispute concerning these facts nor does petitioner dispute that Marie Lyttle has more seniority in business education than she. Intervenor Giacalone was hired on or about October 14, 1985 to teach Distribution Education, and thus is untenured. Petitioner contends she should have been assigned to teach distributive education because she has the educational background to do so, is eligible for a N.J. comprehensive business education endorsement and holds a New York teaching certificate for "commerce." The Board contends that it could not assign petitioner distributive education marketing and sales courses because she does not hold the proper New Jersey endorsement for this subject area. Petitioner holds a New Jersey principal/supervisor's certificate and endorsements for secondary school art and secretarial studies. She has taught secretarial studies extensively and was placed on the seniority list solely for that subject area. She admits that she received a copy of the seniority list of May 2, 1979 and made no objection to it. It was not until the Board reduced petitioner's teaching position from fulltime to .8

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on May 21, 1985, that petitioner claimed seniority in the distributive education subject field.

FINDINGS OF FACT

1. Petitioner holds the following New Jersey endorsements: secondary school teacher of art, teacher of secretarial studies (June 1970) and certifications: supervisor (March 1978) and principal/supervisor (July 1978).

2. Petitioner holds New York certifications as teacher of art and teacher of commerce (February 1970).

3. There are three teachers in the business education department: Marie Lyttle who was hired in 1974, petitioner who was hired in 1976, and intervenor Giacalone, who was hired on October 14, 1985 to replace a teacher of distributive education who had retired.

4. Petitioner has taught typing, office practice, business machines, stenography, accounting, speedwriting and retail sales and served as a part-time chairperson of business education from September 1976 to April 1983, when the position was eliminated. (It was reestablished in September 1984).

5. While chairperson of business education, petitioner developed a course outline in retail sales (P-17) which she taught for either a year or one-half a year (1976-1977). She also assisted in obtaining approvals for the distributive education courses.

6. In September 1978, Distributive Education I - Careers in Marketing, was added to the curriculum. Both this course and Introduction to Sales (Distributive Education II-Sales) evolved from the retail sales course initially developed by petitioner but she did not teach these courses,

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which were taught by a teacher with a distributive occupations endorsement.

7. Petitioner continued to teach courses in the secretarial studies area such as typing, business machines, speedwriting, accounting, office procedures and the like until the present time.

8. When the teacher assigned to the distributive education courses retired in October 1985, the Board hired intervenor Giacalone to teach them.

9. Giacalone holds the following endorsements on her instructional certificates: teacher of general business studies and teacher of distributive occupations; she also holds an endorsement on an educational service certificate, coordinator of vocational technical cooperative education programs.

10. The Distributive Education curriculum has developed over the years; the courses now taught by Giacalone are described more particularly in Exhibits R-1, R-2 and R-3. They lead to the cooperative work experience program. The sequence of distributive education courses in sales, advertising, data processing and marketing is now quite distinct from the secretarial studies curriculum.

11. Petitioner specified for the record her extensive academic background in business studies methods, her specialized experience as a supervisor in business curriculum development and her work in setting up the first word processing program in the East at the college level.

DICUSSION AND CONCLUSION

Petitioner argues that she has all the requirements necessary for an endorsement as a teacher of comprehensive business education as specified in Regulations and Standards for Certification. Under such an endorsement, pursuant to N.J.A.C. 6:11-6.2(a)4vii, she

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would be authorized to teach distributive occupations, including sales, advertising and retailing. While it may be my personal opinion that she is extremely qualified, I am not at liberty to substitute my opinion for that of the Board of Examiners or to ignore the requirements set forth under N.J.A.C. 6:11-6.3(a)2, which now include passing a state test in the subject field. There is little doubt in my mind that petitioner could pass such a test, but I am not authorized to declare it as having been passed.

Under N.J.A.C. 6:11-6.3(d), petitioner could have applied for transcript evaluations in 1984 or earlier and if she had received them before September 1, 1985, she could have pursued alternative procedures. This is not a case in which an evaluation has occurred, and the applicant has passed the last required course but has not yet received a degree, for example. Neither respondent nor intervenor concedes that petitioner is eligible for a comprehensive business education endorsement and simply does not yet have it in her possession; thus the facts are not similar to those in Kane v. Bd. of Ed. of City of Hoboken, 1975 S.L.D. 12 (January 20, 1975).

Petitioner has not proved by reference to applicable New York or New Jersey rules that a teacher of commerce certification is the equivalent of New Jersey's comprehensive business education endorsement. Thus I **CONCLUDE** petitioner has not proved that she is eligible for an endorsement which would permit her to teach distributive education, nor has she previously taught courses synonymous with the present distributive education courses for which assignment she contends. Administrative delay beyond the control of a teacher cannot be discerned in these findings. Fischback v. Bd. of Ed. of Twsp. of North Bergn, 1983 S.L.D. ____ (December 29, 1983), aff'd State Board of Ed. July 11, 1984. Since petitioner did not hold the appropriate endorsement, she cannot be credited for teaching in the distributive occupations subject field in obtaining a supervisor's certficate, or for seniority purposes although she clearly met the teaching requirement by her service as a secretarial studies teacher. Her seniority is not disputed in the latter subject field.

It should also be noted that petitioner never disputed her seniority subject area as stated on the May 2, 1979 list which she admitted she received. At the least, this list should have alerted her to make application for the comprehensive business education

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endorsement. I do not go so far as to conclude that she is estopped by laches from making such a claim at this time, but rather, conclude that she did not make timely application to determine her eligibility for the desired endorsement. The Board's argument of estoppel is not without merit, however. It illustrates the fact that only changed circumstances, that is, the RIF to part-time, initiated a claim of eligibility for the endorsement needed.

I CONCLUDE petitioner's seniority rights were not violated when the Board reduced petitioner from a full-time to a part-time position of .8, since she did not have the required endorsement to teach marketing and distributive occupations and had never taught in that subject area, except for one year or less of a retail sales course in a different format.

It is therefore **ORDERED** that the petition be **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

May 20, 1986
DATE

Naomi Dower LaBastille
NAOMI DOWER-LaBASTILLE, ALJ

MAY 23 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAY 23 1986
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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MICHELLE SAVINO CARON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner argues in exceptions that the ALJ, in reaching her decision, failed to fully consider petitioner's background. Among her qualifications, petitioner received eighteen college credits for her skills based upon successful performance testing at the college level for her certification license. These tests, avers petitioner, gave her the right to certification with the secretarial speciality with a broad comprehensive business background as a result of all work indicated on five transcripts.

Further, petitioner contends she has acquired seniority in the secondary area pursuant to the subject area endorsement of comprehensive business education and, as such, is entitled to teach the distributive education courses currently being taught by Intervenor. Petitioner posits she is certified to teach comprehensive business education under N.J.A.C. 6:11-6.2(a)(4)i. Within that endorsement, avers petitioner, is an entitlement to teach "general" business. (Exceptions, at p. 7) According to petitioner, a review of the endorsement for general business shows that it authorizes the holder to teach: "'consumer education sales, retailing, advertising.'" (Petitioner's Exceptions at p. 7, quoting N.J.A.C. 6:11-6.2(a)iv) Thus, avows petitioner, this entitlement to teach sales, retailing and advertising thus authorizes her to teach marketing and distributive occupations as these are defined as including 'sales, advertising, retailing' under N.J.A.C. 6:11-6.2(a)(4)vii. (Exceptions, at p. 7)

Petitioner further avers she has achieved certification to teach distributive education by virtue of her ability to teach comprehensive business education in two ways. The first way, avows petitioner, is that she is certified in New Jersey as both a supervisor and as a principal/supervisor. A review of the standards for issuance of an administrative certificate under N.J.A.C. 6:11-10.2 shows that one of the requirements for the issuance of such a certificate is a standard New Jersey teacher's certificate or its equivalent. (N.J.A.C. 6:11-10.2(a)(3)(i)1) Unless the Board were contending that petitioner was not qualified to serve in such a capacity, which it is not avers petitioner, then in fact her

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supervisory certificate subsumes within it "'a standard New Jersey teacher's certificate or its equivalent'***." (Exceptions, at pp. 7-8) Thus, posits petitioner, in order to have attained her supervisor's certificate, petitioner was required to have the equivalent of a New Jersey teacher's certificate, in this case the comprehensive business education certificate, and thus is qualified to teach distributive education with the Board. Further, petitioner contends that the ALJ completely ignored the fact that petitioner could not have been qualified to supervise distributive education were she not qualified to teach distributive education.

In addition to her supervisory certificate and experience, a review of petitioner's studies in the field of business education shows that she is fully qualified to teach business education in the State of New Jersey, avows petitioner. She avers she has studied all that is necessary to obtain a comprehensive business certificate and asserts she is qualified for and has received a New York Teacher of Commerce Certificate, which is the equivalent of a New Jersey teaching certification in comprehensive business education. Petitioner contends the ALJ erred in stating petitioner has not shown her qualifications for such a certificate.

Petitioner submits that she has seniority to teach distributive education with the Board and that the ALJ erred in finding to the contrary. Petitioner prays for reinstatement to a full-time position of employment together with all lost wages.

Initially, the Commissioner adopts the Order Granting Partial Summary Judgment on Issue A of the Prehearing Order in this matter addressing whether petitioner's claim to a supervisory position is barred as untimely. The Commissioner concurs with the ALJ that the State Board decision in John Polaha v. Board of Education of the Buena Regional School District, Atlantic County, decided by the Commissioner December 17, 1984, rev'd State Board October 16, 1985 is dispositive of the matter. N.J.A.C. 6:24-1.2 is applicable to the facts contested herein regarding whether petitioner's claim to a supervisory position was not cognizable until "damages" accrued in May 1985. (Order Granting Partial Summary Judgment, at pp. 2-3) The Commissioner finds that the 90 day rule applied in the instant matter from the date in September 1984 when the Board appointed another supervisor to the .2 chairperson position.

The Commissioner notes for the record that distributive education is a subject area requiring an Educational Services Certificate pursuant to N.J.A.C. 6:11-12.24, not a Standard Teacher Certificate pursuant to N.J.A.C. 6:11-5.1 et seq. N.J.A.C. 6:11-12.24 - Teacher-coordinator of cooperative vocational-technical education program requires the following:

> (a) An endorsement shall be required for the position of teacher-coordinator of cooperative vocational-technical education in the occupational area(s) of agriculture education, distributive education, health occupations, home

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economics education, and work experience career exploration program (W.E.C.E.P.). The specific area(s) in which the holder may serve as teacher-coordinator will be designated on the endorsement. Such endorsement shall also entitle the holder to teach related vocational-technical subjects in the appropriate occupational area(s) designated on the endorsement, and to act as liaison between the school and the co-operating employer's training station in the respective subject area(s).

(b) The prerequisites for a teacher coordinator's endorsement are:

1. A regular instructional certificate in the appropriate occupational area to be coordinated. (The appropriate instructional certificate for W.E.C.E.P. may be any regular endorsement in vocational education, industrial arts, or home economics.);

2. Successful completion of one of the following:

i. Two years of teaching in the occupational area to be coordinated, plus two years of approved occupational experience (A W.E.C.E.P. teacher-coordinator will be required to document two years of teaching under a New Jersey instructional certificate, plus two years of approved occupational experience.); or

ii. A combination of:

(1) An approved bachelor's degree;

(2) A college curriculum that includes a practicum in the occupational area to be coordinated; and

(3) A program of directed occupational field experience offered as part of a college curriculum directly related to the area to be coordinated; and

3. A program of college studies including one of the following:

i. A college curriculum approved by the New Jersey State Department of Education as the basis for issuing this certificate; or

ii. A program of college studies including at least one course in each of the following areas:

(1) Principles and philosophy of vocational-technical education;

(2) Problems in organizing and teaching cooperative education programs;

(3) Curriculum construction in vocational-technical education;

(4) Vocational guidance.

(emphasis added)

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The record before him is unequivocal that petitioner holds neither the proper Educational Services Certificate nor the endorsement required to hold the position of distributive education teacher with the Board. Hence, she cannot, as a matter of law, accrue seniority in said educational services area.

Petitioner holds teaching certifications in the following areas:

New Jersey Secondary School Teacher of Art
New York Teacher of Art
New York Teacher of Commerce
New Jersey Teacher of Secretarial Studies
New Jersey Supervisor
New Jersey Principal/Supervisor

While the Commissioner may agree with the ALJ that petitioner appears to be eminently well qualified in the areas of secretarial and business skills, none of her credentials or experience meet the requirements of N.J.A.C. 6:11-12.24. That petitioner designed the distributive education program is of no import in arriving at a determination as to whether she has seniority in the position either, for the simple reason that she never served in the subject area. N.J.A.C. 6:3-1.10(1)(15) iii states unequivocally:

> Any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special subject field endorsement.

See also, In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Township Board of Education and the The Edison Township Board of Education, Middlesex County, decided by the Commissioner August 6, 1984, aff'd State Board, January 2, 1985, aff'd Superior Court (App. Div) June 17, 1986.

Consequently, the Commissioner affirms the decision of the ALJ. The Commissioner concludes that petitioner's seniority rights were not violated when the Board reduced her from a full-time to a part-time position, first of .8, then .2, since she did not have the required endorsement nor the proper certificate to teach distributive education and has never taught in that subject area, except for one year or less of a retail sales course in a different format.

Accordingly, the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 27, 1986

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MICHELLE SAVINO CARON,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF MIDLAND PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 27, 1986

For the Petitioner-Appellant, Oxfeld, Cohen and Blunda (Nancy Iris Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Winne, Banta, Rizzi, Hetherington and Basralian (Robert M. Jacobs, Esq., of Counsel)

For the Intervenor-Respondent, Alfred E. Maurice, Esq.

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

Affirmed N.J. Superior Court October 26, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3760-85
AGENCY DKT. NO. 135-5/85

JOSEPH RUFALO,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON,

Respondent

and

ELI GORELICK,

Intervenor

Nancy Iris Oxfeld, Esq., for petitioner
(Oxfeld, Cohen & Blunda, attorneys)

Evangeline V. Tutt, Esq., for respondent
(Riker, Danzig, Scherer & Hyland, attorneys)

Robert M. Schwartz, Esq., for intervenor

Record Closed: May 12, 1986 Decided: May 20, 1986

BEFORE **WARD R. YOUNG,** ALJ:

Joseph Rufalo, a tenured high school vice-principal employed by the Livingston Board of Education (Board), alleged a violation of his tenure and seniority rights resulting from an administrative reorganization by the Board and his transfer to a classroom teaching position. Rufalo claimed the remaining vice principalship held by Eli Gorelick after abolishment of one of two such positions, and also claimed the newly created position of Supervisor of Secondary Staff Development and Curriculum Coordinator, which is held by one Robert Grady.

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The Board denies any improprieties and avers its actions at all times were proper exercises of its discretionary authority.

The matter was transmitted to the Office of Administrative Law as a contested case on June 19, 1985 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on August 9, 1985. Subsequent to an agreement by the parties to submit the matter for summary decision, a motion opposed to summary decision was filed by petitioner after a change of counsel.

A partial summary decision and order was entered by the undersigned on January 3, 1986, wherein summary decision was granted to the Board on petitioner's claim to the vice-principalship held by Gorelick. Petitioner's motion to proceed to plenary hearing on the issue of his claim to the supervisor's position held by Grady was granted. The Commissioner chose not to review the partial summary decision until the entire case was concluded and transmitted to him. Said decision is therefore incorporated herein by reference. Due to the granting of summary decision to the Board on the issue of petitioner's claim to the position of vice-principal held by Gorelick, the latter's counsel did not participate in the plenary hearing.

The remaining issue proceeded to plenary hearing on February 24, April 10, and April 11, 1986. The record closed upon the final submission of post-hearing briefs on May 12, 1986.

The sole issue to be addressed is whether the Board transferred the essential responsibilities of petitioner's former position of vice-principal to the newly created supervisor's position to support his claim to that position now held by Grady.

Eight witnesses testified as to the duties performed by petitioner as vice-principal as well as the duties performed by Grady as supervisor. The transcripts of said testimony adduced during the three days of hearing are incorporated herein by reference.

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It cannot be disputed that some duties that were performed by petitioner are now being performed by Grady. This is almost an inevitable expectation when a Board abolishes one administrative position and creates a supervisory one. The threshold question to be determined is whether the duties performed by Grady are substantially those that were performed by petitioner under different job titles.

A background of the administrative structure is helpful to understand the development of this dispute.

Sometime prior to 1975, Betty Schwartz was assigned to a position in the high school as a coordinator of instruction charged with responsibilities of supervision and curriculum development. These responsibilities were later expanded to include the junior high school. In 1975, Ms. Schwartz was transferred to the central office as supervisor of instruction charged with district-wide curriculum development and supervision of instruction. She retired at the conclusion of the 1984-85 school year.

In the 1979-80 school year there were three vice-principals in the high school, namely, Joseph Rufalo, Eli Gorelick, and John Edack. Edack retired sometime during that year, and was not replaced.

Robert S. Kish became Superintendent of Schools on May 1, 1984. He testified that he determined, in consultation with the high school principal, that Rufalo and Gorelick were spending possibly greater than 50 to 60 per cent of their time on student discipline, and the remaining time with other administrative duties "not directly involved with curriculum and instruction." (See Tr. III, p. 85).

Kish testified the Board charged him with priority responsibilities of improving instruction and program at a minimum cost. (Tr. III, p. 87). He further tetified that a district reorganization took place in the 1984-85 school year, which closed one elementary school, and created a K-5, 6-8, and 9-12 system by moving 6th grades from the elementary to middle school, and 9th grades from the junior high school to the high school. Kish had

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concluded "That substantial revision of the organizational structure and programs was necessary to ensure that efficient operation of the Livingston Public Schools System and to redirect the administrative priorities to program and instruction, stated affirmatively I wished to have a developmental rather than custodial emphasis." (Tr. III, p. 91).

Kish further testified that eight positions were eliminated by abolishment or retirement, namely, district-wide supervisor of instruction (Mr. Schwartz's position), three vice-principals (one at the high school, and one at each junior high school), "one district audio visual aids director whose responsibilities really had little to do with program, they included one guidance director, and . . . two coordinators, one was a K to 6 science coordinator whose responsibility did not include the supervision of instruction and the other was a K to 12 social studies coordinator who also did not include the supervison of instruction." (Tr. III, pp. 92-93).

Kish also testified as to the objective "to recommend a new administrative organization where the focus of the positions would be very specifically on program and instruction." (Tr. III, pp. 93-94). Six positions were created, he stated, a K-8 coordinator, four K-8 subject supervisor in language arts and reading, math, science, and social studies, and the high school curriculum and instruction position claimed by petitioner. All of the above changes became effective July 1, 1985. (See Tr. III, pp. 94-95).

Allen Berlin, high school principal, testified that petitioner was minimally involved in teacher observations and evaluations from 1977 through 1984, which was expanded with the team assessment concept introduced by Kish for the 1984-85 school year.

Rufalo testified on redirect examination that he made 19 teacher observations and evaluations during the seven year period from 1977-84, and 21 observations during 1984-85 as a team member.

A great deal of testimony was adduced concerning Rufalo's responsibilities with the testing program, which I **FIND** to have been exclusively ministerial as the administrative liaison with the central office.

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Concerning curriculum and staff development, I **FIND** Rufalos' responsibilities to have been limited to reading and special education, including compensatory education, his unquestioned area of expertise.

The testimony of the retired supervision of instruction, Betty Schwartz, as well as three subject supervisors in English, Science, and Foreign Language clearly establishes that Rufalo had no significant role in curriculum or staff development. The subject supervisors further testified that Grady has filled a responsible role in curriculum and staff development at the high school, which has been void since the transfer of Betty Schwartz from the high school to the central office in 1975.

A review of the entire record in this matter clearly establishes the need to distinguish between some involvement touching upon the areas of curriculum and staff development, which is indeed credited to Rufalo, and a significant and substantive role designed to result in recognizable improvements in curriculum and effective teaching.

Said review results in the following **FINDINGS OF FACT:**

1) Rufalo credibly fulfilled his responsibilities as high school vice-principal.

2) Rufalo's responsibilities as high school vice principal was largely in the area of student discipline and other administrative duties not directly related to curriculum and staff development.

3) Grady assumed responsibilities formerly assigned to Rufalo in the area of test administration and substitute teachers, but is otherwise exclusively responsible for curriculum and staff development.

4) The position of Supervisor of Secondary Staff Development and Curriculum Coordination held by Grady is substantially different from that of the position of high school vice-principal that was held by Rufalo, as it represents an entirely different, expanded focus and emphasis.

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5) Petitioner's tenure and/or seniority rights were not violated by the Board's administrative reorganization and reassignments.

N.J.S.A. 18A:28-9 states:

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

I CONCLUDE that the Petition of Appeal shall be and is hereby DISMISSED.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

20 May 1986
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

MAY 22 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 23 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

WITNESSES:

Allen J. Berlin, high school principal
Betty Schwartz, retired supervisor of instruction
Joseph Rufalo, petitioner
Edmund Fabrizio, supervisor of Science
Elaine Gill, supervisor of English
Dolores Cunningham, supervisor of Foreign Languager
Herbert R. Andlauer, Deputy Superintendent
Robert S. Kish, Superintendent of Schools

EVIDENTIARY DOCUMENTS:

P-1	Draft of Reorganization Committee report
P-2	Supervisors' job description
P-5	1979-80 Basic Skills Committee memo
P-6	October 23, 1981 memo, Rufalo to Berlin/Turner
P-7	October 1, 1989 memo, Rufalo to Gill, et al.
P-8	March 5, 1980 memo, Rufalo to Gill, et al.

(Note: P-3 and P-4 marked for ID. only)

R-1	1979-80 allocation of responsibilities
R-2	1980-81 allocation of responsibilities
R-3	1981-82 allocation of responsibilities
R-4	1982-83 allocation of responsibilities
R-5	1983-84 allocation of responsibilities
R-6	1984-85
R-7	August 20, 1985 memo, Scambio to Andlauer
R-8	May 27, 1983, April 30, 1984 and April 10, 1985 evaluations
R-9	1978-79 allocation of responsibilities
R-10	1980-81 Level II Basic Skills Reading test results
R-11	February 1, 1985 minutes of Board meeting

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JOSEPH RUFALO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
ELI GORELICK,	:	
INTERVENOR.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties in accordance with N.J.A.C. 1:1-16.4a, b and c and are summarized below.

Petitioner excepts to the ALJ's determination that he is not entitled to the position of Supervisor of Secondary Staff Development and Curriculum Coordinator. He contends the findings of fact are not completely accurate and calls attention to pages 3-19 of his Post-Hearing Brief in support of such. Further, petitioner points to Finding of Fact No. 3 as being incorrect in that it fails to include duties such as disciplining students, statewide testing and bussing.

Petitioner argues that the ALJ misstated and misapplied the law insofar as it applies to the instant matter. He acknowledges that the ALJ correctly cites N.J.S.A. 18A:28-9 as giving a board the right to reduce staff based upon administrative or supervisory reorganization but avers that there was a failure to address the fact that such reduction must be in accordance with the rules and regulations for seniority, N.J.A.C. 6:3-1.10.

More specifically, petitioner argues that although the duties of the supervisor position are not identical to the vice-principal position he formerly held, the duties of the supervisor position are nonetheless of such a nature that they exceed those of a supervisor and they place it in the category of vice-principal, as opposed to the category of supervisor. He stresses that N.J.A.C. 6:3-1.10 sets down separate categories for vice-principal and supervisor and cites Vogel v. Bd. of Ed. of Borough of Ridgefield, decided by the Commissioner August 15, 1983, rev'd State Board June 5, 1985 and Gonsalves et al. v. Bd. of Ed. of South Orange-Maplewood, decided by the Commissioner February 22, 1985 in support of the argument that the job responsibilities of the contested position are administrative not supervisory. Petitioner also alleges the ALJ failed to analyze the duties in any way whatsoever to determine if the duties fall into the category of high

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school vice-principal and that a change in emphasis and focus from administration to curriculum and instruction in a position does not lead to a loss in seniority rights.

The Board offers its own arguments to counter those advanced by petitioner, primarily those that support that the essential duties of his vice-principal position were not transferred to the new supervisor's position and that the essential duties of the supervisor position formerly held by Mrs. Schwartz was transferred to the disputed position.

Upon a careful and thorough review of the entire record of this matter, the Commissioner finds that there is nothing advanced in petitioner's exceptions to warrant reversal of the ALJ's findings and determination. He concurs with petitioner, however, that finding no. 3 is not completely correct in that the disciplining of students in the absence of Mr. Gorelick is not included nor is responsibility relative to bussing. Statewide testing and final exam scheduling would fit under "areas of test administration."

After examination of the transcripts, exhibits, briefs and exceptions, the Commissioner is convinced that, contrary to petitioner's arguments, the position of high school vice-principal previously held by petitioner represents a different position from the contested one in terms of essential duties, focus and emphasis. Further, a review of the supervisor job description itself (P-2) does not reveal a single job responsibility that may not be performed by one whose duties fall within the category of supervisor as opposed to the vice-principal category.

Notwithstanding the case law cited by petitioner to the contrary, there is no legal basis to compel the placement of the supervisor's position (both for job description duties and those additional duties testified to by witnesses such as disciplining students and bussing) within the vice-principal category because of the nature of said duties. For example, notwithstanding the passages cited from Vogel, supra, and Gonsalves, supra, there is no statute, rule or regulation which precludes a supervisor from performing staff evaluation. In fact, many supervisors do perform this function as herein. Nor is there any legal basis to preclude a supervisor from disciplining students. There is nothing to preclude a board from assigning discipline to a guidance counselor, teacher, vice-principal or supervisor.

In Gonsalves, supra, and Vogel, supra, the pivotal, crucial issue to be resolved was the same as that framed by the ALJ in the instant matter as well, namely, whether the Board transferred the essential responsibilities of petitioner's former position to the newly created position. While in Vogel, supra, some duties were characterized as being beyond the scope of a supervisor, nowhere in that decision did the State Board determine that the contested position fell under an administrative/principal category versus a supervisory category, merely because the supervisor performed staff evaluations, disciplined students or on occasion conducted faculty meetings. Rather, the decision rested on whether the duties in the

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new supervisory position were essentially the same as the principal position. It stated:

> ***[A] Board's decision to abolish a position is not sacrosanct and will be disturbed if it is found upon examination that the duties of the abolished position essentially have been transferred to another position so as to defeat the rights of a tenured employee***. *** If the new supervisory position did not incorporate the duties of principal, [he] would not be eligible for reinstatement, as he does not enjoy seniority as a supervisor. ***If, however, the duties actually performed in each position are found to be substantially similar, it will be found that the position of principal was not abolished in fact and***appropriate relief must be accorded to protect [his] tenure and seniority rights.
> (Slip Opinion, at p. 5)

It was concluded that the positions were substantially similar and that the duties of the principal were merely shifted to the supervisory position. Thus, the board was found to have acted in bad faith to thwart Vogel's tenure and seniority rights.

Thus, the standard of review the ALJ applied in the present matter was appropriate. While the initial decision does not painstakingly review and compare each and every duty fulfilled by Grady and petitioner, the Commissioner determines that each finding is sufficiently supported in the record. In the Commissioner's judgment, finding no. 4 in the initial decision, ante, could be tempered to read "substantively different" as opposed to "entirely different", given that there was some overlap in the two positions. With respect to the overlap, it is stressed that the supervisor's disciplining of students is not a major focus of his job as it was with petitioner. Rather, the supervisor is called upon to do this task in the absence of the vice-principal. (P-2) Bussing responsibilities had not been carried out by petitioner since the 1981-82 school year (R-1-6) and is not a major focus for either position. A review of the record further indicates that the vast majority of duties formerly fulfilled by petitioner are not carried out by the supervisor. In the same view, the record fully supports that the major thrust and scope of the supervisor's position relates to curriculum, instruction and staff development. There are many facets to these critical areas of school operation and the Commissioner sees no major duty performed by the supervisor to be beyond the scope of a supervisor.

Therefore, as in Gonsalves, supra, and Gattoni v. Bd. of Ed. of North Bergen, decided February 19, 1985, the Commissioner finds not only that the positions are substantively and essentially different but also that the Board's reorganization was done rationally and was based on sound educational grounds. See superintendent's and assistant superintendent's testimony. (Tr. IV-66-122) That each and every duty of the supervisor position

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could be performed by a vice-principal does not alter in any way a board's prerogative to designate such position as a supervisory one so long as there is no demonstration that the supervisory position is virtually identical to the abolished one or that bad faith existed as the reason for the board's action.

Accordingly, the Commissioner adopts the recommended decision of the Office of Administrative Law for the reasons expressed in the initial decision except as slightly modified herein. Therefore, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

July 1, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7092-85
AGENCY DKT. NO. 340-10/85

HELEN BOGUSZEWSKI, JOAN CURRIE and ELIZABETH RIVERA,

Petitioners

v.

SCOTCH PLAINS - FANWOOD BOARD OF EDUCATION,

Respondent

Gregory T. Syrek, Esq., for petitioners
(Bucceri & Pincus, attorneys)

Casper P. Boehm, Jr., Esq., for respondent

Record Closed: April 14, 1986 Decided: May 15, 1986

BEFORE **WARD R. YOUNG, ALJ:**

Petitioners alleged the Scotch Plains-Fanwood Board of Education (Board) denied them proper salary guide placement and emoluments. The Board denies the allegations and asserts its actions at all times were proper exercises of its discretionary authority. It also seeks dismissal of the petition due to its untimeliness pursuant to N.J.A.C. 6:24-1.2 and/or laches.

The matter was transmitted to the Office of Administrative Law as a contested case on November 7, 1985 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on December 18, 1985 at which the parties agreed to submit the matter for summary decision based on stipulated facts and joint exhibits. Delays were encountered

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during the discovery process due to a variety of reasons deemed by the undersigned to be just cause to warrant time extensions. Briefs were filed by the parties in a timely fashion and the record closed with final submissions on April 14, 1986.

I.

The following stipulated facts are adopted herein as FINDINGS OF FACT:

1. Boguszewski, Currie, and Rivera are tenured teaching staff members employed by respondent. Boguszewski has been employed on a part-time basis, while Currie and Rivera are full time teachers.

2. Petitioners have been reemployed by respondent for the 1985-86 school year.

3. Boguszewski has been employed by respondent since January 4, 1977. She was compensated at an hourly rate as a compensatory education teacher from her initial employment through the 1979-80 school year.

4. Currie has been employed by respondent since September 1, 1968.

5. Rivera has been employed by respondent since September 1976, and was compensated at an hourly rate as a Title I and compensatory education teacher until March 28, 1979.

6. Petitioners have possessed the appropriate certifications required by respondent.

7. Boguszewski, Currie, and Rivera have been compensated in accordance with the teachers salary guide since September 1, 1980, March 1, 1973 and April 1, 1979, respectively.

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8. Full time elementary classroom teachers employed by respondent have a defined workday of seven hours, from 8:15 a.m. to 3:15 p.m.

9. Boguszewski received out-of-district teaching experience when placed on the salary guide.

10. Petitioners were not credited on the salary guide for in-district teaching experience prior to placement thereon.

I ALSO FIND the Petition of Appeal to have been filed with the Commissioner of Education on October 7, 1985.

II.

Respondent raised the affirmative defenses of petitioner's alleged violation of N.J.A.C. 6:24-1.2 and laches in seeking dismissal of the petition, and relies on Martello v. Bd. of Ed. of the Twp of Willingboro, et al., 1985 S.L.D. ____ (decided January 11, 1985); Brady v. Bd. of Ed. of the Twp. of Boonton, 1985 S.L.D. ____ (decided February 6, 1985); and Watchung Hills Regional Education Association on behalf of Gabriel Testa, et al. v. Bd. of Ed. of the Watchung Hills Regional High School District, 1980 S.L.D. 347.

Respondent argues that our courts "have identified the accrual of a cause of action as the date on which the right to institute and maintain a suit first arose," and cites Rosenau v. City of New Brunswick and Gammon Meter Company, 51 N.J. 130, 137 (1968) and Burd v. New Jersey Telephone Company, 149 N.J. Super. 20, 30 (App. Div. 1977) in support thereof.

Respondent also argues there are "no provisions for tolling of the filing period on the grounds for continuing violation or resort to contractual grievance mechanism;" and cites DeChiaro v. Bd. of Ed. of the Morris School District, 1976 S.L.D. 751.

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Petitioners argue the inapplicability of N.J.A.C. 6:24-1.2 and laches as the basic rights raised by them are statutory. They are teaching staff members pursuant to N.J.S.A. 18A:1-1 and N.J.S.A. 18A:28-5 as enunciated in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), and are entitled to be compensated in the same manner as other teaching staff members employed by the Board. Reliance is also placed on N.J.S.A. 18A:16-11, and North Plainfield Ed. Assoc. v. Bd. of Ed. of the Boro of North Plainfield, 96 N.J. 587 (1984). Petitioners also cited Stockton v. Bd. of Ed. of the City of Trenton, 1985 S.L.D. _____ (State Board decision April 3, 1985); Bree v. Bd. of Ed. of the Twp of Boonton, 1985 S.L.D. _____ (State Board decision February 6, 1985); Garfole, et al. v. Bd. of Ed. of the Twp. of Winfield, 1985 S.L.D. ____ (decided August 1, 1985); Fair Lawn Educ. Assoc., et al. v. Bd. of Ed. of Fair Lawn, 1982 S.L.D. 731, aff'd N.J. Super. (App. Div. decided January 11, 1984, aff'd. in part, rev'd in part, 99 N.J. 8 (1985)); and Bergenfield Educ. Assoc., et al. v. Bergenfield Bd. of Ed., 1981 S.L.D. 567, aff'd in part, rev'd in part, St. Bd. of Ed. 1982 S.L.D. 1440, aff'd in part, rev'd in part N.J. Super. (App. Div. decided May 19, 1983). Petitioners also cite Scotch Plains - Fanwood Educ. Assoc. v. Scotch Plains-Fanwood Bd. of Ed., 1983 S.L.D. _____ (decided October 11, 1983).

Bergenfield, Fair Lawn, and Scotch Plains - Fanwood are distinguished from the instant matter as they were filed prior to the decision of the N.J. Supreme Court on June 23, 1982 in Spiewak, which stated at 83, n.2:

> Teachers not before the Court will therefore not be entitled to any back pay award. . . . However, all currently employed supplemental and remedial teachers should have their tenure eligibility calculated on the basis of this opinion from the beginning of their employment.

The acquisition of tenure is not at issue in this dispute. Petitioners seek advancement on the salary guide for in-district experience as supplemental teachers prior to their placement on the salary guide on September 1, 1980, March 1, 1973, and April 1979, respectively for Boguszewski, Currie, and Rivera.

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Concerning compensation, the Spiewak Court also said at 84, n.3:

> We do not decide what, if any, additional benefits the teachers in these cases are entitled to either retroactively or prospectively. That is primarily a matter of contract and the relevant collective bargaining agreements are not part of the record.

The State Board emphasized in Bree and Stockton that the time limit of N.J.A.C. 6:24-1.2 "has been strictly construed to mean that the 90-day period runs from the time the initial cause of action accrued."

In DeChiaro, the Commissioner determined that petitioners' delay in making an effective protest warranted a finding of laches.

In Dorothy Elowitch v. Bayonne Board of Education, 1967 S.L.D. 78, aff'd State Board of Education, 1967 S.L.D. 86, aff'd N.J. Super. (App. Div.), 1968 S.L.D. 260, the Commissioner quoted Justice Hehey in the case of Marjon v. Altman, 120 N.J.L. 16 at 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.

The State Board in Bree and Stockton also emphasized that the salary guide placement issues therein did not involve violations of statutory entitlements unrelated to service as teachers. The Supreme Court in North Plainfield also found at 593 that the Appellate Division in that case misperceived "The increment as a 'statutory entitlement unrelated to the teachers' qualifications, performance or quality of teaching services rendered'."

N.J.S.A. 18A:29-9 states:

> Whenever a person shall hereafter accept office, position or employment as a member in any school district of this state, his

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> 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.

Garfole is distinguishable as a matter in which salary increases were sought and awarded to petitioners as members of the teachers' bargaining unit. The negotiated agreement provided that any individual contract between the Board and an individual teacher was subject to and be consistent with the terms incorporated therein.

Boguszewski was initially placed on the salary guide at step 3 on September 1, 1980; is currently at step 8; and seeks placement on step 12.

Currie was initially placed on the salary guide at step 0 on March 1, 1973; is currently at step 12 and seeks placement on step 17.

Rivera was initially placed on the salary guide at step 0 on April 1, 1979; is currently at step 6 1/2 and seeks placement on step 9.

The record does not incorporate any evidence that dissatisfaction with salary step placement upon initial placement resulted in the filing of a petition of appeal by either petitioner until October 7, 1985.

Concerning salary guide placement as a statutory entitlement, in Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982), a matter in which petitioner sought salary credit for military service pursuant to N.J.S.A. 18A:29-11, the Supreme Court said at 150:

> Whether the benefit flowing from a statute is to be considered a statutory entitlement or a term of the public employees contract of employment depends upon the nature of the benefit and its relationship to the employment. Stating the problem in terms of incorporation in the employment contract or as a statutory benefit begs the question. Rather, attention should be directed to the purpose of the statute and its relevance and materiality to the employment.

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In the instant matter, I **FIND** the causes of action occurred when petitioners were initially placed on the salary guide, which for Boguszewski was over 5 years and 1 month prior to the filing of the instant petition; for Currie was over 12 years and 7 months; and for Rivera was over 6 years and 6 months. I **ALSO FIND** the salary guide placements sought are not statutory entitlements. **I FURTHER FIND** that all petitioners are in violation of N.J.A.C. 6:24-1.2 and guilty of laches.

I CONCLUDE, therefore, that summary decision is **GRANTED** to the Board and **DENIED** petitioners, and that the Petition of Appeal shall be and is hereby **DISMISSED**.

There is no compelling reason to further address the substance of petitioners claims or list the 108 joint exhibits on an addendum, which is deemed herein to be irrelevant.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby FILE this Initial Decision with **Saul Cooperman** for consideration.

15 May 1986
DATE

WARD R. YOUNG, ALJ

MAY 22 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

MAY 22 1986
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

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HELEN BOGUSZEWSKI, JOAN CURRIE AND ELIZABETH RIVERA,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter including the initial decision has been reviewed by the Commissioner.

Petitioners' exceptions to the initial decision and the Board's reply to those exceptions have been filed pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners are seeking advancement on the Board's salary guide for in-district experience as supplemental teachers prior to their placement on the teachers salary guide on April 1, 1979 (Rivera), March 1, 1973 (Currie) and September 1, 1980 (Boguszewski).

In opposing those conclusions reached by the ALJ in the initial decision, it is observed that petitioners have renewed their original arguments in support of their claims to proper salary guide placement already commented upon in the initial decision. These arguments are summarized below.

Petitioners contend that the ALJ erred in dismissing their claims on the basis of the 90 day time bar set forth in N.J.A.C. 6:24-1.2 and the doctrine of laches. They claim that their basic rights to appropriate compensation on the Board's salary guide for teachers is a statutory right which has been denied to them by the Board. Petitioners invoke the provisions of N.J.S.A. 18A:1-1, as well as the provisions of N.J.S.A. 18A:28-5 in asserting that they are tenured teaching staff members employed by the Board in accordance with N.J.S.A. 18A:16-1.

Because statutory rights are involved, petitioners maintain that N.J.A.C. 6:24-1.2 may not be applied to bar these claims. They rely on the Supreme Court's decision in North Plainfield, supra, to buttress this contention. Petitioners further rely on Lavin wherein the Supreme Court recognized that actions for salary guide placement by teachers are to be viewed as discreet matters each school year which result in a new cause of action for the purposes of establishing compliance with the 90 day provision of N.J.A.C. 6:24-1.2 and the doctrine of laches.

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In this regard petitioners claim that a new and continuing cause of action arose at the commencement of the 1985-86 school year after they received their first salary check. It was this action, petitioners maintain, that triggered the 90 day provision of N.J.A.C. 6:24-1.2 and the filing of the instant Petition of Appeal on October 7, 1985 in compliance with the 90 day provision. Petitioners further maintain that their action in filing a timely petition comports with two recent decisions rendered by the State Board of Education in Stockton, supra, and Bree, supra. In Stockton, petitioners note that the State Board reversed the Commissioner's earlier decision and held that petitioner therein was time barred pursuant to N.J.A.C. 6:24-1.2 when he failed to commence an action against the Board within 90 days of the receipt of his first paycheck on November 9, 1983, which reflected a downward adjustment of salary for the 1983-84 school year.

In Bree, petitioners point out that the State Board reversed that portion of the Commissioner's decision which granted adjusted salary compensation to petitioner for the 1983-84 school year because his petition was filed beyond the 90 days (December 1983) in which the initial cause of action arose. Petitioners further note that the State Board did, however, affirm that part of the Commissioner's decision in Bree as being timely which granted adjustment to his salary for the 1984-85 school year because a new cause of action arose at the commencement of that year.

Another reason advanced in petitioners' exceptions to the application of the provisions of N.J.A.C. 6:24-1.2 appears in pertinent part below:

> "***The Commissioner of Education has already determined an identical case in Scotch Plains-Fanwood. Scotch Plains-Fanwood Educ. Assoc. v. Bd. of Ed., Scotch Plains-Fanwood, 1983 S.L.D. ____ (October 11, 1983), appeal pending State Board of Education. As a result, the respondent has been fully aware of the salary rights and entitlements of its teachers since October, 1983. The present action was initiated because of the Board's failure to comply with the earlier decision. Significantly, in the prior matter, the Commissioner expressly held that N.J.A.C. 6:24-1.2 should not apply and that the entitlement to relief extended back to the initial employment of each individual. Thus, there is clear authority that N.J.A.C. 6:24-1.2 should not be applied to the claims of Scotch Plains-Fanwood teachers in cases such as this. The initial decision fails to examine the true impact of this prior determination in the present case.***" (Petitioners' Exceptions, at pp. 2-3)

Moreover, petitioners argue that the doctrine of laches cannot be applied against them inasmuch as laches is an equitable

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defense and they assert that their claims in this matter are legal, as opposed to being equitable, in nature.

Finally, petitioners contend that the Board failed to present any argument in support of the application of laches in the instant matter. Consequently, there was no basis for such a finding and conclusion to be made in the initial decision.

The Board in its reply to exceptions maintains that the ALJ correctly determined that petitioners' claims are time barred according to N.J.A.C. 6:24-1.2 and the doctrine of laches. It is recognized by the Board that the rules governing school controversies and disputes may be relaxed by the Commissioner (N.J.A.C. 6:24-1.17) where strict adherence to such rules would be inappropriate, unnecessary or would result in injustice. However, the Board argues that petitioners cannot claim surprise or injustice in the instant matter inasmuch as they were fully aware of the terms and conditions which were operative at the times of their initial employment as part-time supplemental teachers. Moreover, the Board further maintains that petitioners completely understood the employment contract issued to them at the time of their initial employment; they accepted the contract and performed services during the years in question without instituting any action before the Commissioner.

Similarly, the Board in relying on De Chiaro, supra, concludes the following:

> "***The Administrative Code, Commissioner's decision and case law make no provisions for tolling of the filing period on the grounds for continuing violation or resort to contractual grievance mechanism. In De Chiaro vs. Board of Education of the Morris School District, Morris County, 1976 S.L.D. 751 (August 8, 1976), the Commissioner did not find that each incorrect salary payment constituted a new violation from which a cause of action accrued. On the contrary, the Commissioner held that a Petition alleging improper salary payment was a "claim founded in and triggered by an initiating event" of placing the Petitioner on the wrong salary step. Petitioner's claim was, consequently, barred by laches. Therefore, the cause of action for Petitioners herein should have arisen the first year they were placed on the salary scale. This was more than ninety days from the time Petitioners filed their action. The initial decision was correct in relying on the De Chiaro decision in finding the Petitioners guilty of laches.***" (Board's Exceptions, at p. 3)

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Petitioners' reliance upon Lavin, supra, is also rejected by the Board inasmuch as salary credit for military service (N.J.S.A. 18A:29-11) was deemed by the court to have been established by the legislature as a reward for military service and not for performance or services rendered as a teacher, as claimed by petitioners herein. Consequently, the Board avers the statute of limitations which would have barred Lavin's claim was held to be inapplicable. The court applied the doctrine of laches as to any retroactive claim in Lavin; however, it further concluded that it was appropriate to grant prospective application of Lavin's request for military service credit relative to salary guide placement.

Additionally, the Board argues that petitioners may not rely on the Commissioner's prior decision in Scotch Plains-Fanwood Education Association v. Board of Education of Scotch Plains-Fanwood, supra, to refute the applicability of N.J.A.C. 6:24-1.2. The Board asserts that the relief granted to petitioners in that matter was based upon the fact that they had begun their action before the N.J. Supreme Court had issued its ruling in Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982).

In conclusion, the Board maintains that the ALJ correctly determined that placement on a teachers salary guide is not a statutory entitlement as claimed by petitioners. In support of this contention the Board relies on Spiewak, supra, and Frances Hyman et al. v. Board of Education of the Township of Teaneck, Bergen County, decided by the Commissioner August 15, 1983, aff'd in part/rev'd in part State Board of Education March 6, 1985, aff'd N.J. Superior Court, Appellate Division, February 26, 1986.

Upon review of the arguments filed by the parties, the Commissioner observes that petitioners contend their rights to appropriate placement and salary compensation on the Board's teachers salary guide are statutory and remain undiminished with the passage of time. Petitioners also claim that such rights to appropriate salary guide placement and retroactive compensation are not subject to the provisions of N.J.A.C. 6:24-1.2 or the doctrine of laches. In support of their demands, petitioners attempt to rely on the relief granted to those individual petitioners by the Commissioner in his prior decision in Scotch Plains-Fanwood Education Association, supra. Petitioners, however, were not parties to the earlier matter which was decided in accordance with the relief granted pursuant to the dictates of the ruling handed down by the court to those petitioners in Spiewak.

Therefore, the Commissioner finds and determines that petitioners' arguments in support of their claim to retroactive compensation and advanced salary guide placement are misplaced and totally without merit essentially for those reasons stated in the initial decision, as supplemented below.

In the Commissioner's judgment petitioners have not established that any of the statutes or case law upon which they rely in the record of this matter confers a statutory right to salary guide placement. While the court in Lavin, supra, held that the 90 day

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limit imposed by N.J.A.C. 6:24-1.2 was inapplicable in settling controversies involving an absolute statutory right and entitlement, the basis for such holding was subsequently distinguished and further clarified in North Plainfield as follows:

> ***As explained by Justice Schreiber in Lavin v. Hackensack Bd. of Educ., 90 N.J. 145 (1982):
>
> > The legislative purpose of N.J.S.A. 18A:29-11 is to reward veterans for service to their country in time of war. The reward takes the form of crediting the military service as teaching experience even though there is no functional relationship between the two. The credit has the effect of increasing the number of dollars to which the teacher who is a veteran is entitled. The emolument is not for services rendered or to be rendered for school teaching as such. It was established by the Legislature as a reward or bonus for service in the military, and not for performance as a teacher. Accordingly, the payment should be considered as a statutory entitlement, rather than as an element of the employment contract. That being so, the statute of limitations is inapplicable.*** (96 N.J. at 593-594)

The court in North Plainfield then went on to distinguish Lavin as follows:

> ***From that perspective, salary increments accruing under N.J.S.A. 18A:29-11 are distinctly different from those awarded under N.J.S.A. 18A:29-8. The annual increment under N.J.S.A. 18A:29-11 accrues because of time spent in military service without regard to performance as a teacher. By contrast, the annual increment under N.J.S.A. 18A:29-8 is subject to annual evaluation of teacher performance. Consequently, that Court's analogy of an annual increment to the statutory entitlement for veterans is invalid. (Id. at 594)

It is essential to point out at this juncture that petitioners' and the ALJ's reliance upon the State Board's decision in Bree and Stockton to emphasize the strict limitations placed upon the 90 day time period in interpreting the provisions of N.J.A.C. 6:24-1.2 are misplaced for the following reasons.

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1. Both Bree and Stockton have been decided on appeal by the Appellate Courts. These decisions were rendered on January 7 and May 16, 1986, respectively.

2. In Bree the court reversed that part of the decision of the State Board which overruled the Commissioner's prior determination to grant petitioner an adjustment to his salary for the 1983-84 school year by relaxing the 90 day time period in N.J.A.C. 6:24-1.2. In rendering its decision of this matter, the court upheld the authority vested in the Commissioner pursuant to N.J.A.C. 6:24-1.19 (now 6:24-1.17).

3. In Stockton, the court reversed the State Board and upheld the Commissioner's earlier determination that the 90 day period under N.J.A.C. 6:24-1.2 for filing the petition of appeal commenced on February 8, 1984.

The Court in Bree, however, did not disturb the language of the State Board related to salary guide placement issues which reads in pertinent part:

> ***We emphasize that the right to a negotiated increase, like the right to an increment, is not a statutory entitlement. See North Plainfield Education Association v. Board of Education of the Borough of North Plainfield. 96 N.J. 587 (1984).
>
> ***The fact that [petitioner] is permanently deprived of the [1984] increase does not constitute a new violation each year, but is the effect of an earlier employment decision. Id.***"
>
> (State Board Slip Opinion, at p. 5)

The Commissioner notes that this issue of salary guide credit for remedial/supplemental teaching experience has been dealt with in numerous decisions wherein the 90 day time bar was applied. Baker, supra; Shulman v. Bd. of Ed. of Morris School District, decided by the Commissioner April 15, 1985; Reilly v. Bd. of Ed. of Kearny, decided by the Commissioner April 25, 1985; Verschuren v. Bd. of Ed. of Union County Regional High School District No. 1, decided by the Commissioner July 8, 1985; Conner et al. v. Bd. of Ed. of River Vale, decided by the Commissioner February 18, 1986; Bertisch et al. v. Bd. of Ed. of Bergenfield v. Bergenfield Education Assoc., decided by the Commissioner April 10, 1986; Carol Bocker et al. v. Board of Education of the Township of Wayne, Passaic County, decided by the Commissioner April 17, 1986

Therefore, the Commissioner finds and determines that petitioners' claims to advanced salary guide placement and compensation

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are not statutory entitlements, nor do they represent a continuing violation of law arising from the dates on which the Board's action was initiated. In the instant matter, the initial causes of action are determined to be those dates cited in the initial decision, upon which each of the individual petitioners was placed and compensated on the negotiated teachers salary guide. North Plainfield; Bree (State Board Slip Opinion, p. 5)

It is evident from the undisputed facts contained in the record of this matter that each of the individually named petitioners was initially placed on the teachers salary guide at different times at least 5 years prior to the filing of their Petition of Appeal with the Commissioner. At those times petitioners accepted such placement and compensation without instituting formal action against the Board. Petitioners may not now contend that they were unaware of their initial salary guide placement or the fact that they were not given experience credit or compensation for prior in-district experience as supplemental teachers.

In view of the above, the Commissioner rejects petitioners' arguments opposing the application of N.J.A.C. 6:24-1.2 and the doctrine of laches as an effective bar to the relief they are seeking herein.

In the Commissioner's judgment, petitioners may not rely on his prior decision in Scotch Plains-Fanwood Education Association, supra, currently pending on appeal before the State Board of Education. Unlike petitioners herein, those individually named petitioners represented by the Association were determined to be tenure eligible and were granted retrospective salary compensation and other statutory benefits in accordance with the Supreme Court's decision in Spiewak. The purpose for according such relief to the individually named petitioners in Scotch Plains-Fanwood Education Association was that their cases were pending on appeal when the court's decision in Spiewak was rendered. Petitioners herein did not have any litigation pending against the Board when the Spiewak or Scotch Plains-Fanwood Education Association matters were decided.

As indicated in the initial decision, tenure which is a statutory right is not an issue in this matter. Additionally, the record establishes that the instant Petition of Appeal was filed on October 7, 1985, approximately 2 years after the Scotch Plains-Fanwood Education Association decision was rendered by the Commissioner on October 11, 1983.

Accordingly, the Commissioner hereby affirms the initial decision with modification, as supplemented above. The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 8992-85
AGENCY DKT. NO. 427-10/84

MARILYN R. SHEEHAN,
Petitioner,
v.
BOARD OF EDUCATION
OF THE CITY OF NEWARK,
ESSEX COUNTY,
Respondent.

Bruce D. Leder, Esq., for petitioner
(Schneider, Cohen & Solomon, attorneys)

J. Isaac Porter, Associate Counsel, Newark Board of Education, for respondent
(Vickie A. Donaldson, General Counsel)

Record Closed: April 7, 1986 Decided: May 20, 1986

BEFORE **ELINOR R. REINER**, ALJ:

On October 16, 1984, Marilyn R. Sheehan, employed by respondent as a tenured school psychologist, filed a petition of appeal with the Commissioner of Education, claiming that the withholding of her increment for the 1984-85 school year was arbitrary and capricious. Respondent filed its answer on December 11, 1984, contending that petitioner had not been deprived of any of her rights and failed to state a claim for which relief could be granted.

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On December 17, 1984, this matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on February 11, 1985, and the following issues were isolated:

1. Was the action of respondent in withholding petitioner's increment arbitrary and capricious?

2. Did respondent violate its own policies and procedures in failing to give petitioner a hearing?

3. If petitioner is successful, to what relief is she entitled?

A hearing was scheduled for April 8 and 16, 1985 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102. Due to an indication from the parties that the matter would be settled, the hearing was adjourned to June 4, 1985. It is to be noted that during this proceeding petitioner had moved for default judgment, alleging that respondent's answer was not filed within 20 days of the filing of the petition. Inasmuch as the matter was not settled, a joint request was received from the parties for an adjournment of the June 4, 1985 hearing date to await the Commissioner's decision on a similar motion. By letter dated June 21, 1985, this judge denied petitioner's motion for default judgment and rescheduled the hearing for August 29, 1985. The hearing was adjourned on request of petitioner's attorney who indicated that there was a possible withdrawal of this matter. It was subsequently rescheduled and heard on September 3, 1985 and October 25, 1985.

At the hearing on October 25, 1985, respondent objected to the testimony of Anthony J. Megaro, alleging that there was no indication from the depositions that Magaro would be testifying or that he would testify regarding Sheehan's prior years'

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absentee records that he presented to the Board. Noting that Megaro's testimony was relevant if he was testifying as to what was presented to the Board, this judge, finding it necessary to cure the discovery failure, granted petitioner's request for an adjournment for the purpose of conducting further discovery. This judge further determined that if the Board had not been advised of Sheehan's prior years' absences and acted upon it, then such testimony would not be relevant. On January 7, 1985, the adjourned hearing date, petitioner's attorney did not appear, it being his understanding that respondent's request for an adjournment of that hearing date had been granted. On that date, respondent, admitting that it could not demonstrate that information regarding petitioner's prior years' absences had been presented to the Board, moved to withdraw Megaro's testimony and any exhibits introduced in regard to it. It was stated that petitioner had no objection to the withdrawal of that testimony. On January 10, 1986, the parties appeared, additional evidence was submitted and the hearing was concluded.

Subsequent thereto, the parties submitted briefs in this matter. When it became apparent that certain issues had been raised by petitioner which necessitated a response by respondent, this judge requested that respondent respond to petitioner's allegations in writing. The last submission was filed on April 7, 1986. Witnesses who testified and exhibits marked into evidence at the time of the hearing are listed in the appendix attached hereto.

Undisputed Facts

At the hearing, which proceeded on the issue of whether respondent acted arbitrarily and capriciously in denying petitioner's increment, it became clear that a number of the facts were essentially uncontroverted. They may be summarized as follows:

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1. Petitioner holds a Bachelor of Arts degree, a master's degree in educational psychology and a doctorate in counseling. She has a kindergarten through 8th grade elementary certificate, a 9th grade through 12th grade certificate in English, a school psychologist certificate and a teacher of psychology certificate. She has been employed by respondent continuously since September 1972 and is a tenured school psychologist.

2. By letter dated June 17, 1983, petitioner requested a leave of absence for the period of October 15, 1983 through September 1, 1984 (P-1). Respondent granted this request (P-2).

3. Petitioner worked for respondent from the first day of school in September 1983 through Friday, October 14, 1983, when her approved leave of absence began.

4. During this period in 1983, petitioner was marked out as sick on September 12, 13, 14, 21, 23, 27, 28, 29, 30, and on October 4, 5, 6, 7, 12 and 13, a total of 15 days. She took personal days on September 20, 22 and October 11 and was out due to a holiday on October 10 (P-3).

5. Petitioner attended a meeting on October 14, 1983, regarding her abuse of sick time. Prior to that, no one had advised or counseled her that she had been taking too much sick time.

6. By contract, petitioner received 15 sick leave days per year (P-4).

7. By letter dated July 16, 1984, petitioner was advised by respondent's Human Resource Services Committee, that it "would conduct a hearing on the denial of increments." She was advised that "it would be advisable to have representation at that proceeding (P-5)."

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8. Petitioner attended the hearing on July 21, 1984. Due to the stated failure of respondent to be prepared with petitioner's records, the hearing was not held. The committee advised petitioner that her hearing would be rescheduled. Petitioner was not notified of another hearing.

9. By letter dated August 28, 1984, petitioner was advised that a recommendation would be made to the Board to withhold her increment based on "unsatisfactory teaching performance and for other good cause pursuant to N.J.S.A. 18A:29-14," at the August 31, 1984 special meeting. She was advised that the Board would consider the recommendation and determine by a majority vote of all the members of the Board of Education whether her increment would be withheld. She was advised that if the Board decided to withhold her increment she would be given written notice of such action within ten days after the action (P-6).

10. Petitioner was not present at this special meeting, during which the Board determined to withhold her increment.

11. By letter dated August 30, 1984 from Lynnette Cooke Crooms, Labor Relations Specialist, petitioner received an apology for the failure of the Human Resource Committee to advise petitioner as to what action the committee would recommend to the full Board (P-7).

12. By letter dated September 25, 1984, respondent advised petitioner that the Board of Education took action at its special meeting on August 31, 1984, to withhold her increment and/or salary adjustment for the 1984-85 academic school year. The reason for the withholding was stated to be litigation and/or investigation: abuse of sick leave (P-8 and R-1).

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13. Petitioner matriculated as a full-time student in the Juris Doctor program at Antioch School of Law. Her date of entrance was October 8, 1983, and her anticipated date of graduation was May 1986 (R-3).

14. For the fall 1983-84 semester (August 23 through January 1984), petitioner enrolled in the following courses: Torts, Civil Procedure, Legal Bibliography, Criminal Law, Legal Analysis and Writing and Introduction to Professional Methods (R-4 and R-10).

15. For the fall 1983 semester, all of the above courses were offered Monday through Friday. To the knowledge of the registrar, no other classes were scheduled by any of the professors (R-8).

16. During the spring 1984 semester, petitioner took a leave of absence from Antioch School of Law (R-8 and R-11). Her last date of attendance at Antioch was in February 1984.

17. Verna Robinson, a third year law student at Antioch School of Law, affirmed that she attended law classes on Saturdays with petitioner during the school year beginning in August 1983 at the Antioch School of Law (P-12).

18. On or about April 15, 1983, petitioner was in an automobile accident. She was absent for ten days after the accident.

19. Petitioner was under the care of Orthopedic Associates from September 12, 1983 through October 13, 1983, due to the injuries sustained in the automobile accident. She was diagnosed as having cervical strain and acute lumbosacral strain. She was advised to rest, swim, have physical therapy treatments three times per week and not to drive long distances (P-10).

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20. During this period, petitioner contacted Orthopedic Associates by telephone regarding her condition (P-10), received physical therapy in the office (P-9) and was at the office of Orthopedic Associates on September 23, 1983 for these injuries (P-11).

21. Respondent has no written policy requiring the Human Resource Services Committee to hold a hearing in regard to the withholding of an increment.

22. Petitioner earned $30,443 for the 1983-84 school year. She earned that same figure for the 1984-85 school year. If her increment had not been withheld, her salary would have been $32,878.

Testimony

In addition to the above undisputed facts, testimony was adduced by petitioner to demonstrate in the main that she was not absent from her duties with respondent in order to attend Antioch Law School but rather was absent due to sickness.

Petitioner assumed the stand on her own behalf and traced her absences during September and October 1983. Noting that she was out sick for the period from September 12 through 14, she explained that she was under the care of Dr. Kahn, a general practitioner. In fact, she contended that she saw him on September 12 when he treated her for her ulcer and her neck and back pain (from the accident). She further revealed that she saw Dr. Joseph Kouten about the continuous pain in her lower back. During the week of September 19, she took personal days on September 20 and 22 because she had legal appointments. She was absent on September 21 due to illness and alleged that she

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saw Dr. Kouten for her back and neck pains on September 23. During the week of September 26, she was out sick from September 27 to 30 because of the continuous pain in her back. She indicated that during that time she had physical therapy and had an appointment to see Dr. Phair, an associate of Dr. Kouten's. Testifying regarding the week of October 3, she stated that she was out sick from the fourth to the seventh because of the continuous pain in her back and neck, as well as nausea. During the week of October 10, she took a personal day and stayed home. She was out sick on October 12 and 13 because of the pain in her back, neck and stomach.

In further testimony, petitioner contended that she called the Board of Education each time that she was out sick. Contending that she was not required to supply respondent with notes from her physicians, she admitted that she had not done so. In fact, on cross-examination, petitioner admitted that she obtained letters from her doctors after the litigation began in this matter. (She obtained P-9 on September 4, 1984.) She indicated, moreover, that she had not received a copy of the attendance improvement plan prior to October 1983. According to petitioner, she took this sick time because she was home, at the doctor's office or in physical therapy with Dr. Kouten.

Testifying regarding her attendance at Antioch Law School, petitioner indicated that she taught for respondent in September 1982 when she was enrolled and took courses at Antioch. Contending that she did not take the sick time in order to attend school at Antioch, she alleged that Antioch has a weekend law school program; she attended weekends and evenings. More to the point, she alleged that she attended Antioch on Saturday, September 17, returning on Sunday, September 18, in addition to the weekend of October 8 through Monday, October 10, a holiday. She returned to school on October 22, 1983 during her leave of absence.

On redirect examination, petitioner explained that although there was no indication and no listing in the schedule that the courses were given on Saturdays, she took courses on Saturday at Antioch. Noting that Antioch does not require attendance at particular times, she indicated that Antioch repeats courses in the evenings, by the same

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or a different professor (sometimes at a professor's apartment; she seemed to convey that it was done on an informal, group basis). In addition, she noted that Antioch offers courses on Sunday and holidays. Further, students sometimes conduct seminars with other students during which some instruction is given. In addition, petitioner indicated that since she received tapes of courses and workbooks, it was not always necessary to attend classes for each course. In further testimony, petitioner revealed that she stopped attending Antioch when she became disabled due to a broken leg in February 1984, which required that she go to a physical therapist. She did not believe that she had notified anyone at respondent that she broke her leg and had taken a leave of absence from Antioch; she admitted that she had not put it in writing.

In an effort to rebut the above testimony, Dorothy Gould, who has been employed by respondent for 41 years, testified. Gould, who is presently assistant executive superintendent of pupil personnel services, stated that she has functioned in that capacity from January 1983 to the present. As such, she is directly responsible for four divisions: child guidance, nurses and medical (health services), transportation and special education. She indicated that petitioner has worked in her department for over five years, and is under her management. She clarified that she was not personally involved with petitioner (having 140 staff members under her supervision) and was not her immediate supervisor.

Gould recalled that in late summer 1984, she became aware that petitioner had broken her leg and was not attending Antioch Law School. Apparently prior to that, she was not aware that petitioner had not attended Antioch but knew of petitioner's broken leg. She indicated that if petitioner had not been using her leave of absence for the purpose intended, it was customary that respondent be notified. She received no such notification. Gould explained that petitioner's broken leg would have terminated the leave

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of absence because she would no longer be attending Antioch. Since she would return to work when the leg healed, Gould opined that petitioner had a responsibility to inform the Board that she was no longer able to complete her studies at Antioch Law School because of her broken leg. In addition, she did not receive notes from any physicians from petitioner regarding her accident nor was she familiar with P-9, 10 or 11.

On cross-examination, Gould revealed that she is responsible for the attendance improvement plan for the district. Although she noted that under this plan after five consecutive days of illness, the employee must submit a medical certificate, she admitted that prior to October 15, 1983, petitioner was not out sick for five continuous days. Therefore, she needed no note. However, she explained that there is supposed to be a conference with the immediate supervisor and the employee after five incidental days of sick time. Thus, after September 23, petitioner should have received a counseling session. After three more days of sickness, a second conference should have been held. Thus, petitioner should have received a second conference after September 30. Further, after eight days a recommendation by the supervisor would trigger this witness's conference with the employee. Admitting that she did not receive that information in writing, she contended, however, that after October 4, petitioner was out sick except for October 14.

In further testimony, Gould stated that 18 days of sick time trigger a recommendation to withhold an increment. When asked whether petitioner was out 18 days between September and October 15, she stated that the record showed 18 incidental days, personal days and sick days. When questioned regarding whether abuse of sick leave included personal leave, she stated "No." She explained, however, that the question is the excessive number of sick leave days. Thus, she stated that "the 18 is 15 days sick leave and three days personal leave." She stated that "that is the manner in which the Board arrives at the number 18." More particularly, she contended that the number 18 may have been made up through a combination of incidental (absences which do not occur in a continuous pattern) sick leave and personal leave.

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Questioned as to how an employee would know respondent's policy on sick time, Gould indicated that copies of the program as it relates to staff attendance were distributed. Thus, she noted that as part of staff orientation on attendance begun in September 1982 there were meetings during which every employee was oriented and given a copy of the attendance improvement plan which defined incidental absences and the effect of absenses the day before a holiday. She did not know whether petitioner was present at the orientation or given any documents.

In further testimony, Gould explained that she made a recommendation to her supervisor, Deputy Executive Superintendent Gladys Hillman-Jones, to withhold petitioner's increment. It was Jones's responsibility to send the recommendation to the Board through the Human Resource Services Committee. According to Gould, the Human Resource Services Committee would discuss the recommendation to decide if it should be submitted for Board approval. Although she noted that the committee holds meetings, which are not called hearings, she admitted that P-5 indicated that hearings were held. She was not sure if the committee conducts hearings regarding all teachers or whether hearings were held in the summer.

On redirect examination, Gould confirmed that she was aware that petitioner had been out sick in April 1983 for over five days. Although she could not recall if she received a doctor's note in April 1983 for the absence (she had no recollection of the doctor's slips having been brought in by Ms. Sheehan), she stated that five consecutive days of sick time require a note. She admitted that the medical records would not be brought to her office in the usual course of business. Admitting that sometimes if there is no note an individual would not get a paycheck, she did not recall petitioner indicating that she did not get a paycheck.

Sheehan, resuming the stand, alleged that she had submitted notes from a physician to the clerk for her sick time in April 1983. Although unaware that after five days of absence a note was required, she claimed that she submitted a note after six days in 1983.

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Discussion

The question to be resolved in the instant case is whether the Board's action in withholding petitioner's salary and adjustment increment is to be upheld. Clearly, that action was taken pursuant to N.J.S.A. 18A:29-14, which indicates that the Board of Education has the authority to withhold the employment increment of a teacher for inefficiency or other good cause. The withholding of an increment is a matter of essential managerial prerogative which has been delegated by the Legislature to the local Board of education. Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 311, 321 (1979).

Although the Commissioner may review the Board's determination, the Commissioner may not "substitute his judgment for that of those who made the evaluation but . . . [may] determine whether they had a reasonable basis for their conclusions." Kopera v. Bd. of Ed. of West Orange, 60 N.J. Super. 288, 296 (App. Div. 1960). The burden of proving unreasonableness is on the teacher. In considering the scope of that review, the Appellate Division in Trautwein v. Bd. of Ed. of the Boro of Bound Brook, (N.J. App. Div., Apr. 8, 1980, A-2773-78) (unreported), certif. den., 84 N.J. 469 (June 12, 1980) explained that at issue before the Commissioner was whether those who made the evaluation had a reasonable basis for their conclusions. Thus, citing Kopera, at 296-297, the court clarified that the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise-on-scene; and that the burden of proving unreasonableness is upon the appellant. The court clarified that they do not understand Kopera to mean that the Commissioner's review is limited merely to a consideration of whether the local Board's decision was supported by

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the facts in its possession. When, as here, the hearing is held before the Commissioner, or his designee, for the first time, the Commissioner's obligation, of course, is to make a de novo and independent decision on the facts. See, Trautwein, at 9.

With this backdrop, it is to be observed that petitioner's argument that respondent acted arbitrarily and capriciously is based on the following:

1. Pointing out that petitioner received notice at least 25 days after respondent took action, petitioner contends that respondent violated N.J.S.A. 18A:29-14 by failing to give petitioner written notice of its action within 10 days.

2. Petitioner argues that respondent's action is arbitrary in that it ignored its own policies. Specifically, petitioner argues that there is no dispute that respondent violated the Attendance Improvement Plan by not holding conferences after three, five and eight-day absences.

3. Petitioner argues that respondent acted arbitrarily and capriciously by not investigating whether petitioner was legitimately sick. Petitioner alleges that respondent did not hold conferences to determine whether petitioner was sick or require petitioner to submit doctors' notes. The Human Resource Services Committee did not ask petitioner any questions regarding her sick leave and no evidence was adduced to demonstrate that the Board inquired as to the legitimacy of the illnesses.

In response, respondent argues that petitioner utilized sick and personal days to attend courses at Antioch School of Law during the months of September and October 1983. Requested by this tribunal to submit a further response in regard to respondent's failure to follow the Attendance Improvement Plan, respondent asserts that the crux of

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petitioner's increment denial related to utilizing leave time for purposes other than that for which it was intended (i.e., feigning illness to attend law school), which the manual does not address. Moreover, respondent alleged that it has met the legislative intent of N.J.S.A. 18A:29-14 by giving petitioner adequate notice of its action. It argues, in addition, that petitioner has not established that the Board has adopted a policy or procedure requiring a hearing by a Board committee. Further, since a hearing is not required by statute or case law, petitioner is not entitled to a hearing before the Human Resource Services Committee.

I have reviewed the arguments of counsel and will address each of petitioner's points here.

1. Notice

At issue is whether respondent's failure to give petitioner timely notice of the withholding of the increment voids respondent's action. Essentially, petitioner, citing Klein v. Bd. of Ed. of Cedar Grove., 1981 S.L.D. 1190 contends that the case law substantiates a technical violation of N.J.S.A. 18A:29-14 when the affected employee had knowledge of the reasons. Petitioner argues, however, that in the instant matter no evidence was offered by respondent to substantiate the fact that petitioner knew or even should have known the reasons for the withholding. Alleging that she was never advised that the alleged abuse of sick leave was the reason for the withholding, petitioner contends that if she had been advised, she could have produced a doctor's note as she did at the hearing here.

This tribunal has considered the record in the instant matter and cannot agree with the position espoused by petitioner. It appears clear that such a technical violation, while not condoned by the Commissioner, has in fact been excused especially when the

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record convinces the Commissioner that petitioner knew the reasons for the withholding of the increment. Thus, it was stated in Marshall v. Bd. of Ed. of the Southern Ocean County Reg. High Sch. Dist., 1978 S.L.D. 593, 596 that:

> The Commissioner has carefully reviewed the legal arguments set forth by respective counsel in light of relevant statutory and case law. He finds that the Board was indeed remiss in not following the letter of the law by its failure to notify petitioner in writing of its reasons to withhold his salary increment adjustment within ten days of its action. He determines, however, that such failure is not fatal in the total circumstances of the instant matter. For full compliance with the statute, albeit tardy, the Commissioner now directs the Board to provide petitioner with a complete statement of its reasons to withhold his salary increment adjustment.

Noting that petitioner was aware of such action, together with the reasons, the Commissioner, citing Hillman v. Bd. of Ed. of Caldwell-West Caldwell, 1977 S.L.D. 218, stated that the intent of the notification requirement in N.J.S.A. 18A:29-14 is to give the affected employee opportunity to appeal the action to the Commissioner. See, Marshall. See, Baker v. Bd. of Ed. of Bergenfield, 1978 S.L.D. 740; see also, Klein, wherein the Commissioner in reviewing the record was convinced that petitioner knew the reasons for the withholding of the increment.

In the instant matter, upon review of the total circumstances, I do not find the statutory defect to be fatal. While it may be that petitioner was not provided with a hearing to investigate the facts or an opportunity to present documentation as to the reasons for her actions, I am convinced that petitioner essentially knew the reasons for the withholding of her increment. She was advised by letter dated July 16, 1984, that the Human Resource Services Committee would conduct a hearing on the denial of her increment. In fact, it is undisputed that she attended that committee hearing only to find that the committee was unprepared to go ahead with it. Clearly, she must have known at that time the basic reason why the hearing was to be conducted (P-5). Moreover, she was advised by letter dated August 28, 1984, prior to the Board of Education withholding her increment, that it was to be withheld based on unsatisfactory teaching performance and

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for "other good cause." While no specific reason was given, clearly she was apprised that action in regard to her increment was to be taken at that time (P-6). Moreover, as an indication that petitioner had some idea as to the reasons for the denial of the increment, I am persuaded by the fact that by letter dated August 30, 1984, Linet Cacroon apologized that the Human Resource Services Committee had not advised petitioner what action the committee would recommend to the full Board.

For petitioner to suggest that she was to attend a Human Resource Services Committee meeting without having any idea regarding the reason for the withholding of the increment, and left the meeting without learning the reason for it, seems incredible to this tribunal. Thus, even though the Board did not technically comply with the statutory requirement that petitioner be supplied, within ten days of the Board's action, with a written statement of the reasons as to why the increment was being withheld, considering the total circumstances, I am convinced that petitioner knew or should have known the reasons for the withholding of the increment. While I am in no way sanctioning the action of the Board in failing to comply with the procedural mandates of N.J.S.A. 18A:29-14, this procedural omission, under the totality of the circumstances, seems harmless and shall not warrant setting aside the Board's action. Moreover, this appears to be the appropriate result when one considers that the cases cited above suggest that the essential purpose of the statute is to give petitioner an opportunity to appeal the action to the Commissioner. In the instant case, there is no allegation that petitioner suffered any harm by the Board's failure to give notice within the 10-day period. Since petitioner had notice within 25 days and was able to perfect her appeal before the commissioner, she suffered no harm.

2. Failure to Follow Attendance Improvement Plan

There is no doubt that respondent violated the requirements of the plan by failing to hold conferences as required in the plan. An employee is to receive an informal conference after any three days' absence, a formal conference after any five days'

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absence, and a formal conference after any eight days' absence (R-2). As was stated by petitioner, no excuse was offered by respondent for ignoring its attendance plan.

At issue, in view of the above-noted facts, is whether respondent's failure to follow its own Attendance Improvement Plan demonstrates that its action to withhold petitioner's increment was arbitrary and capricious. Petitioner cites Shifrinson v. Marlboro Tp. Bd. of Ed. 1984 S.L.D. ____ (Comm'r of Ed. June 4, 1984), in support of her position that if a Board of education violates its own policy the increment should be restored.

Although in Shifrinson the board of education failed to follow a policy directly related to the withholding of the increment, it seems to be well settled that where a local school board fails to follow its own policy, the decision to withhold an increment constitutes an arbitrary and capricious action. See, Williams v. Bd. of Ed. of Newark, OAL DKT. NO. EDU 8696-84 (June 25, 1985), aff'd, Comm'r of Ed. (July 25, 1985); Applegate v. Freehold Reg. High Sch. Dist., 1969 S.L.D. 56; Fitzpatrick v. Bd. of Ed. of the Boro of Montville, 1969 S.L.D. 4. In further support of the proposition that a policy once adopted is binding on a Board, it is to be noted that the cases cited above overruled the holding in Greenway v. Bd. of Ed. of Camden, 129 N.J.L. 461 (E. & A. 1943), to the effect that a local school board's salary schedule is not binding on the Board. Thus, one of the first decisions noting that Greenway was no longer good law, the then-acting commissioner observed that "the holding in Greenway, supra . . . is now specifically altered by legislative enactment." Ross v. Bd. of Ed. of the City of Rahway, 1968 S.L.D. 26, 29. Thus, the Commissioner explained that L. 1965, c. 236, presently codified as N.J.S.A. 18A:29-4.1, clearly established the contractual nature of the salary policies adopted by local boards and provided that "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." The concept that a salary policy once adopted becomes a part of the regulations that control the Board's action and all parties are equally bound by that policy, lends support to petitioner's case here.

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Moreover, the fact that Shifrinson, apparently referred to the failure of a Board to follow a policy directly related to the withholding of an increment, which is not the particular circumstance here, does not seem to this tribunal to help petitioner. For it must be observed that here the policy related in some manner to respondent's action. If the Board had followed its policy of allowing for the conferences, petitioner may very well have been able to explain those absences, thus obviating the withholding of her increment. Thus, while the Attendance Improvement Plan had as its main purpose to improve employee attendance, clearly the logical implication of the failure of a teacher to correct a poor attendance record, could certainly result in the withholding of that teacher's increment. That being so, the policy was related to the withholding of petitioner's increment in a manner similar to the policy in Shifrinson. In light of this, it seems reasonable to conclude that respondent's action in violating its own policy was arbitrary and capricious.

3. Failure to Consider the Reasons for the Absenteeism

At issue in regard to this contention is whether respondent acted improperly in failing to investigate whether petitioner was legitimately sick. In support of her position, petitioner contends that respondent did not hold conferences to determine whether petitioner was legitimately ill, did not require petitioner to submit doctors' notes and did not ask petitioner any questions regarding her sick leave. As part and parcel of this argument, petitioner points out that respondent ignored its practice of giving the affected employee a hearing before the Human Resource Services Committee.

This tribunal has considered petitioner's argument and must agree that respondent's action was arbitrary and capricious due to its failure to consider the legitimate use of sick leave. In Williams, the administrative law judge determined that

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respondent's action was arbitrary and capricious in view of the fact, among others, that the Board had not considered the particular circumstances for petitioner's absence. See also, Marilyn Kuehn v. Bd. of Ed. of the Tp. of Teaneck, 1983 S.L.D. ____, wherein the commissioner determined that the lack of consideration of the particular circumstances for absence creates a dearth of good cause regarding the withholding of increment as required by N.J.S.A. 18A:29-14. Clearly, the instant case is analogous in that here, too, there has been a failure to consider the particular circumstances for petitioner's absence. Rather, it appears that the Board simply assumed that petitioner was attending Antioch School of Law and acted in accord with that.

Moreover, and of particular import here, respondent failed to follow its own procedure in regard to petitioner of providing a hearing before the Human Resource Services Committee. Although it is clear that there was no written policy giving petitioner the right to a hearing before the Human Resource Services Committee, obviously petitioner had been granted that right, which was effectively denied to her through no fault of her own. The appearance before the Human Resource Services Committee must be considered to constitute a procedure established by respondent in an effort to determine the circumstances precipitating the withholding of the increment. The Human Resource Services Committee was making a recommendation to the Board of Education and in view of that it obviously had the responsibility to consider the circumstances of petitioner's absence. The denial of a hearing to petitioner resulted in a recommendation without any input from petitioner.

Research discloses that there are no cases in which a teacher was denied an opportunity to respond to the Board and the Commissioner concluded that this failure was not fatal to the Board's action. Rather, it appears that the failure to provide a meaningful opportunity to respond is always fatal to the action of the Board. In fact,

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any violation of the Board's established procedure to provide an opportunity for a hearing is sufficient cause to set aside the withholding action. The policy behind this rule is expressed in Fitzpatrick v. Bd. of Ed. of the Boro of Montvale, 1969 S.L.D. 4, 7:

> Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play. Conceding further that a salary increment may be denied for reasons other than unsatisfactory teaching performance, the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice that such a recommendation is to be made to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. This is not to say that deprivation of a salary increase requires service of written charges, entitlement to a full scale plenary hearing or the kind of formal procedures necessary to dismissal of tenured employees. But certainly any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgment is erroneous.

In like manner, the failure to provide petitioner with a hearing before the Human Resource Services Committee, an obvious procedure of respondent, is a violation of petitioner's right and denied petitioner the opportunity to convince respondent that its judgment was incorrect. Further, the process of recommendation by the Human Resource Services Committee in the absence of consideration of the circumstances causing petitioner's absence was arbitrary and capricious. See, Williams, at 5.

Conclusion

As discussed above, in the instant case respondent's policies provided for conferences under the Attendance Improvement Plan and a hearing before the Human Resource Services Committee. Petitioner was effectively denied any of the conferences as set forth in the Attendance Improvement Plan and, thus, an opportunity to respond to the allegations of respondent prior to the withholding of her salary increment. Further,

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she was denied an opportunity to appear before the Human Resource Services Committee to respond to the allegations of respondent. In view of respondent's failure to follow its own policies and procedures, this tribunal concludes that respondent's action in denying petitioner's increment was arbitrary and capricious.

Where a school board violates its own policy by failing to offer the petitioner a hearing prior to withholding a salary increment, the appropriate remedy is to place the petitioner on the proper step on the salary guide as if the Board never acted and compensate her for the salary differential between the amount received and the amount she would have received had the Board never acted. Williams, Shifrinson, Applegate, Fitzpatrick and Ross. In view of the above discussion, it is unnecessary for this tribunal to reach findings on the reasons for the withholding of petitioner's salary increment. Applegate, at 60. See also, Fitzpatrick at 8, wherein the commissioner determined to make no finding with respect to the merits of petitioner's entitlement to a salary increment but to confine his determination to the question of procedural validity.

Order

Based on the above discussion, findings of fact and conclusions of law, it is hereby **ORDERED** that respondent place petitioner on the proper step on the salary guide as if it had never acted to withhold her increment for the school year 1984-85, and to compensate petitioner for the salary differential between the amount she received for 1984-85 and the amount she would have received from the effective date of the increment

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withholding as if the withholding action had not been taken. It is further **ORDERED** that interest on the salary differential is denied.[1]

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

---

[1]It is to be noted that petitioner seeks a restoration of her increment with interest. The commissioner has jurisdiction to make an award of interest, whether pre-judgment or post-judgment, Bd. of Ed. of the City of Newark v. Ruth Levitt and Esther E. Sasloe, 197 N.J. Super. 239, 247 (App. Div. 1984). In considering whether or not to allow interest, and, if so, how much, the commissioner should, of course, be guided by the same principles respecting the award of pre-judgment interest and post-judgment interest which controls the judicial excercise of this power. Id. at 248. Where the debtor is a governmental agency and interest in the cause is not provided for by statute, particular circumspection in the granting of pre-judgment interest is required and a showing of overriding and compelling equitable reasons must be made in order to justify the award. Id. at 244. Here, it must be observed that interest is not provided by statute and there has been no showing of overriding and compelling equitable reasons to justify the award of interest. In light of this, pre-judgment interest is denied.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

May 20, 1986
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

MAY 22 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 23 1986
DATE

Ronald J. Parker & S
OFFICE OF ADMINISTRATIVE LAW

al/e

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MARILYN R. SHEEHAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

For the record the Commissioner sets forth the following chronology:

Sept. 1982-Jan. 1983	Petitioner attends classes at Antioch Law School, Washington, D.C. as a part-time student.
Friday, April 15, 1983	Petitioner in car accident. Diagnosis: cervical strain and acute lumbosacral strain.
Friday, June 17, 1983	Petitioner requests leave of absence to attend Antioch Law School full time to "pursue courses relative to legal procedures with regard to the disadvantaged: whether minority; or physically, mentally, or emotionally handicapped." (P-1)
Monday, August 8, 1983	Antioch summer session begins. Petitioner matriculated as a full-time student.
Wednesday, Sept. 7, 1983	Classes commence at Newark public schools. Petitioner reports to work.
Thursday, Sept. 8, 1983	Petitioner's leave approved by Columbus Salley, Executive Superintendent, Newark.
Monday, Sept. 12, 1983	Petitioner marked out as sick from Newark duties.
Tuesday, Sept. 13, 1983	Petitioner marked out as sick from Newark duties.
Wednesday, Sept. 14, 1983	Petitioner marked out as sick from Newark duties.
Tuesday, Sept. 20, 1983	Petitioner takes personal day leave from duties in Newark.

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Wednesday, Sept. 21, 1983	Petitioner marked out as sick from Newark duties.
Thursday, Sept. 22, 1983	Petitioner takes personal day leave from duties in Newark.
Friday, Sept. 23, 1983	Petitioner takes personal day leave from duties in Newark.
Tuesday, Sept. 27, 1983	Petitioner marked out as sick from Newark duties.
Wednesday, Sept. 28, 1983	Petitioner marked out as sick from Newark duties.
Thursday, Sept. 29, 1983	Petitioner marked out as sick from Newark duties.
Friday, Sept. 30, 1983	Petitioner marked out as sick from Newark duties.
Tuesday, Oct. 4, 1983	Petitioner marked out as sick from Newark duties.
Wednesday, Oct. 5, 1983	Petitioner marked out as sick from Newark duties.
Thursday, Oct. 6, 1983	Petitioner marked out as sick from Newark duties.
Friday, Oct. 7, 1983	Petitioner marked out as sick from Newark duties.
Monday, Oct. 10, 1983	School holiday in Newark.
Tuesday, Oct. 11, 1983	Petitioner takes personal day leave from duties in Newark.
Wednesday, Oct. 12, 1983	Petitioner marked out as sick from Newark duties.
Thursday, Oct. 13, 1983	Petitioner marked out as sick from Newark duties.
Friday, Oct. 14, 1983	Petitioner's leave of absence commences.
Feb. 1984	Petitioner breaks leg. Withdraws from program at Antioch.
July 16, 1984	Petitioner advised by Human Resources Services Committee (HRSC) that it would conduct hearing on denial of her increment.

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July 21, 1984	HRSC hearing. Petitioner attended but meeting cancelled for lack of preparedness on part of HRSC.
Aug. 28, 1984	Petitioner advised by HRSC that it would recommend to Board that it withhold her increment.
Aug. 30, 1984	Letter of apology from HRSC to petitioner for failure to Board to advise her as to what action it would take.
Sept. 1984	Petitioner returns to full-time duties with Newark Board.
Sept. 25, 1984	Board advised petitioner that it took action on Aug. 31 to withhold her increment. Reason: "Litigation and/or investigation: abuse of sick leave." (P-8)

The Commissioner notes initially a correction in Finding of Fact No. 13, in the initial decision, ante. Petitioner matriculated as a full-time student in the Juris Doctor program at Antioch School of Law on August 8, 1983, not on October 8, 1983, as suggested by the initial decision. Further, the Commissioner notes that it is not clear from the record when the fall session at Antioch began. Petitioner testified that the fall semester began on September 17, 1983. (Tr. 22) Documents from Antioch do not specify the date that the fall semester commenced, although it is stated therein that August 8, 1983 is the date petitioner assumed status as a full-time, matriculated law student at Antioch Law School.

Having carefully reviewed the record in the instant matter, the Commissioner will first address the notice argument raised by petitioner. The Commissioner finds, as did the ALJ, that while the Board was technically in violation of N.J.S.A. 18A:29-14, petitioner was on notice as to the reasons why the Board withheld her increment. As noted by the ALJ:

> ***Thus, even though the Board did not technically comply with the statutory requirements that petitioner be supplied, within ten days of the Board's action, with a written statement of the reasons as to why the increment was being withheld, considering the total circumstances, I am convinced that petitioner knew or should have known the reasons for the withholding of the increment. While I am in no way sanctioning the action of the Board in failing to comply with the procedural mandates of N.J.S.A. 18A:29-14, this procedural omission, under the totality of the circumstances, seems harmless and shall not warrant setting aside the Board's action. (Initial Decision, ante)

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Notwithstanding this finding, the Commissioner cannot state too strongly his disapproval of the Newark Board's failure to carry out its responsibility to properly notify petitioner as to the reasons why her increment was withheld. The Commissioner agrees with the ALJ that this breach was not a fatal one however. As noted by the ALJ, Hillman v. Bd. of Ed of Caldwell-West Caldwell, 1977 S.L.D. 218, establishes that

> ***The intent of the notification requirement in N.J.S.A. 18A:29-14 is to give the affected employee opportunity to appeal the action to the Commissioner. (at 226)

The Commissioner finds, as did the ALJ, that petitioner suffered no harm by the Board's failure to give notice within the 10-day period. Since petitioner had notice within 25 days and was able to perfect her Petition of Appeal before the Commissioner, the intent of the statute was carried out.

The Commissioner finds there is conflicting evidence in the record as to petitioner's motivation in requesting a leave which raises serious question asto petitioner's integrity. Her letter of June 17, 1983 requesting the leave states that her purpose was

> to pursue courses relative to legal procedures with regard to the disadvantaged: whether minority; or physically, mentally, or emotionally handicapped.
>
> I feel this would benefit the Newark Educaional (sic) System in as much as (sic) it deals with these classes of problems. I work with these classes of problems every day in my position as, (sic) School Psychologist. (P-1)

Petitioner's testimony at the hearing establishes her purpose was otherwise:

> Q. Without reading it, can you tell us why you requested the leave of absence?
>
> A. I wanted to pursue my studies at the Antioch School of Law in export and import banking. (Tr. 7)

The Commissioner is also perplexed as to why, if petitioner's motives were pure, she began her leave from the Newark Board on October 15 when the schedule of classes provided by the Law School indicates clearly that classes began no later than September 17, 1983. The record is unequivocal that petitioner was duly registered for the following schedule of classes from August 1983 to January 1984:

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Civil Procedure	Monday/Wednesday	8 to 10 a.m.
Criminal Law	Monday/Wednesday	6 to 7:30 p.m.
Torts	Monday/Wednesday	10 to 12 noon
Legal Writing and	Friday	8 to 12 noon
Professional Methods	Friday	8 to 10 a.m.

(Tr. 43-46)

The course schedule for Antioch Law School for the 1983 fall semester comports with the above. (R-9) The letter dated October 14, 1985 from the registrar at Antioch further adds:

> "No other classes were scheduled by any of the professors to my knowledge." (R-8)

Notwithstanding this contradiction, the Commissioner finds entirely unpersuasive petitioner's testimony as follows adduced at the hearing, that she attended Antioch Law School during the fall of 1983 in the following fashion:

> A. Yes, Antioch has a policy of not requiring students to attend classes at these particular times.
>
> Q. What particular times:
>
> A. Torts Monday, Wednesday 8, 10. Criminal law Thursday, Friday, 9 to 10. Introduction to professional methods Friday 4 to 6.
>
> What Antioch does is; it has repeat courses of the exact same subjects in the evenings given by the same professor, or other professors in an informal setting. In fact, the professors sometimes have the people go to their apartments and conduct classes there with small groups. That is not a requirement. So they offer informal groups with these professors or professionals, which have tort courses which are acceptable.
>
> They also offer on Saturdays, Sundays, and holidays what they call Intensive School Programs in which everyone of these courses are again offered to first year students who have matriculated in another informal kind of setting. On Saturdays, Sundays and holidays with the same professionals or professors, they offer more than one session when a student may attend.
>
> Also, there's a fourth thing which allows students to conduct seminars with groups of students also either at the school, in

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apartments, at halls, frat houses, sorority houses whereby the same instruction is given.

So there is no policy that a student must attend these courses at this particular time.

MR. LEDER: No further questions.

MR. PORTER: Just one more question.

RECROSS EXAMINATION BY MR. PORTER:

Q. In fact, it's also a policy, is it not, Mrs. Sheehan, you didn't attend any of those courses at that particular time?

A. That's correct.

Q. The particular time is on Saturday?

A. I said to you I did attend on Saturday, two weekends after October 31.

Q. In fact, the only time you ever attended --

A. Saturdays, Sundays and holidays I attended. Here's another --

Q. You did attend two weekend courses after October 31, 1983?

A. No, I attended two weekend courses during September, and also after October the 31st -- I'm sorry, 21st. (Tr. 51-52)

The only evidence petitioner offered in support of the above was an unsworn note from a fellow law classmate stating that she

> attended law classes on Saturdays with Marilyn Sheehan during the school year beginning in August, 1983 at the Antioch School of Law. (P-12)

The Commissioner finds it entirely too coincidental that petitioner's absences during the weeks from September 1, 1983 through October 15, 1983 were for any other reason than to facilitate her attending law classes during the weekdays in Washington, D.C. until the official start of her leave of absence.

The Commissioner finds the doctors' notes provided by petitioner in preparation for this litigation (P-9-11) equally unreliable. Only one of the three notes is date specific, and none indicate at what time petitioner was at the doctors' offices, if at all. Further, none of the three letters suggests that petitioner

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was in any way prevented from attending to her duties with the Newark Board as a result of her being under doctors' care, if indeed she was, during the month of September and the first half of the month of October 1983.

It is well-established in case law that an annual increment in a teacher's salary is not a statutory entitlement. Rather, it is

> in the nature of a reward for meritorious service to the school district. (See North Plainfield Educ. Ass'n v. Bd. of Educ. of the Borough of North Plainfield, 96 N.J. 587, 593.)

While the ALJ is correct in asserting that the Board failed to invoke its conference schedule and other activities related to improving the attendance of employees when it became apparent that petitioner's attendance was less than exemplary, it stands unrefuted in the record that petitioner was guilty of abusing her sick leave entitlement. It is similarly unrefuted in the record that petitioner consciously failed to apprise the Board of her changed circumstances following her broken leg in February 1983 In failing to notify the Board that she had withdrawn from law school as a result of her broken leg, the Commissioner finds that petitioner acted in bad faith and is guilty of conduct unbecoming a teacher. The Board, on the other hand, acted in good faith in acceding to petitioner's request for a leave of absence in advancing her education, despite the fact that she was less than forthcoming in her motivation for attending law school, as noted above.

Thus, notwithstanding the Board's inexcusable omission in failing to follow the step-by-step conference schedule made a part of its policy for improving attendance among its employees, it is the Commissioner's opinion that it would indeed be a travesty of justice to suggest that petitioner earned the meritorious distinction of an annual increment based upon her obvious and remorseless abuse of sick leave entitlement during the early part of the 1983-84 school year and in failing to notify the Board that she had withdrawn from law school in February 1984.

Either way, the factual circumstances strongly suggest a conclusion that the pattern of absences demonstrates a manipulation of sick leave days whereby petitioner 1) avoided submitting doctors' notes by strategically avoiding being absent for more than three days consecutively, 2) interspersed sick leave with personal day leave and, to avoid the appearance of excessive absenteeism, 3) proffered a previous injury as a repeated pretext for most all of her absences following that accident in April 1983.

Consequently, the Commissioner finds and determines that under the totality of circumstances herein, to adopt the conclusion of the ALJ that:

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> [i]n view of respondent's failure to follow its own policies and procedures, this tribunal concludes that respondent's action in denying petitioner's increment was arbitrary and capricious (Initial Decision, ante)

would be to exalt form over substance. Notwithstanding such case law as Stephen H. Shifrinson v. Board of Education of the Township of Marlboro, Monmouth County, decided by the Commissioner June 4, 1984 and Stanford J. Williams and Constance F. Williams v. Board of Education of the City of Newark, Essex County, decided by the Commissioner July 25, 1985, the conduct of petitioner in this matter was so egregious as to warrant the setting aside of previous case law precedent limited to the special circumstances which prevail in this matter.

Consequently, the Commissioner rejects the determination of the ALJ in order to avoid a manifest injustice. The Board's action withholding petitioner's 1984-85 increment is hereby reinstated. The instant Petition of Appeal is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6024-85
AGENCY DKT. NO. 303-8/85

LINDA SORIANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,
Respondent.

Kenneth L. Nowak, Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys)

Nathanya G. Simon, Esq., for respondent
(Schwartz, Pisano & Simon, attorneys)

Record Closed: April 15, 1986 Decided: May 30, 1986

BEFORE **SYBIL R. MOSES,** ALJ:

I

Procedural History

This matter comes before the Office of Administrative Law (OAL) as the result of a petition filed by Linda Soriano, pursuant to N.J.S.A. 18A:6-9, which vests the Commissioner of Education with jurisdiction to hear and determine all controversies and disputes arising under the school laws. The petition, filed on August 29, 1985, alleged that

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the Board of Education of the Township of Bloomfield (Board) arbitrarily, unreasonably and capriciously withheld her salary and adjustment increments for the 1985-86 school year. The Board filed its answer on September 19, 1985, denying the allegations and asking that the petition be dismissed. The matter was forwarded to the OAL on September 24, 1985 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on November 25, 1985. It was determined that the following issue had to be resolved: Whether the denial of the increments by the Board was arbitrary, capricious and/or unreasonable, or did the Board act reasonably and with good cause? Settlement discussions were held between counsel, but the matter was not able to be resolved. A hearing was held in this matter on February 24, February 25 and March 3, 1986, at the OAL, 185 Washington Street, Newark, New Jersey.

Linda Soriano testified on her own behalf. Testifying on behalf of the Board were:

Dr. James McNasby, principal, Bloomfield Senior High School;
Dr. Nicholas Celso, 1984-85 director of curriculum and instruction, Bloomfield School District;
Pasqual Orsini, Jr., assistant principal, Bloomfield Senior High School;
Judy Graef, coordinator, home economics, Bloomfield School District;
Dr. Harold Morris, superintendent of schools, Bloomfield, New Jersey;
John M. Healy, principal, North Junior High School, Bloomfield, New Jersey.

A list of those items marked for identification or into evidence during the course of the hearing is attached to this decision and designated Appendix I.

II

Uncontroverted Background Facts

After a review of the testimony and evidence and the statements of facts in the

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briefs of both attorneys, I have concluded that the ensuing version of the background of this dispute is basically uncontroverted. It is hereby adopted as fact. Linda Soriano is a tenured teaching staff member with the Bloomfield School District. She began teaching in that district in 1970-71 as a home economics, food and clothing teacher in South Junior High School. She is certified in the area of home economics.

Ms. Soriano taught at South Junior High from the 1970-71 school year to the 1982-83 school year. She was observed and evaluated each year. Generally, she received satisfactory notations on observations and evaluations during the period she was teaching at South Junior High School. On occasion those documents did contain unsatisfactory ratings or suggestions that she begin graduate studies or other avenues of professional development.

Ms. Soriano was selected (did not volunteer) to teach at both North and South Junior High Schools for the 1983-84 school year. She was assigned half time to South Junior High School and half time to North Junior High School. Ms. Soriano opposed and filed a grievance in regard to this assignment, but the grievance was denied.

In December 1983, Mr. Healy, the principal of North Junior High School, evaluated Ms. Soriano. In that observation (J-37), Ms. Soriano received satisfactory ratings in all but two areas, teaching techniques and attendance, where Mr. Healy indicated she "needed improvement."

In April 1984, Ms. Soriano filed two grievances involving Ms. Graef and relating to an evaluation. One of the grievances was denied, but one was granted, and an evaluation made by Ms. Graef was removed from Ms. Soriano's personnel record.

In May 1984, Ms. Soriano received her annual report from Mr. Healy. He listed several areas needing improvement, including plan book, instruction and conclusions and laboratory procedures. However, overall, she was rated as satisfactory (J-38). Ms. Graef also evaluated Ms. Soriano at the end of the 1983-84 school year (see, J-39), and found her to be performing at a satisfactory level in all applicable areas.

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It is uncontroverted that the high school needed another home economics teacher for the 1984-85 school year. Ms. Soriano was selected (did not volunteer) to teach at the high school. It is the events of the 1984-85 school year which are in dispute and to which the relevant testimony was directed.

III

Analysis of Relevant Testimony

Ms. Soriano stated that she learned in May or June 1984 that a part-time home economics teacher at the high school was to lose her job and that someone from one of the junior high schools would have to be transferred to the high school. Mr. Soriano made an appointment to see Dr. Morris, superintendent of schools, to tell him that she did not want to be transferred to the high school. She did not want to be transferred because Ms. Graef was department chairman at the high school, as well as being townwide coordinator, and she had filed a grievance against Ms. Graef. Also, Ms. Soriano liked teaching at the junior high level.

Ms. Soriano received a letter from Ms. Graef on June 24, 1984, telling her that she had been transferred to the high school, notwithstanding her desire to stay in the junior high. Ms. Soriano indicated that there were two other home economics teachers in the junior high, one of whom has more seniority and one of whom had less than she. Nevertheless, Ms. Soriano felt that she had taken the brunt of budget cuts in home economics. She tried to file a grievance, even though she knew transfers were involuntary.

When she received the notice of transfer to the high school, Ms. Soriano met with Ms. Graef at the high school. She had no contact with Graef over the summer, although Ms. Graef did offer to work with her and to give her materials to help her in her new classes. Soriano was assigned to teach interior decorating, which she had never taught before, and foods, which she had taught for only one period in the 1970-71 school year and three periods in the 1982-83 school year. Her area is clothing.

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Dr. McNasby observed Ms. Soriano's interior decorating class two weeks into the school year and gave her a poor evaluation. She did not know Dr. McNasby before her assignment to the high school and first met with him in September after that evaluation. Ms. Graef gave her a negative evaluation (J-46), which was not the result of a formal observation, but the result of her plan book not being handed in on time. Ms. Soriano conceded that her plan books were late during the first two or three weeks of school, but argued that she should not have received a negative evaluation for that. She said she did not want to sign J-46, the negative evaluation on the plan book, but that Dr. McNasby threatened her with the loss of her job if she did not sign. She signed it because she was scared and upset, but she did not file a grievance over J-46.

Ms. Soriano was observed and evaluated many times during the 1984-85 school year. The evaluations were all negative, even though Ms. Soriano said she made desperate efforts to incorporate the comments and to improve. In December 1984, Ms. Soriano learned from Dr. McNasby that if she did not show further improvement, there was a chance her increment would be withheld. She was told in the spring that a recommendation would be made that her increment be withheld. In June her increment was denied by a vote of the Board of Education based on its determination that "(she) demonstrated a failure to follow Board procedures, poor planning skills in the classroom, unsatisfactory teaching techniques and a lack of improvement in (her) performance in the classroom." She received formal notice of the withholding of salary and adjustment increments in a letter from the superintendent of schools dated June 10, 1985.

Ms. Soriano feels that her performance during the 1984-85 school year was not inferior or different from her work in prior years when she had received satisfactory evaluations. In her opinion, it is possible that she received negative evaluations because she had filed grievances or because of ulterior motives of the evaluators; especially Ms. Graef. She feels the negative evaluations were the only way the administration could "get at her" for filing the grievances. She says her efforts to improve were not recognized.

Dr. McNasby has been the principal of the Bloomfield Senior High School since February 1, 1979. His credentials are impressive. One of his functions as principal is to

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evaluate the teachers on his staff. It is his policy to evaluate new teachers no later than the third week in September. His first evaluation of Ms. Soriano was on September 24, 1984 (J-44), when he spent the entire period observing her. Dr. McNasby said he became strongly concerned with Soriano's teaching techniques, as he saw basic errors in delivery of instruction. For example, she presented two film strips without an introduction and she wrote words on the board which were misspelled and which really should have been part of an introduction. He felt the class was not prepared for the film strips.

After the observation, Dr. McNasby had a conference with Ms. Soriano in regard to her evaluation. Her responses were either "yes" or "no," and she had no questions. She gave these responses at all conferences during the 1984-85 school year. Dr. McNasby told Ms. Soriano that there would be other chances for evaluation. In fact, he allowed her to select the class he would observe.

His next evaluation (J-49) took place during a Foods I class on October 5, 1984, which was selected by Ms. Soriano. Dr. McNasby thought that the lesson, which concerned hard-boiled eggs, could have gone further. Ms. Soriano could have discussed the nutritional value of eggs, other uses for hard-boiled eggs and the place of eggs in the family budget. His bottom-line opinion was that there was not enough substance during the period to make the class worthwhile.

Dr. McNasby had a preconference with Ms. Soriano before his next observation. He explained to her what he was looking for, and specified introductory and closing activity. He observed her during the entire second period on December 13, 1984. In his opinion, the lesson concerning pie crust was not satisfactory. She still lacked an introduction and summary. He criticized the fact that half the period was spent in "recipe searches," which was really a homework activity and a waste of time in class. He further criticized her asking and answering her own questions. Dr. McNasby's evaluation (J-50) contained a very strong, negative final paragraph. He did this because he was concerned that since home economics is an elective subject, a poor teacher increases the risk that students will not select the area or that students will try to get out. In addition, he found no improvement between the prior observations and the December observation. Ms. Soriano

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completely denied having a problem. In McNasby's opinion, she was not interested in doing anything to improve her performance. Therefore, he had to suggest that her increment might be denied.

Dr. McNasby discussed the negative evaluation filed by Ms. Graef. He told Ms. Soriano that the contract required her to sign the evaluation, and directed her to sign it. She said that she had 24 hours within which to sign it. Dr. McNasby had never heard of such a rule and did not think it was in the contract. She eventually signed J-46.

Dr. McNasby's last observation and evaluation was conducted on March 7, 1985, as documented in J-53. Dr. McNasby observed a Foods I class, which contained many of the same problems which existed in his prior observations. He noted that 15 minutes of class time was spent doing a recipe search, that there was confusion in regard to Ms. Soriano's directions, that there were poor introductory activities and that Ms. Soriano answered her own questions.

In his annual evaluation, Dr. McNasby summarized the 1984-85 evaluations and recommended that Ms. Soriano's increment be withheld. This was the first time he had ever done this. Dr. McNasby decided to do so because he saw no improvement, no interest in improving and a continuing denial that there were any problems. Dr. McNasby emphasized that the grievances filed by Ms. Soriano played no role whatsoever in his decision to recommend the withholding of her increments. Filing of grievances is part and parcel of public sector labor relations, and is normal and routine. Dr. McNasby concluded that Ms. Soriano lacked basic teaching techniques in regard to introduction, review, closing and questioning. Dr. McNasby had no recollection of speaking with Ms. Graef about Soriano before his first observation in September 1984. He did not look at Soriano's personnel file before evaluating her in order to avoid any predisposition.

Dr. McNasby did speak to Ms. Graef after the September 24 observation to tell her of the problems he saw. He recalls Ms. Graef telling him of the lesson plan problems, and it was he who suggested that Ms. Graef use the form to write up her criticism regarding the late lesson plans. Dr. McNasby did not dispute the fact that Ms. Soriano had received

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satisfactory evaluations in prior years, including an evaluation in June 1984, which indicated she had good techniques. All he knew was that his observations indicated that she had continuing problems with planning, introduction, summary and questioning students.

It was Dr. McNasby's bottom-line opinion that Ms. Soriano is the worse tenured teacher in the district. He was "flabbergasted" during the December 1984 observation at her inability to deliver what he was looking for, even though he had had a preconference with her to specifically describe what he wanted. He was shocked that she had the students do a recipe search, which is not a serious assignment, when an observer was present.

Before preparing J-57, the annual evaluation for Soriano for 1984-85, Dr. McNasby spoke to Ms. Graef, who updated him in regard to her past evaluations, and to Dr. Celso about his evaluation. In his opinion, Dr. Celso's observation was in tune with his observations. Dr. McNasby was pressed hard on cross-examination, and answered the questions directly. He was not evasive and his demeanor was sincere and open. He was a credible witness. Dr. Celso, Ms. Graef and Dr. Morris were also credible, as they answered the questions honestly and put things in context. They impressed this judge with their honesty and their desire to be fair.

Dr. Celso was asked to evaluate Ms. Soriano by the superintendent because of the bad evaluations she had received from Dr. McNasby and Ms. Graef. He alerted Ms. Soriano of the impending evaluation by memo. In his opinion, there was no instructional purpose to the program and the class he observed was not challenging, was not well planned and was not well conducted. Although the mechanical aspects of preparation and cleaning up were sufficient, there was no real give and take of information. Dr. Celso conferred with Ms. Soriano and reviewed his concerns. He said that while she was not pleased in with his evaluation, she thought he was fair in his comments and she did subsequently follow some suggestions he made.

The testimony of Judy Graef, who is chair of the home economics department and

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teaches same at the high school and is the district-wide coordinator for home economics in Bloomfield, was crucial. In May 1984, Ms. Graef knew she would be getting an additional staff member in the high school from one of the junior high schools, but did not know which teacher would be assigned. Assignments are based on student enrollment and the number of sections taught. No teacher in the home economics department teaches just one course, as they all have to teach at least two courses in separate areas.

In June 1984, Ms. Graef learned that Linda Soriano was assigned to the high school. She met with Soriano at the end of June, showed her her rooms, gave her textbooks and a course file and showed her the necessary support material. Graef introduced her to two other teachers, one of whom offered to work with Soriano in regard to the food lab and the teacher manual. Ms. Soriano declined and said she would get the manual in September. She did not take advantage of Ms. Graef's offer of assistance during the summer. Graef knew that Soriano would have preferred to teach clothing, but said that that was impossible due to scheduling problems. If Soriano taught only clothing, this would affect teachers in the other areas.

Ms. Graef began evaluating Ms. Soriano in 1978-79 at the junior high school. Even at that time she had some concerns with her plan book and development of lessons. This concerned developed over time, although there was improvement during the years between 1978 and 1984.

In September 1984, Ms. Graef had a meeting with the home economics teachers in the high school, explaining her expectations in regard to plan books. The plan books have to be turned in every Friday afternoon or Monday before homeroom, and must state objectives, methods, tests and other relevant instructional material. Ms. Graef said Soriano's were not turned in on time and lacked content. The plan book is a guide to the course. It is used in case a teacher is absent and also to document what has happened in class and to give direction for future lessons.

J-46, the negative evaluation, was generated by three late plan books. Graef said she spoke to Ms. Soriano before putting her criticism in writing, but the meeting was not

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productive. Ms. Graef's 1984-85 evaluation was done after a preconference with Soriano, during which she told Ms. Soriano what was expected when she was observed. Ms. Graef was concerned with Ms. Soriano's planning, questioning techniques, methodology and introduction and summary. After the evaluation (S-51), Ms. Graef conferred with Soriano in regard to areas of improvement which were needed.

In April 1985, Ms. Graef and Dr. McNasby discussed withholding Ms. Soriano's increment. In Ms. Graef's opinion, while the June 1984 evaluation had been very good, Ms. Soriano's performance had been very erratic over the years Ms. Graef had been evaluating her and, in the 1984-85 school year, her performance changed to bad. In Ms. Graef's opinion, the withholding of her increment was supported by the fact that little or no improvement was shown in areas where she needed improvement, despite suggestions. It was supported by a lack of acceptance by Ms. Soriano of recommendations and services to assist her.

Ms. Graef was pressed on the grievances Ms. Soriano filed concerning her observation report. This resulted in Graef's report being withdrawn and not being put into Ms. Soriano's file. I watched Ms. Graef very carefully during pressing cross-examination and did not detect any note of vindictiveness or bitterness, as she conceded that the observation had not been filed in the appropriate manner and that she had been directed to reobserve Ms. Soriano. I conclude that those poor evaluations of 1984-85 by Ms. Graef were not the result of her desire to "get back at" Ms. Soriano, but rather were the result of her objective, professional review of Soriano's teaching performance.

Dr. Morris, the superintendent of schools, discussed his relationship with Ms. Soriano, beginning with her objections to being reassigned to both South and North Junior High School for the 1983-84 school year. Dr. Morris denied Ms. Soriano's grievance objecting to the transfer.

Dr. Morris also reviewed Ms. Soriano's reassignment to the high school for 1984-85. She was selected after a review of the recommendations of the department chairman, the principal and the assistant superintendent, and after a review of enrollment needs. It was

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clear that only one teacher was needed in each junior high school to teach home economics. It was therefore necessary to reassign one of the junior high school teachers to the high school because there was a need for another full-time teacher at the high school. It was his recommendation to reassign Ms. Soriano to one full-time job rather than two half-time jobs at each junior high school. He knew she was unhappy with the transfer, but felt it was better that she have a full-time position. Dr. Morris said that seniority is not a factor in making reassignments or transfer, as it is only used to determine reductions in force (RIF). Assignments are based on need, although he does consider the requirements and desires of the teachers.

Dr. Morris was quite credible when he said that he could not honor her request to stay in the junior high school because the home economics department is so small and therefore he has less flexibility. He therefore rejected her argument that because she had seniority, she should be able to choose to stay at the junior high. He felt she was certified and a qualified professional and therefore assigned her to the high school. Dr. Morris was quite adamant that he did not speak with Ms. Graef about transferring Ms. Soriano to the high school until after he determined to make the reassignment. He denied her grievance in regard to the transfer to the high school.

In the fall of 1984, Dr. Morris reviewed Soriano's first observation report (J-44) and was concerned with the unsatisfactory marks. He felt it was an isolated episode and did not have any specific discussions with Dr. McNasby. He then reviewed Ms. Graef's evaluation on the lateness of the plan books (J-46). He received a call from Dr. McNasby because Ms. Soriano did not want to sign it. He told Dr. McNasby to instruct Soriano that failure to sign is a violation of the contract because the evaluation would go into her file anyway. He denied a grievance filed over the use of this form.

Dr. Morris reviews and decides many grievances during the course of the year. Grievances are not used as a basis to discipline teachers and were not the basis for poor evaluations of Soriano during the 1984-85 school year. However, Dr. Morris did review J-49 and subsequent evaluations as he was most concerned about the development of a pattern of negative evaluations. He discussed J-51, Graef's evaluation of Soriano, with

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Ms. Graef and asked what was being done to help Ms. Soriano improve.

Ms. Soriano raised the issue of harassment every time he spoke to her, but he felt it was an excuse that she used in order not to respond to the recommendations in the evaluations. Dr. Morris was most concerned with the thought that Ms. Soriano was deliberately not following up on the recommendations for improvement as a way of getting out of the building. That was why he asked Dr. Celso to observe her, as he respected Celso's training, judgment and objectivity.

Dr. Morris discussed Dr. Celso's evaluation with him and Dr. McNasby's evaluations with him. When he received the recommendation from Dr. McNasby to withhold Ms. Soriano's increment, he discussed it with Celso, Graef and McNasby at great length. He felt it was an appropriate recommendation due to the lack of progress and effort by the tenured teacher in response to a pattern of negative evaluations. Dr. Morris pointed out that if nontenured teachers had received similar negative evaluations, they would no longer be with the system. He conceded there was a big difference between Soriano's performance in prior years, especially the good evaluation in June 1984, and the poor evaluations between September and March of 1984-85. However, he had great respect for Ms. Graef and Drs. McNasby and Celso as evaluators and relied on their conclusions. He personally reviewed Ms. Soriano's personnel file and prepared R-1, the recommendation to the Board which summarizes the information the Board had to consider when it decided to withhold Ms. Soriano's increment.

Mr. Healy, principal of North Junior High School, evaluated Ms. Soriano in the 1983-84 school year. He found very little class participation and tried to assist her in improving her instruction. She agreed to follow his recommendations. He gave her an overall satisfactory on the annual report, because she had the potential to become a better teacher if she followed his recommendations during the coming year.

Mr. Orsini, assistant principal at the high school, reviewed the problems he had with Ms. Soriano concerning her lack of timeliness in giving withdrawal notices without first warning the students, and concerning lack of parental permission slips for students she

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directed to go to the supermarket to get ingredients for class. In his opinion, Ms. Soriano did not follow permission slip procedures for field trips and did not follow the attendance policy for individual classes, which requires that a teacher give warning notices early, before sending withdrawal slips. She was the only teacher who received memos concerning the lack of warning notices.

IV

Findings of Fact re Issues in Controversy

After having reviewed and considered the testimony and evidence, and after having considered the demeanor and credibility of all the witnesses, including petitioner, and after having reviewed the cogent posthearing briefs filed by both attorneys, and after having reviewed the applicable law, I make the following findings of fact:

1. Petitioner, Linda Soriano, has been a tenured teaching staff member employed by the Bloomfield Board of Education from 1970 to the present time.

2. From 1978 to the 1983-84 school year, Ms. Soriano received generally satisfactory evaluations, although certain problems did begin to crop up in her evaluations. Concerns were voiced about her development of lessons and plan books over time, but improvements were made as a result of certain suggestions.

3. Ms. Soriano was assigned to both North and South Junior High School, half-time at each school, for the 1983-84 school year. She filed a grievance protesting this assignment, which was denied.

4. In April 1984, Ms. Soriano filed two grievances, both involving Ms. Graef and both relating to an evaluation (J-46). As a result of the grievances, Dr. Morris took action to ensure that procedures conform to the contract and had Ms. Graef withdraw the observation in question. Ms. Graef was instructed to

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conduct another evaluation, which she did (J-39). At that time, Ms. Graef found Ms. Soriano performing at a satisfactory level in all applicable areas.

5. In June 1984, Ms. Soriano was reassigned to teach full-time in the home economics department in the high school. Ms. Soriano did not want to teach in the high school and filed a grievance protesting this assignment. The grievance was denied.

6. Ms. Soriano did not take advantage of assistance offered to her by Ms. Graef, over the summer of 1984, to review source materials and to prepare for teaching foods and interior decorating in the high school for the 1984-85 school year.

7. The observations and evaluations in September, October, December and March 1984 and 1985 detailed the problems which existed in Ms. Soriano's teaching performance. The specific criticisms and weak points observed, which were documented by Dr. McNasby, Dr. Celso and Ms. Graef, led to the following conclusions:

   A. Ms. Soriano had unsatisfactory opening and closing techniques.

   B. Ms. Soriano showed a lack of planning in the structure of her lessons and in the classroom.

   C. Ms. Soriano's poor lesson plans in her plan book failed to correlate with classroom activities.

   D. Ms. Soriano made poor use of instructional time.

   E. Ms. Soriano had poor methodology and lacked proper questionning technique.

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8. Ms. Soriano was given an opportunity to improve as a result of specific suggestions made by the evaluators during the 1984-85 school year. She was specifically alerted that her increment might be withheld if she did not improve. Notwithstanding these suggestions and warnings, there was a complete lack of improvement in her classroom performance and a lack of interest in responding to improvement. She did not take advantage of opportunities to improve during the 1984-85 school year.

9. The grievances which Ms. Soriano filed, protesting her reassignments to North and South Junior High Schools and to the high school and the 1984 Graef observation regarding the use of an evaluation form for late plan books, had nothing whatsoever to do with the negative evaluations received by Ms. Soriano.

10. The facts underlying the conclusions of Dr. Morris and the Board of Education are all the weak points detailed in the 1984-85 evaluations. Those points are hereby found to be fact and are incorporated by reference as if set forth at length.

11. As a result of the underlying problems and the conclusions regarding the problems with Ms. Soriano's teaching at the high school in 1984-85, Dr. Morris recommended to the Board of Education that it withhold her increments for the 1985-86 school year.

12. There is no evidence whatsoever to support the allegation that Dr. McNasby recommended that Ms. Soriano's increments be withheld in retaliation for the grievances which had previously been filed by Ms. Soriano.

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V

Conclusions of Law

It is undisputed that a Board of Education has the right to withhold employment and adjustment increments "for inefficiency or other good cause . . . or both . . . " N.J.S.A. 18A:29-14. While the Board has the authority to withhold those increments, see Francis Folardo v. Board of Education of the Township of Mahwah, Bergen County, 1975 S.L.D. 830, and Francis Dullea v. Board of Education of the Borough of North Vale, Bergen County, 1978 S.L.D. 558, aff'd, State Board, 1978 S.L.D. 563, such power is not absolute, but is subject to procedural safeguards. See, Zucaro v. Board of Education of Red Bank, Monmouth County, 1980 S.L.D. 586, 592, aff'd, State Board, 1980 S.L.D. 594.

The authority of the Commissioner of Education to examine a Board's decision to withhold an increment was clearly articulated in Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960). The Kopera court directed the Commissioner as follows:

> . . . [W]e think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant. Id. at 296-297.

The Appellate Division held that the Commissioner could only review whether the Board had a reasonable basis for their conclusions. Id. at 295-296. It should be noted that upon remand, the Commissioner of Education added a further dimension of consideration in such matters when he said:

> . . . To withhold an increment on such a salary schedule, it is not necessary to show shortcomings in the part of the teacher sufficient to justify dismissal under the Teacher Tenure Act.

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1960-61 S.L.D. at 62. In accord, Trautwein v. Board of Education of the Borough of Boundbrook (N.J. App. Div., April 8, 1980, A-2773-78) (unreported), certif. denied, 84 N.J. 469 (1980).

Applying the rationale and guidelines of Kopera to the case at bar, it is clear that Ms. Soriano had the burden of proof to show (1) the underlying facts were not as claimed by Dr. McNasby, Ms. Graef, Dr. Celso, Dr. Morris and the Board, and (2) that it was unreasonable, arbitrary and/or capricious for the Board to conclude to withhold her increments based on those facts. Soriano is contending that the underlying facts asserted by the Board, namely that she demonstrated a failure to follow Board procedures, demonstrated poor planning skills in the classroom, demonstrated unsatisfactory teaching techniques and showed a lack of improvement in her performance in the classroom, were false. To do so, she relies on the fact that she had satisfactory evaluations up to and including the 1983-84 school year from her prior principals and from Ms. Graef, the district-wide coordinator. Ms. Soriano contends that she has explained away the reasons for the withholding of her increments by showing that it was a retaliatory move as a result of grievances she filed in 1983 and 1984.

The reasons given by the Board for its actions are set forth as follows:

1. Demonstration of failure to follow Board procedures

2. Poor planning skills in the classroom

3. Unsatisfactory teaching techniques

4. Lack of improvement in her performance in the classrooms

If these reasons are grounded in fact, they certainly would support a withholding of the increments. The testimony of the evaluators for the 1984-85 school year, when coupled with the testimony of Dr. Morris, Mr. Healy and Mr. Orsini, clearly establish that the

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underlying facts are as Dr. McNasby, Ms. Graef and Dr. Celso saw them and as reflected in her evaluations. There is not a scintilla of evidence in this record that the reasons were fabricated by Dr. McNasby and Ms. Graef to retaliate against Ms. Soriano because she filed grievances and prevailed, in one instance, on a grievance concerning a Graef observation. The grievances, especially the successful one regarding the Graef observation in 1984, involved procedural technicalities and played no part whatsoever in Dr. McNasby's thought process. He was a credible and honest witness, as was Ms. Graef. I further note that deficiencies in Ms. Soriano's performance had been pointed out at one time or another between 1978 and 1984, although no disciplinary action had previously been taken.

It is clear that the withholding of increments is the mildest statutory disciplinary measure available to a board of education. It is unnecessary to martial the quantum of proof which is needed to justify suspension or dismissal. See, Hillman v. Board of Education of Caldwell-West Caldwell, Essex County, 1977 S.L.D. 218. Furthermore, there is no obligation on the Board to carry the burden of proof in regard to its reasons for withholding the increment. Trautwein.

I therefore conclude that the first criterion established by Kopera, 60 N.J. Super. at 296, has been met. The underlying facts were as Drs. McNasby and Celso and Ms. Graef claimed they were. There exists sufficient competent and credible evidence in the record before me to show that performance problems did exist during the 1984-85 school year. I further conclude that the second Kopera criterion has been established. It is obviously not unreasonable, arbitrary or capricious for the Board to conclude, based on the proven underlying facts, which were noted by expert professional evaluators, who have been found to be without bias and who were familiar with the problem, to recommend that the increments for the 1985-86 school year be withheld. Even if I would, theoretically, conclude differently, based on the facts presented to the Board, I may not substitute my judgment for that of the Board, so long as the Board rests its decision on a reasonable basis, and so long as it is not arbitrary and capricious. Ibid.

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It is not my function to second-guess or reevaluate the performance of Ms. Soriano. It is merely my function to evaluate whether the basis upon which the action of the Board was made was reasonable under the circumstances. A careful review of all the documents and testimony fully supports the determination of the Board of Education. The evaluations were reasonably and consistently performed, the persons performing the evaluations were properly certificated and were top-notch evaluators. Ms. Soriano was given more than ample opportunity to correct her deficiencies and to demonstrate improvement. Despite additional consideration, including preconference information and opportunities to select appropriate teaching periods for observation, Ms. Soriano's classroom techniques and skills did not improve and were not satisfactory.

The problems relating to dismissal notices and permission slips are de minimus, when compared to the overall problems exhibited by Ms. Soriano. They play no part in my conclusion here.

I therefore conclude that the Board of Education did not violate N.J.S.A. 18A:29-14 in withholding petitioner's salary increments for the 1985-86 school year. I further conclude that the Board of Education did not act in an arbitrary, capricious or unreasonable manner. The reasons presented were sufficient to support the recommendation to withhold the increment.

Accordingly, it is hereby **ORDERED** that this petition be, and is, hereby **DISMISSED.**

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

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

May 30, 1986
DATE

SYBIL R. MOSES, ALJ

MAY 30 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 3 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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LINDA SORIANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon a careful review of the record of this matter, the Commissioner agrees with the findings and conclusion of the Office of Administrative Law that the Bloomfield Board did not act in an arbitrary or capricious manner nor in violation of N.J.S.A. 18A:29-14 in withholding petitioner's salary increments for the 1985-86 school year.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NOS. EDU 4674-84
and EDU 5296-85
AGENCY DKT. NOS. 231-6/84
and 230-7/85
CONSOLIDATED

GARY N. PANAROTTO,
Petitioner/Cross-Claim Intervenor,
v.
BOARD OF EDUCATION
OF THE BOROUGH OF EMERSON,
Respondent,
and
DONNA J. BECKER,
Intervenor/Cross-Claimant.

Louis P. Bucceri, Esq., for petitioner (Bucceri and Pincus, attorneys)

Irving C. Evers, Esq., for respondent (Parisi, Evers & Greenfield, attorneys)

Alfred F. Maurice, Esq., for Intervenor/Cross-Claimant

Record Closed: April 11, 1986 Decided: May 27, 1986

BEFORE **ELINOR R. REINER**, ALJ:

Procedural History

On June 21, 1984, Gary N. Panarotto, employed by respondent as an elementary art teacher, filed a petition of appeal with the Commissioner of Education, claiming that respondent's action reducing his employment to part time for 1984-85 was a violation of his tenure and seniority rights. Respondent filed its answer to the petition on June 25,

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1984, contending that its action was proper and that the petition should be dismissed. On July 3, 1984, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held in this matter on August 20, 1984, during which it was established that the issue to be determined was whether respondent's reduction of petitioner's employment from full time to four-fifths time was in violation of his tenure and seniority rights. Prior to the hearing held in this matter, and at the request of the parties, this judge ordered that this matter be placed on the inactive list. On October 1, 1985, it was agreed that the matter would be taken off the inactive list, motions for summary decision would be forthcoming and a hearing was scheduled for December 6, 1985. Subsequent thereto, Donna Becker moved to intervene and cross-claim. On November 22, a conference call was held during which it became apparent that, inasmuch as Becker had recently received notice of the appeal and retained an attorney, a restructuring of the time deadlines and an adjournment of the scheduled hearing date was necessary.

On January 16, 1986, this judge granted Donna Becker permission to enter the litigation as an intervenor and to file a cross-claim against respondent. It was further ordered that petitioner be allowed to intervene in the cross-claim and to file an answer and affirmative defenses thereto. As a result of the need to supply answers to supplemental interrogatories, an extension of time to file summary decision motions was granted. It was determined by conference call of March 24, 1986 that in response to petitioner's motion for summary decision, responsive briefs would be due on or before April 2, 1986 and any reply by April 11, 1986.

It is to be noted that during the interim of the above proceeding, on July 19, 1985, petitioner filed a second petition claiming that respondent's action in reducing his employment to part time for 1985-86 was a violation of his tenure and seniority rights. On August 29, 1985, respondent filed an answer again alleging that its action was lawful and proper and that the petition should be dismissed. On August 21, 1985, that matter was

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transferred to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 11, 1985, during which this case was consolidated with the previously filed matter for purposes of hearing and decision.

Undisputed Facts

Pursuant to the prehearing orders, the parties provided the court with a stipulation as to the pertinent facts and documents regarding this matter. As may be gleaned from a review of the stipulation, the relevant facts essential to a determination of the issues raised herein are uncontroverted. The stipulation of facts, as well as the attached exhibits (A, B and C respectively), is incorporated by reference herein and constitutes this tribunal's findings of fact. The stipulation is as follows:

1. Petitioner is a tenured teacher of art in respondent's employ.

2. Petitioner has been employed as a full-time teacher of art by respondent as follows:

April 1, 1971 - June 30, 1971	Secondary art
1971 - 1972	Secondary art
1972 - 1973	Secondary art
1973 - 1974	Secondary art
1974 - 1975	Secondary art
1975 - 1976	Secondary art
1976 - 1977	Secondary art
1977 - 1978	Secondary art
1978 - 1979	Secondary art
1979 - 1980	Secondary art
1980 - 1981	Elementary art
1981 - 1982	Elementary art
1982 - 1983	Elementaty art
1983 - 1984	Elementary art

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3. On April 13, 1984, petitioner received notice that his position for 1984-85 will be a part-time 4/5 position as teacher of art due to a reduction in force.

4. As a result of said action, petitioner served as a 4/5 teacher of art at the elementary level for 1984-85.

5. On April 24, 1985, petitioner received notice that his position for the 1985-86 school year was being terminated and/or offered on a part-time basis due to a reduction in force.

6. As a result of said action, petitioner now serves as a 3/5 teacher of art at the elementary level for 1985-86.

7. Ms. Donna Becker is a tenured teacher of art in respondent's employ.

8. Ms. Becker has been employed by respondent as follows:

March 24, 1969 - June 30, 1969	Full time	Elementary Art
1969-70	Full time	Elementary Art
1970 - 71	Full time	Elementary Art
1971 - 72	Full time	Elementary Art
1972 - 73	Full time	Elementary Art
1973 - 74	Full time	Elementary Art
1974 - 75	Full time	Elementary Art
1975 - 76	Full time	Elementary Art
1976 - 77	Full time	Elementary Art
1977 - 78	Full time	Elementary Art
1978 - 79	Maternity Leave Without Pay	
1979 - 80	Maternity Leave Without Pay	
1980 - 81	Maternity Leave Without Pay	
1981 - 82	Half-Time	Elementary Art

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1982 - 83	Half-Time	Elementary Art
1983 - 84	Half-Time	Elementary Art
1984 - 85	Half-Time	Elementary Art
1985 - 86	Half-Time	Elementary Art

9. Respondent's school district consists of a high school housing grades 7-12, departmentalized, and two elementary schools housing grades 3-6 and grades 2 and below, respectively.

10. During the 1979-80 school year, respondent abolished one (1) art teaching position in its high school (grades 7-12), effective for 1980-81. Since petitioner Panarotto was the least senior art teacher at the high school, he was reassigned, based on seniority as then determined under the regulations then in effect, to a full-time elementary art position for 1980-81.

11. Deleted.

12. Annexed hereto and made part hereof as Exhibit A is the seniority list of respondent as of June, 1984.

13. Both petitioner and Donna Becker are duly certified as teachers of art for all grade levels.

14. Exhibits B and C. Exhibit B is a letter dated April 30, 1980 to Panarotto from Superintendent, Harry Jaroslaw. In that letter Jaroslaw referred to Panarotto's letter of April 17, 1980 in which he exercised seniority rights in relation to the staffing of art teachers for 1980-81. Jaroslaw indicated he had decided that as of September 1, 1980, Panarotto would be assigned full time to the elementary schools where he would work under the supervision of Mr. Patrick Villano, Principal of Linwood and Mrs. Ann B. Taylor, Principal of Memorial School.

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Discussion

I. Seniority Regulations

It is clear based on the above undisputed facts that summary decision in the instant case is appropriate. Judson v. Peoples Bank & Trust Co., 17 N.J. 67 (1954). The issue in the instant case is essentially a legal one as to which seniority regulations apply. In fact, there is no dispute that if the new seniority regulations (the new version of N.J.A.C. 6:3-1.10) are applicable to Panarotto, then Panarotto's claims must fail. If, however, the seniority decision is controlled by the pre-1983 version of the regulations, then Panarotto's claims must be upheld as to 1984-85 and 1985-86. An analysis of the history of employment in the district discloses the fact that petitioner's claims must be upheld.

It is apparent from a review of the stipulation of facts (and the parties did not seek in any manner to avoid the obvious meaning of the words and explain that the situation was different than as stated) that petitioner was informed in 1980 that his full-time high school art teaching position for 1980-81 was being abolished. As a result of that action, he exercised his seniority rights (Exhibit B) and "bumped" an elementary art teacher to be reassigned to a full-time elementary art position for 1980-81. He was able to do that because the regulations at that time permitted his secondary level service to be credited over the entire K-12 range.

As of September 1981, when Becker returned from maternity leave, Panarotto had 10.3 years of service in the district as an art teacher. One of those years was at the elementary level and 9.3 were at the secondary level. As of September 1981, Becker had 9.325 years of service, all in elementary art, plus three years of unpaid leave for child rearing purposes. Becker's leave time does not count for seniority under either the old or the new versions of N.J.A.C. 6:3-1.10, and the contrary is not suggested. See, current version of N.J.A.C. 6:3-1.10(b); see, pre-1983 version of regulations as interpreted in Mary E. Comaskey v. Bd. of Ed. of Fort Lee, 1981 S.L.D. 25 (Jan. 9, 1981 Comm'r of Ed.), aff'd St. Bd. of Ed. (May 6, 1981).

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As is stated by petitioner, it is clear that in 1981 Becker was less senior than Panarotto in the area of art teaching. This is true because the pre-amendment rules categorized seniority by certifications, and did not limit the seniority to grades taught. Since both parties had K-12 art certificates, Panarotto's longer period of creditable service (10.3 as opposed to 9.325) had to prevail. Thus, it is clear that in 1981 respondent correctly assigned Becker to a part-time position.

The question at issue is whether the new regulations are to be applied to the 1984 and 1985 reductions in force (RIFS) or whether the pre-amendment version of N.J.A.C. 6:3-1.10 applies to determine Panarotto's seniority. For, if the new regulations are applied to the 1984 and 1985 RIFS, Panarotto's lesser term of service in the elementary area (four years as of June 1984) would be insufficient to take elementary art work away from Becker (with a potential 10.825 years in that elementary category as of June 1984). The same would be true as of June 1985, when Panarotto would hypothetically have had 4.8 years in the elementary area while Becker would have had a potential 11.325 years.[1]

In order to resolve whether the old or the new regulations are to be applied to the instant case, it must be determined whether Panarotto was subject to a RIF for the first time after September 1983. For, in situations where individuals are subject to a RIF for the first time after September 1983, the decisional law, to be discussed herein, has established that the new rules apply. Hill v. Bd. of Ed. of West Orange, OAL DKT. EDU 4113-84 (Dec. 5, 1984), adopted, Comm'r of Ed. (Jan. 21, 1985), aff'd St. Bd. of Ed. (May 1, 1985), aff'd, N.J. App. Div., Feb. 19, 1986, A-4355-84T1 (unreported). However, when an individual was the subject of a RIF and was forced to assert seniority rights prior to September 1983, that individual continues to accrue seniority on the basis of what was ascertained to be his or her pre-amendment rights, even after the new rules took effect. Felper v. Bd. of Ed., West Orange, OAL DKT. EDU 5942-84 (Dec. 13, 1984), adopted Comm'r of Ed. (Jan. 28, 1985).

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[1]It is undisputed that service on a part-time basis is prorated for seniority purposes. Thus, Becker has earned .5 years of seniority for each year starting in 1981-82 and Panarotto gained .8 while a 4/5 employee in 1984-85 (if his reduction is found to be valid).

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With this backdrop, the import of respondent's position that petitioner was not the subject of a RIF in 1980 is apparent. However, respondent's position that Panarotto was not the subject of a RIF in 1980 because he suffered no loss is contrary to that taken by the State Board and Commissioner of Education. A review of Fallis v. Plainfield Bd. of Ed., OAL DKT. EDU 5934-84 (Jan. 16, 1985), adopted, Comm'r of Ed. (Mar. 4, 1985), aff'd St. Bd. of Ed. (Sept. 4, 1985), in which the facts are similar to petitioner's 1980 situation, is illustrative. Fallis' position of assistant high school principal (one of two at the time) was abolished in an administrative reorganization in 1981. Fallis at 2. As a result of being less senior than the other assistant principal, Fallis was transferred to the position of middle school assistant principal in the same district but with no reduction in salary. Ibid. When the senior assistant principal retired in 1984, Fallis attempted to assert preferred eligibility to the position because he contended he had been the subject of a RIF in 1981. Id. at 4. The administrative law judge (ALJ) was unpersuaded by the Board's argument that Fallis had merely been reassigned within a category and ordered his placement in the vacant position. Id. at 13. The Commissioner in adopting the ALJ's decision stated that:

> [t]here is no question that a reduction in force occurred when the Board acted to abolish one of the two high school assistant principal positions . . . The judge is correct when stating seniority comes into play when a reduction in force occurs. Since petitioner was clearly subject to abolishment of his position as part of a reduction in force for reasons of economy and administrative reorganization, his seniority rights pursuant to N.J.A.C. 6:3-1.10 become the controlling issue, irrespective of the fact he was neither dismissed nor reduced in salary. Commissioner's decision at 18.

See also, Marshall v. Neptune Tp. Bd. of Ed., OAL DKT. EDU 5940-84 (Feb. 22, 1985), rejected Comm'r of Ed. (Apr. 8, 1985), rev'd, St. Bd. of Ed. (Jan. 8, 1986). Thus, it was stated in Marshall that, "[o]nce a board has properly acted to abolish a position, the reduction in force has been accomplished and seniority rights are triggered." St. Bd. decision, at 5. Since petitioner's full-time secondary art teaching position was eliminated in 1980, precedent supports the conclusion that he was the subject of a RIF.

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Further, the parties agree that seniority rights are inchoate until triggered by a RIF. Principe v. Woodbridge Tp. Bd. of Ed., OAL DKT. EDU 6238-84 (Mar. 7, 1985), adopted Comm'r of Ed. (Apr. 22, 1985), aff'd St. Bd. of Ed. (Aug. 9, 1985); Fallis v. Plainfield Bd. of Ed.. See also, Howley v. Ewing Bd. of Ed., 6 N.J.A.R. 509, 521 (1982), adopted Comm'r of Ed. (Dec. 20, 1982), aff'd St. Bd. of Ed. (Jun. 1, 1983) wherein it was stated that seniority is a concept which applies only to certain rights of tenured personnel and has meaning only when a reduction in the employment force is necessary. Indeed, it is the Commissioner's position that a teacher is not entitled to a determination of seniority if he has not been the subject of a RIF. Fazen v. Manville Bd. of Ed., OAL DKT. EDU 3359-84 (Sept. 7, 1984), mod. Comm'r of Ed. (Oct. 24, 1984). Thus, and in this context it must be stated that since petitioner would have been unable to "bump" another teacher without a determination of his seniority, the fact of that occurrence leads to the conclusion that a reduction in force did occur in 1980. Further, and as pointed out above, the parties did not seek in any meaningful manner to persuade this tribunal that petitioner had not been the subject of a RIF.

Once it is determined that a RIF did occur prior to the effective date of the new regulations, the result is clear. There is no doubt that the Commissioner is empowered to establish standards for determining seniority in various fields or categories. N.J.S.A. 18A:28-13. Prior to September 1, 1983, the promulgated regulations permitted teachers possessing K-12 certificates to earn seniority above the elementary and secondary categories, even if those individuals had actually taught at only one level. See Felper v. West Orange Bd. of Ed. After that date, however, seniority would accrue only at the level in which a teacher was actually employed. N.J.A.C. 6:3-1.10(l)15iii and 16ii.

In revising the regulations, it was recognized that the changes would have a direct effect on a significant number of teachers. Clearly, a teacher who had been the subject of a RIF for the first time after the new regulations became effective would be governed by those regulations and acquire seniority only at the levels actually taught. Hill v. West Orange Bd. of Ed.; Principe v. Woodbridge Tp. Bd. of Ed.; Camilli v. Northern Highlands Bd. of Ed., OAL DKT. EDU 5752-84 (Nov. 14, 1984), adopted Comm'r of Ed. (Jan. 3, 1985), aff'd St. Bd. of Ed. (May 1, 1985). However, in order to minimize the impact

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of the change, the Department of Education adopted the position that if a teacher's seniority had been determined under the old regulations, the rights so obtained would not subsequently be lost. Thus, it was stated that, "persons who had been the actual beneficiaries of the old rules and regulation's dual endorsements prior to September 1, 1983 will remain undisturbed for the future in those seniority rights they have obtained under those rules." Felper at 3. This posture has been consistently interpreted as meaning that a teacher who held a K-12 certificate and who had been subjected to a RIF prior to September 1, 1983 acquired seniority at both the elementary and secondary levels. Felper at 4; See also, Cohen v. Emerson Bd. of Ed., OAL DKT. EDU 5560-84 (July 18, 1985), mod., Comm'r of Ed., (Sept. 3, 1985), which clarifies this conclusion.

In Cohen, petitioner had suffered a pre-1983 reduction from 4/5 to half time. Subsequently, in 1984, her time was again reduced. She challenged this second reduction, claiming that the initial reduction established her as a person with district-wide seniority from the date of her initial employment. Although the ALJ found in Cohen's favor, he refused to give her district-wide seniority from the date of her initial employment and specifically rejected Felper as precedent. The Commissioner modified the ALJ's decision. He held for petitioner but corrected her seniority to reflect district-wide status from her initial date of employment in 1974, despite the fact that her service in a district-wide capacity did not begin until years later. The reason was simply that, under the old rules, any service under a K-12 certificate granted seniority in all grades, even if that actual service was limited to elementary levels only. Since Cohen was initially reduced prior to 1983, her rights under the old rules vested at that time and could not be undone by the new regulations. Thus, the Felper analysis applied and must be considered at this juncture to be good law.

Applying the Felper and Cohen rationale to the instant case, mandates the conclusion that both Panarotto and Becker had K-12 seniority as teachers of art for the entire span of their careers. This is due to the RIF to which Panarotto was subject in 1980 and his attaining of district-wide seniority at that time, which allowed him to "bump" into the elementary schools despite his exclusively secondary service up until that time.

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Becker's K-12 seniority as a techer of art is due to her reduction to half-time in 1981 as a result of the seniority comparison between her and Panarotto. All subsequent service relates back to this district-wide seniority pursuant to N.J.A.C. 6:3-1.10(h).

As is correctly pointed out by petitioner, calculating the respective seniority of the two individuals is thus rather simple. As of September 1, 1981, Panarotto had 10.3 years of district-wide art seniority. Becker had 9.325 years at that point. Thus, on the merits, Becker was properly reduced to half-time rather than Panarotto. As of June 1984 (the RIF challenged by Panarotto's initial petition), Panarotto had 13.3 years of district-wide service, and Becker had 10.825 years district-wide. Thus, Becker was less senior and should have suffered the 1/5 reduction, not Panarotto. Thus, Panarotto is entitled to relief for the improper reduction he suffered in 1984-85.

As of June 1985, Panarotto should have had 14.3 years of seniority (including the extra 1/5 he should have had for 1984-85.) Even if he is somehow limited to time worked in 1984-85, Panarotto had 14.1 years at that point. Becker had 11.325 years as of June 1985. Thus, the 1985 reduction (Panarotto's second petition) also should have applied to Becker, not Panarotto. Since that reduction was also improper, Panarotto should be returned to full time.

2. Timeliness of Becker's Cross-Claim

A review of the above uncontroverted facts establishes that in the spring of 1980, petitioner was the subject of a RIF by virtue of the elimination of his position as a high school art teacher. He asserted his seniority rights and "bumped" into an elementary art position. In 1981, upon the return of Donna Becker from leave, she suffered a reduction by virtue of her assignment for the first time to a half-time position. Apparently, it is undisputed that that was the result of a seniority decision by the Board comparing her with Panarotto. In the spring of 1984, another reduction resulted in Panarotto being reduced to 4/5. This reduction was contested within 90 days by petitioner's initial petition. A fourth reduction occurred in 1985 (effective for 1985-86) which reduced petitioner to 3/5. That reduction was contested within 90 days by petitioner's second petition.

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Based upon these facts, petitioner contends that Becker's cross-claim must be dismissed as untimely. More particularly, petitioner suggests that in 1981 Becker knew she was working half-time instead of full time. Although that reduction was the only reduction that ever impacted on Becker, she chose to raise no protest for four and one-half years. Pursuant to N.J.A.C. 6:24-1.2, she is barred from doing so now.

Further, and in regard to the subsequent reductions, petitioner alleges that the reductions impacting upon Panarotto in 1984 and 1985 did not harm Becker. Petitioner argues that absent a further reduction in Becker's current employment and seniority status, she has no basis for claiming a larger position, except to the extent a vacancy exists. However, even if it had been appropriate at the time of the reductions in the spring of 1984 and 1985 for Becker to have claimed that portion of Panarotto's position remaining after his reduction, she again failed to do so within 90 days. Rather, petitioner points out that even after the 1984 and 1985 RIFS took effect on Panarotto, Becker did nothing. Moreover, petitioner states that the fact that Becker was not given notice of Panarotto's claim against the Board regarding the 1984 and 1985 reduction in Panarotto's time until November 1985 does not change the character of or justify her inaction. According to petitioner, Becker was by that time already aware of the finding of greater seniority in Panarotto's favor in 1981; the dispute between Panarotto and the Board did not suddenly ripen Becker's claim. In addition, petitioner asserts that if Becker relies on the change in regulations, her claim existed as of September 1, 1983 when the new rules took effect.

In response, Becker asserts that irrespective of the timeliness of her cross-claim, the Commissioner is free to make a complete dispostion of the controversy before him and to appropriately calculate the seniority of the respective parties and enter an order affecting the same. It would, therefore, be perfectly appropriate for the Commissioner to enter an order directing the Board to adjust the seniority list adopted by the Board and to award the parties contracts of employment consistent with their respective seniority. Becker asserts that neither the Board nor Panarotto can claim that they did not have notice of the seniority issues that were raised by Becker in her cross-claim prior to its

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being filed. It was clearly Panarotto's intention to replace Becker in her position in elementary art. It was likewise known to the Board that the person who would be immediately affected by Panarotto's petition were he to be successful would be Donna Becker. Becker asserts that the failure of both parties to notify her of the pendency of Panarotto's claims for over a year when they were well advised of her immediate interest in the outcome of the litigation estops them from raising the defense of timeliness at this time.

According to Becker, inasmuch as she was granted intervenor status without the objection of either petitioner or respondent Board, she has all the rights and obligations of a party to the proceeding. Becker further points out that the purpose of the time bar to the presentation of claims is to create some finality to administrative actions in the absence of an objection within a reasonable time. Where an objection to an official action has already been filed in the form of a petition for relief, this purpose can no longer be served and justice and fundamental due process calls for a complete determination of the rights of all the parties that appear in the litigation. In addition, Becker asserts that her claim for the 1985-86 school year was clearly filed within the 90-day period set forth in N.J.A.C. 6:24-1.2.

I have considered the arguments of both parties. Although the application of the pre-1983 regulations renders the determination of the timeliness of intervenor's cross-claim moot, I feel compelled to address in some manner the arguments of counsel. There appears to be no doubt that Becker's claim for the 1985-86 school year was filed within the 90-day period set forth in N.J.A.C. 6:24-1.2. Becker's contention that her earliest notice of the Board's action for the 1985-86 school year was in September 1985 when the school year commenced appears undisputed. At that time, she was working half time and Panarotto was working 3/5 time. This being the case, Becker had 90 days from the first day of school in September 1985 to file her claim. A review of the record demonstrates that Becker made her application to appear as an intervenor and to file her affirmative claim on November 22, 1985, clearly within 90 days of the commencement of the school year. In view of that, Becker's affirmative claim for relief for the 1985-86 school year will be considered to be timely.

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It would appear, however, that this does not help Becker. The actual basis of the cross-claim is Becker's reduction to part time in 1981. Essentially, this tribunal agrees with petitioner that Becker has suffered no further change in her position since that time but is now requesting relief from an action which occurred nearly five years ago.

Essentially, it has been the position of the Commissioner and the State Board that tenure and seniority violations do not constitute continuing violations and that N.J.A.C. 6:24-1.2 (the 90-day rule) is applicable to such matters. Gordon v. Passaic Bd. of Ed., OAL DKT. NO. EDU 4416-83 (Sept. 12, 1983), adopted Comm'r of Ed. (Oct. 31, 1983), rev'd St. Bd. of Ed. (Mar. 6, 1985), at 4. Thus, it has been stated that claims regarding tenure and seniority are functionally related to a teacher's service and are governed by the 90-day rule, which is to be strictly applied with the time measured from the accrual of the cause of action. Id. at 5. See also, Watchung Hills Reg. Ed. Ass'n v. Watchung Hills Reg. High Sch. Dist., 1980 S.L.D. 356.

Clearly, the Commissioner can relax N.J.A.C. 6:24-1.2 if a strict application is inappropriate, unnecessary, or causes injustice, and he has done so in the past. However, as was stated in Wright and Sobanko v. Bd. of Ed. of Belleville, OAL DKT. NO. EDU 5299-80 (Dec. 5, 1980), adopted Comm'r of Ed. (Jan. 23, 1981), the Commissioner and the courts now read N.J.A.C. 6:24-1.2 very strictly and apply it almost without exception. See, Bailey v. Bd. of Ed. of Mansfield, OAL DKT. EDU 4997-79 (Feb. 6, 1980), rejected Comm'r of Ed. (June 19, 1980), aff'd St. Bd. of Ed. (Feb. 4, 1981); Riely v. Bd. of Ed. of Hunterdon Central High Sch., 173 N.J. Super. 109 (App. Div. 1980); Kallimanis v. Bd. of Ed. of Carlstadt, OAL DKT. EDU 868-80 (Aug. 8, 1980), adopted Comm'r of Ed. (Sept. 26, 1980), aff'd St. Bd. of Ed. (Mar. 4, 1981); Gordon, St. Bd. decision at 5. But see, Shokey v. Bd. of Ed. of Cinnaminson, 1978 S.L.D. 919 (Nov. 29, 1978). In the instant case, this tribunal has been presented with no good cause for Becker's failure to timely file. Actually, Becker did not explain in any meaningful way why she did not comply with the 90-day rule. There is no doubt that Becker did nothing in regard to the reduction in 1981 and the reduction in regard to Panarotto in 1984. Moreover, and in regard to her claim for the 1985-86 school year, it is observed that the dispute between Panarotto and Becker is

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essentially an old one, stemming from the decision in 1981. In addition, if Becker relies on the change in regulations, her claim existed as of September 1, 1983 when the new rules took effect. Yet, again she did nothing.

Based upon the foregoing, and although in actuality a moot point here, it is concluded that Becker's claim which is clearly related to the reduction in 1981, is time barred.

It also behooves this tribunal to point out that it appears that Becker's claim is also barred by laches. See, Brewington v. East Orange Bd. of Ed., 1978 S.L.D. 50. There, Brewington asserted a claim for an additional year of seniority based on out-of-district service. While she was on maternity leave, the board incorporated a verification deadline in its negotiated salary policy. She returned to work after the deadline and without having received notice about it. Two years later she became aware of the requirement and attempted to resolve the matter by appealing to the school board. Approximately 20 months later her claim was denied for failure to comply with the deadline. Her subsequent appeal to the Commissioner was not filed for an additional 26 months. The Commissioner held Brewington's two-year delay in acquainting herself with the terms of the negotiated agreement was not a valid reason for the untimely claim and further that no excuse had been offered for her delayed appeal. Id. at 53. He therefore decided that the doctrine of laches applied to bar her claim. Similarly, Becker has failed to contest her reduction in employment for a period in excess of four years. Her alleged lack of knowledge of her rights does not justify this delay.

Order

It is **ORDERED** that the Board adjust its records to reflect Panarotto's correct seniority for assignments in the upcoming 1986-87 school year.

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It is further **ORDERED** that the Board pay to Panarotto back salary and benefits equal to 1/5 of his 1984-85 salary guide step and level and back salary and benefits equal to 2/5 of his 1985-86 salary guide step and level. It is further **ORDERED** that the Board promptly restore to Panarotto all of the benefits and emoluments he lost and would have received if he had occupied a full-time position for 1984-85 and 1985-86. It is further **ORDERED** that Panarotto receive an additional 1/5 year of seniority for 1984-85 and an additional 2/5 year of seniority for 1985-86.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

May 22, 1986
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

MAY 27 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAY 28 1986
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

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GARY N. PANAROTTO,	:	
PETITIONER/CROSS-CLAIM INTERVENOR,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EMERSON, BERGEN COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
DONNA J. BECKER,	:	
INTERVENOR/CROSS-CLAIMANT.	:	

The record and initial decision of the Office of Administrative Law have been reviewed. Exceptions were filed by the parties in accordance with N.J.A.C. 1:1-16.4a, b, and c.

The major thrust of the exceptions filed by the Board and intervenor with respect to petitioner's seniority entitlement centers around objections to the ALJ's determination that the pre-1983 seniority regulations apply to the instant matter. After a review of the record, the Commissioner determines that the ALJ's legal analysis and conclusions in this matter are entirely correct and he adopts them as his own.

Despite the arguments advanced by the Board and intervenor to the contrary, petitioner was subject to a reduction in force under the pre-1983 regulations; thus, his seniority rights were first vested under those regulations not the current ones (N.J.A.C. 6:3-1.10).

The record clearly documents that during the 1979-80 school year, one high school art position was abolished (see Stipulation of Facts No. 11 (cited in the initial decision as No. 10), Exhibit B, and P-2 Supplemental Interrogatories). At that time the Board was required, pursuant to N.J.S.A. 18A:28-11, to determine the seniority of persons affected by the RIF and to notify each person as to his or her seniority status. Thus, it was at this time that petitioner's seniority rights were no longer inchoate but were actually triggered.

In accordance with the regulations in effect at that time, petitioner accrued seniority on a K-12 basis and he was thus entitled to "bump" into an elementary art position. The seniority rights vested or triggered at that time were not abrogated or negated by the adoption of the amendments to N.J.A.C. 6:3-1.10 which

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went into effect in 1983. Felper, supra; Cohen, supra Had Petitioner never been subject to a RIF prior to the amended regulations, the Board and intervenor would indeed be correct in arguing that the current regulations control, but such is not the circumstance.

Having determined that the pre-1983 regulations apply in the instant matter, it is unnecessary to render a determination with respect to the timeliness of intervenor's cross-claim, as it is moot. The Commissioner therefore passes no judgment on the ALJ's determinations regarding that issue.

Accordingly, the Commissioner adopts as his own the initial decision, except as qualified above. The Board is, therefore, directed to comply with the decision's orders. Further, the Board is ordered to review and revise its seniority list for art personnel for any reduction in force that occurred prior to June 30, 1983 consistent with this decision.

COMMISSIONER OF EDUCATION

July 8, 1986
Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 3545-86
AGENCY DKT. NO. 183-5/86

A.B., AS PARENT AND GUARDIAN AD LITEM, ON BEHALF OF C.B.,
Petitioner,
v.
FREEHOLD TOWNSHIP BOARD OF EDUCATION and ROBERT W. MAC MILLAN, JR., PRINCIPAL, CLIFTON T. BARKALOW SCHOOL,
Respondents.

Robert P. Zmitrovis, Esq., for petitioner

Martin B. Anton, Esq., for respondents (Anton & Sendzik, attorneys)

Record Closed: June 6, 1986 Decided: June 11, 1986

BEFORE **BRUCE R. CAMPBELL,** ALJ:

This matter came on by way of an order to show cause filed with the Commissioner of Education on May 23, 1986, and amended on May 29, 1986, by the petitioner. It was transmitted on the latter day, without answer, as an emergent matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

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On June 3 and 4, 1986, I held brief conferences of counsel, concerning procedural matters, by telephone. On June 4, the respondents' answer was delivered to the Office of Administrative Law, Quakerbridge Plaza, Trenton.

The petitioner alleges and the respondents deny that certain disciplinary action taken against C.B. was arbitrary and unreasonable. The petitioner seeks an order directing that C.B. be reinstated to the school baseball team, that C.B. be allowed to attend a school dance, that C.B. be permitted to participate in an activity known as Government Day and that Respondent MacMillan be censured if an abuse of his position is found.

The Department of Education considers the matter a request for interim relief and stay of district board action under its rule at N.J.A.C. 6:24-1.5, readopted April 10, 1986 (18 N.J.R. 977). Briefly stated, that rule allows a petitioner to include in a petition a request for a stay of the action complained of pending a final decision in the case, allows any party opposing to so indicate in its pleadings and provides that after transmission of the case to the Office of Administrative Law, any request for emergent relief shall be determined by the Office of Administrative Law.

The matter was heard on an expedited basis on June 5, 1986, at the Freehold Township Municipal Court.

I.

The parties agreed on certain facts and upon the issues at the opening of hearing. Among other things, it was agreed that time has rendered moot all issues except the requested relief that C.B. be allowed to attend a certain school dance. It was further agreed that the only issues before this tribunal are whether the student disciplinary code is valid on its face and whether it has been applied fairly to C.B.

The parties represented that this matter was opened in the Chancery Division of Superior Court. Although the Superior Court made no finding, it both referred the matter to the Commissioner of Education and set down a plenary hearing in the Chancery Division in late April. The petitioner states he took a dismissal with prejudice in order to gain a hearing before the Freehold Township Board of Education (Board) on April 16, 1986. The Board denies that the dismissal with prejudice was a condition precedent to a hearing

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before the Board. In either event, the Chancery Division matter is closed and the matter is properly before the Commissioner and the Office of Administrative Law.

II.

The petitioner was permitted to cross-examine those persons who made affidavits or other sworn statements that are a part of the pleadings in this case. The petitioner also was permitted to call witnesses, including himself, in support of his case.

The superintendent of schools testified that each of the two middle schools in the district has a disciplinary code. They are not identical but are similar. The number of detentions necessary to trigger suspension of a pupil from activities at each school differs by one, it being conceded that a lesser number is necessary at the Barkalow School. The code is the responsibility of professional staff at each school. Implementation is evenhanded and the superintendent has had no complaints, prior to this case, to the contrary.

The principals and teachers at each school have developed and implemented the respective codes. In the usual case a pupil must commit two infractions before being given a detention. It is possible to get a detention for a single infraction if the infraction is egregious.

A lunchroom employee testified concerning a series of incident with C.B. and several of his friend Lunchroom employee are permitted to give unacceptable behavior slips to pupils. These slips are often referred to as misdemeanor slips.

This worker told C.B. and the group that regularly sits with him at a lunch table that she was told approximately one month ago by her immediate supervisor to "crack down on discipline." This witness further testified that she tries maintain order in the lunchroom, provide assistance where needed, keep control, hand out discipline notes where necessary and call the principal, if necessary, in a given situation.

The witness knows C.B. She has given misdemeanor slips to C.B. for misbehavior such as pounding on the lunch table, chanting, throwing food and throwing beverage cans. On other occasions, she has merely sent him from the room and not issued misdemeanor slips. She has spoken to C.B. many times concerning his behavior and she

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has given him many warnings in that regard. At the time the witness warned the whole group that she would crack down, C.B. threw a soda can several feet from the table to a trash basket.

In another incident, C.B. and one other pupil used loud and foul language as they came into the lunchroom. This witness told them to step outside and wait in the hallway so that the principal would observe that they had been ejected from the lunchroom. Both boys raised their fists to her and made several inappropriate remarks. The witness has spoken to these two pupils many times. The witness further testified that C.B. said, "Don't be surprised if a limo pulls up in front of your house and Guido gets out." The witness also testified that she is of Italian descent.

The witness also stated that C.B. was not the only pupil at the particular table to be given misdemeanor slips. All pupils who misbehaved were treated equally. She gave no discipline slips regarding the fist incident because the pupils apologized. The witness reiterated that many times she has issued oral warnings rather than misdemeanor slips.

A pupil and friend of C.B. testified that he has been a good friend of C.B. for two years, that he has received misdemeanor slips and that he has seen C.B. and others receive slips. He believes he received a slip each time he "messed up."

He knows the lunchroom aide. He heard her say to C.B. and others that the principal had told her to crack down on C.B. and on him. He also testified he has heard the aide use rough language.

On recall, the aide testified that she heard the pupil's testimony, that she did not say she had specifically been told to crack down on C.B. and the other pupil, that she said she would crack down on all pupils in the lunchroom and that she has warned every pupil in the lunchroom, especially those at C.B.'s table concerning acceptable behavior.

The principal of the school, who made a sworn affidavit in connection with the pleadings in this matter, was cross-examined by the petitioner. He stated that the discipline code was written in 1979, has been revised each year, and the regulations are substantially the same today as they were in 1979.

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This witness knows the disciplinary record of C.B. In his opinion, the code has been, and is, applied uniformly to all pupils. The code is largely self-administered by the faculty.

His real property and A.B.'s share a back lot line. There was an incident some two and one-half years ago concerning water in the principal's yard that he believed came from A.B.'s swimming pool. They discussed and resolved the matter. There were no further incidents.

The principal testified that C.B. had been removed from participation in Government Day on the basis of detentions received. After intervention by certain Board members, C.B. was restored to participation in that activity. However, he was removed again upon commission of further infractions. On May 13, 1986, the principal wrote a letter to A.B. (petitioner's exhibit E) stating:

> It has come to my attention that there has been discussion regarding your son's participation in Government Day.
>
> The Barkalow Discipline Rules state that after five detentions a student eliminates himself/herself from "all school sponsored activities." Although you have received copies of the regulations, and there has been extensive communication with you regarding your son's disregard for school rules, it appears that the procedures are still not clear to you or your son.
>
> Since your son was not specifically reminded of the aforementioned consequences of accumulating five detentions, he will be permitted to accompany the elected students to Township Hall on Government Day as long as the following conditions are met:
>
> 1. Exemplary behavior is exhibited.
> 2. No detentions assigned between now and the day of the trip.
> 3. The second copy of this letter will be returned to the school office by 9:00 a.m. Wednesday, May 14, 1986.

At the time letter issued, the principal did not know if C.B.'s record was clean. The principal was sure, however, that if C.B. misbehaved once, he was to be removed from participation in Government Day.

Subsequently, C.B. received one additional detention. He was late to class, which resulted in one misdemeanor being assessed against him, and he failed to return the

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slip, signed by a parent, the next day. Under the terms of the code (petitioner's exhibit A) the lateness to class coupled with a failure to return the slip the next day constituted two infractions which, in turn, constituted one detention. The principal learned of the additional detention when the detention letter was not returned to the school office. His clerk, as a matter of routine, reported to the principal that a pupil, in this case C.B., had not returned a signed detention letter.

The principal denied any relationship between the swimming pool incident of some time ago and the present case of C.B. He noted that 11 other pupils were given the same discipline at the same time.

A.B. testified that approximately two and one-half months ago he had asked the principal to change C.B.'s science class assignment at the end of this semester. The principal had refused. In a discussion with the principal and the discipline committee, he was warned that C.B. was one detention away from elimination from participation in a class trip and a class dance. The witness stated that the principal said baseball team participation was not involved. When C.B. received another detention shortly thereafter, the principal sent a letter to A.B. stating that C.B. was eliminated from the class trip and dance but not from the baseball team.

A.B. conceded that the baseball team coach has his own rule under which five detentions mean elimination from the team. The petitioner states the principal called C.B. into the principal's office and informed C.B. that he had received five or more detentions since making the team and was eliminated from the team.

When A.B. learned that C.B. was eliminated from Government Day, that was "the final straw." This occurred after A.B.'s hearing before the Board. A.B. immediately called two Board members. They said C.B. should not be eliminated from Government Day because that was not included in the "settlement" reached at A.B.'s appearance before the Board. One of the Board members informed A.B. that he would receive a telephone call from the superintendent or principal on the subject. Actually, he received a letter (petitioner's exhibit E, above). He then found out that C.B. had received another detention slip on Monday, May 19. C.B. informed A.B. that he had, indeed, been given another slip but that C.B. had left the slip in school. A.B. testified that he wrote a letter to the teacher in lieu of signing the slip. He also stated that he had done this before.

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A.B. stated that it is impossible that C.B.'s behavior is due to anything other than "this business." A.B. also stated he could not recall receiving a copy of the disciplinary code at the beginning of the 1985-86 school year but that he knows the code now. He conceded that the code says it applies to all school activities, including sports.

A.B. also stated that certain portions of the transcript of the April 16, 1986 hearing before the Board (petitioner's exhibit F) are incorrect. He specifically denied making the statement recorded at lines 21-24 on page 16 and 1-4 on page 17. He disagrees with the lunchroom aide's testimony that C.B. used improper language in the lunchroom. However, referring to page 17 in the transcript, he stated at hearing that if the aide's testimony were true, he'd have no patience with some of these things. On page 18 of the transcript, A.B. says the code does not mention sports. Upon reviewing the code, he concedes that it covers all school-sponsored activities.

A.B. also stated he knew reinstatement to C.B. to Government Day was based on continued exemplary behavior. If C.B.'s behavior were not exemplary, he could not participate in the event.

A.B. conceded that this is C.B.'s third year in the Barkalow School and that he and his wife have been called in on "numerous occasions" regarding C.B.'s behavior. C.B. was suspended from the baseball team last year on a report from a school nurse who saw C.B. riding a bicycle dangerously, after school, but on school grounds. A.B. stated that he loves C.B. very much and that this could conceivably cloud his judgment.

A computer teacher testified that on May 19, 1986, she gave C.B. a misdemeanor slip. C.B. was five minutes late to class, as was another pupil. Both presented unacceptable excuses. The teacher was not aware of C.B.'s precarious disciplinary position at the time she issued the slip. The teacher recalls that after May 19 C.B. was not late again.

This teacher has taught C.B. for one semester. He is a good pupil who seems to enjoy using computers. He is often late to class, however, which hampers the rest of the class. On May 20, she gave C.B. another slip because he failed to return the first. The code makes clear that slips are to be returned to the teacher the following day. C.B. and the other pupil who had done the same thing were each handed a detention slip by this teacher. C.B. denied to this teacher that she had ever given him the slip.

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C.B. testified that he did throw a beverage can into a trash basket while seated at his table in the school cafeteria. He stated he did not know that it was an infraction to throw objects in the lunchroom. He denied ever using "bad language" to the lunchroom aide. He also denied making a fist at the aide, but testified that he was with a pupil who did.

On May 19, he received a misdemeanor slip from the computer teacher for being five minutes late. He left the slip in his locker at the end of the school day but told his father about it that evening. A.B. wrote a letter to "To whom it may concern." The letter stated that A.B. was aware that C.B. had received a penalty slip. C.B. says he took the letter to the appropriate teacher on May 20. He denies that she gave him another misdemeanor slip at that time.

On May 23, C.B. was called to the principal's office with another pupil. The principal informed him that he had received an additional detention for being late to class. This, plus a slip from the cafeteria in his file, constituted cause for another detention.

On cross-examination, C.B. stated that he did receive a slip on the 19th. He took a letter, in lieu of the slip, to school on the 20th. The witness was shown a handwritten note signed by his mother and dated May 21. He conceded that this was his parents' response to the misdemeanor slip of May 19.

The witness also examined a copy of the student handbook he received in September 1985. He stated that he understands the cafeteria rules at page 4. He also stated he did throw a soda can 10 feet into a trash basket but sees nothing wrong in that. He admitted it is a fact he has received misdemeanor slips and detentions. He also conceded it is a fact he knew reinstatement to Government Day required exemplary behavior on his part.

The petitioner was allowed to recall the principal. The principal stated he had called a faculty meeting after C.B. was reinstated to Government Day. He informed the group of the Board's decision that, in fairness, C.B. should be reinstated to Government Day. He agreed with the Board decision to reinstate C.B. The Board president told him what the content of the letter to A.B. should be, but the exact language was the principal's. The disciplinary committee works directly with the faculty at all times. This

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was an unusual case and the principal believed it should be shared with faculty because it was an exception to the five-detentions rule. The principal denied that he informed the faculty at this time that C.B. had one detention slip pending in his detention file.

The petitioner rested following his testimony.

III.

During the course of the hearing counsel were advised that I took notice that a Board is not bound by promises of individual Board members and that Board members act in an official capacity only when the Board is in session. Dorrington v. North Bergen Bd. of Ed., 1982 S.L.D. 247. In addition, the petitioner seemed to argue that the baseball tryout period should be considered separately from actual team participation for purposes of counting disciplinary incidents. Although the baseball team question is virtually moot, counsel were advised that potential players are under the authority of the coach and of the school so long as they are involved in any phase of the activity. N.J.S.A. 18A:37-1.

IV.

The respondents moved for summary judgment in their favor upon conclusion of the petitioner's case. The ruling from the bench was as follows:

> Gentlemen, I've heard the arguments of counsel. I have read all the pleadings in this case, including the transcript of the hearing before the Board on April 16th. I've listened carefully to the testimony today and, as required by the law of the state, I have assessed the credibility of those who have testified. That is the unique prerogative of the person who hears the case, as clearly expressed by our courts in Mayflower Securities which, in turn, cited Close v. Kordulak Bros. as to assessment credibility.
>
> It's black letter law that motions to dismiss are granted sparingly. As long as there is more than a mere scintilla of evidence making out a case, the law prefers to err on the side of caution and to give the petitioner his full day in court, not merely a half day. In this case, however, I am persuaded that the petitioner has not carried the burden of persuasion and has not demonstrated by a preponderance of the credible evidence in the record that the disciplinary code at the Barkalow School is either invalid on its face or as applied.
>
> The Commissioner of Education has stated that participation in co-curricular activities in the public schools is a privilege and not a

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right. Pupils are required by law to attend school regularly, but they are not required to participate in any activities beyond the actual classroom work and other related assignments, such as study halls. They need not be compelled to participate in any athletic activities beyond the required physical education classes of 150 minutes per week.

The promulgation of rules and regulations for participation in co-curricular endeavors is a proper subject for a local board of education. By extension, the local board of education can and, indeed, must, in order to make it work, delegate certain administrative acts relative to codes of conduct to building administrators. The general right of the board of education to do all things necessary and proper for the conduct of schools is found at N.J.S.A. 18A:11-1. The action taken by an administrative agency, whether it be a local planning board, the Division of Motor Vehicles or a board of education is entitled to a presumption of correctness and will not be upset unless there is a clear showing that the decision made was arbitrary, capricious or unreasonable.

There are many statements of this in the law. One that was made by the Appellate Division is found in Quinlan v. North Bergen Township Board of Education at 73 N.J. Super. 40. That was an Appellate Division decision in 1962. Approximately four years later, the Appellate Division said the same thing in Thomas v. Morris Township Board of Education. That cite is 89 N.J. Super. 327, Appellate Division, 1965, affirmed 46 N.J. 581. That would be New Jersey Supreme Court, 1966.

Even making all inferences that may fairly be made in favor of the party, not the maker of the motion, in this case the petitioner, I FIND and CONCLUDE on the basis of what has been presented that the petitioner has failed to show that the board or its agents are arbitrary, capricious or unreasonable.

I would like to state for the record further that I do not find any malice in the petition. I find a parent's concern is quite evident. I see some evidence of youthful zeal, but I do not find malice. On the other side of the bar, I find no malice in the application. I simply am not convinced by this record that ill will has been exhibited by the Board or its agents.

One last observation and that is simply this: It is also black letter law that a board member is a board of education member when and only when the board is in session. Anything he or she may say outside of those sessions is said as a private citizen. No board member has the capacity to act as agent for the board except by resolution in specific matters. A conversation with a constituent does not constitute and cannot constitute board action.

Therefore, for the reasons stated, the motion which, I believe, was for summary judgment on behalf of the board is granted. This matter may be taken interlocutorily to the Commissioner of Education; otherwise, it will become the final decision in the case upon the expiration of 45 days.

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In consideration of the foregoing, presentation of the respondents' case would require an unwarranted expenditure of public resources. It has long been the law in this State that the elements of due process of law are notice, an opportunity to be heard and an orderly proceeding adapted to the nature of the case. DiMaio v. Reid, 132 N.J.L. 17, 18 (Sup. Ct. 1944). The petitioner was given every opportunity to make a case but failed to do so.

Accordingly, I **ORDER** that the petition and amended petition be and are hereby **DISMISSED.**

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

11 JUNE 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

JUN 11 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JUN 12 1986
DATE

Mailed To Parties:
Ronald I. Parker /ss
OFFICE OF ADMINISTRATIVE LAW

ml

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A.B., as parent and guardian ad litem, on behalf of C.B.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FREEHOLD AND ROBERT W. MAC MILLAN, JR., PRINCIPAL, CLIFTON T. BARKALOW SCHOOL, MONMOUTH COUNTY,	:	
RESPONDENTS.	:	

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

Upon consideration of the record, the Commissioner is in agreement with the findings and determination of the Office of Administrative Law. Consequently, the initial decision is adopted as the final decision in the matter for the reasons expressed therein.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3611-85
(EDU 7383-83 and EDU 223-83-remanded)
AGENCY DKT. NO. 455-11/82A

EDWARD BROWN,
Petitioner,
v.
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL IN THE COUNTY OF SUSSEX,
Respondent.

Gerald B. Hanifan, Esq., for petitioner

Emanuel A. Honig, Esq., for respondent
(Honig and Honig, attorneys)

Record Closed: April 18, 1986 Decided: June 2, 1986

BEFORE **SYBIL R. MOSES,** ALJ:

I

Procedural History

Complainant, Edward H. Brown, alleges unlawful discrimination in the hiring practices of the Board of Education of the Vocational/Technical School in the County of

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Sussex (Board). The case comes before the Office of Administrative Law (OAL) as the result of the filing of a petition by Mr. Brown on September 27, 1982, alleging that he was not hired for the position of commercial foods teacher in the vocational school in July 1981 because of unlawful racial discrimination. The lengthy period of time which has elapsed since the petition was filed requires a detailed procedural history.

The Board filed an answer to the petition on December 27, 1982, asserting among its defenses a violation of N.J.A.C. 6:24-1.2, which requires that petitions alleging violations of the school laws be filed within 90 days of the act complained of. The matter was subsequently forwarded to the OAL as a contested case. An administrative law judge (ALJ) dismissed the petition as untimely filed on June 27, 1983.

The ALJ's initial decision was set aside by the Commissioner of Education on August 11, 1983 and remanded for hearing on the merits. The State Board of Education reversed the decision of the Commissioner of Education and adopted the decision of the administrative law judge on May 2, 1984.

Mr. Brown then appealed to the Appellate Division of Superior Court, which reversed the decision of the State Board of Education, relaxing the 90-day rule and remanding for hearing on the merits. The Appellate Division decision was issued on April 4, 1985. On June 12, 1985, the Commissioner of Education again forwarded the matter to the OAL for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on the remanded case on July 16, 1985. Mr. Hanifan entered his appearance as counsel on behalf of petitioner Brown. Counsel agreed that the following issues were still in controversy.

1. Was petitioner as well qualified for the position of teacher of commercial foods as the successful candidate.

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2. Did the Board violate its affirmative action policy regarding minority applicants in failing to appoint petitioner to the position of teacher of commercial foods.

3. If petitioner should prevail, to what relief is he entitled.

Any issues concerning whether the Board had a defective affirmative action plan are no longer in controversy in this case.

An Order of Inactivity for 60 days, due to the illness of Mr. Honig, was entered on October 18, 1985. The hearing took place on March 4, 5, 6 and 17, 1986, in the Tax Court of Sussex County, Sparta, New Jersey.

The following witnesses testified on behalf of petitioner:

Dale Reinhart, former superintendent of schools, Sussex County
Nida Thomas, former director of the Office of Equal Educational Opportunity, New Jersey Department of Education
Harry Stein, former school program coordinator to Sussex County
Dr. Leonard J. Saunders (EDD), superintendent of schools, Roselle, New Jersey
Dr. J. Harry Smith (honorary LLD), former president, Essex Community College
Edward H. Brown

The following witnesses testified on behalf of respondent:

Dr. George A. Wilson (EDD), superintendent of schools, Sussex County Vocational School
Walter G. Jakl, assistant superintendent, principal, Sussex County Vocational School
Robert D. Walker, teacher, Sussex County Vocational School

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Robert H. Lombardo, supervisor, Institutional Support Services, Sussex County Vocational and Technical School, formerly director of Special Services, Sussex County Vocational and Technical School

Recent briefs and responses were timely filed. The record closed on April 18, 1986.

II

Evidence

A list of those items moved into evidence during the course of the hearing is attached to this decision and designated Appendix I.

III

Uncontroverted Facts

The Board operates a secondary high school for vocational education for students throughout Sussex County. The school offers courses in the culinary arts for the purpose of teaching students certain skills which will enable them to qualify for employment in the preparation and serving of foods in restaurants and similar establishments.

In July 1981, a vacancy occurred in the culinary faculty which required the Board to hire a teacher of commercial foods. This came about because Mr. Walker, who had been in charge of the kitchen area, (the "back of the house") wanted to move to the "dining room" (the "front of the house"). After deliberation the superintendent of schools and the Board determined that an instructor of commercial foods was needed who could handle the back of the house, who could instruct and supervise the students in the daily preparation of meals and who could carry out classroom instruction. A job notice was posted with employment agencies specified in the affirmative action plan adopted by the Board in 1977. The job was advertised in all media specificied in the plan, including the New Jersey Herald, a daily newspaper published in Sussex County. The advertisement in

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the New Jersey Herald was dictated by Dr. Wilson to his secretary over the telephone. It stated:

> VOCATIONAL EDUCATION
>
> Instructors. The following Teaching vacancies exist at the Sussex County Vocational Technical School, Commercial Foods, Auto Body, CIE Coordinator. Applicants must possess a current vocational teaching certificate or have six years' experience, high school diploma and willing to take college courses. Please send resume to Sussex County Vocational Technical School, 105 North Church Rd., Sparta, N.J. 07871. Equal Opportunity Affirmative Action Employer.

Mr. Jakl, the assistant superintendent and principal of the high school, was given the job of interviewing candidates. Mr. Brown and six other candidates filed applications for the position of commercial foods teacher. The applicants included one black, Mr. Brown, and one female. Stanley Cohn, a white male, was one of the seven applicants. None of the applicants possessed a current vocational teaching certificate.

The advertisement calls for "six years' experience," and does not specify what type of experience. It is uncontroverted that Dr. Wilson instructed Mr. Jakl to tell each candidate that the Board preferred to hire someone with six years' teaching experience in the secondary schools in the field of food preparation and culinary arts.

Mr. Jakl was designated chairman of the Review Committee, which was set up to evaluate candidates for positions at the high school. He selected Mr. Walker, the senior commercial foods teacher, to serve with him on that Review Committee for the specific purpose of evaluating the qualifications of the candidates for the position of commercial foods teacher. Mr. Jakl interviewed all seven applicants for the commerical foods position. Mr. Walker did not interview those candidates who lacked appropriate qualifications. Mr. Brown and Mr. Cohn were interviewed by Mr. Walker.

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The job description for a prospective employee is as set forth in paragraph 14 of the Stipulation of Facts. Petitioner's self-described educational and employment background and Stanley Cohn's self-described educational and employment background, are also set forth in paragraphs 27 and 28 of the Stipulation of Facts.

IV

Analysis of Testimony

The thrust of all testimony presented by petitioner was to establish that Mr. Brown was so far superior to Mr. Cohn in his capabilities, experience and education that he should have been selected and to show that he was not selected because racial discrimination or racial bias entered into the decision-making process.

Mr. Brown testified on his own behalf. An assessment of his credibility is crucial in order to assess his credentials, experience and education. I found Mr. Brown less than candid during his testimony. He went out of his way to "puff his wares." He made statements which were not true, and when he was caught short, reversed himself and testified to "errors."

An outstanding example of this puffing is his testimony that he graduated, Phi Beta Kappa, from Fairleigh Dickinson University. If true, this impressive credential would certainly justify a conclusion that he had exceptional academic and scholarly credentials. Dr. J. Harry Smith said that Brown told him he was a member of Phi Beta Kappa, and it was partially on this representation that Dr. Smith concluded that Mr. Brown was far more capable than the other candidate. Furthermore, the stipulation of facts signed by both counsel, C-1 in evidence, contained a statement that Mr. Brown was a member of Phi Beta Kappa. However, it is uncontroverted that Fairleigh Dickinson University has never had a chapter of Phi Beta Kappa. Petitioner's counsel took the onus upon himself, saying that the assertion of Phi Beta Kappa in C-1 was a typing error, and pointed out that Mr. Brown's resume and curriculum vitae (C.V.) and (P-1 and P-2) indicate that he belonged to Phi Zeta Kappa, an honorary society at Fairleigh Dickinson University. While it is

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correct that the resume indicates membership in Phi Zeta Kappa, I found Mr. Brown's credibility gavely impeached by his assertion before me, in sworn testimony, that he was a member of Phi Beta Kappa and by his representation to Dr. Smith of the same fact.

Among further instances of credibility problems with Mr. Brown's testimony is his representation that he taught at New York University (See P-1, his resume) when, in fact, he taught at Brooklyn Community College. Mr. Brown asserted that his C.V. (P-2) is a a list of courses in foods which he took. It is really a list of all courses in foods offered by Fairleigh Dickinson and duplicates the course catalog. It strains credulity that Mr. Brown was told the job would pay close to $30,000 a year, when J-2 in evidence, the teachers' salary guide for 1982-83, indicates that the top salary for a teacher of commercial foods at the Sussex County Vocational and Technical High School, which would be paid to a person with an M.A. degree plus 45 credits, was $22,820. P-20 purports to be Mr. Brown's official transcript of his grades in college. Yet, it clearly states that it is not official, and contains handwritten grades and handwritten notations indicating "dean's list."

Mr. Brown described his background and the interview he had with Mr. Jakl at the vocational school. He gave Mr. Jakl a 55-page abstract of his history in the food service industry, as well as additional materials, and was upset that Mr. Jakl just leafed through it and did not read it carefully at that time. He felt it was discriminatory that Mr. Jakl interviewed him while wearing a "jogging" suit and felt it insulting that he had to ask most of the questions. Mr. Brown thought that his experience with the high school equivalency program (HEP) at Fairleigh Dickinson during the 1960s was the equivalent of teaching high school students. He pointed out to Mr. Jakl that he taught at NYU [sic]. According to Mr. Brown, he was never asked to appear before a screening board or committee and had no other interviews.

Mr. Brown was notified in August 1981 that he was not the successful candidate. He subsequently filed a complaint with Dr. Reinhart, County Superintendent of Schools, setting forth all the concerns he had because the position went to someone else and his

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fears that racism played a part in the decision-making process. Mr. Brown met with Mr. Stein, the school program coordinator and Nida Thomas of the State Board of Education during August and September 1981, giving them a great deal of information.

In March 1982, he received a report prepared by Ms. Thomas, which he showed to Dr. Reinhart and Mr. Stein. He then asked for a meeting with the Board, which request was denied. As of April 1982, Mr. Brown had not been asked to reapply for and had no information in regard to an opening in commercial foods, although the letter denying him the position stated that his resume would be kept on file for a year in case an opening should occur.

In July 1982, Mr. Brown saw a readvertisement of the commercial foods position in the newspaper. No one from the school had called him for an interview. Notwithstanding, he sent his credentials and a cover letter to the school asking to be considered. He was never called or interviewed. In August 1982, Mr. Brown and his lawyer met with the Board, Dr. Reinhart, Mr. Stein, Dr. Wilson and Mr. Jakl concerning the position. That was his last contact with the Board of Education.

Mr. Brown testified about his income from September 1981 to date, saying that he had little or no income. Any income he did have came from consulting work.

It was Mr. Brown's position that Mr. Jakl told him that he was eminently qualified. While a brief mention was made of teaching experience during the discussion, he said that Jakl agreed with him that his teaching experience at Fairleigh Dickinson was similar to teaching at the high school level. He never understood that the advertisement meant that the Board was seeking a certified teacher or someone with teaching experience. However, Mr. Brown asserted that he did have six or seven years teaching experience. As chairman of the Community Advisory Board to the Equal Educational Opportunity Fund, he had tutorial or remedial instruction responsibilities between 1971 and 1975, he taught for one year at New York Community College and worked with high school students in the

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HEP program at Fairleigh Dickinson for 18 months to two years.

Mr. Brown did concede that he saw Mr. Walker on the same day he interviewed with Mr. Jakl, but, in his opinion, the meeting with Walker was not an interview and had nothing to do with a Screening Committee. He told Mr. Walker that the facilities were filthy, that he saw rat poison and made other critical remarks. He was not aware that Walker was interviewing him and there was no discussion of employment or a Screening Committee.

Mr. Brown saw evidence of racial discrimination because Mr. Jakl was wearing a jogging suit when he interviewed him, because Jakl had no knowledge of the course of study and because there were no blacks on the entire work force at the school. Mr. Brown said that his credentials were so much better than Mr. Cohn's that either racism pervaded the decision or there was a judgmental deficiency in the decision-making process. He was a black resident of Sussex County who was more qualified but was denied the job, which was given to someone who lived in Essex County.

Dr. Reinhart was a reticent witness. He assigned Mr. Stein to investigate allegations by Mr. Brown that the affirmative action plan at the school had been violated. After Mr. Stein reported to him, Dr. Reinhart said he could not conclude that the affirmative action plan had been followed.

Dr. Reinhart also described the certification process for emergency and provisional certificates for teachers of vocational education who are not certified. He reviewed P-4, the advertisement of July 24, 1981, and interpreted "six years' experience" to mean experience in the field, not necessarily teaching experience.

Nida Thomas reviewed the question of whether the affirmative action plan had been implemented. She found Screening Committee irregularities between the treatment of Mr. Cohn and that of Mr. Brown. In her opinion, a screening committee was required by law, either N.J.S.A. 18A:36-20 or N.J.A.C. 6:4-1.1 et seq.

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She said all districts knew that they had to have screening committees for the hiring of candidates. It was her conclusion that there was an apparent disregard of the affirmative action plan here because there were two candidates, a white man and a black man, and the black man had more work experience and superior qualifications. However, she could not remember if the district was looking for a cook or a teacher.

Mr. Stein's testimony was not hostile in the least to the interests of Mr. Brown. Stein's job was to monitor affirmative action plans in the county. He reviewed Mr. Brown's complaints and Mr. Cohn's background. In his opinion, the critical factor in the hiring of Mr. Cohn was Cohn's experience in teaching secondary school students. He personally checked on Mr. Cohn's experience and found that it did, in fact, exist. In Mr. Stein's opinion, while six years teaching experience was not a requirement for the position, it was a qualification which mandated the choice of Mr. Cohn.

Mr. Stein said that Dr. Wilson knew the policies underlying affirmative action; that when candidates are equal, the candidate from the underutilized area (minority) is to get the position. Mr. Stein felt that Wilson gave an objective, straight-forward response to his question concerning knowledge of affirmative action policies. It is conceded that Mr. Stein did not make inquiries into Mr. Brown's background because Mr. Cohn had been selected, and his responsibility was to verify the experience of Mr. Cohn. Mr. Stein was of the opinion that the wording in the ad was imprecise and not clear in regard to the qualifications for the job.

Mr. Stein knew that the position was readvertised in June 1982 because Cohn's emergency certification had expired. Both Jakl and Wilson told him that while Brown was qualified, a comparison with Cohn's qualifications indicated that Cohn had more experience teaching at the secondary level and had more hands-on experience.

Mr. Stein reviewed the affirmative action plan, which required the Board to publicly advertise and to interview candidates before hiring. He noted that N.J.A.C. 6:4-1.1 et seq. requires public access to open positions. However, if the 1981 applicant

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was not in the protected or underutilized class for the 1982 position, there was no requirement to interview. Mr. Stein did think that a reinterview would have been an indication of good faith on the part of the Board.

Dr. Saunders and Dr. Smith, experts called by petitioner, were qualified as experts in the hiring of teachers and in affirmative action programs. Both testified that Mr. Brown's resume was far more extensive and impressive than Mr. Cohn's, but also that both men were qualified to teach in a vocational school. Both men testified that the notes made of the interviews (P-13 and P-14) of both men were insufficient for the purposes of affirmative action or for any hiring decisions.

Dr. Saunders conceded that any decision to hire is subjective and that looking for a candidate who knows how to teach, or who has experience or who has the potential to teach is an acceptable criterion. He stated that the impression received at the interview is most important.

Dr. Smith found Mr. Brown more qualified in terms of experience and academic preparation. In reaching this opinion in regard to qualifications, Dr. Smith took into account information he received from Mr. Brown, including the representation that Mr. Brown was a member of Phi Beta Kappa. In Smith's opinion, the July 1981 advertisement was written with a specific person in mind in order to discriminate against Mr. Brown. (Dr. Wilson, Mr. Jakl and Mr. Walker all testified they never met Mr. Cohn or knew Mr. Cohn before he submitted his letter of application and resume after the ad appeared on July 24, 1981.)

The thrust of the testimony presented by the Board centered around its position that it was reasonable to require teaching experience at the secondary level, and therefore it was reasonable to hire Mr. Cohn. The Board tried to show that it complied with its affirmative action requirements.

Dr. Wilson was qualified as an expert in school administration and affirmative action. He described how the vacancy in commercial foods came about and how the

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district hired for open positions. He pointed out that the district determined that someone with experience was needed, and therefore he called his secretary at the Board office and dictated an ad for an experienced teacher (P-4). Someone experienced both in kitchen politics and in dealing with secondary students was necessary, especially when dealing with commercial food students, who were often among the most disaffected in the school.

Dr. Wilson described the screening process as one in which the principal does the initial interviewing. He directed Mr. Jakl to allow for six years of field experience but to look closely at anyone with high school experience. Dr. Wilson never particpated in these teacher interviews. He interviewed neither Mr. Brown nor any of the other candidates for the position of commercial foods teacher. He said it was the practice of the district to involve in the interviewing process a teacher in the area for which the person was being hired. The recommendation for the successful candidate had to come in writing from the principal.

Mr. Jakl interviewed some of the candidates who applied for the commercial foods position. He gave Dr. Wilson all the applications, the advertisement, his notes and his recommendations, including his reasons for selecting Mr. Cohn, the successful candidate. Dr. Wilson then prepared a recommendation for the Board agenda with his conclusions, which were reached after reviewing the resumes and Mr. Jakl's decision. He was satisfied that Mr. Cohn had the high school teaching experience needed for this position.

Dr. Wilson said that Mr. Brown was not equally qualified because he had never taught high school students, he had never been assigned as a regular high school teacher and he had never been evaluated as a high school teacher. He stated the reasons for Mr. Cohn's selection, which included working with Project CO-ED in Newark, effective training for dealing with disaffected youths. He knew that Mr. Jakl had spoken to the evaluator at CO-ED who said that Mr. Cohn had good experience. Most important, during the year immediately preceding, Mr. Cohn taught in an approved high school commercial foods program in Piscataway and received good evaluations and a favorable recommendation from the staff. He therefore determined that Mr. Cohn was certifiable.

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As the affirmative action officer, Dr. Wilson reviewed the applications to see if anyone in any protected class had qualifications equal to Mr. Cohn's. He felt that no one did, so Mr. Cohn was appointed. He told the Board's personnel committee that the affirmative action procedures had been followed.

Dr. Wilson was adamant that he neither met nor knew Mr. Cohn prior to his being selected to teach at the Sussex County Vocational-Technical School and therefore could not have known that Cohn had six years teaching experience. He was adamant that he never spoke to Mr. Brown before August 11, 1981, or since, except at a meeting with the Board on August 17, 1982.

Dr. Wilson testified that the starting salary for the commercial foods position was dependent on the degree and years of experience. The maximum salary for someone without a Bachelor's Degree was $19,213. The maximum for someone with an M.A. plus 45 credits was $22,820. Under no circumstances could any representative of the school district have told Mr. Brown that the position paid close to $30,000 a year.

In 1982, Dr. Wilson prepared a readvertisement of the position. He complied with the affirmative action program in that instance by posting the ad with 30 agencies, including those dealing with minorities. The 1982 advertisement specified six years' teaching experience. Since Mr. Brown did not have the minimal qualifications, he was never called for a reinterview.

During cross-examination, it came out that Dr. Wilson was disgruntled by the County Superintendent's investigation and complained that he never really knew what the complaint was about. He said he disregarded the fact that Mr. Cohn's grades in the late 1940's were Cs and Ds, feeling they were not relevant to his teaching abilities in the 1980's. Dr. Wilson pointed out that since he has been superintendent of schools, only two blacks have applied for teaching positions, one of whom was hired. He noted that less than one-half of one percent of the population in Sussex County is black. Dr. Wilson said

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he did not discriminate against Mr. Brown nor did he have any discriminatory purposes in mind when he dictated the two advertisements. He did not see any overt or covert discrimination against Mr. Brown on the basis of racism by any members of his staff. The primary reason Mr. Cohn was hired was his recent secondary school teaching experience.

Dr. Wilson's credibility was supported by his outstanding background and experience in the field of education. His demeanor was calm and he was collected during the course of pressing cross-examination. I accept as correct his representations concerning the importance to the district of hiring someone with recent secondary experience. While it is true that Dr. Wilson was angered and irritated by the investigation and subsequent legal proceedings as a result of Mr. Brown's complaint to such a degree that he wrote a complaining letter to the President of the United States, I cannot hold his exercise of his First Amendment rights against him.

Mr. Jakl interviewed both Brown and Cohn. He was candid and sincere and his description of the Brown interview, as set forth in paragraphs 16 through 22 of the stipulation of fact, is reliable. I accept Jakl's representation that Mr. Walker conferred with three of the applicants as a member of the "Screening Committee," and that Walker was consulted and gave his opinion in regard to three of the seven applicants. Mr. Jakl made the ultimate decision and filled out P-13 and P-14 before making inquiry about the applicants' backgrounds. After making his initial decision to hire Cohn, Jakl did call Project CO-ED and Piscataway. He learned that the letters of recommendation for Cohn were accurate and received no negative reports.

Mr. Jakl conceded he did not make any inquiries about Mr. Brown but said he did not because Brown was not suitable for the position in the first place due to his lack of high school teaching experience. Mr. Jakl did consider Mr. Brown's Bachelor's Degree and the courses Mr. Brown had taken. However, Brown had no experience as a teacher. Further, Mr. Jakl, who has worked with secondary school students in the vocational area for many years, had no indication that Mr. Brown had any understanding of the type of child he would have to teach. He received the impression that Mr. Brown would not make a good teacher and was concerned with Mr. Brown's manner of speaking to people,

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including his vocabulary, which consisted of lengthy, multisyllabic words which might be over the heads of the children he would be teaching. He agrees he declined to read Mr. Brown's resume and C.V. because they were much too lengthy.

Mr. Jakl chose Cohn due to his high school teaching experience, despite a lack of academic credentials similar to Mr. Brown's. As principal of the school, Mr. Jakl felt it was crucial for the commercial foods teacher to have the ability to connect with high school age students. Wile Mr. Brown had a great deal of managerial experience, Jakl felt that dealing with paid employees differs markedly from dealing with students. He pointed out that a teacher must put up with students' problems and that a teacher cannot fire a student. In Jakl's opinion, experience in managing restaurants does not qualify one to be a teacher. Mr. Jakl took the requirements of the affirmative action plan into account but determined that Brown's qualifications were not equal to those of Mr. Cohn. Mr. Jakl did not know Mr. Cohn before he applied and therefore could not have known that Mr. Cohn had six years of experience teaching high school students. Mr. Jakl did not know Mr. Brown before he applied for the position.

Mr. Jakl did keep Brown's application on file for a year but did not contact him in 1982 when the new advertisement was published because he did not consider the position really vacant since Mr. Cohn had put in a good year's teaching. Jakl's candor was most apparent when he conceded that the first ad could have been accidentally misleading concerning the requirement for six years' teaching experience. He insisted it was not intentionally misleading.

Mr. Walker, a teacher of commercial foods, described his function as a full partner in the interview process for applicants for this new position. The interviews were informal, but he had an opportunity to speak with Mr. Jakl after all the interviews. Walker said that they were specifically looking for someone with teaching experience. He knew ahead of time that candidates were coming for interviews, although he did not recall if Jakl used the word "interview" when he was introduced to either Brown or Cohn. He vigorously denied Brown's assertion that there was rat poison in the school's kitchen. Mr. Walker said a successful teacher was desperately needed to handle the back of the

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house in the commercial foods area. He thinks that people who have been in industry often have problems teaching high school students because their expectations for these students are far too high.

Mr. Walker was an extremely credible witness. His background was impressive. He was past president of the local Teachers Union, chief of the Negotiating Team and chairman of the Grievance Committee. As a member of the NJEA Executive Committee, he had been part of the Affirmative Action Hiring Plan Team and was well aware of the necessity for implementing affirmative action policies when candidates of equal ability were present.

Mr. Lombardo, who first arranged for Mr. Brown to meet with Jakl and eventually Walker, was not involved in the hiring of the commercial foods teacher in 1981 or 1982 and had no part to play in the hiring decision. His testimony is not relevant.

V

Arguments of Counsel

Counsel for Mr. Brown argues that not only has he proven a prima facie case, showing that he was a black and therefore in a protected class, that he was more qualified than the successful candidate and that the Board did not conform to its own affirmative action plan in 1981. He argues that he has shown that the reason Mr. Cohn was selected (his six years of teaching experience) has been proven to be pretextual, since both the expert testimony and the testimony of respondent's witnesses show that the 1981 ad did not refer to teaching experience, but asked for experience in the field. Counsel asserts that the testimony shows that Mr. Brown has a far superior background and experience to that of Mr. Cohn and is of superior intelligence.

Petitioner urges that Ms. Thomas's analysis of lack of compliance with the affirmative action plan should be accepted as fact and that I should conclude there was no

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screening committee, which is required. Counsel argues that even if the first advertisement, P-4, was not specifically tailored for Cohn, the second one, P-9, was obviously tailored not only to keep Mr. Cohn as a teacher, but to preclude Mr. Brown. Counsel asks me to draw an adverse inference from the fact that Mr. Cohn did not testify, that he would not have been a good witness and his testimony would have forced me to conclude that Brown was superior to Cohn.

Counsel asserts a theory that an absence of blacks from the workplace shows that the Board has not put its affirmative action plan into effect. Counsel urges that Mr. Brown be made whole for his loss of income from August 1981 to the present and that attorney's fees be awarded. Mr. Brown has waived any punitive or compensatory damages for pain, humiliation and suffering.

Counsel for the Board argues that petitioner has not sustained his burden of proof and that it has successfully shown that it had a legitimate, bona fide, nondiscriminatory reason upon which to base its decision to hire Mr. Cohn. The Board asserts that Mr. Brown did not show that he had the qualifications specified for the position (six years' teaching experience) nor that the reasons the Board wanted such a qualification imposed were untrue or insufficient. Respondent argues that it had an absolute right to establish a bona fide qualification of teaching experience for the position and that this requirement was made known to applicants either through the ad in question or through Mr. Jakl during the course of the interview process. Counsel urges this judge not to second-guess its rejection of Mr. Brown; it argues that it reasonably arrived at its opinion that he was not qualified for the position, since it needed someone who had experience teaching secondary schools.

Counsel for the Board urges that the basic problem in this case is Mr. Brown's inability and unwillingness to understand that he was not selected simply because he did not have the breadth of teaching experience it was seeking and not because he was a black man. Counsel argues that Mr. Brown falsely sought to bolster his allegedly superior credentials, which gravely impeached his credibility. Counsel also notes that Mr. Brown has a pretentious and pedantic attitude, which was noted by Mr. Jakl in his interview and

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which prompted Jakl to conclude that Mr. Brown would not relate well to secondary school students.

Counsel for the Board argues that should I conclude that discrimination existed and that Mr. Brown should be made whole for not being hired, I must also conclude that he made no bona fide effort to secure employment during the period of time since he applied. He asserts Mr. Brown was required to act reasonably in regard to mitigation to assure that the Board's loss will be minimized.

VI

Findings of Fact re Issues in Controversy

After reviewing and considering the testimony and evidence, and the demeanor and credibility of all the witnesses, as well as the posthearing briefs and reply briefs filed by both counsel and the applicable law, I make the following findings of fact in regard to the issues still in controversy.

1. In July 1981, the Board of Education placed an advertisement in the newspapers for a commercial foods teacher. The ad asked for six years' experience, and did not specify teaching experience.

2. Mr. Brown, petitioner here, and Stanley Cohn applied for the position of commercial foods teacher. Mr. Brown did not (and still does not) have six years' teaching experience in the secondary schools. Mr. Cohn had six years of experience teaching secondary school students. He had just completed a year in the Piscataway school system teaching commercial foods at the secondary level. He was looking for a job because he was subject to a reduction in force in that system.

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3. Dr. Wilson directed Mr. Jakl, principal of the high school and assistant superintendent, to inform every applicant that the Board would give preference to or was looking for someone with six years' teaching experience at the secondary school level. Mr. Jakl complied with that request and every applicant was so informed.

4. Mr. Jakl asked Mr. Walker, the senior commercial foods teacher, to serve with him on an interview committee, which I find is the equivalent of a screening committee. Mr. Walker interviewed Mr. Brown and Mr. Cohn in an informal manner and conveyed his opinions to Mr. Jakl.

5. The requirement for six years teaching experience was established by the Board because it is crucial for commercial foods teachers to have the ability to relate to high school age students, and especially to deal with problems of disaffected youth.

6. Mr. Brown did not have superior qualifications to Mr. Cohn, especially when taking into account the Board's desire to have a teacher with six years of secondary school experience.

7. The maximum salary which would have been paid to a person hired to be a commercial foods tacher, if that person had an M.A. Degree plus 45 credits, was $22,820. No Board representative told Mr. Brown that the job would pay close to $30,000.

8. The Board complied with its own affirmative action plan when it decided to hire Mr. Cohn, because it concluded, after review of Dr. Wilson's recommendations based on Mr. Jakl's interview and the screening committee's interview, that Mr. Brown was not as qualified as Mr. Cohn for this specific position.

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9. Neither Dr. Wilson, Mr. Jakl or Mr. Walker ever met Mr. Brown or Mr. Cohn prior to the placement of the July 1981.

10. The testimony of the expert witnesses is based, in part, on inaccurate representations made to them by Mr. Brown, and therefore is not adopted here. There were no overt or subtle expressions of racial discrimination during the hiring process in the summer of 1981.

11. The impression a candidate gives at an interview is of crucial importance. Mr. Brown's interview convinced Mr. Jakl that he would not be a good secondary school teacher. Mr. Jakl, who has a great deal of experience in the field, concluded that Mr. Brown did not have an understanding of the type of child he would have to teach and was concerned that Mr. Brown might be talking over the heads of the children. I find as fact that Mr. Brown would have great difficulty in relating to disaffected vocational school students.

12. The investigation of the County superintendent of schools and Ms. Thomas, the agent of the Commissioner of Education, relied on the paper credentials of both candidates. Mr. Stein was satisfied that Mr. Cohn possessed the secondary school experience asserted in his resume. Ms. Thomas's conclusion that there was no screening committee is not supported by the evidence before me.

13. In 1982 an advertisement was placed for the position of commercial foods teacher because the Board was under the impression that it had to readvertise all positions taught by persons who had emergency or provisional certificates. That advertisement specifically asked for a person with six years' experience. Mr. Brown was not interviewed for the position in 1982 because he still lacked the requisite experience. The 1982 advertisement was not misleading in the least. It was not discriminatory because it represented a continuation of the

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Board's intent to hire someone with six years of secondary school teaching experience because of the problems at the school.

14. Mr. Brown made numerous attempts to find employment after he was rejected for the position in August of 1981. Despite his self-described superior qualifications, he has been unable to obtain any employment since that time.

15. Mr. Brown has earned little or no income since 1981. The documentation of same presented in this hearing is skimpy, at best.

16. Mr. Brown is not, and never has been, a member of Phi Beta Kappa. Fairleigh Dickinson University did not have in 1955-56, and does not have today, a chapter of Phi Beta Kappa on any of its campuses.

VII

Conclusions of Law

The major question to be determined is whether the Board of Education of the Vocational-Technical School in the County of Sussex violated N.J.S.A. 18A:36-20, as well as N.J.S.A. 10:5-12a, which prohibit an employer from discriminating against any individual in the "terms, conditions or privileges of employment" on account of race. It is clear that the petitioner, Edward H. Brown, has the overall burden of proof by a preponderance of the competent and credible evidence, even where invidious discrimination is alleged. Both attorneys agree that the standard of proof set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), as adopted by the State of New Jersey in Peper v. Princeton University Board of Trustees, 77 N.J. 55 (1978), is applicable to the case at bar.

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Initially, a complainant must establish a prima facie case of discrimination, and that, in itself, is a delicate task. In the area of employment discrimination, it is generally recognized that such acts are more difficult to prove than other acts of discrimination. Clearly, no employer, when establishing terms and conditions of employment, will explicitly differentiate on account of race. In this case, I conclude that Mr. Brown did present a prima facie case in accordance with the standards of McDonnell-Douglas, as adopted by Peper, 77 N.J. at 81. Brown showed that he was a member of the protected class, and he further showed that he was qualfied to teach commercial foods pursuant to the description set forth in the advertisement published on July 24, 1981. He then showed that a white person was selected for the job, even though he (Brown) had equal, if not better, qualifications.

Since a prima facie case was made, the Board was obligated to present legitimate, nondiscriminatory reasons for its failure to hire Mr. Brown for the position of commercial foods teacher and to present evidence that it did comply with its affirmative action plan, as required by N.J.A.C. 4:6-1.1 et seq. The petitioner had the opportunity to rebut with evidence showing that the Board's reasons for hiring Mr. Cohn rather than him were pretextual, to cover up race discrimination. See, McDonnell-Douglas Corp. v. Green, 411 U.S. 792, as well as Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). In cases of employment discrimination, the burden of proof never shifts from the complainant to prove that the alleged reasons for the respondent's selection of another person were pretextual and that discrimination was the substantial factor in the selection process and was really the cause for his or her failure to be given the job sought. Harvard v. Bushberg Brothers, Inc., 137 N.J. Super. 537 (App. Div. 1975).

In evaluating the evidence here, I have certainly kept in mind the underlying salutory purposes of the Law Against Discrimination, as stated in N.J.S.A. 10:5-3, 4 and 6, and as applicable to the case at bar, pursuant to N.J.S.A. 18A:6-9, which permits the Division on Civil Rights and the Commissioner of Education to have concurrent jurisdiction in determining complaints of discrimination involving the public schools of this State. It has been determined that generally complaints of discrimination in the school system should be decided by the Commissioner of Education, see, Hinfey v.

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Matawan Regional Board of Education, 77 N.J. 514 (1978) and Teaneck Bd. of Ed. v. Teaneck Teachers Association, 185 N.J. Super. 269 (App. Div. 1982). See also, National Organization for Women v. Little League Baseball, Inc., 127 N.J. Super. 522, 533 (App. Div. 1974). The purpose of the law is remedial and should be read with an approach sympathetic to its objectives. I am aware that discriminatory conduct is generally covert and subtle in nature and that a complainant does not have to prove that a respondent announced such a policy overtly. This judge can determine whether the respondent had a discriminatory intent toward the complainant or petitioner by examining what was done and said and by reviewing the totality of the circumstances of the entire transaction. Parker v. Dornbierer, 140 N.J. Super. 185, 189 (App. Div. 1976). I have taken such an approach in the case at bar.

In reviewing the entire episode, from the time the Board determined that a commercial foods position was vacant through the publishing of the 1981 ad, to the interviewing by Mr. Jakl and Mr. Walker, to the determination of the superintendent and the Board that it would hire Mr. Cohn, I conclude that petitioner has not carried his ultimate burden of proof, which never leaves him, that the Board's decision to hire Mr. Cohn, based on his recent experience teaching commercial foods to secondary students, was unreasonable. I have reviewed the ad in question (P-4), which states "applicants must possess a current vocational teaching certificate or have six years' experience. . . ." [emphasis added] It is the argument of petitioner that the ad, in and of itself, was either tailored to Mr. Cohn's qualifications or indicated that the Board never considered teaching experience when it published the ad and used that reason to discriminate against him on the basis of race. Since neither Dr. Wilson nor Mr. Jakl had ever met Mr. Cohn or knew of his qualifications prior to the publication of the ad, there can be no finding that the ad was tailored to Mr. Cohn's qualifications. While the ad may have been accidentally and unintentionally misleading, most important is the unrebutted, uncontroverted fact that Mr. Jakl told every applicant who came before him that experience in teaching commercial foods to secondary school students was extremely important to the Board. Mr. Brown's testimony concerning the interview confirmed that Mr. Jakl told him this. Mr. Brown went out of his way to compare his teaching of freshmen in the Community College and working with students in the HEP program at Fairleigh Dickinson with regular teaching of secondary students.

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Further evidence of the reasonableness of the requirement of six years' experience can be found in the testimony of Mr. Jakl, Dr. Wilson and Mr. Walker, all of whom had great experience in the area of teaching vocational-technical students. Each indicated that a teacher with secondary experience in vocational schools was preferable, since they needed someone who would relate well to the disaffected students who were the majority of commercial foods instructees.

I CONCLUDE that Mr. Brown has not carried his burden to show he was more qualified to teach secondary school students than Mr. Cohn. The expert opinions of Drs. Saunders and Smith relied, at least in the case of Dr. Smith, on an incorrect statement presented to them by Mr. Brown that he was a member of Phi Beta Kappa. The qualifications presented in Mr. Brown's resume and C.V. were puffed and overspoke his academic background and work experience.

Petitioner's counsel graciously took upon himself the responsibility for the statement in the stipulation that petitioner belonged to Phi Beta Kappa, saying it was due to a typographical error. Pursuant to his representation, I corrected that stipulation on March 17, 1986. However, counsel could not explain away Mr. Brown's testimony before me and his representations to Dr. Smith and others.

Mr. Brown has not shown he was more qualified just because of his experience in the food service industry. Persons who have experience in running and managing restaurants are not always the best persons to teach students because they expect too much from high school students and do not understand that they cannot fire them as they can paid employees. I have further found that Mr. Brown did not have six years' hands-on experience teaching high school students. Any experience he had with the HEP program at Fairleigh Dickinson University in the 1960's was not instructional and was at least 15 years prior to his application for this position. This is in sharp contrast to Mr. Cohn, who taught high school students the previous year and who received good evaluations for his work in Piscataway and in Project CO-ED. (See, R-10, 11 and 12.)

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It is obvious that the Board had a legitimate reason to want to hire a person with secondary school experience to teach the disaffected youngsters who participate in commercial foods in the Sussex County Vocational-Technical School. It relied on the recent high school experience and good evaluations of Mr. Cohn in hiring him. It made a reasonable conclusion, with which I concur, that Mr. Brown is not the sort of person who can relate well to secondary school students in a vocational-technical school. I conclude that the Board has presented bona fide reasons why it hired Mr. Cohn instead of Mr. Brown, and I base this conclusion on the credibility, sincerity and honesty of the Board's witnesses, which is to be contrasted with my lack of faith in the testimony of Mr. Brown himself.

I have carefully reviewed Ms. Thomas's testimony concerning the affirmative action plan and her conclusion that the requirement for a screening committee was not followed. Ms. Thomas was a credible witness and I am concerned with her conclusions. However, I have found as fact that Mr. Walker was part of the interview process, did interview both Mr. Brown and Mr. Cohn and did give his opinions to Mr. Jakl before Mr. Jakl made the ultimate decision. Mr. Walker's credibility was unimpeachable as was his dedication to the teaching profession. While it may have been the better practice for Mr. Jakl to have specifically told Mr. Brown that Walker was part of a screening committee, I do note that the interview took place during the summer when school was not in session and was done on an informal basis. An informal screening committee is not forbidden.

Petitioner and Ms. Thomas assert the affirmative action plan was not followed because it lacked a screening committee and because the ad was tailored to Mr. Cohn's qualifications. I have found as fact that there was a screening committee, which consisted of Mr. Walker and Mr. Jakl. I have further found that P-4, the July 24, 1981 ad, was not tailored for Mr. Cohn since neither Wilson nor Jaki knew Mr. Cohn (nor did they know Mr. Brown) before the ad was dictated and published. In reviewing the details of the affirmative action plan, including the requirements for posting and mailing, I conclude that all requirements were met. I further conclude that there is no requirement in the entire plan for a screening committee, albeit that one did exist.

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I have also reviewed N.J.A.C. 6:4-1.1, Equality in Educational Programs, very carefully. It was Ms. Thomas's opinion that this regulation, as well as the affirmative action plan, requires a screening committee. N.J.A.C. 6:4-1.1 et seq., does not require a screening committee for employment purposes. Therefore, I conclude that the Board did comply with its own affirmative action plan and did not violate its policy to appoint minority applicants who are members of protected classes if those persons possess equal qualifications to the nonprotected person. In the case at bar, petitioner was not as well qualified for the position of teacher of commercial foods as the successful candidate because he did not have recent secondary school experience and because he did not appear to be the sort of person who could relate well to the disaffected youths in the program. The Board did not violate its affirmative action policy because it did post, publish and mail the ad in question to the agencies listed at the conclusion of its own affirmative action plan. The ultimate conclusion is that petitioner has not shown by a preponderance of the evidence that he was discriminated against on the basis of race. Since the requirement and/or desire for six years teaching experience has been shown to be reasonable and not pretextual in the circumstances here, the 1982 ad was not discriminatory.

The remaining issue set forth in the Prehearing Order concerns relief to which petitioner would be entitled if he should prevail. I have reviewed petitioner's proofs in regard to salary to which he might have earned had he been employed, as well as attempts he said he made to mitigate respondent's damages. The maximum salary petitioner could have received had he been employed for the 1981-82 school year was $19,470 (for a BA degree without any postgraduate credits), see page 2 of J-2 in evidence. J-2 is adopted as fact in this case, and the total salary to which he would be entitled if he ultimately prevails can be determined from a review of said document, putting Mr. Brown on step 12 with a BA degree.

Mr. Brown was aware of his duty to mitigate. He testified as to his earnings from July 1981 to date, which evidence was minimal, to put it kindly. According to Mr. Brown, he had very little income during the years following his rejection for the position of teacher of commercial foods and lived on an inheritance. The tax returns and other

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documents are so skimpy that it is impossible for this judge to make an ultimate conclusion, should Mr. Brown eventually prevail, as to what monies should be deducted from the total sum he might have earned. I do find that Mr. Brown made efforts to obtain other employment since 1981 but was unable to obtain even one offer of employment, despite his assertion of superior qualifications and assiduous efforts to obtain employment.

The law concerning mitigation of damages is set forth in Goodman v. London Metals Exchange, Inc., 86 N.J. 19 (1981). It states that the measure of damages is the salary that would have been paid to the wrongfully discharged (or wrongfully not hired) employee. Id. at 34. However, "the employer has been permitted to reduce its damages by showing that the employee has earned wages from other employment. [citations omitted] The employer may also reduce the award by showing that the employee could have secured other employment by reasonable effort, but did not." [citations omitted] Ibid. To avoid further litigation in this already protracted case, I have reviewed the mitigation argument presented by respondent. Mitigation of damages requires the discriminatee to lower his sights and accept employment with lower pay, different work or at a distant location as time passes and he does not obtain employment comparable to that which he would have had had he not been discriminated against. Id. at 36-38. It is clear that mitigation, including the "lower sights" principle, is an affirmative defense and the burden of proving the appropriateness of its application to the case at bar rests on the Board of Education, the putative employer. No evidence was presented by respondent to show that comparable employment opportunities were available or that even if the lower sights doctrine were applicable, there were other suitable jobs. The Goodman Court specifically rejected the holding of Talman v. Bd. of Trustees of Burlington Cty. College, 169 N.J. Super. 535 (App. Div. 1979), certif. den. 81 N.J. 407 (1979), which required a discriminatee to exercise reasonable efforts and which imposed the burden of proving mitigation or failure to mitigate on both the employer and discriminatee instead of just the employer. I therefore conclude that should Mr. Brown ultimately prevail, and my conclusion that he did not prove discrimination on the basis of race be reversed, then Mr. Brown would be entitled to the salary he would have earned had he been employed by the Board from 1981 as a teacher of commercial foods. He would be entitled to interest as

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provided by R. 4:42-11(a)(i) and (ii). The total amount, of course, must be reduced by whatever income Mr. Brown earned between 1981 to date, as described in P-11, P-18 and P-19 and his testimony.

For all the foregoing reasons, I have determined to dismiss the petition of Mr. Brown because he has not proven racial discrimination and because he has not shown that the affirmative action plan of Sussex County Vocational-Technical School was violated.

Accordingly, it is hereby **ORDERED** that the petition of Edward H. Brown be, and is, hereby **DISMISSED.**

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

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

June 2, 1986
DATE

SYBIL R. MOSES, ALJ

JUN 2 - 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JUN 3 1986
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

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EDWARD BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL IN THE COUNTY OF SUSSEX,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner and reply exceptions thereto were filed by the Board within the time prescribed by N.J.A.C. 1:1-16.4a, b and c. The Board's primary exceptions, which were affixed to its reply exceptions were untimely, however.

Petitioner's exceptions initially request that Deputy Commissioner (sic) McCarroll not be allowed to review or have input to the decision herein, since he was involved in a recent case concerning petitioner.

Petitioner contends, inter alia, that the following conclusions and findings of fact in regard to the issues in controversy made by the ALJ were contrary to the weight of the evidence and should be reversed:

1. In paragraph 4, the finding of an equivalent screening committee that Mr. Jakl and Mr. Walker were supposedly on. The denial of Nida Thomas's uncontroverted testimony as to the procedures and acception of the screening committees availability as verified by her testimony in showing that in her experience the use of these screening forms and the like.

2. In paragraph 5, the requirement of six (6) years of teaching experience was not established. No member of the Board of Education was brought into court to testify that in fact that was their standard. The only two individuals that were brought into testify that regards to that was Mr. Jakl, school principal and Dr. Wilson, the school Superintendent. There was no showing of an establishment of the requirement of six (6) years teaching experience especially in

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light of the establishment of the amount of teachers who lacked teaching experience in their school system and the advertisements.

3. In paragraph 6, it was shown by proof that Mr. Brown does in fact have superior qualifications. If we even discount both experts that were submitted by the petitioner, namely Dr. J. Harry Smith and Dr. Leonard J. Saunders, we still have the testimony of Dr. Dale Reinhardt, former Superintendent of Schools of Susex (sic) County, who was qualified, and who had stated that he also believed that Mr. Brown was superior in qualifications.

4. I dispute paragraph 8. The Board could not have complied with its own Affirmative Action Plan since in fact it was complying with the recommendations of Dr. Wilson who as testified by Nida Thomas of the State [Department of Education] had not conformed to his Affirmative Action Plan.

5. In paragraph 10, even if there were accurate statements made, the overall testimony of both expert witnesses indicated that Mr. Brown qualifications were such and so much more superior that Mr. Cohn's that he was eminently more qualified and the testimony of both witnesses, plus Dr. Reinhardt, should have been considered and adopted herein.

6. In regards to paragraph 11, the impression a candidate gives at an interview of crucial importance. However, it is stated in the Stipulation of Facts Complaint, discovery and evidence, the only main reason that the Board denied Mr. Brown his employment was not in his impression because the report indicates that the impression was superior and was marked superior. It was only that he did not have teaching experience. Paragraph 11 should be discounted completely.

7. In paragraph 12, it is correct in Ms. Thomas's conclusion that there was no screening committee. The evidence does support it by the referral to Dr. Reinhardt's investigations himself.

8. Paragraph 13 is a conclusion not based on the facts and is in fact the main reason showing pretextual activities.

(Petitioner's Exceptions, at pp. 9-10)

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Petitioner further excepts to the following conclusions of law made by the ALJ:

While petitioner agrees that discriminatory conduct is generally covert and subtle in nature, it is his contention that when the superintendent of schools exercises his First Amendment rights, which he has a perfect right to do, in writing a letter to the President of the United States complaining about the procedures in Affirmative Action, "it shows a bit sutlely (sic) that in fact he is not a willing participant in Affirmative Action." (Petitioner's Exceptions, at p. 11)

Petitioner further contends that none of the Board members were consulted in this matter nor did they testify as to exactly what happened on the recommendations.

Petitioner excepts to the ALJ's finding that there was a screening committee in the face of Nida Thomas's report and Dr. Reinhardt's conclusions.

Petitioner further avers that there was teaching experience shown through his credentials. Petitioner notes in the testimony not mentioned in the initial decision that one of the women interviewed actually had teaching experience. Petitioner avers that the court discounted that factor. He queries why the female candidate was not indicated as a primary applicant, if teaching experience were to be the primary interest. Further, petitioner avers that "it is clear that there was an injection of the six (6) years experience and it was pretextual in nature." (Petitioner's Exceptions, at p. 12)

Petitioner's exceptions concluded that the court could not find that an informal screening committee existed. Petitioner suggests that Nida Thomas was a Deputy Commissioner and that she made the proper findings that the Board had not conformed to its affirmative action plan. Further, petitioner avers that Dr. Reinhardt was in fact correct. Petitioner contends that the conclusions of the ALJ are contrary to the weight of the evidence. He contends he has met his burden of proof and, thus, has proven race discrimination. Petitioner prays for back salary and employment.

The Board's reply exceptions note objection to the request of counsel for petitioner that Deputy Commissioner (sic) McCarroll not be permitted to participate in any way in the Commissioner's review of the initial decision herein, based upon a possible conflict since he was involved in the recent case of Edward Brown v. Board of Education of the Township of Sparta et al., decided by the Commissioner February 7, 1985, aff'd State Board June 5, 1985, aff'd New Jersey Superior Court, Appellate Division, March 26, 1986. The Board contends that

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> ***[Deputy] Commissioner McCarroll was not so involved at the trial level of this matter as to which [the] Final Decision was affirmed in the Appellate Division. Of course, if Deputy Commissioner McCarroll feels that he should recuse himself, we would leave this matter entirely to his own decision or to [the Commissioner's] discretion.
> (Board's Correspondence, dated June 12, 1986)

The Board's reply exceptions include the following:

1. Exception 3, Uncontroverted Facts: The Board states that the ALJ's determination was accurate that the affirmative action plan of the Board did not require a review committee, but that the procedure used in the instant matter constituted an adequate review committee. The Board avers that the testimony of Nida Thomas, then Assistant Deputy Commissioner of the State Department of Education, that there was no review committee, was not based upon any investigation made by her of the actual procedure used, but was based upon mere hearsay and self-declarations provided by petitioner. The Board avers no witness at the hearing disputed the testimony presented on its behalf that the candidates considered for the position were interviewed by these members of the committee and that they then conferred and came to the conclusion that petitioner was not equally qualified with the candidate selected.

The Board avows that the fact that Mr. Cohn was not called as a witness is immaterial to the fact that all of the testimony, not contradicted in any way, indicates that both candidates were interviewed by both members of the committee.

The Board further contends the evidence and decision disclose that the ALJ was aware that at the time of the selection of Mr. Cohn, there were no black professionals on the staff, although there had been black teachers on the staff in the past and one black nonprofessional was employed at the time of said hiring. The decision further discloses a finding, avers the Board, which was not contested, that less than one-half of one percent of the indigenous population of Sussex County is non-black, thus providing a very limited source for black candidates.

Further, avers the Board, the decision indicates a finding by the ALJ that although P-5 advised petitioner that he would be contacted if the position again became vacant, this was not prejudicial because of the clear finding that he still remained unqualified under the standards of employment established for the position and that this issue was duly considered when petitioner reapplied without having been contacted, not only by the officials in charge but by the entire Board of Education at a conference with petitioner and his attorney.

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2. Exception 4, Analysis of the Testimony: The Board contends that any inference which the ALJ may have drawn from petitioner's contention that Mr. Jakl was wearing a jogging suit while interviewing petitioner is misplaced since Mr. Jakl has never owned a jogging suit. The Board avers that the testimony of Mr. Jakl as to this issue was found to be more credible than the testimony of petitioner and such conclusion was fully justified. Further, the Board avows that the conclusion drawn by the ALJ that Dr. Reinhardt was a reticent witness is entirely proper and should not be disturbed. The Board avers that the ALJ was in a position to observe the demeanor and manner of testimony of Dr. Reinhardt.

The Board's exceptions aver also that the finding of the court that, notwithstanding the advertisement, petitioner and all other candidates were advised that the advertisement calling for six years of experience was intended to signify six years of actual teaching experience, was totally uncontradicted by any witness. Further, the Board replies that the allegation in petitioner's exceptions that Witness Stein refused to talk to petitioner's counsel was not supported by any evidence or representation made before the court. On this point, the Board contends also that there is no basis for any finding that the testimony of Mr. Stein was in any respect lacking in credibility. The Board avows:

> Indeed, he was not a hostile witness but a neutral witness, attempting to set forth the facts as truthfully as possible. Nothing in Mr. Stein's testimony rebuts the finding that Mr. Cohn possessed the qualification of six years of teaching experience and Mr. Brown did not.
> (Board's Reply Exceptions, at pp. 3-4)

Further, the Board states in reply exceptions that the conclusions drawn by the ALJ in the initial decision, ante, are not contrary to the weight of the evidence. Clearly, there was no intentional modification of the advertisement in 1982 because it merely set forth what had been made explicitly clear at the interviews in 1981, namely that teaching experience was intended to be a condition of employment of paramount consequence. The Board argues that petitioner's argument that two candidates, petitioner and Cohn, should have been re-screened in 1982 is totally without merit. The Board avers that it is uncontradicted that petitioner had no changed circumstances which would have justified consideration of his candidacy and the ALJ was entirely correct in concluding that there was nothing pretextual in this procedure.

3. Exception 6, Findings of Fact Regarding Issues in Controversy: The Board contends that none of the findings of fact made by the ALJ were contrary to the weight of the evidence. It avers, inter alia, that

> a. The finding that Mr. Jakl and Mr. Walker constituted a screening committee adequate to review the qualifications of candidates for purposes of the Affirmative Action Plan

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was amply supported by the evidence. The Board states that the testimony of Nida Thomas was not uncontroverted but was, instead, totally refuted by the direct testimony of all the witnesses for the Board which testimony establishes beyond doubt that the review undertaken by Mr. Jakl and Mr. Walker constituted a full review of the qualifications of all candidates. The Board views Ms. Thomas's testimony as relevant only as to the question of the form rather than the substance of the screening process.

b. The Board replies that the exception to the effect that no proofs were offered other than the testimony of Dr. Wilson and Mr. Jakl that the requirement established as a guideline for employment of teachers was teaching experience is wholly without merit. The Board contends that the policy of the school was established by the exhibits entered into evidence and the guideline requiring teaching experience rather than industrial experience is wholly rational and consistent with good educational principles.

c. The Board contends that the issue set forth in paragraph 8 of the Findings of Fact in the initial decision really constitutes the ultimate issue in this case. The Board contends that all of the evidence fully ustifies a finding that the Board, through its administrative officials and Board policy, had concluded that teaching experience was a prerequisite to qualification for employment of paramount importance. The Board avows, "The uncontroverted proofs that the standard for qualification for the employment of a teacher of Commercial Foods was six years of actual teaching experience, leaves (sic) no room for doubt that only Stanley Cohn met this prerequisite."

(Board's Reply Exceptions, at p. 6)

d. The Board avers that the conclusions of paragraph 10 of the Findings of Fact, that the testimony of the expert witnesses was based in part on the representations made to them by petitioner, are fully justified.

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> Indeed, these representations included an apparent deliberate misrepresentation that Petitioner had graduated Phi Beta Kappa, a false representation which obviously greatly affected the conclusions of the trial judge who heard the testimony and observed the witnesses.
>
> Obviously, the conclusions set forth in paragraph 11 of the Findings are based upon the credible testimony of those persons who conducted the interview that Mr. Cohn was found to have superior qualifications in all respects. Great weight must be given to the final sentence of paragraph 11 incorporating the finding by the trial judge that, from her observations, Mr. Brown "would have great difficulty in relating to disaffected vocational school students."
> (Board's Reply Exceptions, at pp. 6-7)

4. Exception 7, Conclusions of Law: The Board agrees with the conclusions drawn by the ALJ from the legal precedents cited. The Board avows that petitioner's argument that by writing a letter to the President of the United States, Dr. Wilson was demonstrating an unqualified objection to affirmative action as a policy, is specious. Petitioner does not like the results of this decision but nothing in his argument, asserts the Board, sustains his position that the decision should be reversed. The Board argues that petitioner's claims must be dismissed because he has failed to sustain the burden of proof imposed upon him by law.

Upon a careful review of the record before him, the Commissioner notes the absence of a transcript being provided by the parties of the proceedings below. Consequently, he adopts as his own the findings of fact as well as the determinations regarding credibility of witnesses as established by the ALJ, who was witness to the entire proceedings.

The Commissioner further finds, as did the ALJ, that petitioner established a prima facie case of race discrimination in accordance with the standards of McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) as adopted by New Jersey in Peper v. Princeton University Board of Trustees, 77 N.J. 55 (1978). The Commissioner also concurs with the ALJ that the Board articulated a legitimate non-discriminatory reason for its failure to hire petitioner. (See Initial Decision, ante)

The Commissioner further notes that in a disparate treatment, race discrimination case,

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> the great majority of cases will turn on the third stage, whether or not the plaintiff can establish that the defendant's articulated reason for its actions is in fact pretext. There are three general categories of evidence that can be presented by the parties:
>
> (1) direct evidence of motive;
> (2) statistical evidence; and
> (3) comparative evidence.
>
> Direct evidence of discriminatory motivation is now relatively unusual. Statistics, all-important in class actions and adverse impact cases, are of relatively low importance in an individual disparate treatment case.***
>
> The key is usually comparative evidence. ***In all instances of comparative evidence, the critical question is whether the persons sought to be compared by either the plaintiff or the defendant are in fact in a comparable factual setting.[1]

As to Issue One enumerated in the Prehearing Order, whether petitioner was as well-qualified for the position of teacher of commercial foods as the successful candidate, the Commissioner finds that the matter hinges on whether the announcement that the Board preferred a candidate with six years teaching experience was a properly established criterion, not a pretext for race discrimination. Since the burden of persuasion never shifts from petitioner to establish that the Board's proffered nondiscriminatory reason for its failure to hire him was pretextual and that discrimination was the substantial factor in the selection process. (Harvard v. Bushberg Brothers, Inc., 137 N.J. Super. 537 (App. Div. 1975); see also McDonnell-Douglas Corp., supra, as well as Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)), petitioner was required to prove that the ad qualifications were either solely tailored to Mr. Cohn's qualifications or were indicative of the fact that the Board never intended teaching experience to be a consideration. The Commissioner finds, as did the ALJ, that petitioner has failed in his burden of proof on this issue. As stated by the ALJ:

> While the ad may have been accidently and unintentionally misleading, most important is the unrebutted, uncontroverted fact that Mr. Jakl told every applicant who came before him that

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[1] Barbara Lindemann Schlei and Paul Grossman, Employment Discrimination Law, 1983, American Bar Association, Chicago, pp. 14-15.

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> experience in teaching commercial foods to secondary school students was extremely important to the Board. Mr. Brown's testimony concerning the interview confirmed that Mr. Jakl told him this.
> (Initial Decision, ante)

Similarly, the Commissioner finds that petitioner has not shown he was more qualified just because of his experience in the food service industry. As stated by the ALJ:

> Persons who have experience in running and managing restaurants are not always the best persons to teach students because they expect too much from high school students and do not understand that they cannot fire them as they can paid employees. I have further found that Mr. Brown did not have six years' hands-on experience teaching high school students. Any experience he had with the HEP program at Fairleigh Dickinson University in the 1960's was not instructional and was at least 15 years prior to his application for this position. This is in sharp contrast to Mr. Cohn, who taught high school students the previous year and who received good evaluations for his work in Piscataway and in Project CO-ED. (See, R-10, 11 and 12.)
>
> It is obvious that the Board had a legitimate reason to want to hire a person with secondary school experience to teach the disaffected youngsters who participate in commercial foods in the Sussex County Vocational-Technical School. It relied on the recent high school experience and good evaluations of Mr. Cohn in hiring him. It made a reasonable conclusion, with which I concur, that Mr. Brown is not the sort of person who can relate well to secondary school students in a vocational-technical school. I conclude that the Board has presented bona fide reasons why it hired Mr. Cohn instead of Mr. Brown, and I base this conclusion on the credibility, sincerity and honesty of the Board's witnesses, which is to be contrasted with my lack of faith in the testimony of Mr. Brown himself.
> (Initial Decision, ante)

Petitioner's exceptions bring nothing new to the record in this regard. Without further evidence the Commissioner finds no basis for disputing that which was established by the ALJ on Issue One. As to the reasonableness of requiring six years teaching experience for the position, the Commissioner concurs with the ALJ that:

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> Further evidence of the reasonableness of the requirement of six years' experience can be found in the testimony of Mr. Jakl, Dr. Wilson and Mr. Walker, all of whom had great experience in the area of teaching vocational-technical students. Each indicated that a teacher with secondary experience in vocational schools was preferable, since they needed someone who would relate well to the disaffected students who were the majority of commercial foods instructees.
> (Initial Decision, ante)

Concerning Issue Two, that is, did the Board violate its affirmative action policy regarding minority applicants in failing to appoint petitioner to the position of teacher of commercial foods, the Commissioner finds that the Sussex County Vocational Board of Education is obliged to carry out the mandates of its affirmative action plan to seek and hire persons who represent minorities. However, it is not obliged to meet its requirements by hiring someone less qualified than the person ultimately selected for the position of teacher of commercial foods. Having established that petitioner was not as well-qualified as Mr. Cohn, by virtue of his lack of secondary teaching experience, and his perceived inability to relate to secondary students, the Commissioner concurs with the ALJ that:

> *** In the case at bar, petitioner was not as well qualified for the position of teacher of commercial foods as the successful candidate because he did not have recent secondary school experience and because he did not appear to be the sort of person who could relate well to the disaffected youths in the program. The Board did not violate its affirmative action policy because it did post, publish and mail the ad in question to the agencies listed at the conclusion of its own affirmative action plan. The ultimate conclusion is that petitioner has not shown by a preponderance of the evidence that he was discriminated against on the basis of race. Since the requirement and/or desire for six years teaching experience has been shown to be reasonable and not pretextual in the circumstances here, the 1982 ad was not discriminatory.
> (Initial Decision, ante)

The Commissioner finds, as did the ALJ, in addition, that the 1981 job requirements were similarly not pretextual, because all candidates were apprised at the time of interviewing of the Board's preference for secondary teaching experience. Therefore, they too were in keeping with the Board's affirmative action plan.

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Finally, since the Commissioner finds that petitioner has failed to meet his burden of persuasion in the instant matter, it is unnecessary to reach the remaining issue set forth in the Prehearing Order, concerning relief to which petitioner would be entitled if he should prevail.

Accordingly, the Commissioner finds and determines that petitioner has failed to prove race discrimination and has not shown that the affirmative action plan of Sussex County Vocational School was violated. The instant Petition of Appeal is thus dismissed with prejudice.

COMMISSIONER OF EDUCATION

July 11, 1986

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EDWARD BROWN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL, IN THE COUNTY OF SUSSEX,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 11, 1983

Decided by the State Board of Education, May 2, 1984

Remanded by the Appellate Division, April 4, 1985

Decided by the Commissioner of Education, July 11, 1986

For the Petitioner-Appellant, Gerald B. Hanifan, Esq.

For the Respondent-Respondent, Emanuel A. Honig, Esq.

After careful review of the record in this case, we concur with the Commissioner's conclusions that Petitioner failed to prove that the Board's decision not to employ him was the result of unlawful racial discrimination and that Petitioner failed to show that the Board violated its affirmative action plan. In concurring with these conclusions, we agree, based on the record, that Petitioner has failed to establish that the Board's stated preference for a candidate with six years of teaching experience was pretextual. Further, although the record indicates that Petitioner had many qualifications making him suitable for employment in various capacities, we emphasize that six years of teaching experience was not among his qualifications. Accordingly, we agree that the Board's conclusion that Petitioner was not as well qualified as the successful candidate for the specific position at issue and its consequent decision to select the other candidate was not in violation of the Board's affirmative action plan. See Initial Decision, at 19. We emphasize that the plan involved in this case does not mandate the selection of a miniority candidate where, as here, qualification is not determined by certification, a non-minority candidate is more qualified for a particular position based on reasonable criteria established by the Board, and the criteria was not established for a discriminatory purpose. See J-1, in evidence.

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We further emphasize that, under the procedures set forth in the plan, the superintendent is responsible for recruitment of both certified and non-certified personnel and that "...he may call upon other staff members for assistance." Id. at P5-4.1 and P6-1.2. In cases of non-certified personnel, interviewing is under the direct supervision of the superintendent, P6-1.2, and he makes the recommendations for the employment of specific persons who have been interviewed and screened by him. P6-1.4. As found by the Administrative Law Judge (ALJ), in this case, the Superintendent called upon the Assistant Superintendent for assistance. The Assistant Superintendent, in turn, asked the senior commericial foods teacher to serve as part of the interview committee and, in fact, each interviewed both of the candidates. We conclude, as did the ALJ and Commissioner, that through the interview process followed in this case, the board fulfilled its procedural obligations under the plan. We need make no judgment concerning the adequacy of the plan since, as agreed at the prehearing conference, such issues are no longer in controversy.

October 1, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1538-86
AGENCY DKT. NO. 431-12/85

BOARD OF EDUCATION OF THE
TOWNSHIP OF GLOUCESTER,
Petitioner,
v.
ARTHUR DE GEORGE,
Respondent.

John D. Wade, Esq., for the petitioner (Wade and Friedman, attorneys)

No appearance by or on behalf of respondent

Record Closed: May 28, 1986 Decided: June 9, 1986

BEFORE AUGUST E. THOMAS, ALJ:

The Board of Education of the Township of Gloucester (Board) seeks to terminate the services of tenured employee Arthur DeGeorge (respondent), a transportation mechanic, through the forfeiture provision of N.J.S.A. 2C:51-2. This petition was filed with the Commissioner following respondent's arrest, indictment, and subsequent conviction and sentencing for manufacturing and disposition of a controlled dangerous substance (CDS).

On December 26, 1985, the matter was filed in the Office of the Commissioner. Respondent did not Answer the Board's complaint mailed to him on December 24, 1985; neither did he respond to the Commissioner's demand to Answer the Board's complaint by January 27, 1986.[1]

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[1] Respondent acknowledged receipt of the Commissioner's demand for Answer (Return Receipt Requested 145775, January 18, 1986).

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On January 30, 1986, the Commissioner advised the Board that he needed further proofs in order to reach a determination on merits of the complaint against respondent. On February 13, 1986, the Commissioner denied the Board's February 4, 1986 request for a 30-day extension in which to supply the requested information. By letter dated February 27, 1986, the Board filed the information required by the Commissioner together with a letter brief seeking respondent's termination. However, after receipt of this information, on or about March 12, 1986, this matter was transferred to the Office of Administrative Law (OAL) as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq., and a prehearing conference was scheduled before the undersigned on April 14, 1986. On March 14, 1986, an adjournment was granted by the OAL at the request of respondent's mother, and the prehearing was rescheduled before me on May 12, 1986. The Prehearing Order notes that respondent failed to appear; neither did he respond to the Order to which he acknowledged receipt on May 15, 1986 (Return Receipt Requested P097618536).

On receipt of the Board's Affidavit on May 28, 1986, the record in this matter was closed.

PROCEDURAL HISTORY AND UNDISPUTED FACTS AS SET FORTH IN THE MOVING PAPERS AND ATTACHMENTS

1. Respondent is employed by the Board as a transportation mechanic. He holds a tenured status.

2. On April 12, 1985, respondent was arrested by the Gloucester Township Police and charged with various complaints involving the sale of a small quantity of amphetamines on school property while employed by the Board.

3. On April 16, 1985, the Board notified respondent that it had acted in a public meeting on April 15, 1985, to suspend him with pay because of the charges filed against him by the Camden County Prosecutor's Office.

4. On August 5, 1985, in Indictment No. 1670-8-85, respondent was formally indicted by the Camden County Grand Jury and charged with two counts of possession of a CDS, N.J.S.A. 24:21-20a(1), and two counts of manufacturing and disposition, N.J.S.A. 24:21-19a(1).

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5. As a result of the indictment on October 29, 1985, the Board passed a resolution suspending respondent without pay.

6. By way of plea bargain entered on November 15, 1985, counts one and three of the indictment were dismissed.

7. On the same date, respondent pled guilty to counts two and four (manufacturing and disposition of CDS; N.J.S.A. 24:19(a)1), was found guilty and sentenced by the Honorable Rudolph J. Rossetti, J.S.C. (See, Judgment of Conviction, and Statement of Reasons for Sentence.)

8. The incidents surrounding the arrest took place on Board property while respondent was working as a tenured employee.

I adopt all of the foregoing as my FINDINGS OF FACT.

CONCLUSION

The Commissioner has determined on several occasions that upon an employee's sentencing by a court, the pertinent statute provides for the forfeiture of his public office. N.J.S.A. 2C:51-2 states in pertinent part that:

> a. A person holding any public office, position, employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime;
>
> (2) He is convicted of an offense involving or touching such office, position or employment; or
>
> (3) . . .
>
> b. The forfeiture set forth in subsection a. shall take effect:

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(1) Upon finding of guilt by the trier of fact or a plea of guilty, if the court so orders; or

(2) Upon sentencing unless the court for good cause shown, orders a stay of such forfeiture . . .

The statute mandates that a guilty person "shall forfeit" such office or position when the crime involves dishonesty or a crime of the third degree (N.J.S.A. 2C:51-2).

N.J.S.A. 2C:51-2 provides for the forfeiture of public office after conviction of an offense. This statute applies to " a person holding any public office, position or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof. . ." See, Kendall v. Camden City Bd. of Ed., OAL DKT. EDU 1293-81, decided by the Comm. March 16, 1983; aff'd. State Bd. of Ed., July 6, 1983; Pemberton Tp. Bd. of Ed. v. Robert Grover, OAL DKT. 651-83, decided by the Comm. June 1, 1983; Haddonfield Bd. of Ed. v. Terrence D. McGuire, OAL DKT. EDU 8413-84, decided by the Comm. October 21, 1985; aff'd. State Bd. of Ed. February 5, 1986.

Accordingly, it is **ORDERED** that respondent has forfeited his right to his tenured position as of November 15, 1985, the date of his conviction and sentence.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

9 June 86
DATE

August E. Thomas
AUGUSTE. THOMAS, ALJ

Receipt Acknowledged:

JUN 10 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 11 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF ARTHUR DE GEORGE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF GLOUCESTER, CAMDEN COUNTY.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent, who made no appearance at the hearing, submitted timely exceptions pro se pursuant to N.J.A.C. 1:1-16.4a, b and c. Said exceptions raise no issue of either law or fact. Instead, respondent seeks the Commissioner's consideration of his personal circumstances in relation to his having three children to support and alleging that he has learned his lesson, having attended a 28-day in-house program for alcohol and drug abuse, as well as AA and NA meetings.

Upon a careful review of the record of this matter, the Commissioner agrees with the finding and the conclusion of the Office of Administrative Law that respondent has forfeited his right to his tenured position as of November 15, 1985, the date of his conviction and sentencing for manufacturing and disposition of a controlled dangerous substance in violation of N.J.S.A. 24:21-19a(1), pursuant to N.J.S.A. 2C:51-2. Notwithstanding respondent's plea for special consideration in this matter based upon his personal rehabilitation, he conveniently neglects the fact that he is guilty of the manufacture and sale of a controlled dangerous substance, thereby affecting the lives of others, as well as himself.

Furthermore, the law is clear that:

> A person *** who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree***.

Respondent's conviction under N.J.S.A. 24:21-29(a), which carries a potential five-year sentence on each count in New Jersey State Prison, would be analogous to at least a crime of the third degree. Thus, the Commissioner enjoys no discretion in the matter. Forfeiture is automatic.

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Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 15, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6029-85
AGENCY DKT. NO. 55-3/85
ON REMAND FROM EDU 1908-85
AGENCY DKT. NO. 55-3/85

MARIAN COLE and NANCY MINNECI,
Petitioner,
v.
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOL DISTRICT,
Respondent.

DIVISION OF CIVIL RIGHTS
OAL DKT. NO. CRT 2192-86
AGENCY DKT. NO. EGO5JE0-22038-E

MARIAN COLE,
Complainant,
v.
THE BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOL DISTRICT,
Respondent.

CONSOLIDATED

Robert A. Fagella, Esq., for petitioners (Zazzali, Zazzali & Kroll, attorneys)

Nathanya Simon, for respondent (Schwartz, Pisano & Simon, attorneys)

Record Closed: May 8, 1986 Decided: June 6, 1986

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Petitioners, tenured teaching staff members, claimed that the Board arbitrarily denied them use of accrued sick days for nonemergency foot surgery. I granted summary judgment grounded on statutory right pursuant to N.J.S.A. 18A:30-1 et seq. in the absence of adequate notice of Board policy and procedure to limit planned sick leave in EDU 1908-85. The Commissioner of Education remanded for further findings and conclusions on September 18, 1985. A new docket number EDU 6029-85 was assigned.

The education case was originally filed March 11, 1985. The civil rights complaint was filed on February 8, 1985. After remand, a prehearing was held on October 28, 1985 at which time hearings were scheduled for January 29, 30 and 31, 1986. On December 13, 1985, respondent moved for consolidation with the pending civil rights complaint filed by petitioner Cole. Cole filed her own oppositon to the motion. In the civil rights case, Cole claims that the Board denied her use of accrued sick days in retaliation for her successful prosecution of earlier civil rights claims. The Division on Civil Rights had not yet concluded the probable cause investigation mandated by N.J.S.A. 10:5-14. Petitioner Minneci objected to the motion as belated and to consolidation because the pendency of review of a predominant interest determination pursuant to N.J.A.C. 1:1-14.7 would force adjournment of the January 29 hearing to her prejudice, since any relief she might obtain had already been delayed for almost a year. Minneci countermoved to sever. The parties did not request oral argument.

On January 8, 1986, I set forth a predominant interest and severance order, which is incorporated in this record. Both the Commissioner of Education (Commissioner) and the Director of the Division of Civil Rights (Director) affirmed my order (on February 6, 1986 and February 20, 1986, respectively). I found predominant interest in determining the matter with the Commissioner but set forth two questions to be determined by the Director:

1. If the Board's action is determined to be retaliatory and arbitrary, whether or not these actions constitute a violation of N.J.S.A. 10:5-12(d).

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2. If the Board has violated N.J.S.A.10:5-12(d), what remedies in addition to the grant of denied sick pay are warranted in the civil rights jurisdiction.

I ordered the consolidation of Marion Cole's complaints in these jurisdictions but severed the case of Nancy Minneci, who had not filed a civil rights complaint.

Prior to the hearings, which had been scheduled for January 29, 30 and 31, 1986, petitioner Minneci and the Board came to an amicable agreement in her severed case (retained under OAL DKT. NO. EDU 6029-85), although the stipulation and consent order was not filed until May 5, 1986 after adoption of a resolution by the Board. A copy of the stipulation is attached hereto and made a part of this decision.

The Cole consolidated docket was stayed, pending a request by Cole for transmission prior to a civil rights probable cause determination. Thus the hearings of January 29, 30 and 31, 1986 were adjourned to April 9, 10 and 11, by which time Civil Rights had received Cole's request and transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On March 5, petitioner's counsel advised the court he was still awaiting the Board's physician's report and names of expert witnesses, which were to have been supplied by the January trial dates. On March 10, 1986, the Board moved to have petitioner Cole submit to a physical examination by its expert. The motion was argued orally by telephone on March 13 and denied by an order of that date on grounds it was untimely and would provide very little relevant information one year after Cole's foot operation.

The Cole matter was heard to conclusion on April 9 and 10, 1986. A list of exhibits entered into evidence is attached to this opinion. The record closed with receipt of the last brief on May 8, 1986.

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The Questions on Remand

In his remand decision of September 18, 1985, the Commissioner ordered a plenary hearing of the case on its merits to establish more fully answers to the following questions:

1. What legal right, if any, does a Board have to deny use of accumulative sick leave when

   (a) medical verification/documentation indicates the need for surgery and (b) the nature of such surgery is not emergency or life-threatening.

2. Did petitioners fail to follow existing procedures for sick leave when absenting themselves without first securing the superintendent's approval on the leave application form.

3. Did petitioners give sufficient advance notice to the superintendent to allow him reasonable time to determine if approval was warranted?

4. Irrespective of the absence of stated timelines on the application from and in the contract:

   (a) Did the principal forward the leave requests in a timely fashion?

   (b) Did the superintendent fail to give timely notice to petitioners that he had a problem with their leave requests?

5. What "criteria" for the granting of sick leave existed in the district, given that the superintendent's denial of petitioners' requests for sick leave states the surgery does not meet the district's criteria for sick leave?

6. Was the denial of accumulated sick leave arbitrary and capricious?

In addition to these questions, a reprisal under N.J.S.A. 10:5-12(d), was at issue in the event the Board's action was retaliatory and arbitrary.

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The Testimony

Marion Cole testified at length concerning the history of her employment with Essex County vocational schools, which began in September 1948, when she served as a teacher of beauty culture in the North 13th Street School. She obtained a B.S. from Rutgers in 1955, supporting herself while doing so by continuing to teach trade subjects. In 1967-68, she was granted a sabbatical leave to obtain her M.A. She holds educational services certification with endorsements in student personnel services and vocational-technical coordination. She also attained administrative certification as supervisor/principal.

In June 1970, three days before completing courses rendering her eligible for certifcation as a principal, she applied for a vice-principal's position, which was denied on the basis of lack of appropriate certification. She subsequently obtained a temporary appointment to a guidance position and she remained in guidance work except for two years, 1978 to 1980, when she served as a vice-principal in Irvington Technical School under then Superintendent O'Connor. At that time, five vice-principals were appointed but a sixth was needed. Few staff members had the required certificate. Cole went through a formal interview and was appointed, but was bumped back to her guidance position when the vice-principal she replaced returned in 1980. Cole served in a guidance position at North 13th Street school from 1980 to the date of her retirement on April 30, 1985. She served 37 years with the system.

Cole stated that at retirement, she never received the terminal leave payment provided for by Artice XXV of the negotiated contract, which grants one day's pay for every four days of accumulated unused sick leave, which she claimed should have been automatically given to her. Her final year's salary was $36,800, counted at 1/200 per day, and she would receive payment for 134 sick days as terminal leave (or 100 in the event she receives full sick pay for 34 days as a result of this case). Respondent's representatives noted for the record that they were entirely unaware Cole had not received terminal leave payment, that she had never mentioned this omission previously and thus, that they had not discovered the omission, which was inadvertent. Prior to close of hearings, the Board assured the court that payment would be made.

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Concerning the procedure for obtaining sick leave for surgery, Cole testified that she was familiar with the Board's practice since she had surgery several times during her many years service with the Board. The practice, in her experience, was for staff to submit the form to the principal and not until returning from such sick leave did the staff member get back the form with the superintendent's signature. Cole experienced this practice personally four times prior to the fifth time, when she filed for sick leave for foot surgery, which is the subject of this proceeding.

Petitioner described what occurred with respect to each prior sick leave, going back to 1971, when she was out sick for six weeks. She has observed that a secretary in the local school office makes out a slip on a week-by-week basis reporting a staff member's sick leave, but these slips do not come back with the superintendent's signature. Cole noted that the original slip with the principal's and superintendent's signatures would be in her school mailbox when she returned from absence. In 1975, she observed this practice after an absence for surgery of 8 to 10 days. She observed the same practice in 1983 (six weeks absence) and turned in a physican's letter upon her return. In November 1984, after two days of absence, she received a form signed by the superintendent four or five days later.

While she had been having increasing discomfort from bunions on her feet, in the fall of 1984, they became more painful and she had to take her shoes off whenever she sat down. The students would laugh because she often walked around in stocking feet. Cole also suffered from arthritis, and she did not want to take pain killing pills continuously for these conditions. Cole went to Dr. Parisi in November 1984 for an ingrown toenail and analysis of her bunion condition. He recommended surgery for her foot deformities, and suggested that the sooner it could be done, the better, since the condition could be expected to get worse. Dr. Parisi told her she should expect to be absent from her work for about six weeks.

Cole did not request that the surgery be scheduled at that time (November 1984) but said she wanted to talk it over with her husband. In fact, they had made reservations for a trip to Venezuela during Christmas recess. She determined to "put it [the surgery] off

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and see" but during Christmas vacation, Cole did a great deal of walking, her feet hurt constantly and nothing relieved the pain. Soon after she returned from vacation, the first or second week in January 1985, Cole asked Dr. Parisi to schedule her surgery. She went for preadmission testing on January 14, the day she submitted her sick leave form to Principal Polito (Exhibit P-2, top). The form gave her date of absence as from January 21 (when she was to enter the hospital) to March 18, 1985. She did not see Polito sign his approval and does not know what he did with the form, but it was returned to her signed when she came back to work.

Cole discussed office coverage with Polito. She came in early and left late the week before the operation and advised her co-workers where her records were. The principal did not advise her of any other procedure required. Cole produced another form (Exhibit P-2 bottom) in the office secretary's writing, which states the days she would be absent in the first week. Cole stated that this was the normal procedure she was familiar with, i.e., that for each week of absence a form was made out by the local school's secretary, signed by the principal and sent to the central office. All the testimony up to this point was uncontroverted and **I FIND** it to be true.

On Friday, January 18 at 2:20, Superintendent Harvey called her. He said, "This is Doctor Harvey." She said, "Yes, Doctor Harvey." He said, "You're going to be out for surgery?" She said, "Yes, Doctor Harvey." He said, "You will have to get a note from the doctor indicating the reason for the surgery." Cole said, "All right, Doctor Harvey, I will have it for you right away." (The above conversation is approximate in that I do not have the transcript of it in hand). Cole immediately called Dr. Parisi and asked him to send a letter to Dr. Harvey, which he did on the same day, January 18, 1985 (Exhibit P-3). Cole had no reason to believe that Dr. Harvey wanted the letter in hand that very Friday afternoon before her surgery on Monday since he did not say so and also since she was aware of the practice regarding sick leave, she had no reason to believe there was any problem.

Cole did not realize there was any problem until she received Dr. Harvey's January 23 letter (Exhibit P-4) on Friday, January 25, 1985, when she returned from the hospital to

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recuperate. Cole did not know what "criteria" Dr. Harvey was referring to in his letter and disputes that she ever received any directive from him that she was not to take leave until he approved it in advance, based on her conversation with him, which was the only communication they had on the subject. On or about January 31, she returned to the hospital for surgery on her other foot, since Dr. Parisi preferred not to operate on both feet at one time. Cole never attempted to communicate with Dr. Harvey after receiving his letter on January 25. On February 28, 1985 she filed notice that she would retire in 60 days, although she had not previously intended to do so. She returned to work March 14, 1985 and received no sick pay for the period of her absence (34 days). She retired from service at the end of April after spring recess.

Cole also contacted her NJEA representative after receiving Dr. Harvey's letter, filed a civil rights complaint on February 8, 1985 and a petition with the Education Commissioner on March 11, 1985. She believed that Dr. Harvey's action of denying her sick pay must have been retaliatory because she knew of other staff members who had no problem when they had the same kind of foot surgery. These persons included Rose Rose and Rose Linfanti in 1984 and Gladys Guower [sic] in 1983.

Cole believed that the administration's denial of sick pay was in retaliation for her participation in three civil rights cases; two in which she was complainant and one in which she testified for a co-worker in 1976. One of the complaints concerned sex discrimination: two males without appropriate certification were appointed to serve in a "male" school and two properly certificated females were not. Cole received retroactive seniority as a result of this case (Exhibit P-9). In a second case, she complained about a less qualified male being appointed vice principal in 1977; she received an appointment as a vice-principal in October 1978 prior to the hearing (Exhibit P-10). She also received $5,000 in a settlement.

With respect to one of her earliest disputes (1972), she recalled a conversation in the parking lot between Albert Sicone, the then business manager and Simeon Moss, a former superintendent, who said, "now that you've got your promotion, you're going to drop the case, aren't you?" "She replied that she could not. Cole recalled another conversation in

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the period 1975-76, wherein Jack Gold, a former Board member, said "No way will you ever get any promotion in this system." Cole also named a number of present members of the administration and one board member who had been with the system at the time of her civil rights disputes. She had no knowledge that any of these persons had discussed denial of her sick pay. She assumed that denial of her terminal leave payment was also retaliatory.

On cross-examination, respondent elicited from Cole the nature of her duties as guidance counselor to about 250 to 300 students. In mid-January, some counselors go to local schools to inform students of the offerings in the county vocational schools. Applications and forms go back and forth between the local schools and the county schools. Pupils must be screened, selected, advised, assisted in shifting classes and rescheduling and given employment counseling. There are no substitutes for guidance counselors: if one is absent, the pupil load is usually shifted to the two who remain. When Cole was absent for seven weeks in 1985, a counselor from the evening division had to be assigned to cover for Cole two to three days per week. Cole was aware that going ahead with the full surgery plan (both feet) would result in her coming back to school just before the end of the third marking period and that she would be missing one whole quarter. The total period of disability might have been as much as 12 weeks if the second foot had been operated on at the end of recuperation for the operation on the first foot. Cole considered this type of scheduling but rejected it because "I think my health is important." She did not consider waiting until summer vacation for the surgery.

Dr. Gerard Parisi, Cole's board certified foot surgeon, often has school personnel referred to him by his wife, who is a teacher in the system. He performed similar operations on several other teachers, including the ones whom Cole named as as having had no problem with their sick pay requests. He described Cole's condition and the need for surgery to correct the bone deformity which he found to be "high normal." In his opinion, if she had waited until the condition worsened, the type of surgical procedure required would have been more serious. He noted that pain is subjective and no one can diagnose it or its severity. Patients tend to believe that "all of a sudden, my bunion got bad" but, in fact the problem evolves slowly until the joint becomes unstable and there is

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retrograde pressure on the bone — at which point the condition gets worse faster. In his opinion, Cole went back to work too early but there were no adverse effects.

Dr. Parisi diagnosed Cole's problems and explained what was needed to correct them in October 25, 1984, but he did have to wait until the minor surgery (ingrown toenail) healed since it was a "dirty" operation and should not be done at the same time as more major bone surgery. Cole did not come back to see him until January 4, 1985, however, when he initiated hospital and surgical scheduling.

The Board presented Dr. Clark D. Miller, who reviewed Cole's x-rays and reports but had not examined her. Dr. Miller is not Board certified but stated that he is "Board eligible" (surgical). He had not been in clinicial practice between 1976 to 1984, due to a serious personal injury. He described Cole's foot deformity as "mild" and noted that 90 percent of all foot surgery is elective in that it can be postponed. Even if the problem is acute and very painful, in Miller's opinion it could be postponed for up to six months by injection of local anesthesia and steroids to take down the inflammation. He noted that Cole voluntarily postponed the recommended surgery for about three months in any event. Miller prefers to perform surgery on both feet at the same time. The normal recovery period is four to six weeks.

Miller stated that there are several foot conditions which progress rapidly and require immediate surgery, but Cole did not have these conditions. He was also of the opinion that pain is important and must be considered. In the event of acute pain, Miller felt that surgery should be scheduled as soon as possible. He saw no notes of acute pain in Parisi's office records on Cole's case. He did not agree that a "foot by foot" method was the preferable one, although it might be more comfortable for the patient. In the "foot by foot" approach, the hospital charges are double, but the surgical bill for the second is usually only 50 percent of the first.

Superintendent William Harvey testified that he himself dealt with the question of Cole's sick pay, that he became superintendent in January 1984 and that he had no knowledge of Cole's prior civil rights cases nor had anyone ever spoken to him about her

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disputes with the system including all the persons Cole mentioned in her testimony. Due to the fact that it took him some months to become familiar with the school system (he had come from another district) he had been unaware of the situation of the other teachers who previously had similar foot surgery and whose approvals had been signed off. Harvey had been superintendent for about a year (to January 1985) when the question of lengthy absences for foot surgery came to his attention. He was concerned at the time with county and state monitoring of teacher attendance. A teacher absence record of over five percent meant failure to pass accreditation standards. Almost immediately after this type of absence came to his attention, he learned that Cole and Minneci had put in long term sick leave forms for foot surgery.

Harvey met Cole at one of the first general staff meetings. She spoke to him and sent him a note with two ideas to improve the meetings. He spoke on the phone with her. Subsequently, he gave her a ride home to North Plainfield after one of the meetings during which he had a lengthy conversation with her. He had occasional conversations with her up to the time he called her on January 18, 1985. Harvey particularly remembered a conversation in the fall of 1984 in which she told him of her plans for Christmas vacation in Venezuela. The third quarter (January - March) is a crucial period for guidance counseling. It was in this context that Harvey reacted when he saw Cole's absence form for the first week on January 18 (Exhibit P-2 bottom of sheet).

Harvey did not receive the form signed by Cole (Exhibit P-2 top of sheet). In order to plan for coverage, the practice established by the business manager was for each principal to report proposed absences for only a week at a time. Thus Principal Polito's secretary made up a form for the week of January 21-25 and it reached the superintendent the Friday before the planned absences. Harvey immediately called Polito, who told him he expected Cole to be absent for eight to ten weeks. Harvey interpreted the negotiated contract (Exhibit P-1), Article XXII A.I and XXI 3 to mean that any teacher planning to be absent for disability for more than three days due to illness must first obtain the superintendent's approval after submission of a doctor's certificate. He therefore telephoned Cole and was of the belief he had communicated to her that she had to submit the doctor's certificate immediately and get his approval before she elected to go on such a long sick leave which was not of an emergency nature.

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Harvey was not aware of the existent practice with respect to the sick leave forms - i.e., that staff was accustomed to getting the originals back with the superintendent's signature after they returned from leave. Thus, there was a miscommunication in the telephone conversation of January 18, each party understanding the other within his and her own context. Cole had no reason to believe that the manner in which she handled her sick leave request was anything other than correct, and she gave Harvey what she thought he wanted, namely, the letter from her doctor. On the other hand, Harvey believed that Cole knew that she had to submit the doctor's letter in advance and get his approval first and thus, when he discovered she had not done so, he believed she had been insubordinate. Due to her past experience with civil rights complaints, Cole promptly viewed Harvey's letter to her as retaliatory. When she found that she would not be paid, she herself retaliated by sending a notice of retirement on February 28 and leaving her position about six weeks before the end of the school year, shortly after spring vacation.

Having decided to retire, Cole saw no point to changing her schedule for the operation on her second foot. On the contrary, it was to her advantage to have it on school time at school expense. The second operation did not increase the period of Cole's disability for more than about a week, however, and she returned to work within a time frame that even the Board's experts felt to be a normal recuperation period.

FINDINGS OF FACT

1. By October 25, 1984, petitioner knew that she needed foot surgery because when she started school in the fall, she experienced increasing pain and discomfort and because Dr. Parisi had diagnosed her condition and explained the necessary procedures.

2. The surgery Cole had was not of the kind that was immediately necessary, so instead of scheduling it for the holiday period, Thanksgiving through Christmas recess, Cole waited until the period January to March, principally because she did not wish to give up her planned holiday in Venezuela.

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3. Cole followed the known practice of the Board by submitting her sick leave form to the principal on or about January 14, for an absence to commence January 21 and disable her to about March 18. She learned the date of the operation between January 4, when she visited Dr. Parisi and about January 12 (shortly before she was to have preadmission testing on January 14.)

4. The principal followed the known practice at the time, which was designed by the business manager for the purpose of determining what coverage would be needed for the following week: his secretary made out a form for the first week of Cole's absence and sent it to the central office toward the end of the week where it reached the superintendent on Friday, January 18.

5. It was not the practice at that time to obtain medical certification and the signed approval of the superintendent prior to taking sick leave. Toward the end of each week the school secretary would submit a form listing only the anticipated absences for the following week and only after the staff member came back from leave would the original form be returned signed by the superintendent.

6. The superintendent had been with the district about a year and did not know of the practice of sending sick leave forms noting in advance only one week's absence. Thus he learned of the extent of such sick leaves too late to require approvals in advance.

7. The superintendent had been alerted to the existence of excessive staff absence in general due to the State's monitoring on that subject and he interpreted the contract to say that medical certification and his approval had to be obtained in advance when more than three days of nonemergency disability was granted. He acted on his belief by denying sick leave to both Cole and Minneci.

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8. The superintendent was also aware that Cole had not been too disabled to go on a foreign vacation less than a month before she applied for sick leave, that her planned surgery and period of disability would make her unavailable through the entire third quarter and busiest period for guidance personnel and that it was almost impossible to obtain replacement coverage for guidance personnel because of the nature of their duties, and the cost and unavailablity of such specialists.

9. Because of the practice followed, the principal did not advise the superintendent the day Cole submitted her sick leave form and he did not learn of it until Friday the 18th.

10. Late on Friday the 18th the superintendent called Cole and was of the belief he had communicated to her that she had to immediately give medical certification and get his approval before going into the hospital on Monday.

11. Cole simply did not know that the superintendent expected her to obtain and deliver the certification by hand and obtain his approval. There was no time to do this by mail and the school offices would close in about an hour.

12. Cole had neither clear notice of what was expected of her (due to the different practice in effect for years) nor sufficient time to carry out the request. It is also unreasonable to expect a patient to cancel a hospital admission and surgery planned for Monday late on Friday afternoon except in the most emergent circumstances.

13. After checking with the school physician, Dr. Rieckers, concerning whether or not the type of operation Cole had was immediately required, the superintendent wrote Cole a strong letter denying Cole's leave upon the belief she had been insubordinate and that she had failed to follow proper procedures.

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14. Due to her past history of civil rights disputes with the Board, Cole interpreted the superintendent's letter as personally retaliatory and gave notice a month later that she would retire before the end of the school year, thus extending the period of lack of guidance services for her students.

15. In fact, the superintendent knew nothing about the civil rights suits filed years before he came to work in the Essex district and was trying to put an end to excessive teacher absences and discontinuity of instruction upon the belief that he was implementing known procedures.

16. The superintendent had no discriminatory animus against Cole or Minneci: they just happened to be the first staff members whose foot surgery he learned about before it occurred; the other three had already returned before the superintendent became aware of this type of lengthy sick leave.

17. The only criteria for granting of long term sick leave is in the negotiated contract: if the employee expects to be disabled due to absence on account of personal illness for more than three consecutive days, a doctor's certification must be supplied stating the illness and inability to report for work. (Found in Article XXI under "sick leave.")

18. The section of the contact which speaks of the need to first obtain permission from the superintendent is found in Article XXII, which is described as "days off and temporary leaves of absence."

19. The omission in giving petitioner terminal leave payment was inadvertent and would have been rectified immediately if petitioner had notified the Board of the omission, but she said nothing until the date of hearing.

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DISCUSSION AND CONCLUSION

It is not within my jurisdiction to interpret the negotiated contract. It does represent the only policy of the Board on the issue which is a subject of this case, however. Simply reading the document as policy, I see in it nothing which requires that the superintendent's permission be given in advance in an elective surgery situation, nor are there any criteria to identify elective surgery and disability. The superintendent acted in good faith, however, in interpreting the contract and is seeking the laudable goal of eliminating excessive absences and discontinuity for his students. His position is arguable as a matter of law, particularly when one considers the "employee application for leave" form. Reviewing that form, one could readily interpret it as consistent with a prior approval requirement. Yet that was not the prior practice.

The dispute here does not concern N.J.S.A. 18A:30-4 which says:

> In case of sick leave claimed, a board of education may require a physician's certificate to be filed with the secretary of the board of education in order to obtain sick leave.

Article XXI of the Collective Bargaining agreement at paragraph 3 specifies the statutory board right with more precision:

> A doctor's certficate stating the illness, the inability of the employee to report for work, and the period of such disability will be required in case of absence on account of personal illness of more than three (3) consecutive days.

Petitioner is not denying that the Board has these rights. One of the questions on remand was

1. What legal right, if any, does a Board have to deny use of accumulative sick leave when

   (a) medical verification/documentation indicates the need for surgery and (b) the nature of such surgery is not emergency or life-threatening.

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I addressed the question in my prior opinion to this remand as follows:

> Continuity of instruction is a valid educational goal important enough to support some limitations even upon constitutionally or statutorily mandated grants of leave. This has been recognized with respect to limitations on choice of dates for maternity leaves as against claims of sex discrimination. Cleveland Bd. of Ed. v. LaFleur et al and Cohen v. Chesterfield County Board, et al; 414 U.S. (1974); Castellano v. Linden Board of Ed., 79 N.J. 407 (1979); Dyson v. Bd. of Ed. of Montvale, (N.J. App. Div. Feb. 8, 1982, A-3182-80T1) (unreported). In the Dyson case, the Commissioner and State Board agreed with the administrative law judge and the Appellate Division quoted:
>
> > The practice of permitting a teacher to start teaching for several weeks at the commencement of a new school year, stop teaching for a few months, and then start teaching again would have an unnecessarily disruptive impact on the continuity of the children's education. [at 6].

Dyson cited Gilchrist v. Bd. of Ed. of Haddonfield, 155 N.J. Super. 358 (App. Div. 1978) on a similar issue:

> We deem it a perfectly rational goal for the Board to be vitally interested in avoiding, where possible, the interruptions in the continuity of classroom instruction that would arise from teachers' absences. Moreover, we deem it to be nondiscriminatory treatment, if it be the Board's policy, not to renew the contract of any nontenured teacher, male or female, who gives the Board advance knowledge of an anticipated absence of substantial duration in the coming school year for any reason. The avoidance of a detrimental interruption in the continuity of classroom instruction is an admirable goal whether the interruption be caused by pregnancy, laminectomy, orchiectomy, prostatectomy or any non-medical reason. Dyson at 4. [emphasis added].

The importance of continuity of instruction is further bolstered by the Commissioner's decison in Angelucci et al, v. West Orange Bd. of Ed., 1980 S.L.D. 1066 where the issue was denial of increments for excessive absence.

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> [The Commissioner] must however call to the attention of the Board the need for the application of consistent standards by administrators in granting approved absences for teachers. If, as contended herein, frequent teacher absences adversely affect pupils and a teacher with an already established record of absences requests an approved absence, such request must be considered and weighed carefully. Id. at 1078].

The above opinions of authority weigh continuity of instruction as against unavoidable leaves and absences and determine that even in such situations limitations or sanctions to preserve continuity of instruction are warranted. ID EDU 1908-85, p. 5, 6.

Based on that discussion, **I CONCLUDE** that a board may set forth standards and procedures for the grant of sick leave and require prior permission in the event of nonemergency surgery resulting in lengthy disability. On the facts of this case, however, I find that the Board has not done so. The contract, as policy, cannot be read to supply the criteria and procedure relied on here. The practice in effect for obtaining sick leave was clearly contrary to the Board's argument that prior permission was required for certain disabilities. Approval subsequent to the foot surgery would be ineffective to attain the Board's goals, since no one denies that petitioner was indeed disabled within the statutory meaning after she elected surgery. The Board had neither policy or practice supporting its position and the petitioner had no notice or insufficient notice to conform to the superintendent's directives. It would therefore be unfair to deny her sick leave.

It should be noted, however, that the superintendent never acted in bad faith and he acted toward cognizable and important education goals. While it is my opinion that Cole's conduct was unprofessional, in that she could have scheduled her absence so as to have the least disruptive effect on the students, and chose instead to schedule it when it would have the least disruptive effect on her own personal life, such opinion cannot support a denial of sick pay. When coupled with the fact of a retaliatory retirement before the end of the school year, resulting in further disruption, these considerations weigh in the balance of equity and preclude the grant of any remedy other than that which is mandated by law. No interest will be allowed.

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In considering the question of discrimination and reprisal in the Civil Rights jurisdiction, I cannot see a prima facie case made out because the superintendent had only been with the district for a year and the civil rights cases and conversations related by petitioners were far remote in time from the sick pay denial in 1985. Additionaly, Cole was not the only person to be denied sick pay: Minneci was also denied it about the same time for the same reasons. In any event, the Board went forward with its proofs that its reason for denial was legitimate, nondiscriminatory and wholly untainted by any discriminatory motivation in accordance with the procedural standard enunciated in McDonald Douglas Corp. v. Green, 411 U.S. 792 (1973). Since I **CONCLUDE** that no discriminatory or unlawful employment practice under N.J.S.A. 10:5-1 occurred, I **CONCLUDE** there was no reprisal under N.J.S.A. 10:512(d). It is therefore unnecessary to address the civil rights remedy which is the second question reserved to the Director in that jurisdiction.

I have reviewed the attached stipulation concerning petitioner Minneci, whose circumstances differed somewhat from those of Cole. Minneci was absent for a much shorter period of time (January 17 to February 4) and did not receive any communication from the superintendent until January 28. There was no communication from him prior to her absence. ID No. EDU 1908-85. **I FIND** that the parties have voluntarily entered into a settlement on Minneci's petition and **CONCLUDE** her case is no longer contested.

It is therefore **ORDERED** that the Board pay petitioner Cole for all sick days claimed, adjusted for the average in terminal leave payment, if any;

it is **ORDERED** that the Board and petitioner Minneci conform to the agreement in their stipulation of settlement.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make the final decision on all issues within the scope of predominant interest. However, if Saul Cooperman does not so act in forty-five (45) days and unless

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such time limit is otherwise extended, this decision on all of the issues within the scope of the predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

June 6, 1986
DATE

NAOMI DOWER-LaBASTILLE, ALJ

JUN 6 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JUN 9 1986
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

jrp

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MARIAN COLE AND NANCY MINNECI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the Board within the time prescribed by N.J.A.C. 1:1-16.4a, b and c. Petitioner Cole's reply exceptions were untimely filed.

The Board seeks reversal of the ALJ's recommended decision urging that its denial of sick leave was neither arbitrary nor capricious. It reiterates arguments advanced during hearing of this matter which have already been thoroughly considered by the ALJ. It avows, inter alia, that Petitioner Cole failed to provide sufficient notice that she needed extended medical leave and that she failed to follow established contractual procedures of providing a physician's certificate and securing superintendent approval.

Upon review of the record in this matter including the Board's exceptions, the Commissioner is unpersuaded that the ALJ erred in her determination that Petitioner Cole is entitled to the use of accumulative sick leave, given the factual circumstances of the case.

Accordingly, the Commissioner adopts the initial decision on remand as the final decision in this matter for the reasons expressed therein. The joint stipulation of settlement entered into by Petitioner Minneci and the Board is likewise approved.

Given the circumstances of this case, the Commissioner recommends that the Board and its administrators take whatever action is deemed necessary to assure that actual practice in the district with respect to sick leave approval fully conforms to written procedures and that all staff are completely and thoroughly apprised of what is required for timely processing and approval of anticipated sick leave so that there is no recurrence of the factual pattern presented in this case.

COMMISSIONER OF EDUCATION

July 15, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION
OAL DKT. NO. EDU 2492-86
AGENCY DKT. NO. 93-3/86

EDWARD J. JABLONSKI,
Petitioner,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF EMERSON, BERGEN COUNTY,
Respondent.

Edward J. Jablonski, petitioner, pro se

Irving C. Evers, Esq., for respondent (Parisi, Evers and Greenfield, attorneys)

Record Closed: June 10, 1986 Decided: June 10, 1986

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter involves a petition filed by Mr. Jablonski with the Commissioner of Education on March 31, 1986 requesting the Commissioner to order a new hearing in a matter that was previously determined, in 1982. Petitioner claims that the evidence, findings and result of the earlier hearing were incomplete, inaccurate and based upon conjecture and premature testimony; thereby denying him a fair and complete hearing, which in turn caused a violation of his tenure and seniority rights. On April 10, 1986, the Commissioner of Education transmitted the matter to the Office of Administrative Law for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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PROCEDURAL HISTORY

In 1982, the petitioner, a tenured employee serving as Director of Guidance in the Emerson school system, was reassigned to work as a guidance counselor because the position of Director of Guidance was abolished as part of an administrative reorganization. The reorganization created a new position, Administrative Assistant to the Principal of the High School. The petitioner felt that he was entitled to be appointed to that position because he claimed that its duties and responsibilities were substantially the same as those performed by the Director of Guidance. Mr. Jablonski did not receive the appointment, and he filed a petition with the Commissioner of Education contesting the Board's action.

The matter was heard by an Administrative Law Judge as a contested case. A full plenary hearing took place on November 22, 1982 resulting in an Initial Decision on March 2, 1983, in favor of the Board and dismissing the petition (OAL DKT. NO. EDU 6812-82). The Judge found that although there was an overlap between the duties of the Director of Guidance and the duties of the Administrative Assistant, that overlap did not make the two positions exactly or even substantially the same. She found that the position of Administrative Assistant to the High School Principal involved duties and responsibilities which went beyond the duties and responsibilities of the Director of Guidance and which included all the duties of the former position of Director of Guidance. She noted that there were significant differences between the positions, and that although there were some similarities and overlap they were not substantially the same.

In a decision dated April 18, 1983, the Commissioner of Education affirmed the findings and determination of the Administrative Law Judge.

The Commissioner's decision was affirmed by the State Board of Education on July 6, 1983.

The petitioner then appealed to the Appellate Division of the Superior Court. In a per curiam decision on March 6, 1984, A-6100-82T2, the Appellate Division affirmed the

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State Board of Education, the Commissioner of Education and the ALJ. A motion to file a petition for rehearing was denied by the Appellate Division by Order dated April 18, 1984.

The subject petition for a new hearing was filed by the petitioner with the Commissioner of Education approximately two years later. The Board filed an answer on April 9, 1986, denying all substantive allegations and asserting 14 separate defenses.

On May 9, 1986, the respondent Board filed a notice of motion and request for oral argument. The motion requested dismissal of the entire petition (in addition to the striking of various allegations therein), citing ten different grounds in support of the demand for dismissal. The respondent also asked for an award of counsel fees, in accordance with an affidavit of services attached to the application. A brief accompanied respondent's motion.

On May 19, 1986, petitioner filed an answer to the motion for dismissal. On May 30, 1986, he filed a supplemental brief.

The matter was scheduled for a prehearing conference on May 20, 1986. At the same time, this Judge also heard extensive oral argument on the respondent's motion to dismiss. A Prehearing Order was entered, identifying the issues, providing for discovery and regulating other aspects of the forthcoming hearing, in the event that the motion to dismiss would be denied.

THE MOTION FOR DISMISSAL AND COUNSEL FEES

DISCUSSION AND ANALYSIS

The question of whether or not a new hearing should be granted is, by its nature, a matter of law. Therefore, the respondent's motion for dismissal shall be treated as a motion for summary decision in accordance with N.J.A.C. 1:1-13.1 et seq. That rule provides that the decision sought shall be rendered if the papers and discovery which have

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been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 73-77 (1954); Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). This discussion is a result of a review of all papers on file and the oral arguments.

Many of the separate allegations of the petition contain little more than disagreement with the testimony adduced at the hearing in the prior matter on November 22, 1982. See paragraphs 3, 5, 6, 7 and 8 of the petition. Paragraph 3 claims that there was a discrepancy between the sworn testimony and the findings of fact. Paragraph 5 states that the testimony of John C. Pinelli was only conjecture. Paragraph 6 contends that Mr. Pinelli's testimony was incomplete and inaccurate because he had no basis to assess the information that was the subject matter of his testimony. Paragraph 7 contends that the testimony of Dr. Serge Angiel was biased, untrue, misleading and totally conjecture. Paragraph 8 states that Dr. Angiel's experience was insufficient to enable him to accurately testify.

The allegations made in the foregoing paragraphs of the petition are without merit, since they are merely argumentative.

Paragraph 15 of the petition alleges that the findings of the Administrative Law Judge were based on premature testimony and conjecture, thereby denying the petitioner a fair and complete hearing and violating his tenure and seniority rights. This allegation also is rejected, since it is a bare repetition of the general basis for the petition.

Paragraph 16 of the petition contends that a denial of a new hearing would set a precedent that would enable boards of education to circumvent tenure and seniority laws. This unsupported allegation is also rejected. Denial of a petition for a new hearing, after the expiration of a period of four years, does not necessarily set a precedent for the circumvention of existing laws.

Paragraph 14 of the petition contends that the 90-day notice rule (presumably N.J.A.C. 6:24-1.2) did not begin to run until January 20, 1986 when the petitioner first

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learned of the underlying facts that caused him to file the subject petition. It is assumed that the petitioner is referring to the action taken by the Board in 1982, when the Administrative Assistant position was denied him. Without exploring this argument at greater length, this Judge sees no need to inquire as to whether or not the 90-day period of limitations should have been tolled from 1982 until January 20, 1986. That argument simply is not relevant to the question at hand, namely, whether or not a new hearing should be granted. Therefore, it is unnecessary to deal with this allegation of the petition or with the respondent's defenses thereto.

Paragraphs 9, 10, 11, 12 and 13 of the petition encompass the primary basis for the petitioner's request for a new hearing, which is simply as follows. The petitioner claims that in November 1982, when the matter was heard at length by the Administrative Law Judge, the actual duties and functions of the newly created Administrative Assistant position existed only on paper, since it had not yet become operational. The petitioner claims that after observing the manner in which the position was operated and conducted during the three and one-half years following the hearing, certain differences became apparent. The differences involved the greater and unanticipated percentage of time spent by the Administrative Assistant directing the guidance department. It is those operational differences that provide the basis for the so-called "new testimony" that "popped up" in January 1986, at which time another reorganization took place and the Administrative Assistant position was abolished. The petitioner claims that it has now become apparent that a much higher percentage of the Administrative Assistant's work involved the guidance department, a conclusion that was not possible to be drawn in 1982, when the position was newly created and there had been little opportunity to observe the operational experience involved in performing the jobs.

The petitioner explained that the "unavailable witnesses" referred to in the petition were not physically or geographically unavailable in 1982. Both of them were present and available. Rather, petitioner's claim is that in 1986 they would recant or change the 1982 testimony, given the benefit of their experience and observations over the three and one-half or four intervening years.

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The petitioner argues further that on November 22, 1982, no one knew how the Administrative Assistant position would work and that they did not know a substantially greater amount of time would be required to perform the duties of directing the guidance department than was visualized in the job description or the original estimates of the Board. Therefore, the petitioner claims that if the Administrative Law Judge who heard the matter in 1982 had the benefit of the information that has accumulated from that time until 1986, she would have decided the matter differently. That is essentially the reason for the request for a rehearing.

The respondent replied to the above argument by quoting certain portions of the Initial Decision of March 2, 1983. Page 15 of the Initial Decision, paragraph C., states:

> There is an overlap between the duties of the Director of Guidance . . . and the duties of the Administrative Assistant . . . . That overlap does not make the two positions exactly, or even substantially, the same. The position of Administrative Assistant to the Principal has duties and responsibilities which go beyond the duties and responsibilities of the Director of Guidance, and which include all the duties of the former position of Director of Guidance.

Paragraph F. states:

> There are significant differences between the position of Director of Guidance and the 1982-83 reorganized position of Administrative Assistant to the high school principal. The duties of the two positions are not substantially the same, although there are some similarities and overlap.

On page 17 of the Initial Decision, the Administrative Law Judge stated:

> The central issue in this case is whether or not, when the Board created the new position of Administrative Assistant to the high school principal in 1982, it created a position whose responsibilities were substantially identical with the position and responsibilities of the Director of Guidance. The answer to that question is no. The Board created a position which included all the duties of Director of Guidance, but which had greater and additional responsibilities.

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The petitioner bases his argument that the test of time has shown the two positions to be identical on two affidavits attached to the petition. The first affidavit, by John C. Pinelli, Principal of the Emerson Junior-Senior High School, states that his testimony in November 1982 was based upon three months of observation of the position of Administrative Assistant, whereas if he were to testify in 1986, that testimony would be based on his observations during three additional years. He felt that given the benefit of the three additional years, he would now say that 60 percent or more of the Administrative Assistant's time would be devoted to guidance and 40 percent or less would be devoted to the supervision of Social Studies and English. Evidently, his 1982 testimony ascribed a lower percentage of the duties to the guidance function.

The affidavit of Robert F. Tropani, a guidance counselor at the junior-senior high school, states that during the years since 1982 the Administrative Assistant has spent approximately 50 percent of his entire school day directing and supervising all aspects of the guidance office and that there was no substantial difference between the position of Director of Guidance and Administrative Assistant as it related to the functions of the Guidance Department (underlining added).

Neither of the affidavits attached to the petition claims that the duties and responsibilities of the Director of Guidance were substantially identical to all of the duties and responsibilities of the Administrative Assistant. The Administrative Assistant position included all of the duties of the Director of Guidance, but greater and additional responsibilities were added. There is nothing in the papers on file to indicate that, except for a percentage change in emphasis, the situation was very different in actual operation over the three- or four-year period since the original contest. The most that can be said for petitioner's claim is that the Administrative Assistant needed more time than originally expected to fulfill the guidance duties.

The matter before the Administrative Law Judge in 1982 was concluded with finality, and the result is not subject to reanalysis. This discussion merely is an attempt to probe the merits of petitioner's claim that if the actual operation of the Administrative

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Assistant position, when tested by time, had been known at the time of the original hearing, a different result would necessarily have been reached.

The New Jersey court rules provide some guidance on the question of relief from judgments or orders. R. 4:50-1 provides that a party may be relieved from a final judgment or order because of (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial. R. 4:50-2 provides that a motion for such relief shall be made within a reasonable time, and for reason (b) not more than one year after the judgment, order or proceeding was entered or taken. This matter would not fit into that pattern if the Superior Court were involved instead of this forum. In this case, there is no question that the instant petition was filed almost four years after the final administrative action was taken.

The petitioner claims that the manner in which the position of Administrative Assistant was operated during the three or four years following final administrative action constitutes newly discovered evidence which would probably alter the result that obtained in 1982. I disagree. I do not find that the greater percentage of time actually spent by the Administrative Assistant in managing the guidance department was of such a nature as to have probably altered the result if it were known in 1982. The petitioner has not sustained his burden of proof in that regard. The conclusions reached by the Administrative Law Judge in 1982 might very likely have been the same if viewed in the light of the subsequent performance and operation of the position.

Among the defenses urged by the respondent is the doctrine of res judicata and collateral estoppel. Both doctrines are a bar to relitigation of the original controversy. City of Hackensack v. Winner, 82 N.J. 1 (1980); Bango v. Ward, 12 N.J. 415 (1953); Brick Tp. v. Vannell, 55 N.J. Super. 583 (App. Div. 1959).

However, the petitioner insists that this attempt to secure a rehearing is not intended as a relitigation of the earlier matter. Rather, he claims that subsequent events

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have developed more recent facts that could not have been known at the time of the 1982 hearing, facts that would most likely have produced a different result if they had been known at the time. I find that argument unpersuasive. This is nevertheless still an application to retry the matter, but through a side door. It is interesting to note that even though petitioner insists that his application is for reopening rather than reconsideration, he comments, on page 5 of his supplemental brief, that "the evidence and testimony upon which the initial decision was reached was flawed, . . . and that it was unfairly litigated." In the absence of clearly demonstrable fraud or egregious error that demands equitable treatment, the 1982-1984 result is entitled to repose. The petitioner has not demonstrated any compelling reason to disturb the original decision and its affirming opinions. The petitioner's argument urges a difference without a distinction. He wants to try his case again.

An administrative agency does have the inherent power to reopen, modify and rehear orders that have previously been entered. Duvin v. State, 76 N.J. 203 (1978); Ruvoldt v. Nolan, 63 N.J. 171, 183 (1973); Hyman v. Essex County Carpet Cleaning Co., 157 N.J. Super. 510, 516 (App. Div. 1978); In re Marvin Gastman, 147 N.J. Super. 101, 114 (App. Div. 1977); Indursky v. Board of Trustees, Ret. System, 137 N.J. Super. 335 (App. Div. 1975). However, an application seeking its exercise must be made within a reasonable time and with reasonable diligence. Reconsideration has generally been granted when illegality of the administrative action has been shown or when there was evidence of extraordinary circumstances, illegality, fraud, mistake, new evidence or change in circumstances.

In the case at hand, the petitioner has not demonstrated such new evidence or changed circumstances that constitute good cause for the exercise of such an extraordinary remedy.

For all of the foregoing reasons, it is **CONCLUDED** that the petitioner is not entitled to a rehearing. The respondent has sustained its burden of excluding any reasonable doubt as to the existence of any genuine issue of material fact. Judson, supra. It is therefore unnecessary to treat the other arguments and defenses advanced by the respondent.

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The respondent's application for an award of counsel fees must also be considered.

Historically, the Commissioner has declined to award counsel fees to prevailing parties, absent statutory authorization. See, E.B. et al. v. Board of Education of the North Hunterdon Regional School District, et al., OAL DKT. NO. EDU 5187-85 (March 14, 1986), at pages 7-19; reversed by Commissioner of Education, May 1, 1986.

It is nevertheless true that the Commissioner has awarded counsel fees in several instances. Brown v. Board of Education of the City of Newark, 1984 S.L.D. ___ (Dec. 19, 1984); Fox v. Bd. of Ed. of the Tp. of Cinnaminson, 1982 S.L.D. ___ (March 23, 1982); Ross v. Bd. of Ed. of the City of Jersey City, 1981 S.L.D. 307, aff'd, Commissioner of Education, 1981 S.L.D. 319.

However, in E.B., supra, the Commissioner considered, and apparently rejected, the applicant's claim that the foregoing decisions might have established any precedent towards counsel fee awards. The Commissioner referred to Ross as "an exception to the consistent practice of the Commissioner to deny attorneys' fees to successful litigants in education cases." It is obvious, upon reading the Commissioner's decision in Ross, that the few isolated instances where he has approved the award of counsel fees are regarded by him as errant cases that should be confined strictly to their facts.

In another recent decision, Gibson v. Bd. of Education of the City of Newark, 1984 S.L.D. ___ (March 30, 1984), dismissed by the State Board, June 6, 1984, reversed and remanded by the Appellate Division, 205 N.J. Super. 48 (App. Div. 1985), the State Board specifically limited Ross to its facts, reversing the Commissioner's award of counsel fees to the successful litigant. The State Board held that,

> Ross also represents a serious deviation from the general policy that litigants bear their own counsel fees, embodied in both case law, Gerhardt v. Continental Ins. Co., 48 N.J. 291, 302 (1966), and in the rules governing allowance of attorney fees in court cases: R. 4:42-9 limits such awards to specific circumstances, none of which apply here . . . .

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> . . . We believe that the possibility of attorney fees in similar cases might encourage litigation in the future between boards and their members over issues of far less merit than those presented here. Gibson, decided by the State Board of Education, May 6, 1986.

In reiterating his position, the Commissioner has clearly stated that "until such time as he is granted statutory authority or the imprimatur of the Courts of New Jersey to do so, the Commissioner declines to grant counsel fees." E.B. at page 31.

That clear pronouncement shall be followed in the instant matter, and it is also **CONCLUDED** that the Board's application for an award of counsel fees should be **REJECTED.**

It is therefore **ORDERED** that the petition be **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

June 10, 1986
DATE

ARNOLD SAMUELS, ALJ

JUN 12 1986

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 13 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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EDWARD J. JABLONSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EMERSON, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision on motion rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties in accordance with N.J.A.C. 1:1-16.4a, b and c.

Upon review of the record, including the exceptions submitted by the parties, the Commissioner is in agreement with the determination reached by the Office of Administrative Law in this matter. There is nothing presented by petitioner in his exceptions that persuades the Commissioner that the ALJ erred in dismissing the Petition of Appeal. The ALJ's analysis is thorough and appropriate.

Further, even if the "new" evidence clearly were to demonstrate that 60 percent of the controverted position was devoted to duties previously performed by petitioner, this would not lead to a conclusion that he would be entitled to it or that the case should be reopened because of a denial of a fair and complete hearing.

When the issue presented in this matter was litigated previously, the ALJ determined:

> The central issue in this case is whether or not, when the Board created the new position of Administrative Assistant to the High School Principal in 1982, it created a position whose responsibilities were substantially identical with the position and responsibilities of the Director of Guidance. The answer to that question is no. The Board created a position which included all the duties of Director of Guidance but which had greater and additional responsibilities. Having decided the major question in the negative, it follows that Mr. Jablonski's seniority and tenure rights were not violated when he was not employed as the Administrative Assistant to the High School Principal. He was not automatically entitled to that position as it was not substantially the same, in duties or in title, to the one he had had before***. (emphasis supplied)
>
> (Slip Opinion of April 18, 1983, at pp. 17-18)

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This determination was affirmed by the Commissioner, the State Board and the Superior Court, Appellate Division. When examining the record in the instant matter, including the affidavits of the principal and the guidance counselor submitted by petitioner in support of his contention that over time the controverted position became the same as his former Director of Guidance position, there is not a scintilla of information reviewed which constitutes grounds for reopening this matter. It has already been established in the prior adjudication of this matter that the duties of the director position were absorbed within the administrative assistant position but that the additional responsibilities performed by the Administrative Assistant made that latter position broader than the director position, not substantially identical to it. In other words, even granting that the guidance duties absorb 50-60 percent of the administrative assistant position does not alter in any manner the determination rendered previously in this matter.

In light of the above, the Commissioner adopts the decision on motion as the final decision in this matter for the reasons expressed in the initial decision and herein.

Accordingly, the Board's motion requesting dismissal of the petition is hereby granted.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6254-85
(ON REMAND OAL DKT. NO. EDU 2896-85)
AGENCY DKT. NO. 114-5/85

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,
Petitioner,

V.

CHARLES APKARIAN,
Respondent.

Joseph J. Ferrara, Esq., for petitioner
(Krieger, Ferrara, Flynn & Catalina, attorneys)

Sheldon H. Pincus, Esq., for respondent
(Bucceri and Pincus, attorneys)

Record Closed: April 28, 1986 Decided: June 6, 1986

BEFORE JAMES A. OSPENSON, ALJ:

The Board of Education of the Town of West New York, Hudson County, certified on April 22, 1985 and filed with the Commissioner of the Department of Education on April 30, 1985, six charges of unbecoming conduct against Charles Apkarian, a tenured

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teaching member employed by the Board, involving student incidents sufficient, if credited, to warrant his dismissal or reduction of salary, in accordance with the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 et seq. Respondent filed an answer in the Bureau of Controversies and Disputes of the Department of Education, on May 16, 1985, denying the charges, alleging insuficiency thereof under N.J.S.A. 18A:6-11 and alleging affirmatively the charges were unlawful harassment against for protected political activity on his part. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on May 21, 1985 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, under OAL Dkt. No. EDU 2896-85, a prehearing conference was conducted in the Office of Administrative Law on June 17, 1985 and an order entered fixing, inter alia, hearing dates. Before scheduled hearing, however, respondent filed a motion on June 17, 1985 for an order dismissing tenure charges based on the Board's failure to have complied with procedural requirements of N.J.S.A. 18A:6-11. The motion was granted by the administrative law judge and the charges were ordered dismissed, without prejudice, nevertheless, to reconsideration by the Board of the issues raised therein. In a decision dated September 27, 1985, the Commissioner reversed findings and determination of the administrative law judge and ordered the matter remanded for plenary hearing on the merits. (1985 S.L.D. —(Sept. 27, 1985, slip op. at 15; app. pending St. Bd).

This matter then, under OAL Dkt. No. EDU 6254-85, is on remand of the Commissioner's decision transmitted to the Office of Administrative Law on October 1, 1985.

On notice to the parties, the matter came on for supplemental prehearing conference in the Office of Administrative Law on October 22, 1985 and an order entered

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fixing hearing dates beginning January 28, 1986. It was heard on January 28, 29, 30 and February 3, 1986. Thereafter, posthearing submissions having been completed, the record closed.

Before hearing, three written decisions on motions by respondent were entered by the administrative law judge, all of which were reviewable interlocutorily by the Commissioner in accordance with N.J.A.C. 1:1-9.7(a). The orders were dated successively November 19, 1985, November 22, 1985 and January 3, 1986. The decisions were not reviewed before hearing by the Commissioner. They are incorporated herein by reference. The order of November 22, 1985 relieved respondent of obligation otherwise incumbent upon him under rules of discovery to answer written interrogatories because of his asserted and unwaived privilege against self-incrimination under Rule 25 of the Rules of Evidence. The order conditioned relief, however, on a prohibition against respondent's testifying at hearing in defense of tenure charges. Thereafter, by letter to the administrative law judge filed December 6, 1985, respondent elected to waive his "fifth amendment privilege against self-incrimination," to answer interrogatories and, thus, to be free to testify at hearing.

Paragraphs no. 7 of the prehearing conference orders of June 18, 1985 and October 24, 1985 ordered the Board to file and serve upon respondent a particularized statement of incidents involved in the certification of charges. At hearing on January 28, 1986, such a statement of particularization was marked in evidence as a joint exhibit, J-1, "not . . . for the truth of the matters alleged but merely for the purpose of providing both court and counsel with a way of looking at the incidents in toto, and thus . . . to avoid confusion as the testimony from the witnesses comes in." (Transcript, Jan. 28, 1986 at 5-6).

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EVIDENCE AT HEARING

I

Called by the Board concerning incident no. 1, M.L., a student age 11 years and presently in sixth grade at district school No. 4, testified he was in respondent's fifth grade art class in 1985 at school No. 4. The class met once a week. On February 12, 1985, he and a friend, C.C., asked respondent if he, M.L., could get some graph paper from the supply closet. Respondent granted permission. Once in the closet with his friend, M.L. said, respondent suddenly shut the door, yelled, opened the door, grabbed his left arm and pushed him up against a wall outside the closet. Respondent, he said, grabbed his left arm by the elbow. He told respondent he was hurting his arm but, he said, respondent did not reply. He asked to be permitted to go to the nurse but was denied permission to do so. The rest of the class at the time was on line ready to be dismissed to return to homeroom. He said and he and C.C. were in the closet approximately 45 minutes looking for the graph paper. He said he stayed in school that day approximately 40 more minutes but did not complain either to his homeroom teacher or to the nurse. He then went home, he said, and told his mother of the incident. She called their doctor, who advised ice on the arm.

Kathleen L., M.L.'s mother, testified her son told her about the incident on February 12, 1985 with respondent. She said her son complained of a sore arm and she saw it was puffed and red. She confirmed she called the family doctor. She also called school that day and spoke to a vice-principal concerning what her son had told her. The next day, she said, she and her husband spoke to principal Capozzi and reported the incident. She was offered a chance by the principal to meet personally with respondent to get his explanation but, she said, she declined the invitation.

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The Board called C.F., an 11 year old female student who was in respondent's fifth grade art class in the 1984-85 school year, concerning incidents nos. 3 and 5. In November 1984, she said, respondent became angry one day because the class was talking. She said he picked up a desk at which she was seated and pushed it into a long table. He had just remonstrated loudly with the class and had told them to shut up. C.F. said the desk hit her and another student seated to her left. She was hit in the stomach area and was caused to cry, she said, because it hurt. Respondent asked her if she wanted to go to the nurse and she said she would do so later. After school that day, she said, she called her mother at work, who called their doctor. She was already under treatment by her doctor, she said, for a burn on her stomach.

On another occasion, she testified, respondent once asked her for a kiss and on another occasion for a kiss as he was grading her work. She said she did give him a kiss on the cheek, only, however, because she was afraid not to. Some of the other girls in respondent's art class, she said, were asked to give respondent kisses when they went up to hand in their art work for approval. The kisses she said she gave to respondent were light kisses on his cheek; otherwise, she said, he did not touch her person.

Therese F., C.F.'s mother, testified that in November 1984 her daughter called her at work to report the incident of respondent's reaction when the class was noisy and when he picked up the desk to push it into her. She reported the matter to principal Capozzi the next day at a parents' night function. She later wrote a letter to the Board of Education on March 28, 1985 concerning the incident.

Called by the Board, Mario A. Capozzi, a 24 year Board employee now principal of school no. 4 in his fifth year of service, testified respondent taught art in his building in 1984-85 for various grades K-8 until his suspension. He recalled that in February 1985 the mother of M.L., upset, called him to say her son was grabbed by the arm by respondent the previous day. He said she threatened a formal complaint to the Board. Procedure in such an instance, he said, under a negotiated agreement in the district, was for principal

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to talk to teacher to find out the circumstances of a parental complaint. He said he spoke to respondent on the morning of February 14, 1985 and went to school no. 3 to see him. He also informed the superintendent, who was his supervisor. He explained to respondent that a parent had complained and asked what had happened. Respondent replied the children were lined up to be dismissed and the two boys, M.L. and C.C., had asked permission to get art supplies. He said he denied such permission but when he turned his back he noticed the boys inside the supply closet. Respondent told Capozzi he took M.L. by the left elbow and led him from the closet. Capozzi said he told respondent he could not do that, that is, grab children like that or permit any such similar physical contact. Capozzi said it was not the first time he had thus cautioned respondent.

Capozzi also reported that in November 1984 he received a report concerning respondent and another student, C.F., from the student's mother, Therese F., who came to him upset about her daughter's report that respondent had slammed or turned a desk hitting the daughter in the chest. Later, in speaking to respondent, Capozzi said, respondent replied he was attempting to get the attention of the class but denied the desk ever hit child. Capozzi cautioned respondent to stop such conduct and to be more careful in the future. Respondent agreed to do so, he said.

Capozzi said policy of the Board was that corporal punishment was impermissible. There was to be no touching of students for punitive or disciplinary reasons. Such treatment is forbidden by Board handbook from Title 18 of education law, where such conduct is not permitted or condoned.

Called by the Board, Carl Raparelli, district superintendent of schools for the past 15 years, testified the incidents of M.L. on February 12, 1985 (incident no. 1) and D.C. on February 14, 1985 (incident no. 2) were both brought to his attention by the principals of the two school buildings, nos. 3 and 4, involved. District policy, he said, forbids physical contact between teacher and student though "kissing" is not specifically interdicted. Both principals, he said, had warned respondent concerning such policy. In

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his view, it was found his conduct in the two incidents was not in keeping with Board policies concerning contact with students and was not "consistent with professional attitudes of teachers in the district." On cross-examination, he conceded he had made no report to the Division of Youth and Family Services concerning the incidents. Nevertheless, he said, the sum and substance of charges in the present matter, in his view, were not sufficient to warrant respondent's dismissal.

Transcript of deposition testimony of M.A., a pupil, concerning incident no. 4, was refused admission into evidence by the administrative law judge, over respondent's objection, for insufficient basis under R. 4:16-1(c). (Transcript, Jan. 30, 1986, at 3-15).

Called by the Board concerning incident no. 5, M.A., age 8 years, now in second grade in another community, testified she remembered being in respondent's art class. Sometimes, she said, she used to sit on respondent's lap and he would tell her to give him a kiss on the cheek. She did. That happened a lot and with others, she said.

M.A.'s sister, B.A., age 9 years, now in third grade in another community, testified she was in respondent's art class in second and first grade. Sometimes, she said, respondent kissed her on the cheek. Sometimes respondent wanted her to kiss him. When she didn't want to, she said, she didn't say so because she didn't want to hurt respondent's feelings. Last year, she was in the same art class as her sister, M.A.

Concerning incident no. 2, the Board called D.C., a female student, 13 years old, presently in seventh grade in another community. In February 1985, she was a student in respondent's art class. On February 14, 1985, she testified she was sitting near her friends at her desk. No one saw respondent enter the room, she said. The next thing she knew, she was on the floor, seated facing a closet for jackets. She had been seated at a desk with small individual chairs, which were separate and movable. Her right knee hit the desk or under the desk at the bottom, she said, and she fell backwards. When she got up, she saw respondent. The next day, a Friday, she said, in the hall after lunch,

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respondent grabbed her hand pulled her away and gave her a candy heart. She said she told respondent "You hurt me before, I don't want to get hurt again."

She was absent on a Thursday after the fall and because of it, she said, and was out of school for other reasons the rest of February. She did not ask to go to see the nurse on the day of the incident. She said respondent definitely pulled the chair out from under her, because after she got up she saw him with his hands on the chair. Her chair had been moved back, she said, because her low back hit the chair as it did so.

Once respondent asked her for a kiss or "I won't help you with your work." That happened with others, she said. Respondent occasionally asked her to kiss him.

The Board rested.

Respondent's motion to dismiss tenure charges specified in incident nos. 1, 3, 4 and 5 for failure of the Board to make out a prima facie case was denied by the administrative law judge. Transcript, January 30, 1986 at 29-35.

II

The parties stipulated in reference to the charge in incident no. 1 that no school nurse report for having seen student M.L. on February 12, 1985 was made. The parties also stipulated into evidence the deposition testimony of M.L. (R-2) for the purpose only of showing alleged prior inconsistent statements and of impeaching the witness' credibility.

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II

Respondent Charles Apkarian, testified he has been employed by the Board of Education of the Town of West New York, Hudson County, for some thirty years, first as an art teacher, then as testing coordinator and currently again as art teacher. He holds the instructional certificate of teacher of art K-12, and the supervisor's and principal's certificates. He holds B.A. and M.A. degrees from New York University and completed requirements in a doctoral equivalency program there in 1962.

Concerning incident no. 1 involving student M.L. on February 12, 1985 at school no. 4 in the art room about 2:00 p.m., respondent testified he was trying to have his class line up for dismissal. Rising from his desk, he said, he stepped toward the door when M.L. asked him for permission to get graph paper from a supply closet. C.C. was next to him. Respondent said he denied permission for the boys to obtain graph paper because the closet door where supplies were kept had to be kept closed for safety while students were lined up and because both boys had asked for and received about a dozen sheets of graph paper the week before. When near the door, respondent said, he was told by a girl student that M.L. was in the closet. Turning, respondent saw the door open and called for the boys to get out of the closet. He went two steps into the closet, which was about 5 feet by 7 feet, and told M.L. to take his hands off the paper. C.C. slipped out behind him, respondent said.

Respondent put hand on M.L.'s right elbow and guided him out of the closet. Respondent told him to get in line and, when M.L. did, he said his elbow hurt. Respondent advised him to go to the nurse or to the principal. Respondent denied throwing M.L. against the wall. While standing in line, respondent said, M.L. rubbed his elbow and, as the class left the room, asked for a drink of water. Respondent denied permission and M.L. looked up, smiling as if to ask for water from the cooler. Respondent again said no drinks now.

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Later, respondent said, principal Capozzi asked for his version of the incident, which respondent supplied. The principal asked if respondent wanted to meet with the parents of M.L. but such a meeting never took place. Respondent said Capozzi specifically cautioned him "You should not have done that," referring to the incident. Respondent said he replied "Under the circumstances, I agree with you."

Concerning incident no. 3 in November 1984, respondent said he was in school no. 4 at the beginning of first period in the afternoon when he saw C.F. standing up, leaning over a table and shouting to a girl opposite her. The table was 3 feet by 6 feet. The class as a whole was noisy, having just came from the class of a substitute teacher. With children seated at the table, C.F. pushed the table toward them and the wall. Respondent said he reached out, pulled the table away from the children and, in so doing, it touched C.F. in the chest area. She cried and said she was hurt. Respondent said he asked if she wanted to see the nurse. She declined and stayed in class the rest of the period without further complaint.

About three weeks later, respondent said, he spoke to principal Capozzi in another school. Capozzi reported C.F.'s mother was looking for him to speak about a desk incident in which C.F. said respondent had shoved a desk into her. Respondent said he replied he had only slid the desk back to its original position. He said Capozzi told him not to worry about the incident.

Concerning incident no. 5 involving his asking for a kiss from C.F., respondent admitted it occurred. In a class one day, respondent asked C.F. "Do I get one here today?" (indicating his cheek). Respondent said C.F. would reach up and grab him to give him a "peck on the cheek" on occasion and once did so on another occasion as he was coming from the school parking area. Another time, respondent said, C.F. ran out of line, reached up, grabbed him around the neck and gave him a kiss. Respondent asked whether her mother knew about that. He said she replied yes. Respondent denied ever having himself kissed C.F. in return or having put his hands on her person. He admitted she once said to him she did not want to kiss him on the cheek. He never insisted she do

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so, he said. He said administration had never questioned or admonished him about the practice of kissing girl students. Again concerning incident no. 5, respondent said M.A. twice gave him a kiss on the cheek during the 1984-85 school year. Respondent felt he had warm relationships with children in his classes. He would often ask "Do I get one here (cheek) today?" M.A. never said she did not want to do so. Respondent denied ever having touched her person otherwise. On another occasion, he said, B.A., M.A.'s sister, gave him a kiss on the cheek and M.A. gave him a second kiss on the cheek. He denied strongly that B.A. had ever sat on his lap and denied ever having himself kissed other children.

In the case of B.A., respondent said, his action was a way of giving what he felt was needed reassurance to children and to promote a warm relationship. In the process of teaching and helping in art, he said, there was always a need for reinforcement of that sort. When B.A. did a good job, respondent said, he offered her his cheek to kiss. She was the sort of pupil who seemed to need several trips to the teacher's desk before being able to finish her assigned work. He said B.A. once said "My mother doesn't mind." The kissing in general, respondent said, was isolated to only a few incidents. He denied wrongdoing or experiencing any self-gratification. He said it would never happen again. The whole matter was a misunderstanding of his attempt to instill warmth in the classroom, done with innocence in his heart. He himself has been married for 30 years, he said, and has three children and a grandchild.

Respondent said his yearly observations and evaluations were always positive. No salary increments had ever been withheld nor discipline administered against him. He has been elected to the Board of Education of Cliffside Park three times and was appointed once to fill an unexpired term. He served ten years in all as Board member. He attends Holy Cross Armenian Church in Jersey City regularly, was baptized there and was once a trustee.

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Asked on cross-examination why he had not insisted that M.L. report to the nurse when M.L. had reported himself hurt, respondent said he thought M.L. was putting him on. The matter did not seem urgent. He felt a ten-year old child ought to have enough sense to decide whether to go to the nurse or not, and respondent himself had another class entering that he could not leave.

Asked on cross-examination why he asked C.F. for a kiss, respondent said he felt the two had a warm relationship. He was attempting to fulfill what he saw as a father-grandfather role with the child. Kissing, he said, was to him a method of reinforcing certain children.

III

Called by the Board on rebuttal, Carol Ann Stetson testified she was president of the district PTA in 1983. She attended a meeting during that year with respondent and principal Zakarian when a parent had asked to see the principal concerning respondent. The complaint was that respondent had touched a student or kissed her. Respondent assured her there was no substance to the complaint. He was upset. Zakarian told respondent just to do his job and not to let such a situation happen again. Respondent agreed, she said, and nothing like that did happen again to her knowledge. Respondent denied the charge at the meeting, she said.

IV

In rebuttal of Board testimony in support of the specification in incident no. 2, respondent testified near the beginning of class in the early afternoon he walked into class as children were preparing for painting lessons. He saw D.C. seated at a desk about 10

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feet from the door. She was perched on the edge of her chair leaning forward with her full body on the table, her backside on the edge of the chair. Realizing she about to fall, respondent said, he walked over, put his left hand on the back of the chair and cautioned the child she was about to fall. She then fell down, respondent said, as did the chair. He denied pulling the chair from beneath her. He tried to help her up, he said, but she was embarrassed and told him to "leave me alone" when he asked whether she was all right. Respondent offered to send for the nurse but D.C. again said "Leave me alone." There was no further discussion then and work continued in the class. There were no complaints of any injury. The next day, respondent said, he met D.C. in the hall by the water cooler. He tried to console her by saying "I am so sorry about what happened yesterday." She again replied, he said, "Leave me alone." Respondent offered her a piece of candy, which she took. On the day of the chair incident with D.C., he said he asked whether she was too mad to give him "one (kiss) on the cheek."

On cross-examination, respondent, while admitting he put his hand on the back of D.C.'s chair, denied "moving the chair." The chair was movable, not attached to a desk. He said he exerted no force "but it may have moved because my hand was on the chair." He admitted the chair may have "jostled." But he denied an intent himself to move it. He said the child fell backwards on her rear, the chair moving a foot or more and her whole back striking the chair as she fell. He did not see her knees striking the desk or the floor. He did not report the incident to the principal or the school nurse. The incident occurred two days after the M.L. incident (incident no.1).

Again on cross-examination, concerning student D.C., he said he had asked for kisses because "she was like my daughter and I like her." He never asked her, he said, as a pre-condition for helping with her work.

Offered in evidence by respondent were seven certifications by persons who have known him professionally, in civic associations, as fellow-board of education members in Cliffside Park, through political associations and church affiliations, and as fellow teachers. All attested to respondent's good reputation in the community. R-3 to 9.

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FINDINGS AND DISCUSSION

Based on the foregoing, having heard witnesses in testimony and having considered documentary evidence and arguments of counsel, I make the following **FINDINGS of FACT:**

1. During an art class conducted by respondent at school no. 4 on February 12, 1985, respondent, exasperated at a lapse in classroom order and discipline but without specific intent to inflict bodily harm, physically grabbed M.L. from a closet, pulling him out of the closet by the arm and causing minor bruising on the arm of sufficient visible reaction as to cause the child's parent to seek medical advice. Specification no. 1 is **SUSTAINED.**

2. On February 14, 1985 during an art class, respondent, exasperated at a lapse in classroom order and discipline but without specific intent to inflict bodily harm, without warning came up from behind student D.C., pulling the chair on which she was positioned from under her, causing her to sustain temporary injury from the force of a fall to her back, buttocks and knee in coming in contact with chair, desk and floor. Specification no. 2 is **SUSTAINED.**

3. In November 1984, during art class conducted by respondent, respondent, exasperated at a lapse in classroom order and discipline but without specific intent to inflict bodily harm, picked up a desk slamming it to the floor and striking C.F. in the chest, causing discomfort and minor injury.

   During the school year 1984-85, respondent requested a "kiss" or "peck" on his cheek from C.F. and from other female students in the class. Specifications no. 3 are **SUSTAINED.**

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4. Specification no. 4 concerning solicitation of kisses from M.A. during the school year 1984-85 in return for teacher assistance with class assignments is **DISMISSED** for failure of proof.

5. During the 1984-85 school years, respondent as art teacher in school no. 3 requested and received a "kiss" or "peck" from students A.M. and B.M., sisters then eight and nine years old. The kisses or pecks were given. Specifications no. 5 are **SUSTAINED**.

DISCUSSION

Board charges against respondent were the following:

> . . . (8) The aforesaid acts, activities and omissions of teacher Apkarian establish his lack of cooperation with administrative procedures, failure to apply educational philosophies and demonstrate his negative professional attitudes in the performance of his duties.
>
> (9) The aforesaid acts, omissions and activities of teacher Apkarian adversely affect the student/teacher relationship and have had a negative impact and affect [sic] upon the education of the students affected.
>
> (10) The aforesaid acts, omissions and activities of teacher Apkarian have resulted in physical injury to students of the West New York school system and otherwise constitute acts of corporal punishment or discipline not permitted in this school system.
>
> Wherefore, . . . [the following relief is requested]: termination, suspension, . . . other discipline or reprimand. . . and denial of salary and adjustment increments. ["Complaint pursuant to provisions of 18A:6-11," April 22, 1985, at 3-4.]

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The Board argued generally that the quantum of proof necessary in cases involving charges against tenured employees of a board of education, a preponderance of believable evidence adduced, has been met; that respondent as a public teaching employee has been shown to have violated the public trust in him; that conduct proven in the several instances particularized amounted to impermissible corporal punishment and inappropriate physical contact with pupils; and that overall the charges against respondent having been sustained, dismissal from tenured employment is mandated.

Respondent argued generally that the Board had not sustained its burden of proof of charges against him; that there was no credible evidence respondent had inflicted corporal punishment upon any pupil, proof of mere physical contact not being dispositive of unbecoming teacher conduct charges; that no intent to injure any pupils was established; that cheek-kissing was mere innocent tactile reinforcement; and that, finally, should proof of charges nevertheless be determined as sufficient in law, the extreme penalty of removal should not be imposed because of respondent's long and meritorious service to school and community.

Here, particularized specifications nos. 1, 2, 3, and 5 having been sustained, the question results whether the Board, as set forth in the prehearing conference order, has proven by a preponderance of the credible evidence that respondent was guilty of conduct unbecoming a teaching staff member in the specified instances, or one or more thereof; and if so, whether such conduct required his dismissal or reduction of salary.

Though respondent has contended that incidents involving physical contact with C.F. and D.C. were "clearly accidental," and his touching M.L. was discipline enforcement falling short of characterization as corporal punishment (respondent's brief at 45), I am satisfied from the evidence, and the findings above, that such was indeed not the case. I do not credit such contentions of respondent and believe instead the contacts were neither accidental nor incidental. They constitute at best prohibited physical contact, conduct inappropriate to that expected of a teaching staff member. In rejecting respondent's contentions, I have, under circumstances apparent at hearing, no hesitation in crediting

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testimony of the several young pupils involved. In the cases of D.C. and C.F., certainly, respondent's actions may well have been reflexive and in exasperation, but they were not accidental. Specifically, I am satisfied from the evidence respondent purposefully pulled a chair from under D.C., as in incident no. 2, and slammed a desk to the floor in close proximity to C.F. equally as purposefully, as in specification no. 3. The incident involving M.L., in specification no. 1, was equally purposeful and respondent, in his candor, readily so admitted.

Use of corporal punishment of students, it has been said, has been prohibited by a century-old statute, now N.J.S.A. 18A:6-1:

> No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution. . .

In Tenure Hearing of Lomakin, School District of South Orange-Maplewood, Essex County, 1971 S.L.D. 331, the Commissioner of Education noted:

> While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even though those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (N.J.S.A. 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also freedom from offensive bodily touching even though there be no actual physical harm. . . . Such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school to suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions. . . . Thus when teachers resort to unnecessary and inappropriate physical contact with those in their charge they must

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expect to face dismissal or other severe penalty. . .

> . . . Corporal punishment has been defined . . . as any punishment causing or intended to cause bodily pain or suffering. The legal philosophy underlying the proscription of such disciplinary measures is that "an individual has a right to freedom from bodily harm or any impairment whatever of the physical integrity of his person by the infliction of physical pain by another. There is also a right to freedom from offensive bodily touching by another although no physical harm be done. . . ." [citations omitted; 1971 S.L.D. at 334-5].

Applying that standard, I am satisfied respondent's conduct in the incidents involving pupils M.L., D.C. and C.F. (nos. 1, 2 and 3 of J-1) require the conclusion, which I draw, that respondent's conduct was indeed such form of proscribed corporal punishment as constituted intrusion upon those pupils' right to freedom from offensive bodily touching, despite there having been no permanent nor more than transient physical harm done and despite there having been no deliberately premeditated specific intent by respondent to inflict such harm.

Specifications sustained hereinabove (in nos. 3 and 5 of J-1) involving respondent's seeking kisses from young girl students, conduct respondent has in candor admitted but seeks to justify, do not represent corporal punishment. They represent instead, nevertheless, violation of those students' right to freedom from offensive bodily touching. I am satisfied from all of the evidence that respondent in indulging in such conduct was seeking to gratify not his libido so much as his ego. But the prospect of respondent, in his avuncular fashion, trying to create a warm relationship in class and to reinforce, perhaps, young female students he thought needed reinforcement, is nonetheless offensive. Such conduct is demeaning to the personality and interests of young female students and has no place outside the family circle, if there, when indulged in by one the age of a grandfather. Tactile pedagogy in other more extreme forms and circumstances has been discredited in New Jersey public school classrooms. See Tenure

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Hearing of Pasquale, Bd. Ed., City of Elizabeth, Union County, 1984 S.L.D. — (Jan. 9, 1984; slip op. at 34); aff'd St. Bd., 1984 S.L.D. — (Sept. 7, 1984). I find it necessary to **CONCLUDE**, therefore, that respondent's actions as found sustained in incidents nos. 3 and 5 constituted unbecoming teacher conduct.

CONCLUSION

Given the circumstance that charges and specifications of unbecoming teacher conduct have been sustained, the question remains what disciplinary sanction ought then be imposed. While one may recognize, as did the Commissioner in Lomakin, supra (at 335 of 1971 S.L.D.), that some adults react instinctively under provocation of adolescents in a purely physical manner, exasperation and reflexive reaction such as exhibited by respondent here represented irresponsible professional behavior that cannot be condoned. A higher responsibility of the teaching profession is exercise of restraint in the face of child-like behavior by those in their charge. I do not believe respondent's conduct was premeditated, cruel or vicious or done with specific intent to inflict harm. Though the incidents of inappropriate physical conduct upon persons of students were more than one, their nature suggests they were episodic and not regular or patterned. One has in mind also that respondent otherwise on the evidence here a well-respected, experienced teaching staff member of good reputation in school and community. He should be admonished forcefully to exercise self-control in future and to stop demanding kisses from young female students in his charge, a practice that is offensive and demeaning and was shown here to have been subject of parental complaint. In short, I do not find the sustained charges sufficiently flagrant overall as to warrant respondent's summary dismissal from teaching service. Cf. Tenure Hearing of Williams, Sch. Distr. of Red Bank, 3 N.J.A.R. 237, 247-8 (Commissioner's dec., August 27, 1981). Nevertheless, however, I hereby **FIND** and **DETERMINE** respondent, though he should be restored to teaching service as of date of final agency decision herein, should suffer loss of salary for the period of his suspension under N.J.S.A. 18A:6-11; and he should be, and is hereby, **DENIED** salary and/or adjustment increment for the 1986-87 school year if resumption of his salary under N.J.S.A. 18A:6-11 was to levels of the 1985-86 salary guide. If

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resumption of his salary under N.J.S.A. 18A:6-11 remained at levels of the 1984-85 salary guide, then he should be **DENIED** salary and/or adjustment increment as if for the 1985-86 school year.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

June 6, 1986
DATE

JAMES A. OSPENSON, ALJ

JUN 10 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 11 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES APKARIAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN OF	:	DECISION ON REMAND
WEST NEW YORK, HUDSON COUNTY,	:	
	:	

The Commissioner has reviewed the record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law, James A. Ospenson, ALJ.

The Commissioner observes that primary exceptions filed by the parties and reply exceptions filed by the Board were timely received pursuant to N.J.A.C. 1:1-16.4a, b and c.

Respondent, in Point I of his extensive filing of primary exceptions, urges that a review of the transcript of the evidence proffered at trial reveals that the ALJ's recommended findings of fact are against the weight of evidence adduced at trial. He requests that the Commissioner substitute for the ALJ's findings of fact those set forth initially in post-hearing brief and repeated in his exceptions, which include, inter alia, the following.

As to Charge No. 1, respondent denies having pushed either M.L. or C.C. into the supply closet as alleged, nor did he close the closet doors on the children for several minutes as alleged. Although respondent states that "[a]fter again asking [M.L.] to leave the paper along (sic) (which instruction [M.L.] again failed to follow), respondent placed his hand on [M.L.]'s right elbow and guided him out of the closet.***" (Respondent's Exceptions, at p. 2, citing Tr. III-53) He strongly states that at no time did he physically assault either M.L. or C.C., nor, on the day in question, did he throw M.L. up against the wall as alleged.

Respondent argues that the hearing testimony of M.L. is replete with prior inconsistent statements made during the course of his deposition taken on December 3, 1985. Among his prior inconsistent statements were: claiming that respondent grabbed and turned his arm, only after M.L. had come out of the supply closet, and claiming that he was held below his elbow.

As to Charge No. 2, respondent, inter alia, denies exerting any force on the chair or causing the chair to move which resulted in the fall of D.C. Further, respondent asserts that D.C.'s fall was "***due to the awkward position that she was sitting in." (Respondent's Exceptions, at p. 6, citing Tr. IV-61) Further, respondent avows that it was the next afternoon, February 15, 1985, that Principal Zakarian told him for the first time "***not to touch any child lest it be misconstrued however innocent the reason." (Id., at p. 7, citing Tr. III-84) Respondent avers that the

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incident "***was an accident, and that he was astonished when [D.C.] fell." (Id., at p. 7, citing Dep. 2, p. 21) Further, respondent avows that D.C 's absence from school after the incident was not the result of any claimed injuries, but because her parents removed her from the district for education elsewhere. (Id., at p. 7, citing Tr. IV-54)

As to Charge No. 3, respondent contends, inter alia, that C.F. accidently slid the table into the two children opposite her, pinning them against the wall. Respondent avers that he immediately approached the table, placed his hands along its side, and gently slid it away from the two children pinned against the wall. As he did so, suggests respondent, it accidently "grazed" C.F. in the chest area, where she had earlier suffered a burn. (Id., at p. 8, citing Tr. III-68, 70) Respondent avows that at no time during the class did he pick up a desk and slam it to the floor as alleged. Nor did he throw a desk into C.F., as C.F.'s mother claimed he did. (Id., at p. 9, citing Tr. I-85) Respondent further contends that upon explaining the incident to Principal Capozzi approximately three weeks after the incident, the principal neither warned nor admonished respondent, nor was the incident ever discussed again prior to the time the tenure charges were filed. (Id., at p. 9, citing Tr. III-72)

Also, respondent states in exceptions that he never kissed C.F. or any other student. Respondent denies that he ever placed his hands on C.F. (Id., at p. 9, citing Tr. III-74) Respondent contends that there was no legally competent or admissible evidence introduced at trial to support a finding that he requested a kiss from other female students in C.F.'s 1984-85 art class as a condition precedent to assistance with class assignments and a condition precedent to other pupil requests. (Id., at p. 10, citing Tr. III-78)

As to Charge No. 5, respondent avers he never held either M.A. or B.A. on his lap or touched either child in any manner. Respondent states that these two children were "ones who needed constant reinforcement and reassurance about their art work. Respondent sought to establish an atmosphere of warmth in order that each would complete their (sic) work." (Id., at p. 10, citing Tr. III-79) Respondent avers that the innocence of the kissing incident is evidenced by Principal Zakarian's admission to respondent that kindergarten children sometimes kissed him (Zakarian) on the cheek. (Id., at p. 11, citing Tr. III-81)

In general response to all the charges, respondent argues, inter alia, that there is not one iota of evidence from which may be inferred a motivation on his part to commit an act of child abuse, or an act done for purposes of sexual gratification. Any actions found to be taken were done for purely innocent reasons, he avers Further, respondent contends that all his observations and evaluations have been positive in nature, that he has never had a salary or adjustment increment withheld from him, and that he has never been the subject of discipline while employed by the West New York School District.

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In Point II of his exceptions, respondent argues, in the alternative, that assuming, but not conceding, the ALJ's findings on specifications 1, 2, 3 and 5 are affirmed by the Commissioner, the recommended penalty of the loss of one year's salary increment in addition to the salary withheld during suspension pursuant to N.J.S.A. 18A:6-14 is too severe under the circumstances. Respondent argues that he "has suffered great embarrassment as the result of the charges filed against him. The aspersions cast upon an otherwise unblemished escutcheon is penalty enough for a man who has lived his life honorably." (Id., at p. 13)

Respondent contends that the factual findings of the ALJ, even if accepted, are far less serious transgressions than those in In the Matter of the Tenure Hearing of Stanley J. Ziobro, School District of the Town of Westfield, Union County, decided by the Commissioner September 28, 1983, wherein twenty-five years of outstanding service to the school district weighted in favor of imposing a forfeiture of only 120 days' salary. Similarly, respondent contends that in In re Frederick L. Ostergren, 1966 S.L.D. 185, the Commissioner held that in the context of seventeen years of otherwise meritorious service, a reduction in salary and the loss of compensation that would have been earned during service less suspension six months prior was an appropriate penalty under circumstances wherein respondent had two previous complaints in his file and was found guilty of corporal punishment. Respondent respectfully recommends limiting the sanction to loss of salary during suspension, and pain and humiliation suffered. Such a penalty would be stringent, but fairer under the circumstances, respondent prays.

The Board's reply exceptions argue that respondent restates in his exceptions each of the arguments advanced by him to the ALJ with regard to each of the charges asserted. The Board contends respondent's position is in direct conflict with the testimony offered by the Board's witnesses. The Board avows that it is clear from the transcript of the proceedings that in order to have accepted the testimony and position advocated by respondent, the ALJ would have had to find the testimony of all the Board's witnesses unreliable. The Board suggests in reply exceptions that the ALJ carefully considered and weighed the evidence and properly sustained the charges against respondent. The Board incorporates its post-hearing brief in support of its contentions. It submits that the charges in this matter should be sustained by the Commissioner. The Board further submits that the penalty imposed by the ALJ is inappropriate and that the appropriate sanction that should be imposed as a consequence of respondent's acts is dismissal.

The Board's primary exceptions argue again that the penalty in the instant matter should be summary dismissal. The Board argues that incidents involving respondent and pupils of the West New York School District have occurred repeatedly from at least 1984 to February 1985 when respondent was suspended from teaching service. The Board disputes respondent's reiteration of the facts stated in his post-hearing brief and restated in his exceptions. It counters with its own interpretation of the facts, citing numerous transcript

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citations. The Board submits that the testimony concerning respondent's behavior with pupils in the classroom establishes a complete lack of self-restraint and uncontrolled behavior. The Board cites In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, 1974 S.L.D. 98-99; Ruth Schroeder v. Board of Education of Lakewood, 1960-61 S.L.D. 37; In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Blackhorse Pike Regional, 1972 S.L.D. 302, 321 for the proposition that respondent should be dismissed.

The Board avers that the testimony clearly establishes that in each instance respondent was repeatedly warned to cease and desist from physical contact with students. (Tr. II-9-12) Respondent himself admitted that he knew of the existence of the policy in the district prohibiting any physical contact with students, avers the Board. Yet, notwithstanding his knowledge of the policy and notwithstanding his supervisors' repeated warnings to him to cease from such conduct, he continued to engage in the same, resulting in physical injury to some students and unbecoming teacher conduct with regard to other students, avows the Board. Citing In re Ostergren, supra, the Board prays for summary dismissal of respondent.

In reviewing the record, the Commissioner has carefully weighed the legal arguments advanced by the parties in their exceptions, as well as the findings and conclusions of the ALJ. The Commissioner agrees with the ALJ that the incidents involving physical contact with C.F., D.C. and M.L. constitute prohibited physical contact and rise to the level of conduct unbecoming a teacher. While none of these charges (Nos. 1, 2 and 3 of the Statement of Particularization, J-1) indicates that respondent intended to cause bodily pain or suffering, the ALJ is correct in his conclusion that the use of force in these incidents was improper. To the ALJ's discussion in the initial decision, ante, concerning these three incidents the Commissioner adds that he detects, in perusing the record, that respondent is experiencing classroom management difficulties. The transcript is replete with the indicia of chaos in respondent's classes. For example, why are students permitted to "eagerly enter" the classroom in order to obtain the big chairs? (Respondent's Exceptions, at pp. 7-8, citing Tr. III-64) Why is the din in the classroom so great that directives from respondent were not heard by the students? Why need respondent yell to be understood?

> Q. And at or about that time, did you hear any instruction from Mr. Apkarian to stop talking?
>
> A. Well, he yelled and I didn't know what he said and then he came over and yelled to shut up and he threw the desk.
>
> (Tr. I-57-58)

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While the Commissioner agrees with the ALJ that there clear evidence in the record to support the conclusion that respondent was "exasperated at a lapse in classroom order and discipline" (Initial Decision, ante) at the time that Specifications Nos. 1, 2 and 3 took place, the law is clear that the Commissioner

> cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (N.J.S.A. 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also freedom from offensive bodily touching even though there be no actual physical harm,*** [S]uch a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions,*** Thus, when teachers resort "to unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty."***
>
> Corporal punishment has been defined*** as "any punishment causing or intended to cause bodily pain or suffering." The legal philosophy underlying the proscription of such disciplinary measures is that "an individual has a right to freedom from bodily harm or any impairment whatever of the physical integrity of his person by the infliction of physical pain by another. There is also a right to freedom from offensive bodily touching by another altho no actual physical harm be done."***
>
> In the Matter Of the Tenure Hearing of Victor Lomakin, School District of South Orange-Maplewood, 1971 S.L.D. 331, 334-5, quoting In re Ostergren, supra; In the Matter of the Tenure Hearing of Pauline Nickerson, School District of Peapack-Gladstone, 1965 S.L.D. 130, 131

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The ALJ is correct in his finding that the law places a heavy responsibility on teachers to act with self-restraint and that the Commissioner holds that a competent teacher does not need to resort to physical intervention to maintain discipline.

As to Specifications Nos. 3 and 5 of J-1, involving respondent's seeking kisses from young female students in return for teacher assistance or for the sake of bolstering confidence of pupils, the Commissioner concurs with the ALJ's finding that such actions represent a violation of students' right to freedom from offensive bodily touching. The Commissioner agrees with the ALJ that

> respondent in indulging in such conduct was seeking to gratify not his libido so much as his ego. But the prospect of respondent, in his avuncular fashion, trying to create a warm relationship in class and to reinforce, perhaps young female students he thought needed reinforcement, is nonetheless offensive. Such conduct is demeaning to the personality and interests of young female students and has no place outside the family circle, if there, when indulged in by one the age of a grandfather. Tactile pedagogy in other more extreme forms and circumstances has been discredited in New Jersey public school classrooms. See Tenure Hearing of Pasquale, Bd. Ed., City of Elizabeth, Union County, [decided by the Commissioner January 9, 1984, affirmed State Board September 5, 1984.]
>
> (Initial Decision, ante)

In considering the penalty for respondent's conduct, it is the Commissioner's judgment that the interest and well-being of students is paramount. The pattern of unacceptable conduct demonstrated by respondent cannot be tolerated. However, notwithstanding the Board's prayer for dismissal, the Commissioner concurs with the ALJ that the sustained charges are not "sufficiently flagrant overall as to warrant respondent's summary dismissal from teaching service. Cf. In re Williams, Sch. Distr. of Red Bank, 3 N.J.A.R. 237, 247-8 [1981 S.L.D. 931]" (Initial Decision, ante) In so holding, the Commissioner finds particularly persuasive the testimony of the Chief School Administrator, Carl Raparelli, which, in pertinent part, is recited below:

> Q. Mr. Raparelli, you were the individual who filed the charges against Mr. Apkarian in your capacity as Superintendent of Schools?
>
> A. In my capacity, yes.
>
> ***
>
> Q. I'd like to know whether, in your opinion, dismissal is warranted as a result of these actions.

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***

A. No, I do not. (Tr. II-37-39)

Since the Superintendent was cognizant of the circumstances leading to the filing of the instant charges and was, in fact, the person who investigated and submitted the Statement of Evidence under oath to the Board, the Commissioner is convinced that the Superintendent's opinion, coupled with the ALJ's determination and to his own careful scrutiny of the record, requires that a lesser sanction than dismissal is warranted in this matter. Consequently, the Commissioner determines that respondent, although he should be restored to teaching service as of the date of this decision, should suffer loss of salary for the 120-day period of his suspension under N.J.S.A. 18A:6-11 and he should be and is hereby denied salary and/or adjustment increment for both the 1985-86 school year and also for the 1986-87 school year.

Accordingly, the initial decision is affirmed, including the decisions on motion made in this matter, as supplemented herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 16, 1986

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IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES APKARIAN,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF WEST NEW YORK,	:	DECISION
HUDSON COUNTY.	:	
	:	

Decided by the Commissioner of Education, September 27, 1985

For the Petitioner-Respondent, Krieger, Ferrara, Flynn and Catalina (Joseph J. Ferrara, Esq., of Counsel)

For the Respondent-Appellant, Bucceri and Pincus (Sheldon H. Pincus, Esq., of Counsel)

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

September 3, 1986

Affirmed N.J. Superior Court November 20, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7874-85
AGENCY DKT. NO. 407-11/85

OLD BRIDGE EDUCATION ASSOCIATION,
Petitioner,
v.
OLD BRIDGE TOWNSHIP BOARD OF EDUCATION,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld, Cohen & Blunda, attorneys)

Steven J. Tripp, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: April 29, 1986 Decided: June 11, 1986

BEFORE **DANIEL B. MC KEOWN**, ALJ:

The Old Bridge Education Association (petitioner), the majority representative of certain teaching staff members employed by the Old Bridge Board of Education (Board), filed a two count Petition of Appeal before the Commissioner of Education by which it challenges certain assignments visited upon certain of its members as being beyond the scope of the members' instructional certificates and endorsements thereon. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted February 6, 1986, after which a hearing was scheduled and conducted April 1, 1986 at the Old Bridge Township Municipal Building. The record closed April 29, 1986, upon receipt of the Board's reply memorandum. Transcripts of stenographically recorded testimony proferred and elicited at hearing have not been provided this forum.

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ISSUES

The issues to be adjudicated and as agreed upon by counsel to the parties at the prehearing conference conducted February 6, 1986, are these:

1. Are assignments of foreign language teachers to library, culture and/or careers beyond the scope of their authority to teach under their certificates/endorsements.

2. If such assignments are beyond their authority, what remedy is available in regard to seniority.

3. Are assignments of middle school teachers who possess certificates other than elementary or reading but who are assigned to teach reading beyond the scope of their authority to teach under their certificate/endorsement.

4. If such assignments are beyond their authority, what remedy is available in regard to seniority.

5. Whether, if petitioners prevail on the above issues, should an injunction issue against the Board to permanently restrain it from assigning teachers teaching duties outside the scope of their certificate/endorsement.

Petitioners contend that teachers of foreign language and other teachers of certain specific subject matters for which assignments teachers must possess identifiable endorsements upon instructional certificates are assigned to teach subject areas beyond the scope of endorsements granted and possessed by such teachers. All affected teachers are assigned to either the Board's Salk Middle School or its Sandburg Middle School, both of which contain grades seven and eight. The controverted assignments include the teaching of career education, reading, and assignments to the library at each school. Eight teachers assigned the Board's middle schools offered uncontroverted testimony at hearing regarding their assignments, endorsements possessed upon their instructional certificates and the nature of the controverted assignments. A stipulation has also been entered by the parties regarding another teacher who possesses a science endorsement but

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who is also assigned to teach reading. That teacher's surname is Grabko. It is helpful, accordingly, to initially report in chart form as factual findings the surname of each such witness, endorsement possessed and their respective assignments for 1985-86 with footnote explanations where appropriate:

Teacher	Endorsement(s)	1985-86 Assignments
Enz[1]	Teacher of French Teacher of Handicapped	1. Three 7th grade French classes, three times per week; one 8th grade French class, five times per week. 2. One 8th grade class of Career Education, four times per week.[2] 3. Library assignment two periods per week.
Lessa	Social Studies English	1. Social studies. 2. Reading, one period per day, five days per week.[3]
Nice	English Social Studies	1. English 2. Reading, one period per day, five days per week.[4]
Fitzsimmons	Social Studies	1. Social Studies 2. Reading, one period per day, five days per week.[5]
McDonnell	"Teacher in the elementary grades seven and eight: English, social studies, science and mathematics in grades seven through nine."[6]	1. Social Studies 2. Reading, presumably one period per day, five days per week.

[1]Enz testified without contradiction that other teachers of foreign language assigned to the middle school have assignments identical to hers.

[2]Enz has taught career education for the past seven or eight years.

[3]Lessa has taught reading and presumably one period per day, five days per week since 1970.

[4]Nice has taught reading and presumably one period per day, five days per week since 1972.

[5]Fitzsimmons has taught reading and presumably one period per day, five days per year, three of the past four years.

[6]Verbatim from McDonnell's "Certificate" (R-2) issued in June 1966.

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Teacher	Endorsement(s)	1985-86 Assignments
Saddell	Social Studies English Guidance Counselor	1. Social Studies 2. Reading, presumably one period per day, five days per week.
Irish	English Educational Media Specialist	1. Language Arts 2. Reading, presumably one period per day, five days per week.[7]
Tinney	Social Studies[8]	1. Social Studies 2. Reading, one period per day, five days per week.
Grabko[9]	Science	1. Science 2. Reading, one period per day, five days per week.

The testimony and documentary evidence regarding the nature of the controverted assignments to career education, library, and reading is not in dispute between the parties. Accordingly, I **FIND** the following constitutes the factual nature of each such assignment.

CAREER EDUCATION

For purposes of this case, career education is a six week course limited to pupils in the eighth grade only at the Salk Middle School who are not enrolled in a foreign language course. The Sandburg Middle School does not offer career education to its pupils. Enz, the teacher assigned to teach career education, teaches the course throughout the year, although the pupils change every six weeks. Such pupils are identified by the school principal as "vocationally oriented" and are identified by the Board in its letter memorandum at page 7 as those " * * * students at a lower academic level who are not taking a foreign language course [who] are in their careers course when the other eighth graders are taking foreign language." Teachers of foreign language are

---

[7]Irish has taught reading and presumably one period per day, five days per week for 13 of her 16 years of employment with the Board.

[8]Tinney testified that he has a separate endorsement to teach history. A search of authorizing State Board rules and regulations at N.J.A.C. 6:11-1.1 et seq. discloses no authority for the issuance of such a separate endorsement.

[9]The stipulation was entered by the parties regarding Grabko.

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assigned to teach career education because, according to the Salk Middle School principal, they are available as the result of a reduced class period schedule.

While Enz testified she does not teach career counselling per se, the Board agrees that the teaching of career education covers such topics as personal understanding and work attitudes designed to teach the process of career selection, work experiences designed to describe certain careers to pupils, job hunting which addresses working papers, jobs, social security enrollment, and personal job interviews, and money management, including income tax preparations, credit applications and the sale and purchase of automobiles (See C-2 and C-1). Career education also includes a booklet of true stories of persons in various occupations one purpose of which is to strengthen pupils' vocabulary, reading comprehension, analytical and communication skills. As noted earlier, career education does not involve career counselling in any form.

LIBRARY ASSIGNMENTS

Each of the Board's two middle schools has a learning center which includes the school library. Each library is assigned a certified school librarian who has clerical assistance in the form of a library aide. The librarian is present in the library five of each school's eight period day. In the absence of the librarian, pupil use of the library is limited because of the absence of a certificated staff person on duty.

The Salk Middle School principal began assigning teachers of foreign language to the library on or about September 1, 1985, in order to allow greater pupil use of the library when the certified librarian was not present. The Salk Middle School principal specifically limited the duties of such assigned teachers of foreign language "* * * to provide general student supervision and [the teachers of foreign language] will not be [expected] to serve as a substitute librarian" (R-1). The principal of Sandburg Middle School began assigning teachers of foreign language on February 1, 1985 to similar library duty. Specifically, such assigned teachers at the Sandburg Middle School "* * * are not expected to "'teach'" library skills, only to provide "'study period'" type supervision * * *" (R-4). In each school when teachers of foreign language are assigned general supervision of pupils who are using the library, the library aide is present to check books in and out of the library.

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It is noted that the Association filed a grievance complaining of the assignment of teachers of foreign language to the library to supervise students. While the grievance was denied by the principal, the superintendent, and by the Board (P-1 and P-2), the Board advised

> * * * A review (with the County Department of Education) of the role of the teachers scheduled to supervise in the library indicates that they would not be given seniority in this area. A copy of this opinion has been requested and will be shared with the [Old Bridge Education Association]. (P-2)

The Association president testified that he has yet to receive a copy of such opinion from the Middlesex County Superintendent of Schools.

READING

Before January 1986 and after the present petition was filed, the controverted reading courses taught by all named teachers above, except Enz, was called "reading." After January 1986 the controverted course is now called social study readings, or science readings, or literary readings. Both before and after January 1986, separate grades were and are recorded by the affected teacher on each pupil's report card for the reading course they teach. Each reading course has its own curriculum. The reading course taught by these teachers is six weeks in duration after which the pupils then change. The reading courses are an extension of the substantive subject matter taught by each named teacher. As noted by petitioners, each teacher who teaches such reading courses concentrates on subject matter related to their subject matter endorsements, while also concentrating on reading skills such as prefixes, suffixes, vocabulary, pronunciation, phonics, word attack skills, comprehension skills including inferences, conflicts, plots and patterns of events.

The compatability of the teacher's subject matter courses with the subject matter of the reading courses taught is the Board's effort to offer its pupils an interdisciplinary approach to the subject matter while strengthening reading study skills. This approach is further complimented by the Board using a team teaching approach by which the affected teachers are assigned to teach four periods per day in their subject matter and one period per day of reading.

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The foregoing constitutes the relevant and material facts of the matter.

LAW, DISCUSSION AND CONCLUSIONS

There is no dispute between the parties that teaching staff members must be in possession of appropriate certificates for their respective assignments. The appropriateness of such certificates, including endorsements possessed, is determined generally by the nature of the assignment given. In this case, the issues to be adjudicated may be resolved only by addressing whether persons certified as teachers of foreign language may teach career education and/or may be assigned to supervise pupils in a school library in the absence of the regular certified school librarian. In addition, the issue of whether persons who possess the endorsement of social studies or English, or as McDonnell possesses an endorsement as a 'teacher in the elementary grades seven or eight' or 'English, social studies, science, and mathamatics in grades seven through nine', is sufficient to teach a reading course in grades seven and eight.

Turning first to career education, the only general reference to career education in State Board rules and regulations, N.J.A.C. 6:1-1 et seq., is at N.J.A.C. 6:43-2.4, Pre-vocational instruction, which provides in full as follows:

> Pre-vocational instruction shall include instruction designed to familiarize individuals with the broad range of occupations for which special skills are required and the requisite for careers in such occupations.

An endorsement to teach French, N.J.A.C. 6:11-6.2(a)(9)(ii), authorizes the holder to teach French. Such authorization does not authorize the holder to teach anything but French. The career education course of study established as fact in this record, I FIND is similar to the program of vocational education as described at N.J.A.C. 6:43-2.4. A more appropriate endorsement to be required of one who teaches career education at a seventh and eighth grade level of a junior high school, such as here, is marketing and distributive occupations under a business education endorsement. N.J.A.C. 6:11-6.2(4)(vii). It is quickly to be pointed out, however, that I make no ruling that this latter endorsement is the appropriate endorsement for the teaching of career education as that program is defined here. Rather, the point to be made is that career education is more closely aligned with vocational education than it is with the teaching of French. A

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person who is in possession of an endorsement as a teacher of French upon an instructional certificate, I **CONCLUDE** is not authorized to teach career education as that program is presently taught at the Old Bridge middle schools. That teacher Enz has taught career education for seven or eight years does not erase the impropriety of such assignment nor does teacher Enz have a claim to any seniority in the teaching of career education because she does not possess an appropriate certificate for that assignment.

In regard to the assignment of teachers of foreign languages to general supervision of pupils in the library during the absence of the regular certificated school librarian, petitioners' argument that such assignment constitutes the teaching of library is wholely without merit. The general supervision of pupils without instruction does not constitute the teaching of library skills in the remotest sense. Rather, this assignment is more akin to those kinds of duties associated with employment as a public school teacher but not directly and intimately related to the educative process, save for the training of youngsters to behave themselves. The assignment of teachers to the general supervision of pupils who are gathered in large numbers in school cafeterias, playgrounds and in this case libraries, has long been recognized by the Commissioner as an appropriate and valid assignment by boards of education for all certified teachers. Long Branch Educ. Assoc. v. Bd. of Ed. of City of Long Branch, 1974 S.L.D. 191, aff'd 150 N.J. Super. 262 (App. Div. 1976); aff'd 73 N.J. 461 (1977). Consequently, I **CONCLUDE** that the assignment by the Board of teachers of foreign language to generally supervise pupils in the school library is not an assignment beyond the scope of the affected teachers' certificates because such assignment is not a "teaching" assignment which demands an identifiable certificate or endorsement. Rather the assignment of general supervision requires any endorsement on any instructional, educational services or administrative certificate.

Finally, in regard to the matter of the reading assignments given those teachers other than Enz it is noted that these reading courses, despite the fact they are called social study readings or science readings or literary readings, constitute the actual teaching of reading as a skill necessary and attendant to the successful completion of the allied subject matter course. The isolation of these reading courses as formal "reading" courses is established by the fact each such affected teacher assigns specific grades on the pupils' report cards and by the nature of reading skills taught.

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The certification requirements regarding the teaching of reading provide as follows. N.J.A.C. 6:11-6.1(b) authorizes teachers with elementary endorsements to teach reading, grades seven through 12. N.J.A.C. 6:11-6.1(c) authorizes teachers with English endorsements who taught reading prior to February 1976 to continue to teach in such assignment. It is to be noted that this authorization obligates teachers with English endorsements who did not teach reading prior to February 1976 and who now are assigned to teach reading to hold the appropriate endorsement. The appropriate endorsement for the teaching of reading is found at N.J.A.C. 6:11-6.2(a)(20). The endorsement is repeated here in full:

> 20. Reading: This endorsement authorizes the holder to teach reading in all public schools.

The only other endorsement regarding the teaching of reading is found at N.J.A.C. 6:11-12.20, Reading specialist, which is not relevant to the issues here. Applying the foregoing regulations to the facts at hand it may be seen that teachers Lessa, Nice, and Irish are eligible to teach reading by virtue of their possession of English endorsement and by virtue of the fact each has been teaching reading prior to February 1976. McDonnell and Saddell may be eligible to teach reading by virtue of their possession of English endorsements. However, this record does not disclose as it does with the others whether McDonnell and Saddell had been teaching reading under their English endorsements prior to February 1976.

Under the cited State Board rules and regulations, teachers Fitzsimmons and Tinney are not eligible to teach reading because neither possesses an elementary endorsement, an English endorsement, nor a reading endorsement. Each possesses a social studies endorsement which according to N.J.A.C. 6:11-6.2(a)(22) authorizes in full the following:

> 22. Social studies: This endorsement authorizes the holder to teach social studies in all public schools.

Following that analysis it is equally true that teacher Grabko, who did not personally testify before me but whose certification and assignment have been stipulated in the record, is not eligible to teach reading by virtue of the fact she possesses a science

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endorsement to an instructional certificate. The science endorsement, found at N.J.A.C. 6:11-6.2(a)(21) does not authorize the teaching of reading. It does authorize the teaching of biological science, earth science, and physical science. A science endorsement does not authorize, however, the teaching of reading.

Teachers Lessa, Nice, and Irish along with the possibility of teachers McDonnell and Saddell accumulate seniority in their subject areas being taught and because they are also assigned to teach reading under an authorized endorsement they are entitled to seniority credit to the teaching of reading. In this regard, N.J.A.C. 6:3-1.10 provides "Whenever a person shall hold employment simultaneously under two or more subject areas endorsements * * * seniority shall be counted in all subject area endorsements * * * in which he or she is or has been employed." If teachers McDonnell and Saddell began teaching reading under their respective English endorsements prior to February 1976 they too shall be entitled to a credit of seniority for the teaching of social studies and for the teaching of reading under their English endorsements. Such seniority for these teachers shall be attributable to their English endorsements as set forth in N.J.A.C. 6:3-1.10(l)(15)(i).

In sum, then, the assignment of teachers of foreign languages who possess an endorsement in a specific foreign language are not authorized to teach career education as that program is designed here. Accordingly, such assignments are improper and shall cease. The affected persons are entitled to no seniority for career education teaching because they are not appropriately certificated for such teaching. The assignment of teachers of foreign language to general pupil supervision in the library is found to be a proper exercise of the Board's discretion and authority. The assignment of reading to teachers with English endorsements is found to be a proper assignment so long as the possessors of such English endorsements had been teaching reading prior to February 1976. In such case, the affected persons are entitled to seniority credit under their social studies endorsement and under their English endorsement. If such persons did not teach reading prior to February 1976, they are not authorized to teach reading and such assignments must cease. Teachers Fitzsimmons, Tinney, and Grabko are not authorized to teach reading as the course is stuctured here. Such assignments must cease. No one of these three teachers are entitled to seniority for the time spent teaching reading because they do not possess an appropriate certificate to teach reading.

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The Board is accordingly **ORDERED** to cease assignments of subject matter teaching to persons not appropriately certificated. The Board is also directed to credit seniority to those assigned to teach reading who are appropriately certified as stated herein.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

June 11, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

JUN 12 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 13 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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OLD BRIDGE EDUCATION ASSOCIATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY, RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the Board within the time required by N.J.A.C. 1:1-16.4a and b.

The Board takes exception to the ALJ's determinations that (1) it was improper to assign foreign language certified personnel to teach a course entitled "careers" and (2) certain subject area endorsed staff cannot be assigned to teach one period of reading per day in the eighth grade as part of an interdisciplinary team teaching approach to instruction. It relies on its letter memorandum of April 15, 1986 in support of these exceptions. Further, the Board considers erroneous the ALJ's conclusion that William McDonnell may be assigned to teach reading only if he had been doing so under the English (grades 7-9) portion of his endorsement prior to February 1976. In support of this, it points to McDonnell's certificate (R-2) which authorizes him to teach "elementary grades 7 and 8" as well as the enumerated specific subjects for grades 7 through 9.

With respect to the Board's exception regarding foreign language endorsed staff teaching the "careers" course, it argues that, in view of the fact N.J.A.C. 6:11-6.2(a) includes no particular endorsement which would cover "careers" and the course does not involve counseling, it therefore can be taught by any staff with a teaching certificate regardless of the endorsement.

The Commissioner finds this argument unpersuasive and he concurs with the ALJ's conclusion regarding this issue, namely, that an endorsement in French authorizes one to teach French. N.J.A.C. 6:11-6.2(a)9 Such endorsement clearly does not authorize the teaching of career education as presented in this matter, i.e. a separate career education course for those 8th grade students at a lower academic level who are "vocational" oriented rather than "foreign language" oriented. (Initial Decision, ante) This is not a case of elements of career education being infused or integrated into the content area of French, such as found in the science curriculum where there is a specific objective "to develop respect for scientific vocations***" (C-2, Science Curriculum, p. 2) or the infusion of career education and the introduction to career clusters activities into the language arts curriculum (C-2, Language Arts

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Curriculum Guide, pp. 34-36). Rather, what is presented is a separate and distinct career education course totally disassociated from the content area specialty of French.

The Commissioner does not, however, agree with the ALJ's conjectural comments as to what may constitute an appropriate endorsement for the careers course and reinforces the ALJ's statement that the comments do not constitute a "ruling" on the issue.

If the Board is in need of ascertaining appropriate endorsement(s) for the teaching of the careers course, its chief school administrator should seek the assistance of the county superintendent as each of these individuals has responsibility to assure that district staff are properly certified for the positions held (or courses taught as the case is presented herein). N.J.A.C. 6:11-3.5

The Board is correct in its exception regarding William McDonnell. The endorsement, "teacher of elementary grades 7 and 8" (R-2), authorizes the teaching of reading, thus the issue of the English endorsement need not come into play. Consequently, the initial decision is modified to reflect this factor.

As regards the overall determination of the ALJ that one must be endorsed/authorized to teach reading in order to provide instruction in the courses entitled "social studies readings," "science readings" and the like, the Board reiterates its position that it has properly assigned teachers with subject area endorsements to teach one period of reading each day to 8th grade students as part of the 8th grade interdisciplinary team. It contends that its 8th grade students

> ***are taught by teams consisting of four or five teachers, some of whom are certified in the elementary category and others who are certified in particular subject areas. Each student receives instruction each day in math, science, language arts, social studies and reading. On a five person team, each teacher is assigned exclusively to one subject area and teaches five periods of that subject each particular day. On a four person team, each teacher is assigned to teach four periods of math, science, language arts or social studies and one period of reading each day.***
>
> (April 15, 1986 Letter Memorandum, at p. 9)

There is no explanation as to why some "interdisciplinary teams" (those consisting of 5 teachers) have reading instruction provided by a teacher authorized to teach reading while others (those consisting of four teachers) do not. In the latter instance, reading instruction is provided by subject matter endorsed teachers who emphasize that "particular subject area in which they have expertise" and for whom texts have been made available "which coincide with each teacher's particular subject area in order to

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facilitate the reading course.***" (emphasis supplied) (Letter Memorandum, at p. 9)

In view of the fact that the courses are undisputedly reading courses, taught and graded separately from the instructional time/period devoted to the subject areas of science, social studies, mathematics and language arts, the Commissioner concurs with the ALJ's determination that an endorsement authorizing one to teach reading is needed for instructing such courses. In other words, because the instruction provided is firstly reading instruction and the skills being taught are reading skills and subject matter of the particular discipline is merely the vehicle by which the reading skills are taught, it is concluded that an endorsement authorizing the teaching of reading is required.

With respect to this determination the Commissioner wishes to emphasize that it is not meant to preclude the Old Bridge Board or any other board of education from including reading in the content areas as an integral part of the district's curricula. Reading in the content areas is a valuable, desirable instructional strategy to be encouraged. However, it must be recognized that there can be a fine line or delicate balance between what may be deemed to be an "infusion" of reading skills into content areas and the "outright" teaching of reading. This fine line or balance must be carefully assessed when designing curriculum/instructional strategies for addressing the importance of reading across all components of the district's total curriculum. This is vital to assure that subject matter endorsed staff members are not being required to instruct outside the scope of their endorsements.

No matter how vigorously a board may argue to the contrary, there are only certain endorsements which authorize one to teach reading, none of which is social studies, science, math or English (unless reading was taught prior to 1976 under that endorsement).

Consequently, the Commissioner adopts the initial decision as his final decision in this matter for the reasons expressed therein and as modified above.

COMMISSIONER OF EDUCATION

July 16, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4556-85
AGENCY DKT. NO. 193-7/85

BRIAN J. SMALL,

Petitioner

v.

WESTWOOD REGIONAL BOARD OF EDUCATION,

Respondent

and

LINDA SCHADT,

Intervenor

Louis P. Bucceri, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Mark G. Sullivan, Esq., for respondent
(Sullivan & Sullivan, attorneys)

Stephen B. Hunter, Esq., for intervenor
(Klausner & Hunter, attorneys)

Record Closed: May 30, 1986 Decided: June 6, 1986

BEFORE WARD R. YOUNG, ALJ:

Brian J. Small, a tenured teaching staff member, alleged the action of the Westwood Regional Board of Education (Board) in terminating his employment for the 1985-86 school year was in violation of his tenure and seniority rights, and further alleged the Board improperly denied him seniority credit in driver education and health education.

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The Board avers its termination action was a proper exercise of its discretionary authority.

Intervenor Schadt argues she has greater seniority as a teacher of physical education district-wide and/or secondary than petitioner.

The matter was transmitted to the Office of Administrative Law on July 23, 1985 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on September 11, 1985 at which counsel for petitioner and respondent agreed to submit the matter for summary decision. Counsel for petitioner was directed to notice any teaching staff member on whom the determination may impact with a copy of the Petition and the procedure to intervene pursuant to N.J.A.C. 1:1-12.1 et seq. A motion to intervene filed on behalf of Linda Schadt was granted.

Delays were encountered in the filing of a stipulation of facts due to emergencies in Paterson and Morris Vo-Tech requiring the attention of counsel for petitioner and intervenor as well as disputed material facts, and the matter proceeded to hearing on February 13, 1986.

A joint request to file an amended stipulation of facts was granted as was a time extension for the filing of post-hearing briefs in the interest of a fair and full adjudication of the dispute and also because of the lack of urgency since petitioner was reemployed by the Board as of November 25, 1985. The record in this matter closed with the filing of intervenor's responsive brief on May 30, 1986.

The following stipulated facts are adopted herein as **FINDINGS OF FACT:**

1. Small was issued certification as a teacher of health and physical education and teacher of driver education by the State Board of Examiners in September 1978.

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2. The employment history of Small with the respondent Board is as follows:

Dates	Subjects Taught	Grades
11/12/79-6/30/80	Physical Education and Driver Education	9-12
1980 - 1981	Physical Education and Driver Education	9-12
1981 - 1984	Physical Education and Health	9-12
1984 - 1985	Physical Education, Driver Education and Health	9-12

3. Small was continuously employed by respondent on a full-time basis from November 12, 1979 to June 30, 1985 and is tenured pursuant to N.J.S.A. 18A:28-5.

4. The Board abolished one secondary physical education position for the 1985-86 school year; noticed Small of his termination by letter under date of April 1, 1985 by its Superintendent of Schools; and placed Small on a preferred eligibility list as a secondary physical education teacher only.

5. Linda Schadt was issued certification as a teacher of health and physical education by the State Board of Examiners in June 1972.

6. The employment history of Schadt with the respondent Board is as follows:

Dates	Subjects Taught	Grades
1973 - 1982	Physical Education	K-6
1982 - 1984	Physical Education and Health	9-12
1984 - 1985	Physical Education and Health	7 & 8

7. Schadt has been continuously employed by respondent from September 1, 1973 to June 30, 1985 on a full-time basis except for a maternity leave without pay for a period of two weeks in October 1981 and is tenured pursuant to N.J.S.A. 18A:28-5.

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8. The Board acted to reduce one full-time elementary physical education teaching position to half time for the 1982-83 school year, and noticed Schadt by letter under date of April 6, 1982 by its Superintendent of Schools of her employment reduction.

9. The Board acted on May 3, 1982 to approve the assignment of Schadt to a full-time position for the 1982-83 school year, and further acted on September 8, 1982 to approve her transfer to the high school.

10. The Board acted on May 3, 1982 to nonrenew the employment of a nontenured, full-time high school physical education teacher, one Holly Larson.

11. The Board employed a new teacher for the half-time elementary physical education position in 1982-83.

12. The Board acted in March 1984 to abolish one high school physical education position and to terminate the employment of Small.

13. The Board acted on June 4, 1984 to rescind the termination of Small's employment and terminated the employment of Schadt.

14. Schadt filed a petition with the Commissioner of Education alleging a violation of her seniority rights.

15. Wendy Zalko, a tenured health and physical education teacher employed by respondent since September 1974 and continuously assigned at its middle school, was granted a maternity leave of absence from September 27, 1984 until September 1, 1986. (She was also granted sick days with pay from September 1, 1984 to the effective date of her leave.)

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16. Schadt was offered the position vacated by Zalko, accepted same, and withdrew her petition with the Commissioner.

17. The respondent school district consists of four K-6 elementary schools, one middle school consisting of grades seven and eight, plus a group of gifted sixth graders, and one high school consisting of grades 9-12.

18. Respondent's seventh and eighth grader are departmentalized within the meaning of the seniority regulations (N.J.A.C. 6:3-1.10(l)15).

Small seeks back pay for the period of his unemployment from September 1, 1985 to November 25, 1985 due to the alleged violation of his seniority rights and seniority credit for his service as a teacher of health education and driver education. Schadt seeks a determination that she has greater seniority as a secondary teacher of physical education and health than Small.

The first issue to be addressed relates to the applicability of the pre-amendment or amended seniority regulations. Intervenor Schadt argues for the applicability of pre-amendment regulations because of the April 6, 1982 notice she received (J-5) reducing her employment for 1982-83 from full to half time and in reliance on Felper v. West Orange Board of Education, 1985 S.L.D. _____ (decided January 28, 1985).

In Felper, the Commissioner held that a pre-1983 reduction in force had vested her district-wide seniority rights. A review of the stipulated facts in the instant matter, however, reveals that the April 6, 1982 notice to Schadt was negated by her transfer to the high school without any loss of employment, and the only teaching staff member terminated by the Board's reduction in force was a nontenured teacher, Holly Larson. The obvious error of the Board in noticing Schadt on April 6, 1982 was corrected by the Board on May 3, 1982 when it terminated Larson and transferred Schadt. Since the current litigation triggered by the Board's reduction in force action in April 1985 and the withdrawn Schadt petition based on the Board's March 1984 action were post-September 1, 1983 actions, I FIND the amended regulations to be applicable.

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A review of the stipulated service of petitioner Small and intervenor Schadt results in the following **FINDINGS OF FACT** concerning credited seniority through June 30, 1985:

BRIAN S. SMALL		
Secondary physical education	-	5 years, 71/2 months
Secondary driver education	-	5 years, 71/2 months
Secondary health education	-	4 years
LINDA SCHADT		
Elementary physical education	-	12 years
Secondary physical education and health	-	3 years

The above findings are based on the applicability of N.J.A.C. 6:3-1.10(1)15ii which states:

> Whenever a person shall be reassigned from one subject area endorsement to another, all periods of employment in his or her new assignment shall be credited toward his or her seniority in all subject area endorsements in which he or she previously held employment.

I, therefore, **FIND** Small has greater seniority than Schadt as a secondary teacher of health and physical education.

TESTIMONIAL EVIDENCE

The Superintendent of Schools testified that he recommended the employment of petitioner Small be continued for the 1985-86 school year, but the Board preferred a female to provide locker room supervision and continued the employment of intervenor Schadt. He further testified that physical education classes are coeducational; male physical education teacher Wiegel does not supervise the girls' locker room; Schadt supervises the girls' locker room as a companion teacher when she can; the principal assigns another female teacher (who does not teach physical education) to supervise the girls' locker room; but does not know who supervises said locker room in the middle of a period when there are conflicts.

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Intervenor Schadt testified the principal and two guidance counselors are male; the school nurse is female; she (Schadt) helps with locker room supervision when she is available; a female teacher is assigned to locker room supervision when she (Schadt) has conflicts; Schadt supervises the locker room during after-school activities when she can in the fall and spring; a male teacher uses his judgment when Schadt is unavailable; and a female teacher is assigned to the locker room when Schadt has a planning period.

ARGUMENTS OF COUNSEL

Intervenor Schadt argues that the necessary duties and responsibilities of a physical education teacher at the secondary level and the rights of privacy of adolescent girls mandate a conclusion that the Board's selection of her for continued employment in 1985-86 is a bona fide occupational qualification (BFOQ) for exception to the prescriptions of state and federal anti-discrimination statutes.

Petitioner argues that local boards may not select teachers impacted by a reduction in force based on sex, and relies on N.J.S.A. 18A:28-10 which states:

> Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A review of the testimony of the Superintendent and intervenor Schadt clearly reveals that the Board's selection of Schadt over Small for continued employment is not a BFOQ exception. I FIND this argument to lack merit and that it is utilized herein for reliance as a rationale of convenience. This is so because alternative means are used for locker room supervision when Schadt is unavailable, such as during her planning period, and that male supervisors use best judgment when neither Schadt nor the Board's alternatives are available. This is not to say that a female supervisor of the girls' locker room would not be preferable at all times.

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Nevertheless, the Commissioner addressed the dilemma created by conflicts between equality in educational programs (N.J.A.C. 6:4-1.1 et seq.) and seniority protection (N.J.A.C. 6:3-1.10) in Thomas Bierman v. Board of Education of the Borough of Glen Rock, 1980 S.L.D. 822, aff'd State Board of Education 1981 S.L.D. ____ (decided December 2, 1981), aff'd N.J. App. Div. A-2231-81T3, decided May 12, 1983, and said at 823:

> The Commissioner finds nothing in the goals established for Affirmative Action programs or in the rules and regulations that establish standards to be applied as guidelines in the situation of a reduction in force that refute or delimit the seniority status earned by tenured teaching staff members.
>
> The Commissioner affirms the right of the Board to maintain Affirmative Action Programs but not in violation of the seniority rights earned by each tenured teaching staff member.

See also Wendy Wygant, et al v. Jackson Board of Education, 54 U.S.L.W. 4479 (May 20, 1986).

I FIND the Board's termination of petitioner's employment for the 1985-86 school year to have been in violation of his seniority right to that employment. Since the Board reemployed petitioner as of November 25, 1985, I CONCLUDE that he is entitled to back pay for his period of unemployment from September 1, 1985 to November 25, 1985.

The Board is therefore ORDERED to compensate petitioner accordingly, forthwith, and to credit petitioner with accrued seniority consistent with the determinations herein.

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

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I hereby FILE this Initial Decision with **Saul Cooperman** for consideration.

6 June 1986
DATE

WARD R. YOUNG, ALJ

JUN 10 1986
DATE

Receipt acknowledged.
DEPARTMENT OF EDUCATION

Mailed To Parties:
JUN 11 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

WITNESSES

Reno M. Zinzarella, Superintendent of Schools

Linda Schadt, intervenor

EVIDENTIARY DOCUMENTS

J-1(a) April 1, 1985 letter, Zinzarella to Small

J-1(b) Preferred eligibility list

J-2 Small's teacher certificate

J-3 Schadt's teacher certificate

J-4 1985-86 teacher assignments for Weigel and Schadt

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BRIAN J. SMALL,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF WESTWOOD REGIONAL, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT,	:	
AND	:	
LINDA SCHADT,	:	
INTERVENOR.	:	

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

Intervenor Schadt's exceptions to the initial decision and petitioner's reply to exceptions were filed pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

It is Schadt's contention that the ALJ's findings and conclusions in denying her claim to greater district-wide seniority rights over petitioner are in error, given the undisputed facts of the matter controverted herein.

Schadt claims that the Board's action of April 6, 1982 (J-5) in reducing her employment as a teacher of physical education from full time to part time "triggered" the provisions of the pre-1983 seniority regulations (N.J.A.C. 6:3-1.10 et seq.). Schadt argues that her seniority rights became vested at that time, according her district-wide seniority (K-12) in the subject areas of physical education and health initially endorsed on her teaching certificate (J-3) issued in June 1972. She makes this claim to seniority under the provisions of the prior seniority regulations notwithstanding the fact that she had not taught health prior to April 6, 1982. Schadt further maintains that the Felper line of school law decisions supports her claim to district-wide (K-12) seniority entitlements in physical education and health. According to Schadt, the Board's action of May 3, 1982 in reassigning her to a full-time position as a teacher of physical education and health at its high school (9-12) for the 1982-83 and 1983-84 school years resulted from its earlier decision to effect a reduction in force at the elementary level (K-6) and thereby left intact her district-wide seniority entitlement to continued employment.

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Similarly, Schadt argues that the Board's abolishment of a physical education position at the high school for the 1984-85 school year, which ultimately caused her to be reassigned to fill a physical education and health position in grades 7 and 8 at the middle school for a teacher who was granted maternity leave during the 1984-85 and 1985-86 school years, created no impediment to her district-wide seniority status, notwithstanding the fact that she remained in a full-time teaching position at the high school.

Petitioner Small in his reply to Intervenor Schadt's exceptions argues that they are totally without merit precisely for those reasons stated by the ALJ in the initial decision.

The Commissioner has reviewed the relevant arguments of Intervenor Schadt and Petitioner Small advanced in support of their seniority claims. It is observed that the threshold question to be resolved in this matter pertains to the Board's action of April 6, 1982 (J-5) when it originally notified Intervenor Schadt that her full-time physical education position at the elementary level was being reduced to a half-time position. Upon review of the undisputed facts set forth in the initial decision, ante, the Commissioner cannot agree with the ALJ's finding and conclusion that the Board's action of May 3, 1982 negated its earlier determination of April 6, 1982 in effecting a reduction in force which ultimately reduced Intervenor Schadt's elementary physical education teaching position from full time to part time.

The Commissioner notes that the ALJ's conclusion relative to whether Schadt's seniority rights were vested pursuant to Felper, supra, rests upon the fact that Schadt's reduction was "***negated by her transfer to the high school without any loss of employment***." (Initial Decision, ante) Such reading of applicable statutes and regulation is misplaced. Notwithstanding the fact that Intervenor Schadt was not ultimately dismissed, there is no question that a reduction in force did take place. Under such circumstances, N.J.S.A. 18A:28-11 clearly provides that "[i]n the case of any such reduction the board of education shall determine the seniority of the persons affected***." In the Commissioner's view, the fact that the Board did not abide by the precise prescription of the statute should not act to Schadt's detriment. Consequently, the Commissioner finds and determines that Intervenor Schadt was the subject of a reduction in force which triggered her seniority rights which thus became vested in 1982. Felper, supra

In this regard Schadt correctly asserts that her seniority rights were triggered on April 6, 1982 and became vested on a district-wide (K-12) basis in those subject areas endorsed on her teaching certificate in physical education and health. This finding and determination is consistent with Felper, supra, in which the Commissioner previously held that a reduction in force which occurred prior to September 1, 1983, was controlled by the then existing provisions of N.J.A.C. 6:3-1.10 et seq. which vested district-wide (K-12) seniority rights of tenured teachers under those subject fields originally endorsed on their teaching certificates required for employment by a local board of education.

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Although it is apparent that those actions taken by the Board to continue Schadt's full-time employment up to and including the 1985-86 school year allowed her to accrue seniority on a district-wide basis (K-12) in physical education and health, in accordance with the pre- and post-1983 seniority regulations, the facts establish that the Board was not aware that Schadt actually possessed district-wide seniority in those subject areas during those periods of time controverted herein.

Accordingly, the Commissioner finds and determines that Intervenor Schadt, at all times subsequent to the Board's action of April 6, 1982, possessed greater district-wide seniority vested in physical education and health than Petitioner Small, whose seniority in those subject areas accrued at the secondary level and were controlled by the post-1983 amendments to N.J.A.C. 6:3-1.10.

Consequently, when Petitioner Small's employment was terminated by the Board at the conclusion of the 1984-85 school year, he had accrued 5 years, 7.5 months' seniority in secondary physical education and 4 years' seniority in secondary health education. Conversely, however, Intervenor Schadt had accumulated 12 years' district-wide seniority in grades K-12 at the conclusion of the 1984-85 school year.

In summary, the Commissioner finds and determines as follows:

1. At the conclusion of the 1984-85 school year Intervenor Schadt possessed greater seniority in the subject areas of physical education and health (12 years' district-wide K-12) than did petitioner (5 years, 7.5 months' secondary physical education and 4 years' secondary health education).

2. Petitioner had acquired 4 years' seniority in secondary driver education at the conclusion of the 1984-85 school year.

3. The Board failed to properly determine Intervenor Schadt's district-wide seniority (K-12) in physical education and health which became vested on April 6, 1982 in accordance with the pre-1983 seniority regulations.

In view of the above, the Commissioner reverses that part of the initial decision which holds that petitioner enjoys greater seniority than Intervenor Schadt in secondary physical education and health. The Commissioner affirms that part of the initial decision which concludes that petitioner has acquired 5 years, 7.5 months' seniority in secondary driver education.

Additionally, the Board is directed to credit both petitioner and intervenor with their correct seniority entitlements in a manner consistent with this decision. The Board is further directed

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to establish appropriate seniority lists to include all other teaching staff members whose seniority status could be affected in the subject areas of physical education, health and driver education as of the commencement of the 1986-87 school year.

In all other respects the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

July 17, 1986
Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1123-86
AGENCY DKT. NO. 36-2/86

ISADORE TIMMONS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,
Respondent.

Harold N. Springstead, Esq., for petitioner (Aronsohn & Springstead, attorneys)

Margaret M. Foti, Esq., for respondent (Winne, Banta, Rizzi, Hetherington & Basralian, attorneys)

Record Closed: June 10, 1986 Decided: June 20, 1986

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

In early February 1986, Isadore Timmons filed a Verified Petition of Appeal with the Commissioner of Education alleging that on January 13, 1986, he had received a letter from the secretary/business administrator of the Paramus Board of Education advising Timmons that since he had been convicted of shoplifting on November 20, 1985, he automatically forfeited his employment with the Board as a tenured school custodian pursuant to N.J.S.A. 2C:51-2. Timmons's petition alleged that the Board's action violated his tenure rights and he demanded immediate reinstatement. Beyond that, Timmons also maintained that: (1) a conviction for shoplifting cannot give rise to a forfeiture since it does not involve conduct that touched upon his office, position or employment; and (2) at no time was he given an opportunity to explain his conduct or to relate mitigating circumstances surrounding the commission of the offense.

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The Board then filed its answer in which it pointed out that since petitioner was no longer employed by it, he did not enjoy the protection of tenure and since Timmons's conviction was for shoplifting, it constituted an "offense involving dishonesty" which requires automatic forfeiture of his public employment under N.J.S.A. 2C:51-2a(1).

Following joinder of the issues, the matter was transmitted by the Commissioner of Education to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted before the undersigned administrative law judge on March 31, 1986, and the following were identified as the issues in the case:

a) Was the offense for which petitioner was convicted (shoplifting) an offense involving dishonesty, under N.J.S.A. 2C:51-2, requiring that he automatically forfeit his tenured position?

b) If the offense for which petitioner was convicted did not require automatic forfeiture, to what relief is petitioner entitled?

In addition, paragraph 12 of the prehearing order anticipated that the parties would file cross-motions for summary decision and that oral argument in connection with those motions would be conducted at the discretion of the court. Thereafter, in accordance with the schedule established in the prehearing order, the cross-motions, supporting briefs and reply briefs in opposition were filed and oral argument was conducted before me on June 10, 1986.

FINDINGS OF FACT

The following undisputed facts form the basis for the summary determination which I will make in this case:

1. Petitioner, Isadore Timmons, as of November 20, 1985, was a tenured school custodian employed by the respondent, Paramus Board of Education.

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2. On November 14, 1985, petitioner was charged in Paramus Municipal Court with a violation of N.J.S.A. 2C:20-11 in that he allegedly had committed, "the offense of shoplifting by purposely selecting and concealing $89 worth of merchandise [of] the property of Gimbels with the intention of depriving the merchant of the full retail value thereon in violation of New Jersey Statute 2C:20-11."

3. On November 20, 1985, following his plea of guilty, Timmons was convicted in Paramus Municipal Court of the petty disorderly persons offense of shoplifting in violation of the aforementioned statute.

4. On January 13, 1986, the business administrator/secretary of the Paramus Board of Education, Jerome F. Bohnert, sent a letter to petitioner advising that since he had been convicted of shoplifting on November 20, 1985, his continued right to employment in the school district had been forfeited by virtue of the provisions of N.J.S.A. 2C:51-2.

Based upon the undisputed facts related above, and following the oral arguments of counsel, I rendered an oral decision on June 10, 1986, in which I granted respondent's motion for summary decision dismissing the petition. The following constitutes my written initial decision pursuant to N.J.A.C. 1:1-13.2(b).

DISCUSSION

Petitioner advanced several points in his brief with respect to the alleged impropriety of the Board's action. Essentially, he insisted that his conviction for shoplifting, a petty disorderly persons offense, did not involve any activity touching upon his employment as a school custodian and, therefore, it could not be a proper ground for his automatic dismissal. He argued that to interpret the statute otherwise would produce an absurd result and would constitute an application of the forfeiture law which the Legislature did not intend. Petitioner also maintained that his termination was

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procedurally defective as he was never afforded a pretermination hearing. Finally, petitioner argued that automatic termination cannot occur unless the conviction is for conduct which rises to the level of a "crime" as that word is defined in Title 2C. Since shoplifting is only a petty disorderly persons offense, not a crime, and since in his case it occurred away from the employment context, it was petitioner's position that the Board's action should be set aside.

In response, the Board maintained that the statutory language is perfectly clear; that is, any person holding public employment automatically forfeits that employment when convicted of any "offense involving dishonesty," even if that offense was a petty disorderly persons offense and not a "crime." Further according to the Board, an act of "dishonesty" is one which involves any conduct which reasonably can be characterized as such, without the need further to establish that it also involves those elements which previously went into a determination of "moral turpitude," a phrase which was contained in the predecessor statute. See, N.J.S.A. 2A:135-9.

The precise language of the statute to be interpreted and applied in this case, N.J.S.A. 2C:51-2a, is as follows:

> A person holding any public office, position or employment . . . who is convicted of an offense shall forfeit such office or position if:
>
> 1. He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime;
>
> 2. He is convicted of an offense involving or touching such office, position or employment; or
>
> 3. The Constitution or a statute other than the code so provides.

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The predecessor statute, N.J.S.A. 2A:135-9, contained different language. It provided for automatic forfeiture when there was a conviction for, inter alia:

> An indictment, accusation or complaint charging him with the commission of a misdemeanor or high misdemeanor touching the administration of his office or position, or which involves moral turpitude . . .

A comparison of the two statutes reveals that the previous law did not use the word "dishonesty" in describing the sort of qualitative conduct for which a conviction would require automatic forfeiture. Rather, the predecessor statute used the phrase "moral turpitude," and whether particular conduct was deserving of that opprobrious label often involved the need for a full hearing designed to explore all of the surrounding circumstances. See, State v. Weiner, 68 N.J. Super. 468 (App. Div. 1961). This is no longer true. To the contrary, I am convinced that under N.J.S.A. 2C:51-2a(1) a conviction for the offense of "shoplifting," which patently is an "offense involving dishonesty," requires automatic forfeiture of the public office or employment held by the person convicted without the need for a hearing. It is irrelevant whether or not the conduct constitutes a "crime," or could also be characterized as involving "moral turpitude." Moreover, such a conviction unquestionably justifies automatic forfeiture regardless of whether the conduct involved or touched the public position. This is a totally separate basis for forfeiture under the statute. See, N.J.S.A. 2C:51-2a(2).

Both sides have made reference in their briefs to the case of Matter of Tanelli, 1981 S.L.D. 1025, aff'd, Commissioner of Education, Sept. 18, 1981, rev'd and remanded, State Bd. of Ed., 1982 S.L.D. ____ (May 5, 1982), decision on remand, 1982 S.L.D. ____ (July 22, 1982), aff'd, Commissioner of Education, Sept. 9, 1982, rev'd, State Bd. of Ed., 1983 S.L.D. _____ (March 2, 1983), aff'd, 194 N.J. Super. 492 (App. Div. 1984). In that case, a school employee had been convicted for harassing his principal on the telephone—a petty disorderly persons offense. The original initial decision upheld the automatic forfeiture of Tanelli's employment on the basis that the conviction was governed by the provisions of Title 2C. After the Commissioner affirmed that initial decision, the State Board reversed and remanded, finding that the offense took place before the effective date of Title 2C.

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Another case cited by counsel was In the Matter of Fulcoli, 1985 S.L.D. _____ (March 18, 1985). As author of the initial decision of that matter, I am familiar with it. Fulcoli was a tenured teacher convicted of harassment in violation of N.J.S.A. 2C:33-4. Harassment is a petty disorderly persons offense and in Fulcoli's case involved his making telephone calls to female colleagues very late at night, during which he uttered certain obscenities. In addition, he had dispatched envelopes to them containing objectionable material. I determined that automatic forfeiture was required under N.J.S.A. 2C:51-2a(2) because the offense occurred under circumstances which involved or touched upon Fulcoli's public employment. As noted, that is a separate ground for forfeiture under the statute. Nevertheless, a major point to be made with respect to application of the Fulcoli case is that a petty disorderly persons conviction does provide a basis for automatic forfeiture—the conduct need not be a "crime" in the technical sense. Thus, Fulcoli supports the proposition that even a conviction for a disorderly persons offense under the new statute obviates the requirement for a hearing, and forfeiture is mandatory in those circumstances.

In his reply brief, petitioner pointed to a decision which did not involve automatic forfeiture, but which concerned conduct that arguably was more serious than shoplifting. See, In the Matter of the Tenure Hearing of Martin Lieb, 1985 S.L.D. ____ (July 1, 1985). Counsel argued that this decision indicates that it could not have been the Legislature's intent to require a plenary hearing before dismissal where that type of conduct was involved (lewdness), and yet to provide for automatic forfeiture under more "benign" circumstances such as those involved herein. The problem with petitioner's reliance upon Lieb or other cases which perhaps involved more serious antisocial conduct than shoplifting is that none of them involved the "dishonesty" concept contained in N.J.S.A. 2C-51-2a(1). Thus, as the Board observed in its brief, the Legislature's deliberate choice of the word "dishonesty," and its deletion of the phrase "moral turpitude," simply requires less now by way of "seriousness" where forfeiture is concerned. This was the view, as well, of the trial judge in State v. Musto, 187 N.J. Super. 264 (Law Div. 1982), aff'd, 188 N.J. Super. 106 (App. Div. 1983), where he particularly noted that the change appeared to him to be a "broadening of the language of the statute." See, Musto, at 275.

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The decision in Earl v. Bd. of Ed. of Trenton, 1984 S.L.D. ____ (January 13, 1984) is also cited by petitioner. The initial decision in that case did involve a blending of the concepts of "dishonesty," "moral turpitude" and "offenses touching upon one's position." However, that case is not applicable since the Commissioner found that Earl's conviction was for a crime of the third degree, a totally independent basis for forfeiture. In short, the Earl decision does not compel a result different from that which I am reaching here.

In the process of interpreting statutory language, one may not ignore the plain meaning of the words used even though a different construction would be more "desirable" in the eyes of the reviewer. Statutes speak for themselves and are to be construed in accordance with their own terms. Unless there is an ambiguity, the ordinary and proper meaning to be given to the words used by the Legislature must be honored, unless they are obviously intended to be employed in some different sense. See, e.g., State v. Joas, 34 N.J. 179 (1961). In other words, to ascertain legislative intent from the words used in a statute, those words should be given their ordinary and well-understood meaning, absent an explicit indication to the contrary. Where it is unnecessary to go beyond the words of the statute itself, neither a court nor any other reviewer, such as an administrative law judge, should undertake that course. Application of these established principles inexorably lead to the conclusion that the Legislature did intend that under N.J.S.A. 2C:51-2a(1), a public employee automatically forfeits his or her position when convicted for the disorderly persons offense of shoplifting, plainly an offense involving "dishonesty."

Although research has failed to disclose any case in which "dishonesty" was defined or discussed in the context of the present forfeiture statute, the word has been the subject of judicial interpretation in other types of cases. See, e.g., Mortgage Corp. of New Jersey v. Aetna Casualty and Surety Co., 19 N.J. 30 (1955); National Newark and Essex Bank v. American Insurance Co., 76 N.J. 64 (1978). Although those decisions construed indemnity agreement language, and therefore involved contract law, the language used by the courts is relevant in the instant case. Thus, as pointed out in the

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Mortage Corp. decision, the word "dishonesty" is not a "term of art." Rather, it is to be given a broad connotation which involves acts that are "wanting in honesty or integrity" or "not trustworthy." In my judgment, one who takes or conceals merchandise with the intent not to pay for it has committed an offense involving "dishonesty" within any reasonable definition of that word.*

Accordingly, while I do not necessarily disagree with petitioner's assertion that it is arguably anomalous to consider that convictions for various offenses which are "worse" than shoplifting do not require automatic forfeiture, whereas a shoplifting conviction does; nevertheless, the plain meaning of the statute cannot be ignored.

CONCLUSIONS OF LAW

Based upon my review and consideration of the undisputed facts in light of the plain language of N.J.S.A. 2C:51-2a(1), I **CONCLUDE** that the petitioner's conviction on November 20, 1985, in Paramus Municipal Court for the petty disorderly persons offense of shoplifting in violation of N.J.S.A. 2C:20-11 requires that he automatically forfeit his position as a tenured school custodian. That conviction was for an "offense involving dishonesty," and the Board therefore properly acted when it notified petitioner on January 13, 1986, that his position was forfeited and that he was not entitled to any hearing. Accordingly, petitioner's motion for summary decision is **DENIED**, and respondent's motion for summary decision is **GRANTED.**

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

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*I also note that even "petit larceny" was held to be conduct which involves "moral turpitude." See, Raphalides v. N.J. Dept. of Civil Service, 80 N.J. Super. 407 (App. Div. 1963).

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I hereby FILE my initial Decision with SAUL COOPERMAN for consideration.

June 20, 1986
DATE

STEPHEN G. WEISS, administrative law judge

JUN 23 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

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FOR OFFICE OF ADMINISTRATIVE LAW

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ISADORE TIMMONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner and reply exceptions were filed by the Board within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner avers that the decision of the ALJ is inconsistent with the stated purpose of N.J.S.A. 2C:51-2 and leads to the absurd result that

> ***all those public employees in the State of New Jersey who have been convicted of a petty disorderly offense or disorderly persons offense involving dishonesty (having nothing to do with the person's employment) are holding said employment illegally. The law went into effect on September 1, 1979, and it is now encumbant (sic) upon all public authorities in the State of New Jersey to immediately fire anyone so convicted and to do so forthwith without a hearing. (Petitioner's Exceptions, at p. 2)

Petitioner cites In the Matter of the Tenure Hearing of David Earl, School District of the City of Trenton, Mercer County, decided by the Commissioner March 2, 1984, aff'd State Board June 6, 1984; In the Matter of the Tenure Hearing of Mary Jane Cito, School District of the City of Newark, Essex County, decided by the Commissioner September 1, 1983; and In re Lieb, supra, in support of the proposition that to hold, as did the ALJ, that any offense involving dishonesty, whether a disorderly persons or petty disorderly persons offense, requires automatic forfeiture of any public employment, amounts to a violation of the Due Process and Equal Protection Clause of the United States Constitution and the Constitution of the State of New Jersey.

Petitioner excepts to the fact that the ALJ did not deal with the Cito decision although the case was briefed by both sides. Petitioner argues that Cito supports the proposition that in order for a person to be dismissed from public employment, the petty offense must be associated with his/her employment. Since petitioner's offense did not touch upon his employment, he should not have been terminated, he argues. Further, petitioner cites the

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legislative history of N.J.S.A. 2C:51-2 in support of the proposition that forfeiture of public position and employment can only result from a petty offense when it touches the public position. Petitioner avows also that the comments to the final text of N.J.S.A. 2C:51-2, adopted on September 1, 1979, state that the conviction of a disorderly persons offense could only result in forfeiture if the offense touches or involves the public position. Petitioner prays for reinstatement with full back pay and benefits.

The Board's reply to petitioner's exceptions submits that the Commissioner should adopt the initial decision of ALJ Weiss in toto.

The Board argues that In re Earl, supra, must be read in pari materia with State v. Musto, supra, wherein the Court stated in pertinent part as follows:

> Prior to the current language of the forfeiture statute, which states that the offense or crime must be an offense "involving dishonesty" its predecessor, N.J.S.A. 2A:135-9, provided that the crime must involve "moral turpitude." The change from "moral turpitude" to "dishonesty" appears to be a broadening of the language of the statute. 187 N.J. Super. at 275.
>
> (Board's Exceptions, at p. 4)

The Board argues that it follows that an offense involving moral turpitude

> is not to be equated with an offense of dishonesty, but rather, falls within the broad class of offenses characterized as offenses of dishonesty. Based upon the foregoing analysis, petitioner's argument seeking to equate moral turpitude with dishonesty must fail.
>
> (Board's Exceptions, at p. 4)

The Board rebuts petitioner's argument that only when disorderly persons and petty disorderly persons offenses touch upon the public employment is automatic forfeiture appropriate by contrasting the predecessor forfeiture statute with the present forfeiture statute. The former provided:

> Any person holding an office or position, elective or appointive, under the government of this state or of any agency or political subdivision thereof, who is convicted upon, or pleads guilty, non vult or nolo contendere to, an indictment, accusation or complaint charging him with the commission of a misdemeanor or high misdemeanor touching the administration of his office or position, or which involves moral turpitude, shall forfeit his office or position and cease to hold it from the date of his conviction or entry of plea.

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> If the conviction of such officer be reversed, he shall be restored to his office or position with all the rights and emoluments thereof from the date of the forfeiture. (Emphasis added). N.J.S. 2A:135-9. (Board's Exceptions, at pp. 5-6)

The Board avers that a comparison of the present forfeiture statute with the language in the predecessor statute evidences a

> clear intent on the part of the legislature to create separate requirements for forfeiture. The offense must either involve dishonesty or touch upon the public employment. The satisfaction of either of those requirements will trigger automatic forfeiture of the public employment. (emphasis in text) (Board's Exceptions, at p. 6)

As to petitioner's argument that forfeiture of his position based upon his conviction of shoplifting is unduly harsh and reaches a result not intended by the legislature, the Board replies that the legislative intent underlying the statute is to deter those individuals convicted of certain offenses, including those involving dishonesty, from holding public employment. The Board cites O'Halloran v. DeCarlo, 156 N.J. Super. 249 (App. Div. 1978), cert. den. 79 N.J. 469 (1978), cert. den. 442 U.S. 917 (1979) for this proposition. The Board argues that the language of the present forfeiture statute is clear on its face and is well-founded in law and public policy. The Board proffers that if the statute seems unduly harsh, the remedy is with the legislature, not the courts.

Upon review of the record, the Commissioner adopts the recommendation of the ALJ that petitioner's conviction on November 20, 1985 for the petty disorderly persons offense of shoplifting in violation of N.J.S.A. 2C:20-11 requires that he automatically forfeit his position as a tenured school custodian. The Commissioner agrees with the Board that the language of N.J.S.A. 2C:51-2 is clear on its face that the offense must either involve dishonesty or touch upon the public employment. The disjunctive "or" leaves no question in this regard. Further, the legislative history of the statute, as well as the case law developed in State v. Musto, supra, supports the conclusion that an offense involving moral turpitude need not be equated with an offense of dishonesty when the offense is one brought under N.J.S.A. 2C:51-2a(1). The Commissioner is also in accord with the ALJ that the Earl decision does not compel a result different from that reached in Timmons since Earl's conviction was a crime of the third degree, a "totally independent basis for forfeiture." (Initial Decision, ante) As noted by the ALJ, a blending of the concepts of "dishonesty", "moral turpitude" and "offenses" touching upon one's position (2C:51-2) is inappropriate under the instant circumstances, wherein there is no question but that shoplifting is a crime involving dishonesty, an automatic grounds for forfeiture.

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Accordingly, the Commissioner adopts as his own the findings and determination of the ALJ in this matter and reiterates the conclusion of the Board made in its reply exceptions that "if the statute seems unduly harsh, the remedy is with the legislature, not the courts." (Board's Exceptions, at p. 6)

The instant Petition of Appeal is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 23, 1986

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ISADORE TIMMONS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 23, 1986

For the Petitioner-Appellant, Aronsohm and Springstead (Harold N. Springstead, Esq., of Counsel)

For the Respondent-Respondent, Winne, Banta, Rizzi, Hetherington and Basralian (Margaret M. Forti, Esq., of Counsel)

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

December 3, 1986

Affirmed N.J. Superior Court November 13, 1987

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INITIAL DECISION

OAL DKT. NO. EDU 2895-85

AGENCY DKT. NO. 46-3/85

FAIRLAWN EDUCATION ASSOCIATION, NESSIA GORMANNS, MARLAINE GRUBER, MARCIA S. SALKOWITZ, EILEEN SPIELMAN, VIRGINIA E. WHITMAN, SYBIL PINE, GILDA BOTWINICK, HAZEL CUNNINGHIS, VIVIAN C. FELICE, DOLORES FLOYD, JANET FORER, ANNE I. FUSCO, ANN GOOTMAN, MURIEL HIRSCH, BELLA MEYRICH, MAXINE PASCAL, FELICITAS J. ROWE, BARBARA RUDNICK, CLARE SALESKY, ROSLYN SALMAN, MARCIA TOLEP, MARIAN WARMBRAND, FYRNE ZAGORIA, and EILEEN ZELCH,

Petitioners,

v.

BOARD OF EDUCATION BOROUGH OF FAIRLAWN,

Respondent.

Gregory T. Syrek, Esq., for petitioners
(Bucceri & Pincus, attorneys)

Paul H. Green, Esq., for respondent
(Green & Dzwilewski, attorneys)

Record Closed: May 8, 1986 Decided: June 23, 1986

BEFORE **ELINOR R. REINER**, ALJ:

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On March 11, 1985, petitioners, Fairlawn Education Association, et al., employed by respondent as compensatory education, supplemental, Chapter I, Support, Title I, bedside home instructors and English as a Second Language (E.S.L.) teachers, filed a petition of appeal with the Commissioner of Education. Petitioners claimed that pursuant to Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), they are teaching staff members and entitled to receive salaries and benefits comparable to those provided to other teaching staff members in the district. Respondent filed its answer on May 16, 1985, denying petitioners' claim. On May 21, 1985, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held in this matter on July 2, 1985, before the Honorable Timothy N. Tuttle. At that time, the issues were isolated as follows:

1. Have any of the petitioners satisfied the requirements for tenure?

2. Have petitioners been properly compensated for their employment by respondent?

3. Are petitioners entitled to automatic pro rata placement on the district's regular teachers' salary guide?

4. If not, to what salary and benefits are petitioners entitled?

5. Are petitioners entitled to interest on any monetary award granted in this matter?

It was further determined that the parties would provide this tribunal with a stipulation as to all pertinent facts on or before September 1985. A hearing was scheduled for October 21, 1985, at the Office of Administrative Law.

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Subsequent thereto, this matter was transferred to this judge for hearing. A conference call was held in this matter on October 3, 1985, at which time there was a joint request for an adjournment of the hearing scheduled for October 21, 1985, in order to have additional time in which to compile a stipulation of facts and file cross-motions for summary decision. Based upon that request, the dates set forth in the prehearing order were revised, and the hearing was rescheduled for December 3, 1985. At that time, it became apparent that the parties had stipulated to the essential facts and a hearing would not be required. The parties agreed to file a supplemental stipulation of facts (concerning petitioners' salary entitlement should they prevail), and a briefing schedule was established. Although the briefing schedule was only slightly delayed, additional time was requested to complete a review of the supplemental stipulation of facts with respondent and counsel for petitioners. Unfortunately, despite numerous request for same, and an indication that it would be forthcoming, it became apparent by letter filed May 8, 1986 that, following extensive consultations with respondent, respondent was unable to enter into a further stipulation of facts. In view of that correspondence, I have determined that the record is as complete as possible and consider it to be closed as of that date.

Undisputed Facts

The essential facts necessary for determination have been stipulated. The stipulation of facts filed by the parties is incorporated by reference herein and constitutes this tribunal's findings of fact. Of particular import here are the following facts: The petitioners are compensatory education, supplemental, Chapter I, support, Title I, bedside and E.S.L. teachers employed by the Fairlawn Board of Education. The petitioners served in a part-time capacity and were paid on an hourly basis. All of the teachers are still part-time employees except for Tolep, Gootman and Warmbrand who are now full-time teaching staff members. Petitioner Sybil Pine resigned in August 1985, and is no longer employed by respondent.

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The Fairlawn Education Association (F.L.E.A.) is the exclusive representative of the Title I and Supplemental Education teachers. E.S.L. compensatory education teachers are not now, nor have they ever been, represented by any labor organization. Title I and supplemental education teachers are a separate bargaining unit from the full-time teachers, although both groups are represented by F.L.E.A. Respondent has sought to enter into negotiations with F.L.E.A. concerning current terms and conditions of employment for those ancillary teachers represented by the association. F.L.E.A. maintains that there is no obligation to enter into negotiations at this time. Respondent has filed an unfair labor practice charge with the Public Employment Relations Commission (P.E.R.C.) against F.L.E.A. (Docket No. CE-85-22-60), in which respondent seeks to compel F.L.E.A. to enter into negotiations with it. A complaint was issued by P.E.R.C. on or about October 10, 1985, and the matter is currently before P.E.R.C. on the unfair labor practice charge.

Arguments of Counsel

The present petitioners, who were apparently not parties to any prior litigation, request pro rata increases in their salary to bring them on a parity with other tenured teachers. Petitioners urge that they must immediately be placed upon the salary scale prior to any salary negotiations with the Board. They urge that Spiewak and Rutherford Education Association v. Rutherford Bd. of Ed., 99 N.J. 8 (1985) mandate this automatic placement on the full-time teachers' salary scale.

Respondent school board counters that there is no legal entitlement to salary parity with full-time teachers. The fact that one has attained tenure as a part-time teacher does not equate with a finding of a right to placement on the full-time teachers' salary guide. The part-time teachers had separate representation in a different salary negotiation from that negotiated with full-time teachers. The Board also cites the State

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Board of Education's decision in Hyman v. Teaneck Board of Education, OAL DKT. NO. EDU 7719-82 (May 18, 1983), mod., Comm. of Ed. (Aug. 15, 1983), rev'd, State Bd. of Ed. (March 8, 1985), aff'd, (N. J. App. Div., Feb. 26. 1986. A-3508-84T7) (unreported) as rejecting the proposition that tenured part-time teachers are entitled to parity in salary with full-time teachers. The Board concludes that petitioners have a duty to negotiate their salaries with the school board. The requirement of negotiation renders this case outside of the Commissioner's jurisdiction, in that negotiation questions are matters for P.E.R.C.

In response, petitioners argue that the State Board's decision in Hyman is unfairly biased against part-time teachers and should not be applied in the instant case. Petitioners cite Spiewak and Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983) as disapproving this sort of "discriminatory" Board practice. Petitioners also urge that these latter two decisions render the Board's "flexibility" rationale for lower salary to part-time teachers as unsupportable. Petitioners conclude by pointing out that no collectively negotiated agreement exists in this case as was present in Hyman. Based upon the absence of such an agreement, Hyman should not be applied to the instant case.

Respondent replies that the law has changed in "salary parity" cases as a result of the State Board's ruling in Hyman. The cases decided subsequent to Hyman unequivocally state that tenured part-time teachers have no entitlement to pro rata placement on the full-time teachers' salary guide.

Discussion

I have reviewed the arguments of counsel and must agree with respondent that the law, as set forth in the State Board decision in Hyman, is controlling here. (The Appellate Division affirmed " . . . substantially for the reasons expressed by the State Board. . . . " (N. J. App. Div., Feb. 26, 1986, A-3508-84T7) (unreported) at 2.) While a

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review of the school law decisions prior to the State Board's decision in Hyman indicates that there was uncertainty as to what were the emoluments of tenured status, the State Board in Hyman served to clarify this confusion. It ruled that neither Spiewak, the tenure statutes, nor the compensation statutes, confer on any teaching staff member the right to placement on any particular salary guide. Hyman, State Bd. of Ed. Decision, at 11. Therefore, supplemental teachers are not entitled by law to placement on the salary guide for full-time classroom teachers.

More particulary, and upon review of Hyman, it appears that the State Board characterized the Spiewak decision as based upon an analysis of the tenure statutes. Hyman, State Bd. of Ed. Decision, at 4. In the absence of a statutory exception or contrary legislative intent, remedial teachers were held to come within the mandatory provision of N.J.S.A. 18A:28-5. Since the statutory basis of tenure was distinguished by the Supreme Court from the contractual nature of salaries and other benefits, Spiewak was not cited as support for the placement of remedial teachers on a salary scale as a matter of law. Hyman, State Bd. of Ed. Decision, at 7.

The State Board then examined the statutory provisions of tenure, seniority and compensation to determine whether a right to salary guide placement or salary parity exists in those statutes. Tenured teachers receive procedural protections from arbitrary dismissals in N.J.S.A. 18A:6-10; they also receive seniority rights in an economic layoff pursuant to N.J.S.A. 18A:28-12. However, the State Board concluded that nothing in the tenure or seniority statutes confers the right to placement on a salary guide. Hyman, State Bd. of Ed. Decision, at 8. The teachers' compensation statute, N.J.S.A. 18A:29-4.1, provides authorization but not a mandatory requirement of a salary policy for all full-time teaching staff members. Hyman, State Bd. of Ed. Decision, at 8. A Board also has discretionary authority to adopt salary schedules or scales for full-time teaching staff members. N.J.S.A.18A:29-4.1. The Board need not have one salary scale for all full-time teaching staff members, as it may provide different salary scales for different groups of full-time teachers. Hyman, State Bd. of Ed. Decision, at 9. Pursuant to the above statute, all groups of full-time teachers must be covered by a salary scale if any one

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group is covered by a salary scale. However, the salary scale statutes, unlike the tenure statutes, expressly distinguish full-time teachers from part-time teachers. The statutes governing compensation apply only to full-time teachers and do not confer the right to placement on any salary guide to part-time, supplemental or remedial teachers. Id. at 10.

The State Board concluded by asserting that compensation is a term and condition of employment within the contemplation of the New Jersey Employer/Employee Relations Act. Id. at 11. Local school boards are free to negotiate terms of compensation within the parameters of the school law statutes. Ibid. This negotiation process could allow different categories of teaching staff members to be treated differently in terms of salary. Hyman, State Bd. of Ed. Decision, at 15. The compensation statutes permit such differences, and the State Board determined that flexibility in establishing salaries is necessary to enable boards to utilize available resources and attract needed categories of teachers. Ibid. The negotiation process which results in such salary agreements is not within the jurisdiction of the State Board, but within the jurisdiction of P.E.R.C. Hyman, State Bd. of Ed. Decision, at 16.

In view of the above discussion, the Commissioner's determination that Spiewak mandated salary parity between supplemental and full-time teaching staff members was reversed. Hyman, State Bd. of Ed. Decision, at 3. In sum, the Board held, without differentiating between whether there was in fact a negotiated agreement or whether there was a refusal to negotiate a separate agreement, that the fact that there is a separate negotiated salary guide applying to supplemental teachers does not in itself violate the school laws. The Board concluded that Spiewak does not mandate the placement of supplemental teachers on the salary guide for regular teaching staff members and that such right is contained in neither the tenure statutes or those governing compensation. It was clearly determined that because supplemental teachers are not entitled to guide placement as a matter of law, separate guides covering supplemental teachers are permissible so long as such guides conform to the requirements established by the school laws.

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It is to be observed, that subsequent to the State Board's decision in Hyman, the Commissioner of Education has approved the negotiation of separate salary schedules for part-time Title I and remedial teachers in the following cases: Walter v. Bd. of Ed. of Teaneck, OAL DKT. EDU 0017-85 (May 16, 1985) mod., Comm. of Ed. (July 22, 1985) at 31-32; Watchung Hills Education Ass'n v. Bd. of Ed. of Watchung Hills, OAL DKT. EDU 165-85 (July 3, 1985), adopted, Comm. of Ed. (Aug. 19, 1985) at 9-10; Garfole v. Winfield Tp. Bd. of Ed., OAL DKT. EDU 8417-84 (June 17, 1985), mod., Comm. of Ed. (Aug. 1, 1985) at 17-18; Baker v. Bd. of Ed. of Clifton, OAL DKT. EDU 1911-85 (Aug. 26, 1985), adopted, Comm. of Ed. (Oct. 18, 1985), at 12; Trucillo v. Bd. of Ed. of Kearny, OAL DKT. EDU 2456-85 (Oct. 9, 1985), rev'd, Comm. of Ed. (Nov. 25, 1985) at 13-14; Fucetola v. Bd. of Ed. of Totowa, OAL DKT. EDU 2279-85 (Dec. 12, 1985), adopted, Comm. of Ed. (Jan. 28, 1986). These decisions all reject the claims of part-time remedial teachers to mandatory placement on the full-time teachers' salary guide as a matter of law. Research has uncovered no post-Hyman decision which held that part-time remedial teachers are entitled to salary parity with full-time teaching staff members.

Conclusion

I, therefore, **CONCLUDE** that the State Board decision in Hyman supersedes the prior case law and is controlling here on the issue of salary placement. Fucetola, Comm. of Ed., at 15-16. The teachers in the instant case are not entitled to placement on the full-time teachers' salary scale as a matter of law. Such a scale must be negotiated and cannot be determined by the Commissioner. Review of the negotiation process is properly before P.E.R.C.

Order

Based upon the Stipulation of Facts and Conclusions of Law, it is hereby **ORDERED** that based upon the decision in Hyman the claims of petitioners should be dismissed and the relief requested by petitioners to automatic pro rata placement on the full-time teachers salary guide is **DENIED.**

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However. if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

June 20, 1986
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

6/24/86
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 24 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

al/e

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FAIR LAWN EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions and the Board's reply thereto were filed in accordance with the requirements of N.J.A.C. 1:1-16.4a, b and c.

Petitioners take exception to the ALJ's failure to render a determination with respect to tenure acquisition, an issue found in the pre-hearing order, i.e., "Have any of the petitioners satisfied the requirements for tenure?" The Board counters this exception by stating that it had previously admitted that petitioners were tenure eligible (see Board's Answer to Petition of Appeal) and that each has in fact acquired tenure. (Board's Brief, at p. 2) There being no dispute with respect to this issue, it is herein determined that all petitioners have acquired tenure in the Fair Lawn School District.

Petitioners also assert that the ALJ failed to determine their rights to retroactive statutory sick days. It has been stipulated (Stipulation of Facts No. 31) that at no time prior to the 1985-86 school year was sick leave ever granted. The initial decision does not, however, render a determination on the issue of sick leave. The Petition of Appeal alleges, inter alia, that petitioners have not received the same statutory and contractual benefits of employment as other teaching staff members (at page 12) and petitioners request the granting of relief with respect to benefits equal to those of other teaching staff members (at page 13). Further, the pre-hearing order, while not having the issue of sick leave specifically separated out, twice states under the section "Nature of Proceedings" that the matter is to determine what benefits accrue to petitioners. Thus, it is clear that a determination regarding sick leave is in order.

Sick leave is a statutory entitlement granted to all employees who are steadily employed by a board of education or are protected by tenure as dictated by N.J.S.A. 18A:30-2 which reads:

> All persons holding any office, position, or employment in all local school districts, regional school districts or county vocational

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> schools of the state who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.

As such, it is clear that petitioners have statutory entitlement to sick leave under this provision as they are both steadily employed within the meaning of this statute (Woodbridge Township Federation of Teachers Local #822 AFL-CIO et al. v. Bd. of Ed. of Township of Woodbridge, 1974 S.L.D. 1201) and they are protected by tenure (Spiewak, supra).

Thus, petitioners are correct in arguing that sick leave is a statutory right. They go on to argue that as a result of this fact there can be no limitation placed upon their request to vindicate the rights involved. They cite North Plainfield Ed'n Assoc. v. Bd. of Ed. of North Plainfield, 96 N.J. 587 (1984) and Arndt et al. v. Bd. of Ed. of Rockaway Twp., decided November 2, 1984 in support of this argument.

The Board rejects petitioners' reliance on North Plainfield arguing that no statutory entitlement was involved in that case. Rather, it asserts the proper precedent to apply to a statutory entitlement such as sick leave is Lavin v. Hackensack, 90 N.J. 145 (1982) which called for a six-year retroactive limit on claims for statutory entitlements that are service related. Further, it contends that the correct ruling regarding retroactivity of sick leave entitlement should be that found in Garfole and Rabinowitz v. Winfield Bd. of Ed., decided August 1, 1985 which limits retroactivity to the date of the New Jersey Supreme Court decision in Spiewak, supra, on June 23, 1982.

Spiewak, supra, prohibited retroactive payment of emoluments/benefits to any individual not a party to that suit. As such, petitioners' sick leave entitlement is prospective only. Since sick leave is granted as a statutory right on an accumulative basis (N.J.S.A. 18A:30-3), the calculation of the exact number of sick leave days which are to be applied on a prospective basis needs to be determined herein. A review of the case law shows that this issue has been inconsistently addressed. Clark v. Bd. of Ed. of River Edge, decided November 17, 1983, aff'd State Board May 2, 1984 granted sick leave from date of initial employment (back to 1968); Kloss et al. v. Bd. of Ed. of Lyndhurst, decided June 20, 1983 restricted sick leave accumulation to six years retroactively in light of Lavin, supra. Arndt et al., supra, granted accumulative sick leave on a prospective basis but not retroactively to date of initial employment, as asserted by petitioners. Rather, a six-year limitation consistent with the Supreme Court decision in Lavin was intended, although the wording of such may not be as artfully stated as it could be. Garfole and Rabinowitz, supra, restricted accumulative sick leave to the date of the Spiewak decision, as cited by the

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Board above. The rationale for such restriction is not provided within the decision.

Upon careful review and consideration of this matter, the Commissioner determines that the six year statute of limitations articulated in Lavin, supra, and Rutherford Education Association, supra, and applied in Kloss et al., supra, and Arndt et al., supra, is the appropriate precedent to control the calculation of petitioners' statutory entitlement to accumulative sick leave as of the date of this decision. In accordance with Spiewak, supra, the utilization of the sick leave is prospective only. Thus, no payment for loss of salary due to illness in the past six years is permitted.

The remainder of petitioners' exceptions relate to the ALJ's denial of their entitlement to pro rata classroom teacher salary guide placement and her failure to address credit for years of remedial service in the district for those who have assumed full-time classroom teaching positions. With respect to the first point, they argue, inter alia, that the initial decision (1) improperly relies on Hyman, supra, (2) fails to address the impact of prior decisions involving remedial teachers in the Fair Lawn School District and (3) fails to address the impact of N.J.S.A. 18A:16-11 on their claims. Further, petitioners argue that, as a matter of law and equity, remedial teachers are entitled to receive salary and benefits on the same basis as other teaching staff members.

Despite petitioners' protestations to the contrary, the ALJ's reliance on Hyman, supra, was indeed proper as that is the controlling decision on the issue of salary guide placement of teaching staff members, be they full or part-time, auxiliary, remedial, supplemental or ESL. As such, the Commissioner finds the ALJ's legal analysis of the issue to be accurate and appropriate. He, therefore, adopts the conclusion that petitioners are not entitled as a matter of law to placement on the full-time teachers' salary guide. Prior decisions involving remedial instructors in the Fair Lawn School District cited by petitioners have no bearing in the matter in that the decisions are strictly limited to the named parties, none of whom are involved in this matter. Further, the two cases involving the Fair Lawn district are both on remand from the courts for determination of salary entitlement. Fair Lawn, sub nom., Rutherford, supra, and Solomon et al.

As to petitioners' argument that N.J.S.A. 18A:16-11, compensation of de facto employees, is applicable in the instant matter, the Commissioner rejects such argument as totally inappropriate to the factual circumstances herein and the case law cited completely inapposite. Nor does the Commissioner accept the argument that as a matter of equity petitioners are entitled to the relief requested. It must be stressed that salary/compensation is a term and condition of employment that is primarily a matter of contract and is subject to the negotiations process. Given that no violation of education law was found herein, if petitioners are aggrieved with respect to the amount/rate or method of compensation or their representation during the negotiation process, review by

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PERC is the appropriate avenue of redress. Hyman, supra; Fucetola, supra; Trucillo, supra

While the ALJ did not deal specifically with the issue of salary credit for in-district remedial service for those petitioners who have assumed full-time positions, she did state in the initial decision, ante, that, based on Hyman, "all claims of petitioners are denied." (emphasis supplied) Nonetheless, to assure that no ambiguity exists, it is herein determined that there is no education statute which compels that part-time, in-district remedial experience be applied for salary guide placement purposes. As has been previously determined by the Commissioner in a number of similar challenges, assumption of full-time employment position constitutes initial employment within the meaning of N.J.S.A. 18A:29-9 and unless superseded by a collective negotiations agreement, the compensation agreed to is a matter determined by the prospective employee and the Board. See Conti and Cutler v. Bd. of Ed. of Montgomery, decided June 10, 1985, rev'd State Board July 2, 1986; Belleville Ed'n Association v. Belleville Bd. of Ed. 209 N.J. Super. 93 (App. Div. 1986); Conner et al. v. Bd. of Ed. of River Vale, decided February 18, 1986; Baker, supra.

In other words, so long as initial placement on a full-time salary guide does not constitute a reduction in salary for a tenured remedial teacher who has previously been employed part-time, (N.J.S.A. 18A:28-5) and it does not violate the minimum salary requirements mandated by statute, no statutory basis exists to mandate crediting of experience as a part-time remedial teacher in the district.

Accordingly, the initial decision as modified herein is adopted as the final decision in this matter. Petitioners are to be provided accumulative sick leave as directed. Otherwise, the Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

July 30, 1986

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FAIR LAWN EDUCATION ASSOCIATION ET AL.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 30, 1986

For the Petitioner-Appellant, Bucceri and Pincus
(Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Green and Dzwilewski
(Paul H. Green, Esq., of Counsel)

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

December 3, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8279-85
AGENCY DKT. NO. 297-7/84
(ON REMAND OAL DKT. NO.
EDU 6237-84
AGENCY DKT. NO.
297-7/84)

BOARD OF EDUCATION,
MEDFORD TOWNSHIP,
Petitioner,
v.
THOMAS MOLINEUX,
Respondent.

John G. Dyer, III, Esq., for petitioner (Eleuteri, Wilkins & Dyer, attorneys)

Allen S. Zeller, Esq., for respondent (Freeman, Zeller & Bryant, attorneys)

Record Closed: May 25, 1986 Decided: July 3, 1986

BEFORE JOSEPH LAVERY, ALJ:

The Board of Education, Medford Township, (hereinafter "Board") has certified charges based on accompanying statements of evidence, against Thomas Molineux (hereinafter "respondent"), a tenured teacher in its employ. The Board alleges that respondent has:

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1. Repeatedly and without justification engaged in conduct unbecoming a teacher by:

(a) inflicting corporal punishment upon students in violation of N.J.S.A. 18A:6-1,

(b) engaging in unreasonable and unauthorized touching of students that served no legitimate educational purpose, and

(c) engaging in unprofessional and demeaning treatment of students

2. Has repeatedly failed to follow specific directions from immediate supervisors relating to his treatment of students and in so doing engaged in insubordination and conduct unbecoming a teacher.

The Board now asks the Commissioner of Education to end respondent's tenure, and permanently dismiss him, pursuant to authority reposing in the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 et seq.

Today's Initial Decision grants the Board's request.

PROCEDURAL HISTORY

This matter was first initiated by a certification of charges filed with the Commissioner of Education on July 16, 1984.* After timely answer, the matter was declared a contested case by the Commissioner and filed with the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq., on August 21, 1984. The assigned OAL DKT. NO. was EDU 6237-84. At plenary hearing, petitioner agreed on the record to effect settlement. That settlement was filed in the Office of Administrative Law on October 17, 1984. An order of dismissal, issued on November 21, 1985, was sent to the Commissioner of Education.

* A second set of supplemental charges was filed by the Board on March 15, 1985.

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The Commissioner of Education rejected this settlement. He remanded the matter to the Office of Administrative Law on December 27, 1985, initiating the instant case, EDU 8279-85. Plenary hearings followed on March 4, 5, 6, 7 and 10, 1986 in the Morristown Municipal Court. Permission was granted counsel to submit briefs simultaneously on March 31, 1986. April 8, 1986 was the date set for rebuttal, if necessary. Respondent filed his brief, dated March 31, 1986, on April 2, 1986. The Board filed its brief dated May 1, 1986, on May 2, 1986. At that time, the Board also returned copies of exhibits which had been retained for purposes of duplication. The record was then complete.

Respondent, objecting to late filing of the Board's brief, on May 8, 1986 forwarded a motion, certification, and proposed order to suppress the Board's brief. The Board did not reply to this motion. By operation of N.J.A.C. 1:1-9.2 submission date was fixed at 20 days from receipt by petitioner. The submission date of May 28, 1986 will therefore serve as the closing date.

Order on Respondent's Motion to Suppress Petitioner's Brief

Respondent argues that, while he filed a timely post-hearing brief, petitioner has not done so, and has advanced no reason for its neglect.

The Board has chosen not to reply, and to this date has not filed any answer to respondent's motion.

I **CONCLUDE** from this record that the Board's brief was filed over a month past the specified date, without excuse or a request for extension.

I **ORDER**, therefore, that the post-hearing brief of the Board be suppressed, and neither read nor considered in the course of resolving this dispute.

ISSUES

The issues, generally stated, are whether respondent has engaged in the misconduct outlined in the certification of charges paraphrased above. More specifically, what must be resolved is whether respondent, in contravention of controlling law and

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regulations, as well as explicit supervisory prohibitions, physically and emotionally mistreated pupils in his charge. The period in contention extends from November 20, 1970 through May 15, 1984, and the events allegedly occurred at the Memorial School, in the Medford Township School District.

Burden of Proof:

The burden of proof in this matter falls on the Board, which must carry it by a preponderance of the credible evidence.

Undisputed Facts:

Respondent, Thomas Molineux, has spent his entire teaching career in the Medford Township School District. During that time, he served in the capacity of a health and physical education teacher, beginning in September of 1964. It is relevant to note that, since 1974, he has been supervised at the Memorial School by Joseph A. Somers, Jr., assistant principal, and by Steven Levine, who by during the period in question was building principal. For most of the time in question, the superintendent of the district has been Robert Salati.

In the course of his 20-year employment in Memorial School, respondent was involved in a series of incidents referred to in documentary exhibits and testimony submitted by the Board. The allegedly incriminating events are said to have occurred on the following dates:

November 20, 1970
February 26, 1973
March 19, 1973
March 14, 1975
September 16, 1976
February 11, 1977
May 5, 1981
February 13, 1984
February 16, 1984
May 14, 1984.

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Although the authenticity of those documents outlining the history of these events is not seriously in contention, (Exhibits P-1 through P-12, and P-14) the weight and validity of their content is strenuously contested by respondent. However, Superintendent Salati had no such doubts over their accuracy. He was sufficiently convinced of respondent's culpability on that record that, after learning of the final incident on May 14, 1986 he suspended respondent from his duties 2 days later. He then directed preparation of the certification of charges and supplementary certification of charges which prompted the present appeal.

ARGUMENT OF THE PARTIES:

The respective parties presented their cases at the hearing through testimony and pertinent exhibits. It is that presentation which fleshes out the dispute.

The Board's Argument:

The Board sought at hearing to prove that respondent had a long history of angry and intimidating confrontation with pupils in the Memorial School, which included unlawful touching and mishandling. The Board buttressed its allegations with chronological treatment of the events dated above:

November 20, 1970, February 26, 1973 and March 19, 1973 — Supervisor's Complaints:

Two handwritten memos by Robert Healy (Exh. P-8 and P-9) as well as a memo from G.E. Ruby, assistant superintendent, were offered by the Board. It claimed that these were adequate evidence of respondent's physical abuse of pupils, sarcasm, unfavorable comparisons, and wrestling a child to the floor to prevent the swallowing of gum. Neither of the authors of these memos testified.

March 14, 1975 — The M.D. Incident:

Testimony by Steven Levine, as well as the pupil involved, revealed that the boy (an 8th grader) was sent to the Memorial School teacher's lounge. He went on the request of a school official to retrieve an item. M.D. related at hearing that, after

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knocking and being admitted by a substitute teacher, respondent leaped from his chair, angry and shouting. M.D. recalled that respondent then struck him in the chest, grabbed him bodily, and spun him through the door into the hallway, holding his throat. Lifting him by the shirt, respondent threw the boy against the wall, in a corner, striking his head. Students were present and respondent was "out of control". Following the incident, M.D. went to a restroom to recover from his shaking distress. He recalled crying in class from frustration and fear. On return home, he informed his father, who sent a note to the school. M.D. stated that: "Now I feel angry; at the time I felt betrayed."

Mr. Levine added that respondent admitted the action. So informed, Mr. Levine sent a warning memo (Exh. P-2) and cautioned respondent against further outbursts of this kind.

September 16, 1976 — The B.S. Incident:

Mr. Levine charged that on this date respondent grabbed B.S. by the shoulders, pushing him from a line of other students in which he stood, into respondent's office. He then propelled him forcefully against the office wall. After an investigation, which included meeting with B.S. and his mother, Mr. Levine learned that B.S. had answered respondent "yes ma'am." This answer incited respondent. Following a face-to-face apology by both sides, Mr. Levine sent a memo outlining what he learned. This was introduced to respondent's personnel file.

February 11, 1977 — The B.K. Incident:

Joseph A. Somers, Jr., assistant principal, recalled that on this date, while monitoring the loading of buses with children all about, he observed respondent grab B.K., shake him hard by the shoulders, yelling at him all the while, in a very loud voice, six inches from the boy's face. When Mr. Somers approached, respondent released his hold, but continued with angry shouting. B.K. appeared crestfallen, with his head down. Intervening, Mr. Somers told respondent they could handle the matter the following Monday. Over respondent's objections, the child entered the bus. Mr. Somers later

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informed respondent that his conduct was inappropriate, and sent a memo to that effect (Exh. P-7). Further, Mr. Somers met with Superintendent Salati, who sent his own warning memo. (Exh. P-11).

May 5, 1981 — The B.E. Incident:

In testimony, B.E. recalled that while in the middle of a game of "bombardment" during 8th grade gym class, he threw a ball after the whistle. Respondent then went to B.E., grabbed his arm and his groin, taking hold of his genitals and knocking the wind from him. B.E. recalled his extreme embarrassment over the ridicule which followed him into the locker and lunch rooms. Later, B.E. reported the incident to a teacher, who went to his supervisors. The incident is talked of even to this day among his former classmates, according to B.E. (who is now 18). Mr. Levine confirmed that teacher Albert Siedlecki passed on B.E.'s complaint to him. After an investigation, which included speaking to five or six other students, Mr. Levine informed respondent that he would keep notes of the occurrence. Respondent himself answered that the incident may have occurred but it did not register in his memory. Mr. Levine warned respondent but decided to pursue the problem no further because B.E.'s mother was inclined to drop her complaint. Mr. Salati testified that he first learned of the B.E. matter when preparing the present tenure charges. He considered the event serious, and for that reason submitted the supplementary certification of charges. Mr. Salati believed the disturbance should have been made a matter of record at the time.

February 13, 1984 — The R.F. Incident

While in seventh grade, on the above date, R.F. testified, he observed a boy in gym class spit water on the floor while respondent was not present. When respondent appeared and saw the puddle, he asked those students gathered to tell him who did it. Being friendly with R.F., he pressed him specifically for an answer. Respondent then said that R.F. had forgotten something in the nearby locker room, and brought him inside. Once there, R.F. stated, respondent shook his shoulders several times, frightening him in an attempt to extract the name of the guilty student. In his fear, R.F. disclosed the boy's name on the last and hardest shake by respondent. On the following day, after meeting

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with Mr. Levine, respondent encountered R.F. and asked if he were upset, saying with anger and sarcasm, "I didn't hurt you, did I?" R.F. remembered being specifically offended by respondent's conduct because they had been on friendly terms.

Mr. Levine testified that, after being notified by R.F.'s mother, he met with the boy, who described being shaken and pushed against the wall. After informing respondent, the latter answered that he had simply patted R.F. on the shoulder in a friendly way. In an interview conducted by Mr. Levine with the boy and his mother, R.F. said that he had been hurt when pushed against the wall. Mr. Levine in a memo of February 21, 1984, again threatened discipline (Exh. P-4).

February 16, 1984 — The L.C. Incident

Mr. Levine specifically recalled interviewing L.C. and other students including C.R. on the above date about this flare-up. L.C. had complained that, during a gym class, respondent had violently pulled him from the bleachers onto the gym floor, simply because L.C. had failed to tie his shoelace and remove his shirt quickly enough. In contrast, at a later meeting (which Mr. Levine placed as occurring on March 1, 1984), L.C. drew back from his earlier charge. He declared that he was more gently pulled than he had at first contended. Mr. Levine testified that he did not believe the second story. Mr. Somers, also involved, shared that opinion. Further, Mr. Somers stated at hearing that, on the day of the graduation dance, L.C. had yet again retracted his story. He admitted the March 1 version was a sham, motiviated by L.C.'s desire not to cause respondent to lose his job.

For his own part however, L.C. testified that the change of heart on March 1 was motivated by no more than a belief that grown-ups would not accept a teenager's story. Supplementing his friend's testimony, C.R. stated that respondent's behavior was as L.C. described in the first instance. Additionally, **Andrew Hriniak**, a teacher of the special education class which included both L.C. and C.R., recalled seeing the two passing by him immediately after the gym class in issue. Both were in a state of high agitation. Once they reached his special education class, Mr. Hriniak was prepared to begin instruction. Before he could, respondent made an unsolicited entrance. With reddened face, and conspicuous anger, he proceeded to advise Mr. Hriniak and the class that some of the students present were good and some were bad. He then pointed out those whom he thought were "bad," labeling them with unflattering descriptive adjectives. Mr. Hriniak

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remembered pursuading respondent to leave the room and making an effort to discover the cause for respondent's rage. Without replying to the question, respondent left for his own class. Mr. Hriniak was certain that not only L.C. but his entire class had been disrupted and upset.

Mr. Somers, who investigated the incident as assistant principal, believed the first story of L.C. was most truthful. He concluded this after talking to five students who were eye witnesses. He stated that he and Mr. Levine met with respondent on the day following the incident but, strangely, respondent could not recall with certainty whether he touched L.C. Warnings were again issued, including Mr. Levine's memo of February 21, 1984 (Exh. P-4), threatening suspension. Superintendent Salati recalled that, despite dropping the matter earlier, he added the charges concerning L.C. to those certified to the Commissioner of Education. He did so because, at the time of L.C.'s changed description, he warned respondent that, if nothing else happened, he would consider the allegations a dead issue. This was a contingency. Once the later incident with S.R. prompted suspension (see below), the contingency dissipated.

May 14, 1984 — The S.R. Incident

Recalling the final circumstance inducing respondent's suspension, Mr. Levine stated that he spoke with S.R. himself. The child told him that respondent had asked him to scratch his back while the boy was seated on the bleachers. With reluctance, S.R. put one finger to respondent's back. Respondent directed him to scratch higher. S.R. answered that he would not, saying, "no way — what do you think I am — gay?" Mr. Molineux, according to a signed statement by S.R., then slapped S.R. on the side of his head, saying that, "I'll remember that" (Exh. P-5). S.M., a student witness, confirmed that description of the event in testimony. He stated he was seated next to S.R. From his vantage point he clearly observed the blow. He also estimated that had he himself been hit with such force, he would have been hurt. S.M. remembered that when S.R. refused to continue scratching, respondent said, "thanks, you're a big help" (Exh. P-14).

When asked to answer these charges, Mr. Levine stated, respondent answered that he had only administered a "love tap." On learning of this charge, Superintendent Salati determined to suspend respondent. He so informed him personally on May 16, 1986 (Exh. P-12). A certification of tenure charges followed, and the procedural history outlined on page 2 of this Initial Decision began.

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Respondent's Argument:

Respondent answered the Board's case with his perception of a 20-year record marked by satisfactory evaluations, and with counter-descriptions of each charged infraction. He emphasized that he had been teaching since 1964, had obtained a masters degree in 1972, and a supervisor's certificate in 1983. He had also accumulated 67 credits beyond his masters degree. The Board personally assigned him to "Project Teach" and "Pride," experiences intended to develop classroom management and control skills. The Board had also granted him two sabbaticals. Moreover, his career had been interspersed with expressions of appreciation and commendation from as early as 1967 (Exh. R-11, pages 1 through 9).

In replying to each of the Board's charges, respondent adhered to the same chronological order.

November 20, 1970, February 26, 1973, and March 19, 1973 — Supervisor's Notes

Reviewing these documents (Exh. P-8, P-9, and P-10), respondent could not recall the incidents to which they alluded. He assumed that he did not reply because he was not asked. Additionally, at that time, such a move would have been thought of as disrespect to superiors. He was certain no parental complaints had ever been forwarded to him.

March 14, 1975 — The M.D. Incident:

Respondent insisted that his sole response to M.D.'s entering the faculty room was to impose a tongue-lashing and escort him outside. He was certain he never touched the boy. Respondent denied the contents of Exh. P-2, and recalled that he had never seen the father's letter (Exh. P-1). Neither had he been given an opportunity to meet with the student or his father. Called in support, **Jackson B. Wharton**, a retired teacher who had served with respondent until 1983 in the school district, remembered an incident of a pupil entering the faculty room. At that time, respondent had exerted "sound pressure" and "shouting" to eject a boy. The child had scrambled out without respondent at any time touching him. Mr. Wharton, however, was unable to recall the year or the month of this occurrence, and had no recollection of the student's identity.

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September 16, 1976 — The B.S. Incident:

Enlarging on testimony by the Board's witnesses, respondent emphasized that on this date he was dealing with 50 boys from his and another teacher's class, handing out locker combinations. This complicated process had to be completed in 45 minutes, and respondent had developed a time-sensitive routine to finish on schedule. When B.S. responded "yes ma'am" when his name was called, respondent merely placed his hand lightly on the boy's shoulder, removed him to the nearby office, and verbally admonished him in full view of the other students, whom he continued to monitor through an office window. Respondent could not recall-making the admissions in item four of Mr. Levine's memo (Exh. P-3). In fact, he was able to have a damaging sentence labeling the matter as "extremely serious," excised from the memo (Exh. R-2).

February 11, 1977 — The B.K. Incident:

Admitting only that he had grasped B.K.'s shoulder during the bus loading, respondent stated that he was concerned over "loss of evidence." In front of 150 to 200 students gathered there, in a school which included sixth and seventh graders, B.K. had taken out cigarettes and matches. When respondent confronted the boy and demanded the items, B.K. refused to give them up and turned to leave. Respondent then caught B.K. by the shoulders and yelled at him but only because the boy intended to escape on the bus. Respondent recalled that he had been upset with Mr. Somers for intervening. The loss of evidence for this violation of school law could not be remedied on Monday, as Mr. Somers suggested. Despite Exh. P-7, respondent insisted that he did not agree with its contents, nor did he ever have a meeting with Mr. Somers.

May 5, 1981 — The B.R. Incident:

Adverting to the supplemental charges, respondent denied categorically that this incident occurred. Moreover, he was certain that neither Mr. Levine nor Mr. Johnson ever met with him on the topic, notwithstanding their testimony to the contrary.

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February 13, 1984 — The R.F. Incident:

Respondent recalled being forced to mop up the spilled water with paper towels as the students stood by snickering and laughing. He then called R.F. into his office. Respondent felt comfortable doing so because of previously established rapport with the boy. After three attempts to elicit the name of the pupil responsible for the spill, R.F. divulged the name. At no time did respondent shake R.F. or push him against the wall. The boy whom R.F. revealed was the largest in the seventh grade class at that time. Respondent surmised that R.F. reported the matter to Mr. Levine because of his fear of the larger boy. Respondent conceded, however, that he did place his hand on R.F.'s shoulder in a "fatherly manner" in the course of their conversation. He later apologized to R.F. and his mother only to retain a previously established pleasant relationship.

February 16, 1984 — The L.C. Incident:

Testifying on the background to the L.C. altercation, respondent remembered that L.C. had straggled into gym class wearing a one-inch, black silver-spiked dagger collar necklace. At respondent's direction, L.C. left to remove the necklace and place it in his locker. Having thus monopolized the group's attention, L.C. then refused throughout to join in the "shirts and skins" basketball game. He was not a good player, and disliked participating. After two demands that L.C. play with his classmates, respondent carried out his warning that he would "write-up" L.C. for discipline. Respondent strenuously insisted that at no time did he touch L.C. during the gym class period. On the other hand, he conceded that he had interrupted Mr. Hriniak's class to tell him of problems with his students. Respondent agreed that entering Mr. Hriniak's room unannounced was inappropriate. The following day he again discussed the attitude of the students with Mr. Hriniak. Yet, the alleged touching was never mentioned by Mr. Hriniak during this conversation. At a subsequent meeting with Mr. Levine and Mr. Somers, respondent again categorically denied the incident took place. Finally, at a later meeting with Mr. Salati, respondent further protested his innocence. Because of this, a meeting was arranged with Mr. Somers, L.C. and respondent. L.C. then denied that he had been touched by respondent. Mr. Somers so informed Mr. Salati, and the allegations were considered dropped.

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May 14, 1984 — The S.R. Incident:

Admitting he had asked S.R. to scratch his back, respondent remembered that S.R. did so. When respondent directed S.R. to scratch somewhat higher on his back, the boy replied, "I can't do that." Respondent remembered answering, "thanks a lot," and giving him a "friendly tap" which inflicted neither injury nor pain. On the next day, he was surprised to find himself in Mr. Levine's office with Assistant Superintendent Johnson, Mr. Levine, and Mr. Somers to be questioned on the matter. The day after, an envelope was given him, sending him to the administration building. There, Mr. Salati and Mr. Levine informed him that he was suspended.

By way of brief, respondent made the following legal arguments:

Both the ALJ and the Commissioner of Education have jurisdiction over constitutional claims. They should exercise that jurisdiction to dismiss charges involving incidents prior to 1984. They are too remote, stale, and consequently, violative of due process. Additionally, the Board is equitably estopped from making these charges by its long history of favorably evaluating respondent and imposing only mild rebukes over the years. Respondent also was denied his constitutional right to confront and cross-examine adverse witnesses. He was not given access to evidence against him before trial, and the testimony during hearing was replete with hearsay to an impermissible degree. More importantly, that hearsay was not supported by legally competent evidence. Finally, the "corporal punishment" ostensibly inflicted, and "unbecoming conduct" by respondent were not of a nature anticipated by N.J.S.A. 18A:6-10, as previously interpreted by the Commissioner of Education.

FINDINGS OF FACT

Therefore, after considering the testimony previously set forth, and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following FINDINGS OF FACT:

As to UNDISPUTED facts, I **FIND** those designated on pages 4 through 5 of this opinion.

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As to matters which are disputed or CONTESTED, pursuant to N.J.A.C. 1:1-16.3(c)7, I FIND:

1. On **March 14, 1975,** when M.D. entered the teacher's lounge, respondent jumped from his seat shouting at M.D. in a loud and frightening manner. Respondent then struck M.D. in the chest, and spun him out the door into the hallway while holding his throat. Lifting M.D. up by the shirt, respondent pushed him against the wall in a hallway corner, hitting M.D.'s head. M.D. was frightened, and later cried as a result.

2. On **February 11, 1977,** respondent grabbed B.K., shook him by the shoulders, and shouted at him within six inches of his face in an angry and threatening manner, before approximately one hundred other children.

3. On **May 5, 1981,** respondent grabbed the arm and groin of B.E., taking hold of his genitals during gym class, rendering B.E. shocked and breathless. B.E. was embarrassed in front of classmates.

4. On **February 13, 1984,** respondent, on a pretext, brought R.F. into a nearby locker room, where he shook R.F. by the shoulders violently several times, with increasing strength and with angry demeanor. Respondent successfully induced R.F. to disclose the name of another student who had spit water on the gym floor. Respondent then pushed R.F. away. R.F. was thoroughly frightened by the experience.

5. **On February 16, 1984,** respondent in a state of anger, clutched L.C. by his arm and his tee-shirt, in front of the full gym class. Respondent then yanked L.C. from the bleachers. Though unhurt, L.C. was left in a state of shock and anger. Subsequently, respondent appeared in Mr. Hriniak's special education class and addresed the group in an angry monologue marked by uncomplimentary descriptions of selected individual students present.

6. On **May 14, 1984,** respondent compelled S.R. to scratch his back, in front of an entire gym class. After S.R. refused to continue, respondent slapped him forcefully on the side of the head.

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ANALYSIS

A reasonable analysis of the instant case should include first, a discussion of how the contested facts were resolved by Findings and, second, an application of the substantive law controlling corporal punishment to those facts:

The Facts:

As noted at the outset, the Board must establish its case by a preponderance of the credible evidence. That evidence is found to preponderate if it "establishes' the reasonable probability of the fact'," Jaeger v. Elizabeth Town Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940). The evidence must be such as to "generate [the] belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), certif. den. 31 N.J. 75 (1959), overruled on other grounds 36 N.J. 487 (1962). Additionally "[A] Trier of the facts in contested or uncontested cases has a right and a duty to consider the attitude and demeanor of the witnesses as it affects the credibility of their testimony." Rains v. Rains, 127 N.J. 328, 332 (E&A 1940). In that regard, "[T]estimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." In Re: Perrone, 5 N.J. 514, 522 (1950), see also: Spagnuolo v. Bonet, 16 N.J. 546, 554-555 (1954). Finally, notwithstanding the admissibility of hearsay evidence, N.J.A.C. 1:1-15.8(a), some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to have provided assurance of probability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.8(b).

Relying on these standards, it is plain that the Board's charges stemming from the non-specific handwritten memos of Mr. Healy and the memo from Assistant Superintendant Ruby are beyond rehabilitation, absent some validating testimony. The Board offered none. Consequently, no weight will be attributed to these memoranda, which were not subject to cross-examination. Moreover, the "B.S." incident of September 17, 1976 is equally unsupported by eye-witnesses. All these allegations also suffer from obvious remoteness which has not been cured by disclosures from sharpened memories of any who were present at the time. In brief, the Board's evidence does not preponderate.

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However, the remaining allegations are not similarly flawed. "M.D." testified with dramatic effect from a clear, unhesitating recollection of his traumatic experience on March 14, 1975. As a witness, M.D. was articulate and emminently credible. His version of what took place should, and does, prevail over respondent's denial. Mr. Somers' eye-witness account of the "B.K." encounter during the bus-loading on February 11, 1977 was similarly believable. "B.E." also pursuasively described his shock and embarrassment at being mishandled by petitioner on May 5, 1981, as did "R.F." with his personal recounting of respondent's wrath on February 13, 1984.

The witness' evocation of the two remaining events offer less evidentiary weight. They give pause for thought. Yet, in the end, the composite Board testimony is more believable than that of respondent. In the first instance, "L.C." to a great extent gives tainted testimony. It is conceded that he largely retracted his initial, harsh description of respondent's grip on his shoulder when being pulled from the bleachers. Nevertheless, the eye-witness description of his school mate, "C.R.", supplemented by Mr. Hriniak's observation of both boys' contemporaneous reaction are fully credible. It is unlikely that L.C.'s and C.R.'s intense, excited exclamations on the way to and during Mr. Hriniak's class following gym, implicating respondent, were not the true version.

Secondly, in the "S.R." dispute, the victim did not testify. Yet, this defect is cured by "S.M.", a totally credible witness who sat right next to S.R. when respondent had the boy scratch his back. S.M.'s demeanor and the content of his testimony were fully credible.

In sum, the most acceptable testimony and exhibits evince a pattern of corporal, abusive punishment, accompanied by emotional intimidation. The record discloses that respondent's outbursts were rife with uncontainable anger. The question then is, what response does the law demand of the Commissionner of Education when he is faced with such in-school behavior by a tenured teacher?.

The Law:

There is no dearth of cases offering guidance. Neither is there confusion over legislative intent. The underlying statute is the most recent expression of legislative will which has prevailed for more than a century:

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N.J.S.A. 18A:6-1:

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

Numerous administrative decisions and judicial holdings have construed this bar against physical discipline. When teachers resort to unnecessary and inappropriate physical contact with those in their charge they must expect to face dismissal or other severe penalty, Franklin Tp. Bd. of Ed. v. Ostergren, 1966 S.L.D. 185. Yet, consideration also must be given to the intent of a teacher who uses corporal punishment, Peapack-Gladstone Bd. of Ed. v. Nickerson, 1965 S.L.D. 130. Additionally, the impact of penalty on an appellant's teaching career, especially when lengthy service is involved, must also be weighed. In re: Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967). However, it is also relevant that unfitness for a task is best shown by numerous incidents. Unfitness for a position under a school system is best evidenced by a series of incidents, even though one incident may be sufficient. Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943) affd. 131 N.J.L. 326 (E.&A. 1944).

Superimposing the foregoing law on these facts, it would be difficult not to conclude that dismissal is warranted here. Respondent, in virtually all of the separate circumstances portrayed above, was a teacher out of control. His reaction to "misdeeds" by his students, particularly M.D. and B.E., were outsized and shocking. His improper grabbing and striking were blatantly violative of N.J.S.A. 18A:6-1. Even when respondent's length of service is taken into account, there is insufficient mitigation to offset a need for dismissal.

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Respondent understandably protests that the Board itself cannot deny his 20-year history of at least satisfactory evaluations. In that time it is conceded that there was only one mention of his physical contact with students (1977-78). While it can be argued that this bespeaks a tolerance of repondent which passes understanding, that complacency cannot dispel the import of the present record, compiled in open hearing, under oath, and subject to cross-examination. No teacher should be subject to dismissal without deliberate and careful scrutiny of charges prompting that request. Here, a career of some 20 years is at stake. Loss of tenure will have a severely adverse effect. Nevertheless, the Board has substantiated a pattern of extraordinary emotional and physical intimidation of its students by respondent. To countenance such misconduct by restoring him to the classroom would be contrary to the legislative intent of N.J.S.A. 18A:6-1. As a practical matter, it also would expose future students in his charge to a potential for the same prohibited treatment. Consequently, respondent's tenure with the Board should be ended.

Turning to respondent's brief, the constitutional issues which he raises therein are specious. The motion to dismiss for staleness was treated at length in a letter ruling of February 1, 1986, in the course of EDU 6237-84. That ruling also disposed of respondent's challenges to discovery, after extensive oral argument on January 21, 1985. Thereafter, at each stage of the proceedings on remand, respondent's objections to discovery were carefully considered and dealt with pragmatically to effect a cure, as the record discloses throughout. At one point, the hearing was recessed to permit on-site deposition of a newly available witness. As to those witnesses which were not subpoened by the Board, respondent had ample time to subpeona them himself. Respondent had all the protections inherent in due process to confront witnesses. Those elements of record constituting hearsay were given the appropriate weight, and were admissible under N.J.A.C. 1:1-15.8. Finally, respondent's arguements that his conduct does not rise to the level of "corporal punishment" pursuant to N.J.S.A. 18A:6-1 or "unbecoming conduct" pursuant to N.J.S.A. 18A:6-10, are frivolous.

CONCLUSION

I CONCLUDE, therefore, after a review of the entire record including the credibility of witnesses, and for the reasons set forth in the ANALYSIS portion of this opinion that respondent:

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1. repeatedly and without justification engaged in conduct unbecoming a teacher by:

   a. inflicting corporal punishment upon students in violation of N.J.S.A. 18A:6-1,

   b. engaging in unprofessional and demeaning treatment of students

2. repeatedly failed to follow specific directions from immediate supervisors relating to his treatment of students and, in so doing, engaged in insubordination and conduct unbecoming a teacher.

ORDER

I ORDER therefore that petitioner be permanently dismissed from his position of teacher with the Medford Township Board of Education and that his tenure in that title be, and hereby is, terminated.

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

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

July 3, 1986
DATE

JOSEPH LAVERY, ALJ

JUL 3 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 9 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

ij

1992

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IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS MOLINEUX,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION ON REMAND
OF MEDFORD, BURLINGTON COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by respondent within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Respondent takes exception to the entire initial decision rendered by the ALJ averring that it is arbitrary and based on neither sound legal reasoning nor sound factual findings. Respondent's objections and exceptions to the ALJ's findings of law are summarized below.

1. THE COURT'S ABBREVIATED AND SUPERFICIAL TREATMENT OF THE LEGAL ISSUES RAISED IN THIS MATTER IS TOTALLY UNACCEPTABLE AND RENDERS THE INITIAL DECISION UNFIT TO STAND.

Respondent avers that the ALJ had an affirmative duty to consider the threshold issues he posited concerning the violation of his right to a fair hearing and to procedural due process of law as guaranteed by the Constitutions of the United States and New Jersey. Respondent contends the court's response to these claims has been to ignore and/or evade them by refusing at hearing to consider the issues on the grounds of lack of jurisdiction and in the initial decision by dismissing said claims as "specious." (Exceptions, at p. 2, quoting the initial decision, ante) He argues that the failure of the ALJ to assume jurisdiction and to consider these issues requires that the entire initial decision be rejected, citing N.J.S.A. 18A:6-9; Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514, 525 (1978) (the Commissioner of Education may be regarded as having an affirmative duty to decide controversies under school law which entail invidious discrimination practices); and Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407 (App. Div. 1982) (the doctrine of exhaustion of remedies applied and the trial court should properly have deferred the exercise of its jurisdiction of the dispute to the Commissioner of Education). Instead, avows respondent, the ALJ avoided the issues raised and stated that they were "specious" without providing any discussion or reasoning whatsoever. Respondent avers the following are examples of these violations:

A. Several alleged victims of Respondent's alleged "corporal punishment" [including B.K. and S.R.] did not appear and testify and were thus not subject to cross-examination by Respondent. Yet, the Court sustained these charges as being valid.

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> B. Witnesses were permitted by the Court to testify at the hearing despite having failed to answer the Interrogatories served upon them more than one year prior to the hearing. One witness, [M.D.] was permitted to testify even though counsel for the Board represented to the Court and opposing counsel some fourteen months before the hearing that he could not be found. Miraculously, he was located after the hearing started in March, 1986.
>
> C. Charges [concerning B.E.] were sustained despite the fact that the alleged incident occurred in May, 1981, and the Board had no written record or documentation that this "extremely serious" act of corporal punishment even occurred. Nor is there any documentation that Respondent was ever advised of its occurrence until in or about January, 1985, more than three and one-half years later.
>
> (Exceptions, at p. 6)

Citing Morrissey v. Brewer, 408 U.S. 471, 488-489 (1972) and Nicoletta v. No. Jersey District Water Supply Commission, 77 N.J. 145, 164 (1978), respondent suggests that "the most severe and egregious abridgments of his rights were that he was denied the right to 'confront and cross-examine adverse witnesses' and the right to 'know the evidence against him' as required by law where there was no good cause for disallowance of such confrontation.***" (Exceptions, at p. 5, quoting Morrissey and Nicoletta) Citing his post-hearing brief, which is incorporated herein by reference, at pp. 5-22, respondent additionally avers that he was "denied sufficient written notice of the charges proferred (sic) by the Board at the hearing; he was denied full disclosure of the evidence which was used against him; he was denied protection of the Court rules regarding discovery and trial; and he was compelled to defend old and stale charges." (Exceptions, at pp. 6-7) "Had these issues been, as they were required to be, dealt with on their merits, they would have been found meritorious and incapable of dismissal as 'specious'", argues respondent. (Exceptions, at p. 5)

In support of his contention that the charges brought against him were stale, respondent cites In re Koehler's Estate, 43 N.J. Super. 585 (1957) and argues that "[t]he record is replete with candid admissions by key witnesses that they could not recall certain critical elements of events upon which the charges herein were based." (Exceptions, at p. 9)

In addition to all of the foregoing alleged due process violations that respondent avers the court dismissed, he also argues in exceptions that the evidence against him "consisted of hearsay to a totally impermissible degree." (Exceptions, at p. 10) Respondent suggests that in total contravention of N.J.A.C. 1:1-15.8 "the Court permitted witness after witness in this matter to testify as to matters about which they were incompetent to do so, and admitted

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such testimony without any supporting legally competent evidence." (Exceptions, at p. 11)

II. THE COURT'S ABBREVIATED AND SUPERFICIAL TREATMENT OF THE LEGAL STANDARD TO BE MET IN MATTERS ALLEGING CORPORAL PUNISHMENT IS IMPROPER AND RENDERS THE INITIAL DECISION UNFIT TO STAND.

Citing In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County, 1961-62 S.L.D. 160, 162, remanded State Board 1963 S.L.D. 251, decision on remand 1964 S.L.D. 142, aff'd State Board 1966 S.L.D. 225, remanded 93 N.J. Super. 404 (App. Div. 1967), decision on remand 1967 S.L.D. 215, aff'd App. Div. 1967 S.L.D. 220, as well as a panoply of other cases concerning the corporal punishment and mitigation thereof, respondent contends that the totality of circumstances in the instant matter militate against his dismissal on the basis of infliction of corporal punishment. Respondent contends that in not one instance have the requisite proofs of corporal punishment been met. In not one instance, argues respondent, has the requisite proof of intent to cause bodily harm as a means of punishment been proved or even clearly alleged. In fact, argues respondent, in each instance, the students themselves in their testimony, where obtained, actually denied any physical harm or intent to injure or punish. Respondent avers that "the character evidence offered with respect to these students indicated that, in general, they were behavior problems, were hostile to authority figures and had proven tendencies to fabricate and change their stories with impunity." (Exceptions, at p. 16) Respondent contends that it is clear that the charges of infliction of corporal punishment are without merit and should be dismissed.

Citing a raft of cases including In the Matter of the Tenure Hearing of William Simpson, School District of the Borough of Audubon Park, 1978 S.L.D. 368, aff'd St. Bd. 377 (sexual misconduct) and In the Matter of the Tenure Hearing of Louis Cirangle, School District of the Borough of Maywood, 1980 S.L.D. 82, respondent alleges that "clearly, unless a teacher is found to have committed sexual misconduct, criminal conduct or other conduct of a similarly grave nature, his or her conduct has not been found to warrant dismissal. (Exceptions, at pp. 18-19) Respondent avers that throughout his tenure of employment, he has received evaluations that, without exception, praised his conduct, his performance and his ability to work with students. He submits that the unbecoming conduct charges are without merit and should, therefore, be dismissed.

In view of the foregoing, it is respondent's contention that all tenure charges should be dismissed against him and that he forthwith be reinstated with full back pay, including increments. In closing, respondent's exceptions contend that "clearly this [initial] decision, which was rendered more than two months late without reason or justification, meets none of the requirements established by law. As such, it must be rejected in its entirety." (Exceptions, at p. 21)

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Upon review of the record in this matter, the Commissioner is unpersuaded by respondent's exceptions that the ALJ erred in determining that respondent

1. repeatedly and without justification engaged in conduct unbecoming a teacher by:

   a. inflicting corporal punishment upon students in violation of N.J.S.A. 18A:6-1 and

   b. engaging in unprofessional and demeaning treatment of students

2. repeatedly failed to follow specific direction from immediate supervisors relating to his treatment of students and, in so doing, engaged in insubordination.

Initially, in the absence of a transcript having been provided by the parties, the Commissioner accepts as his own the findings of fact set forth by the ALJ in the initial decision, ante. Further, in response to respondent's allegation that the charges alleged to have occurred before 1984 are stale, the Commissioner finds that there is nothing in the statutes or rules that precludes the Board from raising, nor the Commissioner from considering, such evidence as establishing that a pattern of inappropriate behavior exists and has continued to affect the education provided the students of Medford Township. The applicable legal standard is set forth in Redcay v. State Board of Ed., 130 N.J.L. 369 (Sup. Ct. 1943):

> ***Unfitness for a task is best shown by numerous incidents. Unfitness for a position under a school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it may also be shown by many incidents.***
> (130 N.J.L. at 371)

Thus, the Commissioner dismisses as being without merit respondent's allegation that any of the charges levied against him are stale. See also Letter Ruling, February 1, 1985, Board of Education, Medford Township v. Thomas Molineux, OAL DKT. NO. EDU 6237-84, No. 2 at pp. 2-3.

Similarly, the Commissioner finds without merit respondent's allegation of violations of due process based on the fact that "[s]everal alleged victims of Respondent's alleged 'corporal punishment' did not appear and testify and were thus not subject to cross-examination by Respondent." (Exceptions, at p. 6) It is noted that in every charge brought against respondent there was corroborative testimony provided at hearing and in all instances, except that concerning B.E., a record made of the incidents. As to M.D.'s testimony, which respondent has

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characterized as surprise witness testimony, the initial decision states, although not clearly establishing reference to which witness, that "[a]t one point, the hearing was recessed to permit on-site deposition of a newly available witness.***" (Initial Decision, ante) The Commissioner finds that this accommodation too militates against respondent's allegation that he was denied due process, as do those matters which were resolved by way of Letter Ruling and Order on February 1, 1985. The Commissioner adopts as his own the resolution of the issue raised therein.

As to respondent's allegation that M.D.'s testimony differed substantially from that which was represented by Board counsel's certification, the Commissioner accepts the judgment of the ALJ as to the factual conclusion to be drawn from such testimony in the absence of any specific example of such divergence by respondent. Similarly, the Commissioner accepts the judgment of the ALJ concerning hearsay evidence in the absence of any specific documentation of such allegations in respondent's exceptions. He finds without merit, therefore, respondent's contention that "the evidence against him consisted of hearsay to a totally impermissible degree." (Exceptions, at p. 10)

Finally, the Commissioner notes that it is the ALJ's prerogative to decide when the record in a contested case closes. N.J.A.C. 1:1-16.1 As such, the ALJ's selection of May 28, 1986 as the closing date was entirely appropriate and the initial decision, rendered on July 3, 1986, was well within the 45 days provided for the rendering of said decision following the closing of the record. Notwithstanding this fact, the Commissioner notes that no legal penalty attaches to the late submission of an initial decision by an ALJ, unlike N.J.S.A. 52:14B-10, which states that if the Commissioner does not act within 45 days in rendering his decision and unless such time limit is otherwise extended, the recommended decision shall become a final decision. Thus, the Commissioner finds that respondent's exception suggesting that the ALJ's decision was untimely and therefore must be rejected is entirely without merit.

As to the merits of the matter, the Commissioner is satisfied, having reviewed the record before him, that respondent's repeatedly resorting to the use of excessive force, despite repeated warnings to desist, represents unequivocal evidence of corporal punishment and thereby conduct unbecoming a teacher.

Repondent's evaluation dated June 15, 1977 mentions two incidents as having occurred early in that year involving physical mistreatment of youngsters. His March 1, 1967 evaluation indicates that he demonstrated "a need to improve his tact when handling students." His November 24, 1965 evaluation indicates "needs growth in handling children." These early indicators of difficulty handling the disciplining of students coupled with the the continuous stream of incidents including those of March 14, 1975 involving M.D., September 16, 1976 involving B.S., February 11, 1977 involving B.K., May 5, 1981 involving B.E., February 13, 1984 involving R.F., February 16, 1984 involving L.C. and May 14, 1984

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involving S.R. "***evince a pattern of corporal, abusive punishment, accompanied by emotional intimidation." (Initial Decision, ante) While the Commissioner faults the Medford Township School District for failing to institute earlier corrective measures in dealing with respondent's outbursts, its omission does not excuse respondent from conducting himself in an entirely appropriate and professional manner in regard to correcting student behavior. See In the Matter of the Tenure Hearing of M. William Cowan, School District of the Borough of Bernardsville, Somerset County, decided by the Commissioner January 15, 1986. (Commissioner affirmed findings and determination in initial decision terminating respondent from his tenured teaching position, noting respondent's continued use of corporal punishment and fits of anger against pupils despite prior warnings and actions of the Board.) The Commissioner finds that the B.K. incident of February 11, 1977, alone, which was observed not only by hundreds of pupils but also by Vice Principal Somers, and which respondent does not deny occurred, represents clear evidence of conduct unbecoming a teacher and corporal punishment in violation of N.J.S.A. 18A:6-1. The Commissioner concurs with the ALJ that even taking into account respondent's length of service and the comments in his evaluations that spoke positively of his teaching, the record before him is clear that respondent is guilty of unacceptable behavior so flagrantly unbridled as to represent a real danger to his charges. The law is clear that the Commissioner

> cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (N.J.S.A. 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also freedom from offensive bodily touching even though there be no actual physical harm.*** [S]uch a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions.*** Thus, when teachers resort "to unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty."***
>
> Corporal punishment has been defined *** as "any punishment causing or intended to cause bodily

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pain or suffering." The legal philosophy underlying the proscription of such disciplinary measures is that "an individual has a right to freedom from bodily harm or any impairment whatever of the physical integrity of his person by the infliction of physical pain by another. There is also a right to freedom from offensive bodily touching by another altho no actual physical harm be done."***

In the Matter of the Tenure Hearing of Victor Lomakin, School District of South Orange-Maplewood, 1971 S.L.D. 331, 334-5, quoting In re Ostergren, supra; In the Matter of the Tenure Hearing of Pauline Nickerson, School District of Peapack-Gladstone, 1965 S.L.D. 130, 131

In considering the penalty for respondent's conduct, it is the Commissioner's judgment that the interest and well-being of students is paramount. The pattern of unacceptable conduct demonstrated by respondent cannot be tolerated. Having found, as did the ALJ, that respondent disregarded prior warnings by the Board and continued to inflict corporal punishment on certain pupils, the Commissioner concludes that respondent's behavior has been demonstrative of conduct unbecoming a teaching staff member. Accordingly, it is hereby ordered that respondent be and is dismissed from his employment with the Medford Township Board of Education, effective as of the date of the Commissioner's decision. It is further ordered that this matter be forwarded to the State Board of Examiners for consideration pursuant to N.J.A.C. 6:11-3.7.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 8, 1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5592-85
AGENCY DKT. NO. 242-7 85

JEANNE PRIOR,
Petitioner,
v.
BOARDS OF EDUCATION OF BERGENFIELD, DUMONT, TENAFLY, ORADELL, RIVER EDGE, NEW MILFORD, ROCHELLE PARK and RIVERDELL REGIONAL,
Respondents.

Sheldon H. Pincus, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Irving C. Evers, Esq., for River Edge Board
(Parisi, Evers & Greenfield, P.A.)

Sidney Sayovitz, Esq. for Bergenfield and Dumont Boards
(Greenwood & Sayovitz, attorneys)

Frank N. D'Ambra, Esq., for Tenafly Board
(Aron, Salsberg & Rosen, attorneys)

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Marc Joseph, Esq., for Riverdell Regional Board
(Stein, Joseph & Rosen, attorneys)

Eric Bernstein, Esq., for New Milford Board
(Gerald L. Dorf, P.A., attorney)

Andrew Cevasco, Esq., for Oradell Board
(Breslin, Herten & LePore, P.A., attorney)

Robert M. Jaworksi, Esq., for Rochelle Park Board
(Beattie, Padovano, Breslin & Dunn, attorneys)

Record Closed: May 15, 1986 Decided: June 23, 1986

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

Jeanne Prior claimed that she attained tenure in Region V, a Bergen County special services district, and that her rights pursuant to N.J.S.A. 18A:28-6 were violated when she was nonrenewed by the River Edge Board. On September 4, 1985, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A first prehearing conference was held on October 24, 1985. Discovery was lengthy due to the number of districts involved. During the course of discovery, petitioner learned of another member of Region V (Riverdell) which had not been named as a respondent. I granted petitioner's motion to amend to add Riverdell Regional Board and held a second prehearing on February 3, 1986. The parties sent supplemental interrogatories and held depositions in February and March. The case was bifurcated to curtail discovery on seniority since if petitioner had no tenure, a determination of seniority among staff of all the respondent districts would be unnecessary.

Hearings were held on April 14, 15, 16 and 17, 1986 in Paramus and Lodi. The

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transcripts are designated 1T, 2T, 3T and 4T respectively. A list of exhibits entered into evidence is attached to this decision. After close of the petitioner's case, the parties made motions for dismissal, both generally and on district specific grounds. I granted the general motion for dismissal, but due to the voluminous documents, allowed petitioner time to review them and file a brief which would point up all facts in her favor, upon which I would reconsider and reduce the result to writing in an initial decision. Respondents were permitted to file in opposition and the record closed with receipt of the last brief on May 15, 1986.

THE ISSUES

The prehearing order listed the following issues:

1. Is Region 5 a joint special educational facility: Is it a de facto jointure commission? Is it a regional school system?

2. Is petitioner tenured in any district or group of districts and, if so, which one? On what basis? If tenure exists, in what category or subcategory will she have tenure and seniority rights?

3. Was a special education class moved from River Edge to Bergenfield solely for the purpose of preventing petitioner from achieving tenure? If so, by whom? If so, is the claim barred by the rule of limitations?

4. If petitioner's rights were violated, what should the remedy be?

Other issues arose during the course of fact-finding and argument. Some districts were not members of Region V during the entire period of petitioner's employment. Riverdell Regional and Tenafly were among these districts. Riverdell Regional also argued that it was restricted to secondary school students and thus could not legally employ petitioner. All districts other than River Edge and Bergenfield argued that they had never employed petitioner. River Edge and Bergenfield contended that petitioner had

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never been employed by either of them for a sufficient time to satisfy the requirements of the tenure statute, N.J.S.A. 18A:28-6. Respondents also contended that petitoner was employed in her first year in River Edge as a replacement teacher for a tenured teacher who was on leave of absence and thus could not count the time served her first year as tenurable in any event.

THE TESTIMONY

Petitioner was the only witness, but much of the evidence she presented was documentary: it included minutes and publications of Region V and of the individual respondent boards within the region. The parties did not dispute the fact that petitioner signed a contract of employment with River Edge for 1981-82, 1982-83 and 1983-84 and with Bergenfield in 1984-85 and that she received her nonrenewal notice from Bergenfield in April to be effective at the end of the 1984-85 school year. Respondents cross examined petitioner at great length on the indicia of her employment in each year.

Much of the questioning was for credibility purposes because petitioner, unlike the usual lay witness, testified and answered in language which repeatedly characterized responses in conclusory terms consistent with her legal theory in the manner exhibited by "expert witnesses" who have attended special training sessions on how to testify as an expert witness. For example, the following kind of responses became an oft-repeated litany:

2. Who employed you in 1981-82?

   A. I was employed by Region V in an N.I. class housed in River Edge.

2. Were you interviewed by anybody from Revion V in connection with the employment?

   A. Insofar as River Edge is one of the towns that comprise Region V, I would say so. (2T3:23 to 4:1)

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2. What position did you hold in 1982-83?

A. I was employed by Region V teaching a preschool class housed in River Edge.

2. Who hired you and what service did you perform in 1983-84?

A. I was hired by Region V to teach a preschool class housed in River Edge.

2. What was your position and from whom did you received your checks in 1984-85?

A. I taught a Region V preschool class housed in Bergenfield. My check came from the Bergenfield Board but I was hired by Region V.

2. How did you come to know that the N.I., C.H., M.A., T.M.R. class and all the other 68 or 70 classes in eight school districts were part of Region V instead of offerings of each of these districts?

A. These were programs that are part of the regional system that are housed in these various towns. (3T92:5-7).

The above example is not quoted directly from a transcript but fairly illustrates the nature of the testimony repeated over and over throughout the transcripts. The witness was not candid.

The Region V coordinator visited petitioner's classes from time to time as, presumably, did parents considering placements for handicapped children and child study

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team members from other districts who were assessing placements. Petitioner repeatedly characterized these visits as "observations," which is a term of art in education and is defined as such in N.J.A.C. 6:3-1.21(h)6. The "observation" visit of a supervisor must be for the purpose of formally collecting data on the teacher's performance of her duties. This did occur on one occasion, when the then-Region V coordinator Dr. Bazron participated in a formal evaluation in 1982-83. Petitioner, however, termed every visit of the Region V coordinators or out-of-district personnel as an observation, although such personnel came to inform themselves about the programs, not to formally evaluate petitioner. (e.g., 3T 102-103).

Another example of deliberate characterization (or more accurately, mischaracterization) could be seen in petitioner's testimony concerning her interaction with child study teams (CSTs) of various districts. This testimony was engineered to give the impression that all the CSTs and petitioner were working for the same employer, District V. In fact, since petitioner taught handicapped children, N.J.A.C. 6:28-3.6(c) required that, as a classroom teacher, she was to participate in certain tasks (such as IEP meetings) with the CST of whatever district was responsible for a particular child, and might participate in the transition of such a child from an elementary to a secondary school such as Riverdell Regional. N.J.A.C. 6:28-4.3. Since a teacher having knowledge of the pupil's educational performance must be involved, if a child from any district in the state or county had been placed in petitioner's class, she would be required to interact with CST personnel from outside the district which employed her. Petitioner used this educational scheme as a vehicle for characterizing her employment as regional.

Finally, on the issue of petitioner's credibility, her memory was quite selective. She did not know or recall a number of facts which would have filled in the picture. Her testimony also evidenced certain inconsistencies. Some examples of this can be found at 2T2 to 13 and 3T107 to 115. In short, the testimony of petitioner which was reliabile was only testimony eliciting facts which could not be characterized or mischaracterized. Thus petitioner's statements as to who interviewed her, who signed her evaluations, whose name was on her checks and what classes she taught are a basis of fact-finding.

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Region V documents specifically addressing the "Early Childhood Center" give coloration of factual support to petitioner's theory. That is because the program was a new one, so that the Region V coordinator was called upon to assist the districts in assessing the need for the program, advising on its implementation, producing a handbook and disseminating information to parents. The coordinator was just that, however, and worked in a small office with about five desks. He or she learned about available programs and space, advised districts about placement of handicapped children and facilitated cost efficient joint transportation. These efforts avoided costly duplication of efforts among the districts. The Region V coordinator never hired a single teacher. He or she had no authority to do so.

Even the facts concerning the preschool classes taught by petitioner for two years in River Edge and one in Bergenfield, were insufficient to make out a prima facie case of the existence of a joint special educational facility, de facto jointure commission or regional school system, as will be discussed below. Since the time petitioner spent as N.I. teacher in 1981-82 for River Edge is essential to her tenure claim with "Region V," it was only necessary on a motion to dismiss, to carefully consider the facts elicited concerning that year, giving petitioner the benefit of favorable inferences.

The documentary evidence concerning petitioner's 1981-82 N.I. class (out of hundreds of exhibits) included a publication of the Region V coordinator stating that the districts were holding a meeting to accept public comment on their plans (P-194, 195, 196) and listing the special education classes existing in each district on a district by district basis (P-197, 197(a)), and the information that the coordinator had visited virtually all of the 58 classes in the local districts (P-234 and RE-3). In addition, there was testimony (corroborated by RE-3) that petitioner's River Edge N.I. class contained one child from out of district, a Dumont E.D. classified child, and that Dumont (not District V) supplied an aide to that class because of the E.D. child. Weighing this evidence against other facts from petitioner's own testimony, I see no proof that petitioner was employed by any entity other than the River Edge Board in 1981-82.

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FINDINGS OF FACT ON MOTION TO DISMISS

1. Petitioner was interviewed by River Edge supervisory personnel, hired by them, evaluated by them, placed on a regular salary guide after signing a contract for the year, was paid by the River Edge Board to teach a River Edge N.I. class and received all the benefits of regular teaching staff members in 1981-82. (1T:172-177).

2. Petitioner was hired to replace a tenured River Edge teacher who was on a one-year leave of absence in Colorado for 1981-82 and who, it was believed, might not return, but who did return to her employment with River Edge the following year.

3. Petitioner taught preschool handicapped classes in River Edge in 1982-83 and 1983-84, but was nonrenewed.

4. River Edge knew as early as 1982-83 that it no longer had the space available for early childhood classes and by 1983-84, the need for such classes for River Edge children in 1984-85 diminished.

5. River Edge eliminated preschool handicapped classes and nonrenewed petitioner, but she obtained a position with the Bergenfield Board to teach an early childhood class for 1984-85 at the end of which year Bergenfield nonrenewed petitioner.

CONCLUSORY FINDING

6. The River Edge Board and no other entity employed petitioner in 1981-82.

7. Even if Region V as an entity were found to have employed petitioner when she taught preschool classes in River Edge and Bergenfield in

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1982-83, 1983-84 and 1984-85, the maximum tenurable time she accrued with such entity was three years.

8. When the River Edge Board ceased offering preschool classes at the end of the 1983-84 school year, it acted in good faith based upon lack of space and diminished need for these classes.

DISCUSSION and CONCLUSIONS

Respondents moved to dismiss on two principal grounds referable to all parties. A determination on these two grounds precludes the necessity of addressing the grounds which are specific to each district. It is clear from the facts that the N.I. class position petitioner filled in River Edge in 1981-82 was not vacant, but was being held for a tenured teacher on a leave of absence. Indeed, the tenured teacher returned the following year. Petitioner was placed on the regular salary guide that year and understood she would be teaching for the entire year, however. This is not a situation wherein the replacement teacher was paid as a per diem or long term substitute and expected to be terminated when the regular teacher returned at some point during the school year. New Milford argued that, since the position was not vacant, Prior was a substitute and her time was not tenurable in accordance with Driscoll v. Bd. of Ed. of Clifton, 165 N.J. Super. 241 (App.Div. 1977) and Sayreville Ed. Ass'n, Rucki et al v. Bd. of Ed. of Sayreville,193 N.J. Super. 424 (App. Div. 1984).

The facts here are somewhat different from those discussed in the above cited case. Prior signed a contract for the year, was placed on the regular salary guide and received all the benefits of a regular teaching staff member. While it is true that the position she filled was not technically vacant in that the tenured teacher on leave had to be given a position on her return, no rule required that the tenured teacher be given the same position on her return, and in fact, the Board suspected she might not return. The "temporary arrangement" intended by N.J.S.A. 18A:16-1.1 as interpreted by the court in Sayreville at 428, does not readily describe a position held under contract for an entire school year. The court in Sayreville was concerned with the use of long-term substitute

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status to deny teachers full benefits granted to regular teaching staff members, one of which was accrual of tenurable time. In this case, the facts show that Prior was granted all the benefits of regular staff but respondents claim that tenurable time should not accrue to her.

In its reasoning, the Sayreville court noted that the legitimate interests of the board or public are not prejudiced by granting teachers who serve for a substantial part of a school year the status and benefits of a teaching staff member because they can be evaluated and nonrenewed, if a board so desires. The requirement that a vacancy exist is significant because otherwise a board might have to incur the expense of duplicative benefits. Id. at 430. Whenever a teacher is contracted for for an entire year to "replace" a regular teaching staff member on an unpaid leave of absence, such that a Board incurs no expense for duplicative benefits, no public policy reason appears to deny the replacement teacher regular teaching staff status. In effect, a vacancy existed for one whole school year in the N.I. class position.

I noted prominently that Prior was under contract for one full year, not because contract controls tenurable time, since Spiewak expressly disapproved that point, but because the contract for one year is an indication that the position was open for the entire school year. Spiewak v. Rutherford Bld. of Ed., 90 N.J. 63, 80 (1982) clearly establishes that tenure is statutory rather than contractual. The Spiewak court discussed arguments that the teacher petitioners were "temporary" because provision of Federal funds for these positions was temporary, that is, the receipt of funds for the future was not certain. Such arguments were rejected.

The absence of a written contract would not be dispositive since a board may not unilaterally determine the character of the teacher's employment by withholding it. Sayreville, at 432, note 1. If a teacher is hired for one full school year to fill a specific classroom assignment during an unpaid leave of absence of a tenured teacher, I see no policy or statutory directive which would preclude the newly hired teacher from accrual of tenurable time. The courts have interpreted N.J.S.A. 18A:16-1.1, which expressly prohibits a substitute from acquiring tenure, to refer to a temporary absence,

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even if protracted. But how long is a "protracted" absence? Some districts permit two to three years of continuous leaves without pay. Old Bridge Ed. Ass'n et al v. Bd. of Ed. of Old Bridge, EDU 6532-84 (June 11, 1985), 1985 S.L.D. ____ (August 8, 1985).

I cannot conceive that unpaid leaves of absences for one or more school years should bar accrual of tenurable time for teachers hired for an entire year as replacements. Although I am reluctant to extend the rationale of case law absent appellate precedent, the unfairness of the example speaks for itself. **I CONCLUDE** that "temporary" and "protracted" absence does not include one or more entire school years, so as to preclude a replacement teacher from accruing tenurable time, when the regular teaching staff member is on unpaid leave for the same period of time. **I CONCLUDE** that such an interpretation of N.J.S.A. 18A:16-1.1 best achieves the policy behind and intent of the legislature in the context of both N.J.S.A. 18A:16-1.1 and 28-6. I thus do not accept this grounds as a basis for granting the motion to dismiss.

The three years and a day statutorily required to attain tenure set forth in N.J.S.A. 18A:28-6 has not been met by petitioner, however, because there was no evidence that petitioner was employed by Region V or any respondent district for that period. In her first year (1981-82), petitioner was employed by the River Edge Board and, most favorably viewed, the maximum time she served with River Edge was three years. Further, River Edge nonrenewed petitioner after it abolished her position in good faith. Allowing every legitimate favorable inference, the standard enunciated in Dolson v. Anastasia, 55 N.J.. 2 (1969), petitioner has showed less than a scintilla of evidence of employment by the Region in 1981-82 and her claim under the statute must be dismissed on motion at the end of her case.

It is therefore **ORDERED** that the motion to dismiss be granted in favor of all respondents.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

June 23, 1986
DATE

Naomi Dower LaBastille
NAOMI DOWER-LaBASTILLE, ALJ

6/25/86
DATE

Received/Acknowledged:

DEPARTMENT OF EDUCATION

JUN 26 1986
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

jrp

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JEANNE PRIOR,	:	
PETITIONER,	:	
V.	:	
BOARDS OF EDUCATION OF BERGENFIELD, DUMONT, TENAFLY, ORADELL, RIVER EDGE, NEW MILFORD, ROCHELLE PARK AND RIVER DELL REGIONAL, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	
	:	

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

It is observed that timely exceptions to the initial decision were filed by petitioner and that timely replies were filed by Respondent Boards of Bergenfield, Dumont, New Milford, River Dell Regional and Tenafly pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioner takes exception to the characterization of her testimony by the ALJ as being "less than candid and conclusory." (Petitioner's Exceptions, at p. 1) Petitioner submits that such characterization of her testimony by the ALJ reflects a total lack of understanding of the issues in the instant matter, a lack of review of the voluminous documentary evidence made part of the record and a calculated determination by the ALJ to allow the Boards to continue to collude and work a charade that Region V is nonexistent. Petitioner maintains that she attempted to show throughout all of her testimony and the documents she produced in evidence that a regional system Region V exists and is operated by the Boards. She further maintains that the ALJ either ignored certain documents admitted into evidence in support of her claim or, on the other hand, refused to allow certain material documents to be entered into evidence at the time of the hearing.

More specifically, petitioner argues that the ALJ's determination to limit the admission into evidence of Exhibits P-241, 242, 250 and 254 on the grounds of the Boards' claims of attorney-client privilege constituted reversible error and deprived the record of crucial evidence in support of her claims that Region V is a de facto jointure commission and, further, that the transfer of the preschool handicapped program from River Edge to Bergenfield, as of the 1984-85 school year, was effected to deprive her of a tenure status.

The above-cited exhibits are those minutes of the Region V Superintendents' Advisory Council (SAC) held on April 25, 1985 (P-241), May 14, 1985 (P-242), and January 9, 1986 (P-254). Exhibit

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P-250 is a letter memorandum from the Director of Region V to the SAC dated October 28, 1985. Petitioner argues that the portions of these exhibits are not subject to the attorney-client privilege (N.J.S.A. 2A:84A-20, Rules of Evidence, Rule 26) by virtue of the fact that certain counsel for the respondent school districts were not only communicating with their respective clients who were the superintendents of the respective school districts, but also with the superintendents of the remaining school districts as well as other "guests." In this regard, petitioner further argues as follows:

> ***Petitioner further submits that the ALJ's determination raises a further point as to just who is the "client" who may, or on whose behalf, the attorney client privilege may be asserted. Is it Region V for whose minutes admissibility was sought? If so, no counsel claimed to represent Region V or to claim the privilege on its behalf. If only counsel for Bergenfield, Dumont and Tenafly were present at the meeting represented by Exhibit P-241, did not their discussion with the superintendents whose attorneys were not present waive the privilege or were they claiming to request these districts or the Region as a whole at these meetings? Why is only one attorney responsible for determining the legal basis of Region V (P-254) (P-184, p. 5)? Does not the assertion of this privilege constitute evidence that the various respondents, banded together, constituting the only Region petitioner claims to exist in her petition and that an illegality and sham is being worked in the method in which special education is delivered within the Region. (See Exception II, infra.) Petitioner respectfully submits that these exhibits' exclusion deprived her of the opportunity to create a full record of Region V's operations and actions towards her, and that their admission would have precluded the ALJ's determination to dismiss the case.***
>
> (Petitioner's Exceptions, at p. 6)

Petitioner asserts that the ALJ's determination to grant the Boards' Motion to Dismiss these proceedings also constitutes reversible error because no effort was made to ascertain the legal basis for Region V's existence. In support of this claim petitioner argues as follows:

> ***Under N.J.S.A. 18A:46-1 et seq., special education services, such as those provided by Region V, must be provided through one or more of the methods specified in N.J.S.A. 18A:46-14. This requirement is clear given the expressly mandatory language of N.J.S.A. 18A:46-14.

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> The facilities and programs of education required under this chapter shall be provided by one or more of the following***. (Emphasis supplied)
>
> Any method of special education not falling within N.J.S.A. 18A:46-14 is therefore illegal and must be brought into compliance with applicable law. It is further clear, and has been held, that the failure to comply with N.J.S.A. 18A:46-14 does not impair the rights which may have accrued to the persons employed in the non-compliant district. See e.g. Bisson v. Board of Education of the Borough of Alpha, et al., 1978 S.L.D. 187; Anne Marie Chinnis v. Board of Education of the Lower Cape May Regional School District, et al. *** (decided May 26, 1981), aff'd St. Bd. *** (decided September 2, 1981); Daily v. Board of Education of the Township of Oldmans et al., *** (decided July 1, 1985); [aff'd St. Bd. November 6, 1985] Shelko v. Bd. of Educ. of Mercer Cty. Sp. Service, 97 N.J. 414 (1984); Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982).***"
>
> (Petitioner's Exceptions, at p. 7)

It is observed from page 8 of petitioner's exceptions that she relies on certain exhibits which she submitted in evidence, as well as the transcript of the oral arguments on Motions held on April 17, 1986, in support of her claim that Region V was in fact her employer and that this Region as organized and operated by the Boards was a de facto jointure commission. Those specific exceptions on page 8 are incorporated herein by reference.

Finally, petitioner maintains that the Neurologically Impaired (N.I.) class which she taught in River Edge during the 1981-82 school year was, in fact, one of the classes comprising Region V. Support for this contention by petitioner is grounded upon the annual plans of Region V for the following years:

1. FY 83 (P-194) dated December 1, 1981

2. FY 84 (P-195) dated December 2, 1982

3. FY 84-87 (P-196) dated December 6, 1983

(Petitioner's Exceptions, at p. 9)

Petitioner also points out that the lists of classes identified by Region V (P-197 and 197a) clearly establish that the N.I. class which she taught in River Edge during the 1981-82 school year was included therein.

For all the foregoing reasons presented in her exceptions, petitioner urges the Commissioner to reverse the initial decision and remand the instant matter to the Office of Administrative Law

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directing that the Boards come forward with their cases in order that a final disposition can be rendered on all the issues herein controverted.

The Commissioner has reviewed the replies to petitioner's exceptions submitted by the Respondent Boards of Bergenfield, New Milford, River Dell Regional and Tenafly.

It is noted that the replies filed by these parties form the basis for urging the Commissioner to reject the arguments advanced by petitioner in her exceptions and to affirm those findings and conclusions set forth in the initial decision on the following grounds:

1. The ALJ's characterization of petitioner's testimony should not be disturbed upon appellate review inasmuch as the Commissioner had no opportunity to observe the demeanor of petitioner during direct examination and cross-examination at the time of the hearing conducted in this matter. Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976); Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 28 (1981); Self v. Board of Review, 91 N.J. 453, 459 (1982); In re Bridgewater Twp., 95 N.J. 235, 245 (1984) (River Dell Regional Board's, Reply Exceptions, at p. 1)

2. The attorney-client privilege invoked by the Boards and sustained by the ALJ with regard to the admissibility of certain portions of selected minutes of the SAC (P-241, 242, 250, 254) in accordance with Rule 26 of the New Jersey Rules of Evidence does not constitute reversible error on the following grounds.

a. The client in question is all the boards of education whose superintendents make up the Council, not an anomalous region or group which petitioner contends exists;

b. Since the client is all the boards of education who make up this Council, the privilege was not waived since it was not in the presence of an outside third party; and

c. The client in question did not grant a waiver of the privilege to the coordinator at the time she released the documents to petitioner's attorney.

d. Pursuant to Rule 37 of the New Jersey Rules of Evidence (N.J.S.A. 2A:84A-29), there was no waiver by the client permitting the controverted portions of the SAC minutes (P-241, 242, 250, 254) to be introduced as evidence by petitioner.

e. The presence of the Region V Director at the meetings in question does not constitute a "third-party" in attendance inasmuch as she officially recorded the minutes of the SAC meetings. The Director is therefore a scrivener according to case law and is considered to be a "client." State v. Loponis, 85 N.J.L. 357 (E. & A. 1913); State v. Krich, 123 N.J.L. 519 (Sup. Ct. 1939) (New Milford Board's Reply Exceptions, at pp. 2-3)

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As part of their reply to petitioner's exceptions the Bergenfield and Dumont Boards claims that:

> ***The remainder of petitioner's exceptions concerns issues that have been discussed earlier in the context of petitioner's approach to this case. Petitioner's approach in the hearing and in the exceptions has been simply to refer to documents which mention "Region V". Page 8 and 9 of the exceptions make reference to a number of documents in which Region V and particular N.I. classes are mentioned. Petitioner fails to provide any additional evidence aside from these references. Thus, petitioner failed to discuss any evidence or make reference to any evidence which provides support for its allegations that Jeanne Prior was employed by Region V and not by individual boards of education.
>
> It is submitted that petitioner's approach to this case has been deficient from the very start. Petitioner never provided any hard evidence about regional education. Petitioner's testimony was properly referred to as conclusory by the Administrative Law Judge who had the opportunity to observe the demeanor of the witness. Petitioner's statements that she was employed by Region V [were] never butressed (sic) by any evidence. Similarly, petitioner's exceptions failed to provide any real explanation of how a regional system of education functioned. As noted earlier, simple references to Region V do not make petitioner's case.
>
> It is respectfully submitted that the Administrative Law Judge's decision here is supported by the overwhelming evidence. Petitioner presented [her] case and rested. A review of the documents [does] not provide the evidence that petitioner needs to demonstrate that she was employed by a region. Petitioner's attempts to label her employer as a region were properly dismissed by the Administrative Law Judge as conclusory. Since her attempts were repeated over and over through days of testimony, the Administrative Law Judge had the opportunity to closely examine petitioner's demeanor and to analyze credibility herein. The Administrative Law Judge's observations are entitled to great weight. Not only was petitioner conclusory in her testimony, but in fact, petitioner provided no real evidence on the subject. Petitioner's decision to ignore her contracts and ignore her employment status [does] not result in the meeting of her burden of proof. It is

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respectfully urged that the Administrative Law Judge's Initial Decision herein be affirmed in its entirety and that the petition be dismissed.
(Bergenfield and Dumont Boards' Reply Exceptions, at pp. 3-4)

The Commissioner has reviewed the respective positions taken by the parties to the findings and conclusions in the initial decision. In this regard, the Commissioner finds and determines petitioner's exceptions to the initial decision to be unpersuasive and without merit.

Initially, the Commissioner finds and determines from a review of the transcripts of petitioner's testimony (Tr. I, II and III) that he will not substitute his judgment for that of the ALJ with regard to the characterization of petitioner's testimony as being "less than candid and conclusory." Parker, supra

Similarly, and for the reasons advanced in the reply of the New Milford Board, the Commissioner finds and determines that the ALJ properly limited the admission into evidence of P-241, 242, 250, 254 on the grounds of attorney-client privilege.

In the Commissioner's judgment, the thrust of petitioner's claims herein focuses upon her contention that she enjoys a tenure status with Region V by virtue of the fact that this Region, currently comprised of those Respondent Boards named herein, constitutes a de facto jointure commission which is subject to the provisions of N.J.S.A. 18A:46-25 et seq. Petitioner further relies on prior decisions of the Commissioner in support of her tenure claim that Region V is a de facto jointure commission. Bisson, supra; Chinnis, supra; Daily et al., supra; Shelko, supra; Spiewak, supra (Petitioner's Exceptions, at p. 7)

In order to prevail in her tenure claim petitioner has the burden to prove Region V was organized and operated by Respondent Boards as a de facto jointure commission in accordance with the applicable provisions of N.J.S.A. 18A:46-25 et seq.

The record of this matter, however, fails to substantiate petitioner's claims that Region V constituted anything more than a voluntary association by Respondent Boards, who agreed to work cooperatively to ensure that a comprehensive span of special education programs is available to meet the needs of handicapped pupils in a cost-effective manner without duplication of effort. This voluntary association by Respondent Boards enjoys no special legal status and does not comply with the functions of a jointure commission as defined in N.J.S.A. 18A:46-25 et seq.

The record amply documents the ALJ's finding and determination that petitioner has failed to come forth with a "scintilla" of proof that Region V is a jointure commission. For example:

1. No application was made or submitted by Respondent

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Boards to the Commissioner for approval of a jointure commission. (N.J.S.A. 18A:46-25 et seq.)

2. The Region V Council for Special Education is comprised of a coordinator and a limited support staff who have always been employed by one of the Respondent Boards.

3. The professional staff and support staff responsible for the operation and maintenance of the special education programs in Region V are directly employed by the respective Board of Education of the district in which the special education program is located.

4. The examination, classification and program development of pupils within each school district are the responsibility of the child study team personnel employed by each of the respective Boards.

5. All evaluation of the special education staff of each school district is the sole responsibility of that district.

6. Each of the Respondent Boards is responsible for the funds to be raised and expended to support special education programs for the pupils of their respective school districts.

7. The River Edge Board of Education employed petitioner for the 1981-82, 1982-83, 1983-84 school years to teach special education programs approved by the Board to be conducted in the River Edge School District. The Board negotiated petitioner's initial salary placement on its regular salary guide. It also accorded petitioner all the fringe benefits and emoluments provided to all other teachers who were employees of the River Edge School District.

8. The River Edge Board was solely responsible for terminating its pre-school program for the handicapped at the conclusion of the 1983-84 school year.

9. Petitioner had not acquired a tenure status during her 3 years of employment with the River Edge Board.

10. The Bergenfield Board of Education thereafter assumed the responsibility of providing its own pre-school program for handicapped pupils from within and without the Bergenfield School District.

11. Petitioner was employed by the Bergenfield Board of Education to teach its pre-school handicapped class.

12. At the conclusion of the 1984-85 school year the Bergenfield Board terminated petitioner's employment in its pre-school handicapped program.

It is clear from the record that Region V did not constitute a de facto jointure commission pursuant to the provisions

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of N.J.S.A. 18A:46-25 et seq. and, further, that petitioner therefore was not an employee of Region V but rather she enjoyed 3 years of employment by the River Edge Board of Education from 1981-82 through 1983-84 school years and was thereafter employed by the Bergenfield Board of Education for a period of 1 year during 1984-85.

Consequently, it is observed that petitioner had not served the requisite statutorily prescribed period of time in either the River Edge School District or the Bergenfield School District in order to achieve a tenure status pursuant to N.J.S.A. 18A:28-5.

Moreover, petitioner's reliance upon Bisson, supra, Shelko, supra, and Daily et al., supra, is misplaced for the following reasons.

1. In Bisson, a de facto jointure was determined to be in effect by virtue of the fact that the Alpha, Lopatcong and Pohatcong Boards had agreed to enter an informal arrangement to provide their respective pupils with special services in accordance with N.J.S.A. 18A:46-1 and thereby took the first step in establishing a special services team by employing a school psychologist to service the pupils in all three districts. Additionally, Bisson who had applied for the position as school psychologist was interviewed for employment by the administrative principals of all three school districts before he was hired by the Pohatcong Board.

2. In Shelko, the Court found that the same special education program operated on a county-wide basis by the Ewing Township Board of Education which was subsequently taken over by the Mercer County Special Services School District protected Shelko's tenure rights since she had been employed by both school districts operating the same special education program on a county-wide basis. Thus, it was determined that the provisions of N.J.S.A. 18A:28-16 applied to Shelko because the Mercer County Special Services School District's takeover of the special education program came within the contemplated meaning of N.J.S.A. 18A:28-16.

3. In Daily et al., the Commissioner found that petitioners acquired tenure status with the Oldmans Board, that no jointure commission existed de facto or de jure, that sending-receiving agreements were contractual in nature for specific educational services supplied by ACEP (Auburn Cooperative Education Program). It was concluded that petitioners' tenure status was limited to Oldmans School District and no other and the Board was directed to determine petitioners' seniority rights and place them in any position to which he or she may have entitlement, with remuneration of any back pay improperly denied to them.

More specifically, in Daily et al. the Commissioner held that

> ***It must be emphasized that a jointure exists only when the mandates of N.J.S.A. 18A:46-24 and 25 have been followed.***
>
> (Slip Opinion, at p. 24)

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The Commissioner finds nothing presented by petitioner in the instant matter which supports her contention that the ALJ erred or was in any way incorrect in her analysis, findings or conclusions with respect to petitioner's claim that Region V was operated and maintained by Respondent Boards as a de facto jointure commission.

In view of the above, the Commissioner finds and determines that it is unnecessary to reach a determination with regard to whether or not petitioner's first year of employment (1981-82) in River Edge was that of a substitute teacher.

This is so because petitioner's total teaching service in the employ of the River Edge Board is 3 years and therefore does not satisfy the precise conditions for tenure accrual in that district pursuant to N.J.S.A. 18A:28-5. Moreover, since the provisions of N.J.S.A. 18A:28-16 are inapplicable to petitioner's employment service rendered in the River Edge and Bergenfield School Districts, she may not have these periods of employment which amount to 4 years attach to tenure accrual in the Bergenfield School District.

Accordingly, the Commissioner affirms the initial decision as modified and supplemented above.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

August 11, 1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CROSS-MOTIONS FOR
SUMMARY DECISION
OAL DKT. NO. EDU 1204-86
AGENCY DKT. NO. 38-2/86

HOBOKEN TEACHERS' ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,
Respondent.

Bruce D. Leder, Esq., for petitioner
(Schneider, Cohen & Solomon, attorneys)

James P. Granello, Esq., for respondent
(Murray and Granello, attorneys)

Record Closed: June 5, 1986 Decided: July 3, 1986

BEFORE **SYBIL R. MOSES**, ALJ:

I
Procedural History

This controversy arises as a result of a petition for declaratory judgment filed by the Hoboken Teachers' Association (HTA) on February 4, 1986. The petition asks the Commissioner of Education to declare the recently adopted absenteeism policy of the

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Board of Education of the City of Hoboken (Board) to be in violation of N.J.S.A. 18A:30-1 et seq. and of certain decisions of the Commissioner of Education. The Board filed its answer on February 18, 1986, denying the material allegations of the petition and setting forth procedural and substantive affirmative defenses. The matter was forwarded to the Office of Administrative Law (OAL) on February 25, 1986 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on April 10, 1986. Counsel agreed that the legal issue raised by petitioner was whether the Board's policy, "Procedure for Handling Staff Absences" (Policy), violates N.J.S.A. 18A:30-2 and N.J.S.A. 18A:30-3. The Board raised the following legal issues:

1. Whether the Policy, is facially valid because it exercises appropriate managerial discretion under the education laws of New Jersey and is thus not arbitrary, capricious or unreasonable.

2. Whether this petition should be dismissed for failure to file within 90 days of adoption of the Policy, in violation of N.J.A.C. 6:24-1.2.

3. Whether petitioner, Hoboken Teachers' Association, has standing to pursue this matter.

Counsel agreed that the case could be decided as a matter of law and that evidentiary hearings were not necessary.

A motion to dismiss the petition was filed by the Board on May 19, 1986, based on assertions that the petition had not been filed within 90 days of the action complained of and that the HTA did not have standing to pursue the case. On May 29, 1986, the HTA filed a motion for summary decision on the merits and responded to the motion to dismiss. The Board filed a cross-motion for summary decision and responded to the HTA's arguments on June 4, 1986. The Board filed an additional response, in the form of a PERC case, on June 5, 1986. The record closed on that day.

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II

Uncontroverted Facts

Both attorneys stipulated that the Board implemented the Policy on September 4, 1985. Counsel also agreed that no motion has ever been filed for injunctive relief.

The Policy was adopted after the Hoboken School District was monitored by the New Jersey State Department of Education and found to have an annual occasional absenteeism rate among its teaching and administrative staff in excess of five percent per year. The Board was directed to prepare and enact a "Level II Remedial Plan" to reduce the level of absenteeism in the district. After the Hoboken School District received the Level II review, a committee was formed by the superintendent, composed of teachers (including Mr. Gonzales, president of the HTA), administrators and parents. The purpose of the committee was to study the absenteeism problem. Prior to adopting a policy, the Board received a proposed absence reduction plan from the committee. That proposed plan was reviewed by the District's former superintendent, Dr. Maier, and the county superintendent, who both found the committee's proposal inadequate.

The Policy in issue was prepared by the central Board administration and was formally adopted by the Board on July 16, 1985. It was reviewed and approved by the Hudson County Superintendent of Schools. On February 4, 1986, five months after the Policy was implemented and seven months after its adoption, the HTA filed its petition for declaratory judgment.

The petitioner is a private organization independent of the Board. It is neither employed by the Board nor, as an entity, subject to the challenged Policy. The petition does not name as a co-petitioner any individual member of the HTA who claims to have been harmed by the challenged Policy.

Hoboken's Policy includes a series of events triggered by the number of days a teacher is absent. At Step I, if a teacher is absent for four days, a conference is held with the teacher's principal or immediate supervisor. The conference includes a "signed acknowledgment," but the Policy does not say if this is an acknowledgment of the conference or of the number of days the teacher was absent.

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At Step II, once a teacher is absent for seven days, a letter regarding the number of absences is sent to the teacher and presumably put into his or her personnel file. Any sick days taken beyond the seventh day require a doctor's certificate. Absences taken for funeral and injury leaves are not counted toward the sick leave absence total. Step II is a sick leave verification procedure, as no "disciplinary action" is taken when an employee has a legitimate reason for use of sick leave time. However, the procedure statement indicates that the letter regarding the number of absences is sent to the teacher, whether or not the absences are legitimate.

Once a teacher is absent for nine days, Step III requires a notification to be sent to the Superintendent of Schools. This notification letter includes a review of the absentee's current and past absence record as well as a recommendation for future action. It is sent whether or not the teacher has legitimate reasons for the use of sick leave time.

Step IV provides that a letter may be sent to the staff member by the Superintendent based upon the information obtained in the notification given at Step III. Further notice is given to the teacher that an additional three absences for illness will result in a conference with the Superintendent. According to the Policy, Step IV only occurs once the number of absences and the underlying reasons for the absences have been considered by the Superintendent.

In Step V, the staff member is called for a conference and may be subject to a physical evaluation by a Board-designated physician. Notice is provided that subsequent absences will result in an appearance before a committee of the Board.

Step VI is the final step in the Board's Policy. A staff member who has gone through Steps I and II and whose record indicates similar patterns of absences in prior years must appear before a committee of the Board. The staff member is then advised of the course of action to be taken by the Board relative to the physical inability of the staff member to perform his or her duties.

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Although not a party to this action, teacher George Gonzales, president of the HTA, was required to attend a Step I meeting. Gonzales states in his affidavit that meetings have occurred for various teachers at Steps I, II, III and IV of the Policy. The affidavit establishes that the Board is implementing its Policy in a concrete fashion.

The Policy itself is attached to this Initial Decision and designated Appendix A.

III

Arguments of Counsel

The Board argues that the five-month delay from the implementation date and seven-month delay from the date the Board formally acted to adopt the Policy (July 16, 1985) to the date of the filing of the petition violates the 90-day rule set forth in N.J.A.C. 6:24-1.2, and therefore the petition should be dismissed. The Board also urges dismissal on the grounds that the HTA does not have standing to bring this declaratory judgment action on behalf of its members, relying heavily on Winston v. Bd. of Ed. of South Plainfield, 64 N.J. 582 (1974). The Board especially urges that the HTA has no standing here because there is no individual HTA member named as a co-petitioner claiming a specific harm.

The HTA urges that its petition for declaratory judgment be granted because the Board's Policy is an arbitrary and unreasonable infringement of teachers' statutory sick leave benefits. The HTA asserts that each step of the proceeding is the equivalent of a disciplinary action against the individual teacher.

The Board responds that since its Policy considers the individual, specific circumstances of each absence before requiring the institution of disciplinary actions, the Policy is a reasonable exercise of the Board's managerial authority.

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IV

Conclusions of Law

A. Should this petition be dismissed for failure to file within 90 days of its adoption and/or implementation, in violation of N.J.A.C. 6:24-1.2?

N.J.A.C. 6:24-1.2 requires that petitions asking the Commissioner to determine controversies and disputes arising under the school laws be filed within 90 days after receipt of notice of a proposed board action. This requirement is strictly enforced by the Commissioner. See, e.g., Riely v. Board of Education of Hunterdon Central High School, 173 N.J. Super. 109, 112-113 (App. Div. 1980), where a teacher who delayed appealing the nonrenewal of her contract for over 90 days lost her cause of action. Id., at 113. The reason for Riely's delay was that she first presented a grievance through binding arbitration and did not file an appeal with the Commissioner. Id. at 111. The use of the arbitration mechanism did not excuse the failure to file a timely petition with the Commissioner. Id. at 114. See also, Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 326-327, n. 4 (1979).

Despite the strict application of the 90-day rule, N.J.A.C. 6:24-1.19 provides for the relaxation of such procedural rules ". . . where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." Where staff members contest an administrative policy adopted by a school board, the 90-day rule may properly be relaxed by the Commissioner. Cumberland Regional Edu. Ass'n v. Board of Ed. of Cumberland Regional High School Dist., 1980 S.L.D. 1, 4, rev'd on other grounds, State Bd. of Ed. 1980 S.L.D. 11-12, rev'd and remanded (N.J. App. Div., Jan. 8, 1982, A-1422-80T2)(unreported), at 8, reprinted at 1982 S.L.D. 1464. In Cumberland, the teachers' association contested the establishment of a school dress code for staff members. 1980 S.L.D. at 1-2. The board argued that the association's action was time barred, as the dress code had been implemented more than 90 days prior to the action (citing N.J.A.C. 6:24-1.2). The ALJ rejected this argument, ruling that a subsequent administrative interpretation of the dress code would be a continuing violation of staff members' rights. This continuing violation would therefore toll the 90-day limitation period and permit the present action contesting

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the dress code. The administrative law judge also ruled that the board would suffer no prejudice due to the association's failure to bring its action within 90 days after the implementation of the dress code. Id. at 4, 5.

The present action is similar to that brought by the teachers' association in Cumberland. In the present, case the HTA filed its petition contesting the Board's Policy five months after its implementation. Just as in Cumberland, any subsequent administrative interpretation of the staff absence policy would render this Board's action a continuing violation. 1980 S.L.D. at 4. Also as in Cumberland, the Hoboken Board is unable to assert that it has suffered any prejudice due to the lapse of five months in bringing the present action. Therefore, the 90-day limitation of N.J.A.C. 6:24-1.2 will not bar consideration of the HTA's petition.

The 90-day limitation period in N.J.A.C. 6:24-1.2 has also been held not to apply to an action based upon a violation of a teacher's stautory entitlement. Cf., North Plainfield Educ. Ass'n. v. Bd. of Ed. of North Plainfield, 96 N.J. 587, 594 (1984). In North Plainfield several teachers sought credit on a salary scale for an annual increment denied to them while on sabbatical. Id. at 590. The Commissioner and the State Board of Education denied the teachers' claim due to their failure to file the action within 90 days. Ibid. The Appellate Division reversed, ruling that the annual increment was a statutory right which must be granted to teachers without regard to their performance. Ibid. Since the increment was a statutory right, the Appellate Division held that the 90-day rule did not preclude the teachers' action. Ibid. In reversing the Appellate Division, the Supreme Court held that annual increments are not a statutory entitlement because such increments may be denied for inefficiency or good cause. Id. at 594, citing N.J.S.A. 18A:29-14. In dictum, the Supreme Court indicated that if an annual increment was a statutory right, then the 90-day limitation period would be inapplicable. Id. at 594. In accord, Fallis v. Board of Ed. of Plainfield, OAL DKT NO. EDU 5934-84 (Jan. 16, 1985) adopted Comm. of Ed. (March 4, 1985) at 19, aff'd, State Bd. of Ed. (Sept. 4, 1985). Fallis held that the 90-day limitation period does not apply to an action based upon a violation of a teacher's seniority rights. Seniority rights, unlike yearly salary increments, are a statutory entitlement not subject to a yearly performance evaluation. But see, Gordon v.

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Passaic Twp. Bd. of Ed., State Bd. of Ed. (Mar. 6, 1985) aff'd, N.J. App. Div., May 27, 1986, A-3294-84T7 (unreported) at 8, which held that seniority rights are not a statutory entitlement to which N.J.A.C. 6:24-1.2 does not apply.

In the present case, the HTA alleges that the Board's Policy violates teachers' statutory sick leave rights. N.J.S.A. 18A:30-2 provides that all persons holding any employment in a school district are entitled to ten sick leave days, providing only that such persons are steadily employed. No restrictions are placed upon this benefit, as are placed upon other benefits, such as yearly salary increments. See, N.J.S.A. 18A:29-14. Sick leave time is a statutory entitlement similar to credit for military time, and therefore the 90-day limitation period would not apply. See, Lavin v. Hackensack Board of Ed., 90 N.J. 145, 150-151 (1982). The HTA's claim in the present case is therefore not barred by the 90-day limitation period contained in N.J.A.C. 6:24-1.2.

Accordingly, based on the foregoing analysis, I conclude that the fact that the petition for declaratory judgment was not filed by the HTA within 90 days of the implementation of the Policy will not automatically trigger its dismissal. This is because the Commissioner has not strictly applied the 90-day limitation period in cases where the validity of an administrative policy of a board is being questioned. See, Cumberland, 1980 S.L.D. at 4. Relaxation of the 90-day rule is especially pertinent when future administrative interpretation of such a policy could be considered a "continuing violation" which tolls the 90-day period. Id. at 5. Further, the 90-day period does not apply to an action based upon a violation of a teacher's statutory entitlement, such as sick leave benefits inuring to teachers as a result of N.J.S.A. 18A:30-2. Therefore, the Board's motion to dismiss the petition based on its assertion that the 90-day provision of N.J.A.C. 6:24-1.2 has been violated will be denied.

B. Does petitioner, Hoboken Teachers' Association, have standing to pursue this matter?

The present action is a petition for a declaratory ruling to determine whether the Board's Policy violates N.J.S.A. 18A:30-2 and N.J.S.A. 18A:30-3. N.J.A.C. 6:24- 2.1

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provides that "any interested person" may bring an action for a declaratory judgment before the Commissioner. An "interested person" is defined as ". . . person(s) having a direct and substantial interest in the subject matter of a controversy before the Commissioner and whose rights, status or legal relations will be affected by a determination thereof" N.J.A.C. 6:24-1.1. New Jersey courts utilize a similar standard in determining "standing" under the New Jersey Constitution. See, Crescent Pk. Tenants Assoc. v. Realty Eq. Corp. of N.Y., 58 N.J. 98 (1971), where the court stated ". . . we have appropriately confined litigation to those situations where the litigant's concern with the subject matter evidenced a sufficient stake and real adverseness." Id. at 107. The question in the present case is thus whether the HTA has a "direct and substantial" interest in an attendance policy which may adversely affect its members.

It has been held that a teachers' association has standing to process a claim on behalf of a teacher and to appeal this claim through the administrative process. Winston v. Board of Ed. of South Plainfield, 125 N.J. Super. 131, 142 (App. Div. 1973) aff'd, 64 N.J. 582, 586 (1974). The Appellate Division stated that finding standing was justified because "the final disposition of such claims might have an impact which transcends the personal interest of the individual claimant and have repercussions affecting other employees." 125 N.J. Super. at 142. The concern of an exclusive representative of employees with respect to matters touching their employment is a tangible interest sufficient to enable the entity to participate as a party in administrative hearings. Ibid. The Supreme Court somewhat limited the holding of Winston, saying it applied only to cases in which the association presented claims on behalf of a specific member of the association, 64 N.J. at 586. The Supreme Court affirmed the finding of standing "in view of the special circumstances presented . . ." in the case. Ibid. These "special circumstances" appeared to be that the same attorney represented the named plaintiff as well as the association and confined his arguments for the association to those arguments available to the named petitioner. Ibid. Thus, there was no basis for the Attorney General's concern that the association might present claims beyond those available to the plaintiff. Ibid.

The Board's attorney interprets Winston as permitting a teachers' association to have standing only where: (1) There is an individual co-petitioner claiming a specific

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harm and (2) the association limits its arguments to those available to the individual co-petitioner. Since there is no individual co-petitioner here, the Board's attorney relies on Winston as requiring a ruling dismissing the HTA's petition.

I disagree with that interpretation. The Supreme Court's opinion made it clear that the holding of Winston was limited to those cases in which a teachers' association presents a claim on behalf of a specific member. Ibid. I conclude that the Supreme Court, when it limited its approval of the Appellate Division decision in light of the "special circumstances" in the case, clearly did not intend to create a rule applicable to all teachers' association standing issues. Ibid. The standing decision in Winston concerning a co-petitioner and coterminous issues is not necessarily applicable to a situation where a teachers' association brings a claim on behalf of its entire membership.

To the contrary, a teachers' association does have standing to represent the interests of its membership as a whole in an action before the Commissioner of Education. New Jersey Education Association v. Essex County Educational Services Commission, 1981 S.L.D. 953, 961. In New Jersey Education Association, the association contested the legality of a contract with private vendors for the provision of instructional services in public schools. Id. at 954. The respondent argued that the association did not have standing to challenge this agreement on behalf of its membership. Id. at 959. The administrative law judge (ALJ) rejected this argument, reasoning that the association had organizational rights and relationships which would be affected by the outcome of the proceedings. Id. at 960, citing Winston, 64 N.J. at 582. He stated:

> It is also significant that the petitioners, motivated as they may be by their special associational interests and the rights of their members, also seek to vindicate the public interest. That they and their members may derive special benefits from the outcome of these proceedings does not detract from the fact that they raise serious issues of public administration and statutory interpretation which should always come as swiftly as possible to the attention of those administrative officials charged with regulating or overseeing an area of governmental concern. . . . Restrictive principles of standing developed for good reason to apply in lawsuits between private parties should be applied with greater flexibility in the field of administrative law where, unavoidably, those who render final adjudications are also policy makers in their roles as overseers and regulators. Cites omitted, Id. at 960-961.

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Based on the substantial interests the association had on behalf of its membership as well as the public interest, the ALJ concluded that the association had standing. Id. at 961. The ALJ did not interpret Winston as requiring a member of the association to be a co-petitioner in order for the association to have standing. Id. at 960. See also, Wyckoff Education Association v. Wyckoff Bd. of Ed., 1981 S.L.D. 1128, 1133, adopted, Comm. of Ed., 1981 S.L.D. 1142, 1144, aff'd, State Bd. of Ed., 1982 S.L.D. 1598-1599, where it was held that a teachers' association had standing to represent the interests of its membership to contest a board's practice of using "clerical aides" to perform duties normally performed by certified school nurses. This case relied on dicta in Winston for the proposition that the association's status as employee representative gave it standing to protect the interests of its membership. Id. at 1132. See also, Newark Teachers Union and Smith v. Bd. of Ed. of Newark, OAL DKT. EDU 9836-83 (Apr. 26, 1984) p. 3-4, adopted Comm. of Ed. (June 13, 1984) (ALJ rejected argument that a teachers' association does not have standing to represent the interests of its membership in an action brought by an individual teacher). See also, Bergenfield Education Association v. Bd. of Ed. of Bergenfield, OAL DKT EDU 3147-80 (Oct. 29, 1980) rejected, Comm. of Ed. (Dec. 15, 1980). (The Commissioner found that the association had standing to challenge the Board's driver education policies.)

I find that the Commissioner has not interpreted Winston to require that a teacher be a co-petitoner in order for a teachers' association to have standing in a particular action. See, Wyckoff, 1981 S.L.D. at 1133. The Hoboken Board's argument that the Commissioner's post-Winston decisions ignored the Supreme Court's language is refuted by the discussion of Winston in all the aforementioned cases. See, e.g., Essex County, 1981 S.L.D. at 960. Because the Supreme Court limited the Winston holding to the "particular circumstances" of that case, I cannot conclude that Winston creates a general rule applicable to all teacher's association standing issues, Winston, 64 N.J. at 586. If Winston is not controlling, the Commissioner's decisions in Wyckoff and Essex County are not in conflict with its ruling.

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As the Gonzales affidavit demonstrates, the Board has taken steps to apply its Policy to members of the HTA, which the HTA asserts is contrary to its members' sick leave statutory entitlement. As in Wyckoff and Essex County, the Board has engaged in actual conduct which directly affects the HTA membership. Such a situation presents a "sufficient stake and real adverseness" on behalf of the HTA to permit it to represent the interests of its membership in the present action. See, Crescent Park Tenants Association, 58 N.J. at 107.

Based on this analysis, I have determined to deny the Board's motion to dismiss based on its assertion that the HTA does not have the standing required under N.J.A.C. 6:24-1.1 to pursue this matter. Where the policy of a board directly affects the membership of a teachers' association, the association has standing to litigate a claim on behalf of the membership. The Board's enforcement of its Policy against members of the HTA, specifically the invoking of Step I against member Gonzales, gives the HTA that "direct and substantial interest" necessary to contest the Policy on behalf of its membership. See, Wyckoff, 1981 S.L.D. at 1133.

C. Does the Board's Policy violate N.J.S.A. 18A:30-2 and N.J.S.A. 18A:30-3?

The relevent statutes state:

> N.J.S.A. 18A:30-2. Sick leave allowable
>
> All persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year. [emphasis added]
>
> N.J.S.A. 18A:30-3. Accumulated sick leave
>
> If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years.

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Sick leave is defined as "the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household." N.J.S.A. 18A:30-1. It is not disputed that sick leave time is a statutory entitlement provided to Board employees, as clearly seen by the use of the word "shall" in N.J.S.A. 18A:30-2. The only limitation on this sick leave entitlement is that it be limited to valid illnesses, N.J.S.A. 18A:30-1. To ensure that there is no abuse of this entitlement, the school board may require a physician's certificate in order for a teacher to obtain sick leave, N.J.S.A. 18A:30-4.

The Legislature, through the enactment of the "Public School Education Act of 1975" sought to establish a "thorough and efficient" system of education to fulfill New Jersey's Constitutional mandate. N.J.S.A. 18A:7A-2a(2). The State Board of Education was required to establish goals and standards applicable to all State schools in order to achieve a "thorough and efficient" educational system. N.J.S.A. 18A:7A-6. One part of these goals was to assure the presence of a properly certified and competent teaching staff. N.J.A.C. 6:8-6.2(b)6(i). The regular presence of these teachers in their classrooms was also considered an important part of achieving an efficient educational program. N.J.A.C. 6:8-6.2(b)6(ii). Therefore, it was determined that the annual rate of absenteeism among a district's teaching staff was not to exceed five percent. Ibid. District boards were directed to adopt an improvement process to address staff absenteeism if the annual rate of occasional absences exceeded 3.5 percent. N.J.A.C. 6:8-6.2(b)6(iii). These provisions indicate a policy of balancing the rights of teachers to sick leave time with the needs of students to have their teachers regularly present in the classroom in order to achieve a "thorough and efficient" educational system. N.J.A.C. 6:8-6.2(b)6. It was pursuant to these regulations that the Board adopted the Policy.

Arbitrary decisions by boards of education concerning absences have been addressed by the State Board. A local board's unwritten personnel practice of denying a teacher a salary increment when the teacher was absent more than 90 days during a school year, without regard for the reasons for the absences, violates a teacher's sick leave rights

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under N.J.S.A. 18A:30-3. Kuehn v. Bd. of Ed. of Teaneck, 1981 S.L.D. 1290, rejected, 1981 S.L.D. 1299, reversed, State Bd. of Ed., at p. 3-4 (Feb. 1, 1983). The State Board ruled that the "sheer maximum" of a number of days absent, without consideration of the underlying circumstances of the absences, is not good cause for denying an increment under N.J.S.A. 18A:29-14. The ALJ had declined to rule on the validity of the policy in Kuehn due to procedural violations committed by the school board. 1981 S.L.D. at 1295-1296. The Commissioner rejected this ruling and dismissed the petition without considering the substance of the teacher's claims. Id. at 1300. In reversing the Commissioner, the State Board criticized the local board for its unwritten personnel practice in that: ". . . board personnel policies should be carefully considered, prepared in written form, and publicly proposed and adopted by boards of education." State Bd., at 3. The State Board further criticized the local district's failure to consider the causes behind the teacher's absences. Ibid. A teacher who is seriously ill is "statutorily entitled" to use her annual and accumulated sick leave. Ibid. Any personnel policy which fails to consider the underlying circumstances for absences before disciplining a teacher is arbitrary and without any demonstrated rational basis. Id. at 4.

The Hoboken Policy was a written policy adopted after a public hearing process, unlike the policy in Teaneck. The Policy itself, as well as the affidavit of Walter Fine, indicates that no disciplinary action is taken if an employee has a legitimate reason for being absent. Every step in the Policy requires a conference to be scheduled to determine the factual circumstances surrounding a teacher's leave time. These fact-finding conferences further distinguish the Hoboken Board's Policy from the policy rejected as unreasonable in Kuehn. See, Kuehn, State Bd.of Ed., at 3-4.

However, a written and publicly adopted board policy, which evaluates a teacher based only upon the number of absences regardless of the reasons for the absences, is an arbitrary and unreasonable policy. Montville Township Educ. Ass'n v. Montville Board of Ed., OAL DKT EDU 8247-83 (Feb. 29, 1984) rejected, Comm. of Ed. (Apr. 16, 1984) reversed, State Bd. of Ed. (Nov. 7, 1984), reversed, N.J. App. Div., Dec. 6, 1985, A-1178-84T7 (unreported), at 4. The evaluation guidelines in Montville assigned a rating of satisfactory, needs improvement or unsatisfactory, based on the number of days a teacher

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was absent during a school year. OAL DKT. EDU 8247-83 at 3. The ALJ ruled that this process was reasonable so long as proper consideration was given to the underlying circumstances of the absences as required by Kuehn. Id. at 7. The Commissioner rejected this conclusion, holding that such evaluation notices were arbitrary exercises of the Board's authority, Id. at 10, because the rating was based solely on the number of days absent, regardless of the circumstances or cause of the absences. Ibid. The State Board reversed the Commissioner and found that the evaluations were not unreasonable due to a narrative included in the evaluation describing the underlying causes for the absences. State Board, at p. 4.

The Appellate Division reversed the State Board's determination and directed an order consistent with the Commissioner of Education's decision. N.J. App. Div., A-1178-84T7, unreported decision at 6. The court discounted the inclusion of the narrative information in the evaluation in that ". . . irrespective of the narrative information which may be included in the evaluation report, the simple fact remains that the assigned rating is a merely mathematical consequence and unaffected by the reason for the absence." Id. at 4. A policy of assigning an evaluation grade based solely upon the number of absences was held an unreasonable exercise of the Board's authority. Ibid.

Unlike the policy rejected in Montville, the Hoboken Board assigns no evaluation to a teacher as a result of the number of sick leave absences. As Step III indicates, any future action, such as an unsatisfactory evaluation, occurs only after several fact-finding conferences are held. These conferences review the employee's present, as well as past, attendance record. As Walter Fine indicates in his affidavit, no disciplinary action is taken if legitimate reasons exist for the use of sick time. Hoboken's Policy is a reasonable exercise of Board authority in that the circumstances are considered prior to disciplinary action. Cf., Montville, App. Div. unreported decision, at p. 4.

The issuance of a warning letter to a teacher who in a two-month period exceeds 3.5 percent of the prior year's absence rate in the entire school district is an arbitrary and unreasonable policy which violates the teacher's entitlement to sick leave benefits provided in N.J.S.A. 18A:30-2. Burlington Education Ass'n v. Burlington Bd. of Ed., OAL

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DKT. EDU 5114-84 (May 16, 1985), adopted, Comm. of Ed. (July 1, 1985), affirmed, State Bd. of Ed. (Nov. 13, 1985). The policy adopted in Burlington evaluated the attendance records of its employees every two months, when the local board applied the State Board's 3.5 percent district-wide staff absenteeism maximum to individual teachers. Id. at 4. If a teacher exceeded this percentage, a "warning notice" was issued that indicated the teacher needed to improve his attendance record. Id. at 8, n. 5. This "warning notice" was issued prior to a conference with the teacher and regardless of any legitimate reasons which might exist for the absences. Id. at 4. [emphasis added] The ALJ regarded the warning notice as ". . . the initiation of a disciplinary process in order to conform the affected employee's conduct to the established standard." Id. at 18. The policy was an arbitrary limitation on teachers' sick leave rights because warning notices were issued in a "mechanical fashion" to teachers who were legitimately ill as well as to those who abused their entitlement. Ibid. In adopting the ALJ's opinion, the Commissioner agreed that the Burlington board made improper use of the State Board's attendance percentage goal. Id. at 23. The Commissioner also identified the two-month review period to be too short to ascertain a pattern of abuse which would justify a warning notice. Id. at 26. The issuance of "warning notices" without consideration of the cause of the absences was an arbitrary and unreasonable policy which violated N.J.S.A. 18A:30-2.

The attorney for the HTA argues that the conference notices used by the Hoboken Board are identical to the warning notices found to be unreasonable in Burlington. He argues that the Hoboken fact-finding conferences are disciplinary steps in an arbitrary and unreasonable attendance policy.

I note that the notice sent to Mr. Gonzales, implementing Step I, merely stated "Please meet with me for a conference to discuss your attendance. Please bring this letter with you." Unlike the missive in Burlington, this was not a "warning notice" that initiated a disciplinary process. Burlington, OAL DKT. EDU 5114-84 at 18. While a doctor's certificate is required at Step II, no evaluation or warning is issued on the basis of this conference. As Walter Fine's affidavit makes clear, no disciplinary action is taken if a teacher has made legitimate use of his or her sick time. Contrary to the Burlington policy, the Hoboken Board does not mechanically discipline teachers based solely upon the

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number of absences, without considering the legitimacy of those absences. The fact-finding conferences held by the Hoboken Board are not disciplinary actions, in that no adverse evaluation occurs if legitimate reason for the absences exists. See, In the Matter of Freehold Regional High School District, 12 N.J.P.E.R. 17113, p. 277-278 (April 11, 1986). The Hoboken Policy represents a reasonable balancing of the teacher's sick leave statutory rights with the goals of establishing a thorough and efficient school system. See, Burlington, OAL DKT. EDU 5114-84 at 18.

Therefore, after reviewing the arguments of counsel and the applicable law, I conclude that the within Policy is reasonable and designated to encourage regular teacher attendance, which is an obligation of the Board, pursuant to N.J.A.C. 6:8-6.2(b)6(iii). The documents emerging from the Step I and Step II conferences are not disciplinary acts, nor are they warning notices based solely upon the number of days absent. No disciplinary steps are taken by the Board unless and until a teacher has abused his or her sick leave entitlement. Therefore, the attendance Policy of the Hoboken Board of Education must be considered a reasonable exercise of managerial authority which considers the reasons for the use of sick leave time before imposing any disciplinary action.

Accordingly, it is hereby **ORDERED** that the petition for declaratory judgment filed by the Hoboken Teachers' Association shall be, and is, hereby **DISMISSED**; and

It is further **ORDERED** that the motion of the Hoboken Board of Education to dismiss the within petition for violation of N.J.S.A. 6:24-1.2 and for lack of standing be, and is, hereby **DISMISSED.**

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

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

July 3, 1986
DATE

SYBIL R. MOSES, ALJ

JUL 8
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JUL 9 1986
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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HOBOKEN TEACHERS' ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions submitted by petitioner and the Board's reply were timely filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to that portion of the initial decision which determines that the disputed attendance policy is a reasonable exercise of the Board's managerial authority. More specifically, it objects to the ALJ's findings that the conferences held pursuant to the policy are not disciplinary actions and that the notices issued are not "warning notices" based solely on the number of days absent. As such, petitioner asserts that the ALJ has ignored the precedent established in Kuehn, supra, Montville, supra, and Burlington City Ed. Assoc., supra. The arguments it advances in support of the exceptions are the same already posited in its briefs and considered by the ALJ in reaching a determination in this matter.

Upon careful review of the record in this matter, the Commissioner is in agreement with the findings and conclusion of the ALJ. He finds the analysis of the issues with respect to the attendance policy and pertinent case law thorough as well as accurate and the conclusions reached well reasoned and consistent with the Kuehn standard. Further, he concurs fully with the ALJ's delineation of the factual circumstances in this matter which distinguish it from Montville, supra, and Burlington, supra.

Despite petitioner's vigorous arguments to the contrary, the procedures deemed arbitrary and capricious in Burlington, supra, are not present in this matter. For example, there is a substantial difference between the receipt of a request to attend a conference to discuss one's attendance after four days absence (nearly one-half the statutory allotment for sick leave) as described in the instant matter and what occurred in Burlington, namely, receipt of a "formal warning" that one's attendance is in need of improvement based on a sheer number that could be as few as 1.5 days if occurring in the first two months of the school year. Here, while a number serves as a benchmark for an action to occur no judgment has automatically been made that irrespective of legitimate reasons that may exist, the person's attendance is in violation of Board policy and improvement is needed. Nor is Hoboken using a standard which the

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State Department of Education had expressly declared districts should not apply to individual staff members as transpired in Burlington.

For these reasons and those expressed in the initial decision, the Commissioner adopts the initial decision of the Office of Administrative Law. Accordingly, the Association's petition for declaratory judgment is dismissed and the Board's motions for dismissal on procedural grounds are denied.

COMMISSIONER OF EDUCATION

August 14, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

PARTIAL INITIAL DECISION

OAL DKT. NO. EDU 706-86

AGENCY DKT. NO. 5-1/86

MATAWAN REGIONAL TEACHERS ASSOCIATION, BOROUGH OF MATAWAN, a Municipal Corporation of the State of New Jersey, IRIS ALBIN, STUART ALBIN, LORRAINE AYANIAN, AIDA BEAUDRY, THOMAS BEAUDRY, JILL BINDER, RANDY BINDER, GERTRUDE BLUMENTHAL, BONITA BOYLE, JAMES C. BOYLE, WENDY BRODSKY, IRA BRODSKY, SHERYL BROUGHTON, JAMES BROUGHTON, GERALDINE BRUNGARD, MRS. FRANCIS BURNS, FRANCIS BURNS, ALFRED J. CASAGRANDE, JOANNE CASTRO, MARIANNE CORCORAN, GEORGE D. CORCORAN, LINDA DE MAIN, EDWARD DE MAIN, VICKI L. DE VICO, LOUIS J. DE VICO, MARY ELLEN DOLINICK, KENNETH DOLINICK, GERALDINE L. DUCKWORTH, RAYMOND T. DUCKWORTH, ROSLYN EICHENBAUM, FRED EICHENBAUM, SUSAN FELDMAN, ROBERT FELDMAN, GEORGETTE FRANK, ROY FRANK, ROBERT FRANZBLAU, JOANNE GARGAN, JOHN GARGAN, JOYCE GARIPPA, LINDA GLOGOWER, WARREN

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GLOGOWER, LENA FONG HOR, PATRICIA KELLER, EDMOND P. KELLER, LINDA D. KLIEMISCH, DONNA LASLO, FRANCIS LASLO, DONNA ALVIA LOCKHART, JACKIE LOUGHRAN, JAMES LOUGHRAN, GAIL A. LUPO, CHARLES T. LUPO, PATRICIA A. LYNCH, PATRICIA MARSH, GEORGE MARSH, SHARON A. MAUND, PATRICK J. MAUND, EUGENE J. MC DONALD, PATRICIA A. MC GUINN, MARIA R. MURRAY, PETER F. MURRAY, EDELE L. NISKY, KATHLEEN A. ODELL, LAWRENCE D. ODELL, STEPHANIE PAGANO, THOMAS PAGANO, LAURA PARNESS, WILLIAM PARNESS, REGINA A. REGLER, WAYNE REGLER, ELIZABETH R. RIKE, MARSHA ROSENSTEIN, LEON ROSENSTEIN, HALICE RUBIN, JEFF RUBIN, PATRICIA SHERMAN, HAROLD SHERMAN, KATHLEEN SIEGEL, MARLA SIEMAN, JOHN SIEMAN, DENISE SILVERSTEIN, LAURENCE SILVERSTEIN, JOAN SMITH, ZULLY SMITH, BONNIE SNOW, NORMAN SNOW, HOLLY VOLK, WILLIAM VOLK, ELAINE VRABEL, individually and as representatives of a class,

Petitioners,

v.

MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

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Mark J. Blunda, Esq., for petitioners Matawan Regional Teachers Association and individual petitioners (Oxfeld, Cohen & Blunda, attorneys)

James J. Cleary, Esq., for petitioner Borough of Matawan

Vincent C. DeMaio, Esq., for respondent (DeMaio & DeMaio, attorneys)

Record Closed: June 26, 1986 Decided: July 7, 1986

BEFORE **DANIEL B. MC KEOWN**, ALJ:

INTRODUCTION

On January 10, 1986 petitioners filed a ten count Petition of Appeal before the Commissioner of Education by which they challenge a determination of the Matawan-Aberdeen Regional School District Board of Education (Board) to reorganize its educational program and organizational structure, otherwise known as Plan C, as of July 1, 1986. After the Commissioner of Education transferred the matter on January 31, 1986 to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq., including petitioners' motion for interim relief which was denied,[1] a prehearing conference was conducted March 27, 1986 at which the issues to be tried at hearing were decided and leave was granted petitioners to amend their Petition of Appeal. After petitioners filed an amended Petition of Appeal on April 7, 1986 and added three counts, the Board moved to dismiss two of the three amended counts and the parties then cross-moved for summary decision on Counts 1 and 2 with supporting briefs and exhibits. Summary decision was granted the Board as a matter of law on Counts 1 and 2, while the Board's motion to dismiss Counts 12 and 13 of the amended Petition of Appeal was denied.[2]

A plenary hearing was conducted June 2 through June 6, 1986 at the Marlboro Municipal Building, Marlboro. While 11 counts remain viable, evidence was submitted on only four counts deemed by petitioners to be in critical need of an expedited final decision

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[1]A copy of the written ruling by which petitioners' motion for interim relief was denied is attached hereto.

[2]Counts 1 and 2 alleged that because Plan C was adopted by a 5-4 vote, the adoption was contrary to the Board's by-laws which require the Board to adopt policy by a 2/3 vote and then only by such vote at two public meetings. A copy of the written ruling by which both motions were decided is attached hereto.

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for these reasons. Petitioners seek an order by which Plan C would be set aside which, in turn, would set aside the sale of the Broad Street administration building and the Broad Street School (Broad Street properties) upon the assertion that the proceedings conducted by the Board leading up to and including the 5-4 vote approving Plan C and the 5-4 vote to sell the properties were so tainted by conflicts of interest and other breaches of fiduciary duty that the affirmative votes of three Board members must be declared void.

One of these four counts, Count 11, alleges that the Board accepted a bid and entered a contract for sale of its Broad Street properties for an amount so far below their true market value so as to constitute an illegal gift of public properties and money. The closing date for the transfer of title to such properties may occur as early as July 31, 1986. Counts 12 and 13 allege that three Board members who voted for Plan C and for the sale of the Broad Street properties are tainted by conflicts of interests or inconsistent interests in violation of their fiduciary duty and, as a result, their votes in support of Plan C and for the controverted sale should be declared null and void. Count 8 alleges Plan C will result in a clear violation of an earlier Order issued by the Commissioner of Education in 1980 regarding desegregation. Thus, this expedited initial decision.

Subsequent to the conclusion of the hearing on June 6, 1986, the parties filed letter memoranda in support of their respective positions. The record closed upon receipt of the Board's memorandum on June 26, 1986. A discussion of the evidence submitted on Count 8, Count 11, and combined Counts 12 and 13 follows. Prior to this discussion, however, it is noted that the Matawan-Aberdeen Regional School District is an all-purpose regional school district organized under N.J.S.A. 18A:13-2. It consists of Matawan Borough and Aberdeen Township. The regional board of education consists of nine members. Prior to October 28, 1985, the Board's schools were organized on a grade K-5, 6-7, 8-9 and 10-12 basis. Plan C, adopted by a 5-4 vote at a special meeting conducted October 28, 1985, will result in the schools being organized on a K-6, 7-8, and 9-12 basis. An integral part of Plan C is the closing of the Board's Broad Street Elementary School to pupil use and to close the Broad Street administration building for school purposes. Both properties are to be sold, a transaction currently underway.

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I.

COUNT EIGHT

Count Eight essentially alleges that Plan C will promote and exacerbate pupil imbalance along racial lines which exists in the school district as a whole because the Board's Cliffwood School, assertedly the oldest and most substandard building in the district, will remain open. Accordingly, petitioners contend Plan C violates New Jersey laws against discrimination and an earlier Order (P-23) issued by the Commissioner on October 31, 1980. This Order, it is noted, directed the Board "* * * to continue its efforts with regard to the implementation of [its] approved Desegregation Plan [P-24] * * *".

In support of this allegation, petitioners produced Barbara Anderson, the Director of the Office of Equal Educational Opportunity for the New Jersey Department of Education. Ms. Anderson testified her responsibilities include overseeing desegregation in New Jersey public schools, identifying where pupil imbalances along racial lines occur, and to monitor plans submitted by school districts to correct such pupil imbalances. Ms. Anderson explained that a review of data submitted by the Board regarding implementation of Plan C persuades her that racial balance among pupils would improve in various schools and that the desegregation plan (P-24) which the Board had submitted and the Commissioner approved in 1980 would be furthered by Plan C.

At the conclusion of Ms. Anderson's testimony, the Board's motion to dismiss was granted for failure of petitioners to make out a prima facie case that Plan C will promote and exacerbate pupil imbalance along racial lines or that Plan C is in violation of the Order issued by the Commissioner during 1980 or, in any way, is in violation of New Jersey laws against discrimination.

II.

COUNT ELEVEN

Count Eleven alleges that the Board, despite having received a written professional appraisal in December 1984 assessing the Broad Street properties in excess of $1.5 million, accepted a bid and entered a contract for the sale of the properties in the amount of $826,000. Petitioners contend that because the properties were sold so

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far below the true market value, the sale constitutes an illegal gift and that, as such, the sale must be set aside before title passes from the Board at closing.

BACKGROUND FACTS

I **FIND** the following relevant facts are established by a preponderance of credible evidence regarding this count.

1. During October 1984, the Board engaged real estate appraiser Calvin Schwartz to appraise certain of its facilities, including both Broad Street properties which are the subject properties in dispute here.

2. On or about December 21, 1984 Schwartz submitted to the Board a report in which he appraised the market value of the Broad Street administration building at $466,000 and the market value of the Broad Street Elementary School at $1,091,700. Schwartz did not testify before me but his written appraisal (P-2) was received in evidence.

3. Schwartz's appraisals are based upon his view that the highest and best use to a potential purchaser for the Broad Street administration building would be to convert it to a multiple user office building. The highest and best use of the Broad Street Elementary School, according to Schwartz, is as a Matawan municipal building or, alternatively, multiple office use (P-2, at p. 37). The Matawan governing body is not interested in the use of this facility as a municipal building.

4. Both properties are zoned residential which permits uses for single family detatched dwellings, or a resident professional's use of 25 percent of habitable floor area of the residence as an office, or for public parks, playgrounds and recreational facilities, or for municipal buildings, and certain conditional uses none of which include multiple user office buildings.

5. Schwartz, recognizing the limited market of purchasers of school buildings, suggested that the Board offer each facility separately at 75 percent of their respective appraised values (P-2, at p. 113).

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Accordingly, Schwartz recommended that the Board initially offer the Broad Street Elementary School for sale at $818,800 and then the Broad Street administration building at $349,500.

6. Schwartz recommended that because potential purchasers of schools ranged from local businessmen to out of state purchasers the Board should develop a merchandising program by sending mailings to area real estate brokers and builders, as well as advertising in area and regional New Jersey newspapers, as well as the New York Times and the Wall Street Journal.

7. A. Fred Maffeo, petitioners' real estate expert witness, reviewed Schwartz's appraisals and agreed with Schwartz's market values assigned both properties based on the highest and best use for mixed-office uses. Maffeo did not prepare a formal appraisal independent of Schwartz's.

8. The "highest and best use" is a real estate appraisal principle which is defined as the most profitable likely use to which a property can be put (P-2, at p. 36). Nonetheless, if the intended use within the highest and best use principle is dependent on an uncertain act of another person, the intention cannot be considered within the definition of highest and best use. Id.

9. The declared highest and best use of the Broad Street properties by Schwartz, mixed-office use, is not presently a lawful use within the Matawan zoning ordinance.

10. Maffeo agrees with Schwartz's written assessment that given the location of the facilities the present zoning would be changed or that a variance would have to be granted.

11. Neither Schwartz nor Maffeo assigned market values to the Broad Street properties on existing zoning ordinances. Schwartz did, however, calculate the combined value of the land of the properties at $331,000 (P-2, at p. 46).

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12. On December 19, 1985 the Board, as part of its comprehensive Plan C reorganization, determined to offer the Broad Street properties for sale as a single package for a minimum bid of $800,000.

13. The $800,000 minimum price was recommended to the full Board by Board member Brown. Brown was a member of the Board's ad hoc committee to manage the implementation of Plan C. The committee was also to recommend to the full Board a minimum bid price for its Broad Street properties. Brown recommended the price of $800,000 after having studied the Schwartz appraisal, an earlier study called the Smith-Kehoe Report (R-1), and his own notes of Board meetings where the sale of the Broad Street properties was discussed. Subsequent to the receipt of Schwartz's appraisal, neither Brown nor any Board member communicated with him.

14. Brown knew his recommended price was less than that recommended by Schwartz but, in Brown's view, Schwartz's price was not realistic in light of public comments made by two Matawan Borough council members that there would be neither a zoning change nor a variance granted regarding the properties. Neither Brown nor any Board member took any measures to gauge the probability of a variance. Brown did rely on Schwartz's appraisal that the properties represent 40 buildable lots with an appraised market value of $20,000 for each lot. No value was assigned to the existing facilities because as building lots, such facilities have to be removed before homes are built. Consequently, the existing structures when considered in the total circumstances of existing zoning ordinances are liabilities as opposed to saleable assets.

15. During January 1986, the Board advertised for the sale of the Broad Street properties for a minimum bid of $800,000. Public advertisements were placed in the Asbury Park Press, the Bayshore Weekly, the Home News, the Red Bank Register, and the Newark Star Ledger. In addition, the Board sent announcements of the proposed sale to all commerical real estate agents in Middlesex, Monmouth, and Ocean counties (P-3). The Board did not conduct a public auction of these properties as earlier reported in the letter ruling dated February 4, 1986 and as attached.

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CONCLUSION

For foregoing reasons, the Board's defense of the bar of the limiting period of N.J.A.C. 6:24-1.2(b) is **SUSTAINED** and the petition of appeal herein is **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

August 20, 1986
DATE

JAMES A. OSPENSON, ALJ

AUG 22 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 25 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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further, an interpretation of Hyman to require same would supercede and fly in the face of legislative intent, which is clearly stated in N.J.S.A. 18A:29-4.3:

> The board of education of every district employing one or more teaching staff members having full time supervisory or administrative responsibilities shall adopt salary schedules for each school year that begins after the effective date of this act [Jan. 7, 1974] for all such members, except that for a superintendent of school a board may adopt salary schedule. . . [emphasis added].

A salary guide for the superintendent is permissive, and the Board herein has opted not to adopt one. [Id.; slip op. at 4].

See also Bolger v. Bd. of Ed., Keansburg, 1979 S.L.D. 94, aff'd State Board, 1979 S.L.D. 99, aff'd App. Div., 1980 S.L.D. 1478:

> In his review of the record herein, the Commissioner finds that the Board has not established a salary guide for the superintendent; however, it is not required to do so. The pertinent statute, N.J.S.A. 18A:29-4.3, does not mandate a salary schedule for superintendents and nothing in the record shows the existence of any salary schedule for petitioner. . . [Id.; 1979 S.L.D. at 96].

Based on the foregoing, therefore, I **CONCLUDE** petitioner's claim of entitlement to placement on a superintendent's salary guide under statutory or decisional law and his claim the Board here improperly denied him such placement should be and are hereby **REJECTED.**

IV

Petitioner's final assertion, that Board action violated public policy behind evaluation procedures and salary-fixing, was not, as pointed out by the Board, contained in the petition of appeal. Accordingly, it may not properly be addressed and resolved now. It is **REJECTED.**

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nevertheless valid, he suggested the Board's later action in allocating in the succeeding year's budget an amount sufficient to pay the increased salary evidenced its true intent, thus validating an otherwise unauthorized action of the president and secretary in executing with the superintendent the new contract. The Board later resolved to correct the contract amount and to leave it at the previous year's salary. The Commissioner held it was entirely proper and normal procedure for the Board to estimate an amount for the superintendent's salary for the suceeding year in preparation of its budget. But the amount was no more than an estimate for budget purposes. In that sense, it was said, it was not a final determination or authorization from which vested rights flowed. Mere allocation of an amount to a salary account in a budget by a board preparing the budget could not bind the next board and remove its power to fix salaries for the ensuing school year. Id. at 5-6.

Based on the foregoing, therefore, I **CONCLUDE** that petitioner's argument the Board here had fixed and established his salary for 1985-86 at $64,200 by the act of incorporating that amount in its 1985-86 budget must be **REJECTED.** It follows necessarily, it seems to me, as well, that petitioner's arguments that Board action actually fixing his salary at $60,000 a year for 1985-86 on September 4, 1985 constituted unlawful withholding of salary increment under N.J.S.A. 18A:29-14 or unlawful salary reduction under N.J.S.A. 18A:28-5 likewise must fail. They are hereby **REJECTED.**

III

Petitioner argued next that under Hyman v. Bd. of Ed. Twp. of Teaneck, 1983 S.L.D. — (Aug. 15, 1983), reversed St. Bd. of Ed., 1985 S.L.D. — (March 8, 1985), aff'd App. Div. A-3508-8477 (Feb. 26, 1986), he as superintendent had a right, and the Board had the duty, of placement on a salary guide as for a teaching staff member under N.J.S.A. 18A:29-4.1. That question too would seem to have been laid at rest in Silverman:

> There can be no dispute that a local board has a duty to fix the salary of its superintendent. See N.J.S.A. 18A:17-19. However, the fixing of said salary does not require a salary guide adoption and,

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II

Petitioner argued[1] that the action of the Board in budgeting his salary, under line item 110-F, at $64,200 for 1985-86, the budget for that year having finally been adopted on June 5, 1985, was the actual or constructive act of "fixing" the superintendent's salary under N.J.S.A. 18A:17-19. That being the case, he said, later Board action on September 4, 1985 constituted either the unlawful withholding of a salary increment under N.J.S.A. 18A:29-14 or the unlawful reduction of salary under N.J.S.A. 18:28-5. The flaw in his reasoning, however, lies in the assumption that budgetary salary allocations are actions fixing salaries. The assumption has been rejected as without merit. In Silverman v. Bd. of Ed., Borough of Harrington Park, 1986 S.L.D. — (April 28, 1986), a tenured superintendent challenged action of the board establishing his compensation for 1985-86 at the same level as for the previous year 1984-85. An administrative law judge held, and the Commissioner affirmed, that:

> Petitioner's position that appropriations for salaries incorporated in a board's adopted budget represent fixed expenditures is without merit. If that were so, an absurdity would exist in the prohibition of unexpended appropriations from which no surplus account could exist. The budget must viewed as a fiscal plan to enable a board to fulfill its responsibilities to provide for thorough and efficient educational opportunities for its pupils. Said appropriations therein must not be construed to be mandatory expenditures, other than those required by board indebtedness, law or adopted policy. In the instant matter, I know of no law or policy adoption by the board which requires the budget appropriation for superintendent's salary to represent his fixed salary. [slip op. at 5].

In Vandenbree v. Bd. of Ed., Dist. of Wanaque, Passaic County, 1967 S.L.D. 4, a superintendent sought to set aside a determination fixing his salary for 1965-66 at the same level as that for 1964-65 on the ground the action violated his contractual rights. It appeared the superintendent had executed a contract for a larger amount for the 1965-66 school year, but it also appeared the Board itself had never officially resolved to authorize the contract. To buttress the superintendent's claim the contract was

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1 What follows in paragraphs II, III and IV is obiter dictum. Because the evidential record appears concise and because the parties have addressed and argued other issues, the writer has done likewise, respectfully, in the interest of ultimate judicial economy. By that I mean in case the decision in paragraph I is reversed by the agency head, the need to remand may be averted.

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DISCUSSION

I

Evidence is plain from J-2 and finding no. 17 that the Board passed a resolution on September 4, 1985 fixing petitioner's salary for 1985-86 at $60,000. Equally plain is the fact the petition here was not filed in the Department of Education until January 9, 1986, more than four months later. N.J.A.C. 6:24-1.2(b) provides:

> The petitioner shall file a petition no later than the 90th day from the date of the receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested case hearing.

Action of the Board in open session, it may be suggested, and as memorialized in Board minutes, constituted due and sufficient notice to petitioner of the salary so fixed, and of which he presently complains. No reason has been advanced to justify an inference the 90-day limiting period should not be strictly interposed: that is, there does not appear from evidence of record any reason for relaxation or dispensation of it to avoid injustice under N.J.A.C. 6:24-1.17. Petitioner himself as chief school administrator has the right to a seat on the Board, moreover, under N.J.S.A. 18A:17-20, and may not be heard to deny notice or knowledge of Board action fixing his salary on September 4, 1985. An unexplained and unjustified delay in filing a petition in timely fashion requires invocation of the limiting bar. Cf. Riely v. Hunterdon Central High School Bd. of Ed., 173 N.J. Super. 109, 112-4 (App. Div. 1980); and North Plainfield Education Association v. Bd. of Ed., Borough of North Plainfield, 96 N.J. 587, 594-5 (1984).

Based on the foregoing, therefore, I **CONCLUDE** the petition of appeal in this matter should be, and is hereby, **DISMISSED** as untimely filed under N.J.A.C. 6:24-1.2(b), there having been made out no reason for relaxation thereof under N.J.A.C. 6:24-1.17.

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9. The Board of Education did not send a letter to Charles Juris informing him that his salary increment had been withheld for the 1985-86 academic year.

10. There had been occasions in the past where, through mutual understanding, salary increases for the superintendent were not formalized until the salaries of other employees in the district had been established through contractual negotiations.

11. Charles Juris is not on a salary guide or schedule that represents his level of academic preparation or the number of years of service in the district.

12. Classroom teachers are on a salary guide reflecting their levels of academic preparation and the number of years of service in the district.

13. J-5 is a true and accurate copy of the composite evaluation that was provided to Charles Juris for the 1984-85 academic year.

14. J-6 is a true and accurate copy of a memoradum addressed to Jim Keogh and delivered to him and each Board member on or about October 24, 1985.

15. Beyond the composite evaluation, the Board of Education did not deliver any further documentation regarding the evaluation for the 1984-85 academic year.

16. The Board has set forth the official allocation of salary for Charles Juris in the budget for the 1986-87 academic year at $60,000.

17. On September 4, 1985, the Board of Education passed a resolution so fixing his salary at $60,000. J-2.

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ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and/or stipulated, I make the following Findings of Fact:

1. Charles Juris has been employed as chief school administrator of the Ridgefield Park school district since 1973.

2. Charles Juris is tenured in the position of chief school administrator.

3. On June 5, 1985, the Board of Education of Ridgefield Park formally adopted the budget for the 1985-86 academic year, after the initial budget had been defeated by the voters. J-1.

4. On June 5, 1985, the Board of Education passed, by formal resolution, the final 1985-86 budget for the Ridgefield Park Board of Education. J-2.

5. Pages 13 and 14 of the minutes of the Board of Education meeting of June 5, 1985 are true and correct copies of the official pages 002916 and 002917 in the Board minute ledger. J-3.

6. J-4 is a true and accurate representation of the salary level of Charles Juris from 1972 to the 1984-85 academic year.

7. The salary of Charles Juris in the 1984-85 academic year was $60,000.

8. The Board of Education did not pass any resolution formally implementing the provisions of N.J.S.A. 18A:29-14 for the purpose of withholding the salary of Charles Juris as a form of discipline or punishment for not doing a good job during the 1984-85 or 1985-86 academic year.

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8, 1985), aff'd App. Div. A-3508-8477 (Feb. 26, 1986); and that such action and action in failing to increase his salary for 1985-86 constituted unlawful withholding of salary increment, contrary to N.J.S.A. 18A:29-14, and/or unlawful reduction of his salary, contrary to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:17-19. He sought judgment of the Commissioner of the Department of Education to declare the Board's action and/or nonaction unlawful as alleged, to order restoration of his salary at an appropriate level, together with back pay, and to order the Board henceforth to comply with the law requiring establishment of a salary guide. The Board admitted petitioner's tenure position generally at his present salary level at $60,000 per year for 1985-86, but denied petitioner's remaining claims and raised the affirmative defense of the bar of the limiting period of N.J.A.C. 6:24-1.2.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on January 9, 1986. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on February 3, 1986 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, a prehearing conference was conducted in the Office of Administrative Law on March 26, 1986 and an order entered. It was established the parties were to confer for the purpose of fashioning stipulations of all relevant and material propositions of fact, including documentation, which thereafter were to be filed in the cause no later than ten days before hearing. Thereafter, the matters at issue were to be addressed and resolved as if on cross-motions for summary decision, in accordance with N.J.A.C. 1:1-13.1 et seq., on pleadings, admissions, stipulations, documentation and memoranda of law. All such stipulations, documentation and memoranda of law having been filed, the record closed on August 1, 1986. At issue in the matter generally are (1) whether petitioner shall have established by a preponderance of the credible evidence that his salary for 1985-86 was improperly set by the Board; (2) whether Board action constituted the unlawful withholding of salary increment contrary to N.J.S.A. 18A:29-4.1; (3) whether Board action constituted the unlawful reduction of petitioner's salary for 1985-86 under N.J.S.A. 18A:28-5; and (4) whether petitioner is entitled to salary guide placement under Hyman v. Bd. of Ed. Twp. of Teaneck, 1983 S.L.D. — (Aug. 15, 1983), reversed St. Bd. of Ed., 1985 S.L.D. — (March 8, 1985), aff'd App. Div. A-3508-8477 (Feb. 26, 1986)

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0768-86
AGENCY DKT. NO. 8-1/86

CHARLES A. JURIS,
Petitioner,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF RIDGEFIELD PARK, BERGEN COUNTY,
Respondent.

Jeffrey A. Bartges, Esq., for petitioner

Robert H. Greenwood, Esq., for respondent
(Greenwood & Sayovitz, attorneys)

Record Closed: August 1, 1986 Decided: August 20, 1986

BEFORE **JAMES A. OSPENSON,** ALJ:

Charles A. Juris, a tenured chief school administrator of the Board of Education of the Township of Ridgefield Park, Bergen County, alleged that, although his 1985-86 salary was budgeted and fixed by formal Board action approving the budget at $64,200 on June 5, 1985, the Board nevertheless continued paying him at the level of $60,000 for 1985-86, the same salary he received for the previous year, 1984-85. He alleged the Board has failed and refused to place him on a salary guide as required by Hyman v. Bd. of Ed. Twp. of Teaneck, 1983 S.L.D. — (Aug. 15, 1983), reversed St. Bd. of Ed., 1985 S.L.D. — (March

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IN THE MATTER OF THE TENURE	:	
HEARING OF WEDA M. MOSELLIE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN OF	:	DECISION
PHILLIPSBURG, WARREN COUNTY,	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

Upon review of the record, the Commissioner agrees with the conclusion of the Administrative Law Judge dismissing, without prejudice, the tenure charges herein as being procedurally deficient.

The Commissioner observes the contradiction in the initial decision concerning whether, as stated in the initial decision, ante, the charges, without a statement of evidence, were received by respondent or, as stated in the initial decision, ante, whether the Board failed to provide respondent with a proper statement of evidence under oath. The Commissioner finds that the issue of whether the statement of evidence under oath, which was presented to respondent, met the standards established by statute and case law is moot in view of the fact that respondent was not given adequate time to respond to the charges.

Having determined that the Board's petition in the present matter is fatally defective procedurally, pursuant to N.J.S.A. 18A:6-10 et seq., and N.J.A.C. 6:24-5.1 et seq., the petition is ordered dismissed without prejudice. As such, the Board is directed to pay respondent her full salary as of the date it suspended her without pay, April 8, 1986, because it failed to properly certify tenure charges against her. As in In re Kunz, supra, and In the Matter of the Tenure Hearing of Michael Wallwork, School District of the City of Orange, decided July 1, 1985, the Commissioner determines that, in light of the gravity and nature of the charges of the alleged misconduct against respondent, the Board is in no way precluded from correctly recertifying the tenure charges and continuing her suspension from active employment while pursuing its investigation of the circumstances surrounding respondent's alleged arrest. N.J.S.A. 18A:6-8.3 Further, in light of the seriousness of the allegations in this matter, the Commissioner directs that the Phillipsburg Board inform him within 60 days of receipt of this order of its actions relative to this matter.

The initial decision of the Office of Administrative Law is affirmed.

COMMISSIONER OF EDUCATION

SEPTEMBER 29, 1986

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

August 19, 1986
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

AUG 21 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 22 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. Only after consideration of the charges, statement of position and statements of evidence presented to it may a board determine whether there is probable cause to credit the evidence in support of the charges and whether the charges, if credited, are sufficient to warrant dismissal or reduction of salary. N.J.S.A. 18A:6-11; and see Tenure Hearing of Feitel, 77 S.L.D. 451, aff'd, State Board, 77 S.L.D. 458; Tenure Hearing of Verga, 1983 S.L.D. — (—); Tenure Hearing of Hamlin, 1982 S.L.D. 687; and N.J.A.C. 6:24-5.1, 5.2. See also Tenure Hearing of Rubenstein, 1986 S.L.D. —(Mar. 19, 1986).

CONCLUSION

Based on the foregoing, I **CONCLUDE** the tenure charges herein are procedurally deficient for failure of the Board to have furnished respondent with a proper statement of charges, failure to have provided a proper statement of evidence and failure to have provided respondent an opportunity to submit a written statement of position before determination of the charges by the Board, contrary to N.J.S.A. 18A:6-11. The procedural deficiencies require the charges be dismissed. I **ORDER** them **DISMISSED**, without **PREJUDICE**, however, to reconsideration thereof by the Board consistently with statutory mandate. Against that contingency, nevertheless, I **ORDER** respondent reinstated to active service and compensated at full salary as of and from the date of her suspension without pay. Lastly, the Board is **DIRECTED** to inform the Commissioner of the Department of Education, within 60 days of date of final agency decision in this matter, of any action in disposition of the matter.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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Respondent was suspended without pay effective April 8, 1986, for a period of 120 days pending resolution of the tenure charges. A certificate of determination was filed by the Board secretary with the Commissioner on April 23, 1986.

On May 16, 1986, respondent filed her answer with the Commissioner denying the charges and raising affirmative defenses that included assertions the charges were procedurally insufficient.

The Commissioner transmitted the matter to the Office of Administrative Law on May 21, 1986 for hearing and determination as a contested case in accordance N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on June 20, 1986. At that time, respondent moved to dismiss the tenure charges for procedural irregularity and insufficiency under N.J.S.A. 18A:6-11. The procedural facts in the matter were undisputed. The charges, without a statement of evidence, were received by respondent on 3:06 p.m., Friday, April 4, 1986. By letter to respondent on April 8, 1986, the Board secretary notified her the Board had on April 7, 1986 certified tenure charges to the Commissioner of the Department of Education. For purposes of the motion, respondent and the Board agreed there was no statement of evidence submitted to respondent and she was not given 15 days by the Board to respond to the charges or a statement of evidence supporting them.

The evidential record on the motion to dismiss charges was completed on August 15, 1986, at which time the record closed.

DISCUSSION

Jurisdictionally essential for the filing and certifying of tenure charges against a teaching staff member are a statement of the evidence supporting the charges, an

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3394-86
AGENCY DKT. NO. 100-4/86

TENURE HEARING OF WEDA M. MOSELLIE, SCHOOL DISTRICT OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY.

W. Boyd Harbourt, Esq., for the Board

Stephen B. Hunter, Esq., for respondent
(Klausner & Hunter, attorneys)

Record Closed: August 15, 1986 Decided: August 19, 1986

BEFORE **JAMES A. OSPENSON**, ALJ:

The Board of Education of the Town of Phillipsburg, Warren County, considered charges of unbecoming conduct, insubordination, incapacity and incompetence against Weda M. Mosellie, a tenured teaching staff member, on April 7, 1986. It determined the charges were sufficient, if true, to warrant her dismissal or reduction in salary under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. On April 14, 1986, the Board filed those charges with the Commissioner of the Department of Education.

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The Commissioner is in total agreement with the ALJ's rejection of such arguments as providing documentation that petitioner had, in fact, met his evaluation obligations. The burden of proof rests with petitioner to demonstrate that he had not failed to complete his assigned duties as alleged. The record clearly documents he did not carry this burden. Petitioner offers nothing but assumption and implication to document his argument that he was excused from fulfilling his responsibility to evaluate five staff members. Reliance on such was clearly at his own peril.

Further, petitioner's argument that he completed the same number of evaluations the prior year as the year in question, namely one, stretches the bounds of credibility. Surely the Commissioner is not expected to accept that completion of one evaluation out of eleven assigned in a prior year somehow justifies reversal of the Board's action to withhold an increment when only one out of six are completed the subsequent year. Such an argument is tantamount to accepting that the failure to complete one's evaluation responsibility the prior year precludes a board from invoking disciplinary action in the subsequent year when the number of evaluations completed remains the same. That such an argument is absurd is readily apparent.

Accordingly, the recommended initial decision is adopted as the final decision in this matter for the reasons expressed therein as well as above.

The Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

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Petitioner also avows that the conclusion that he demonstrated a lack of self-restraint and control in dealing with students and parents flies in the face of the realities of being a student disciplinarian. The arguments raised in support thereof are essentially the same as those presented and considered by the ALJ during the hearing of this matter. In addition, he avers that (1) there is no basis for the ALJ's conclusion that it is not the number but petitioner's conduct which gives import to the parental letters and (2) there is absolutely nothing in the record to substantiate that four isolated instances out of 1,708 documented contacts with parents and students demonstrates a lack of self-restraint or controlled behavior.

Again, the Commissioner is unpersuaded by petitioner's argument that the ALJ erred and agrees with the ALJ that petitioner fails to recognize the gravamen of the issue, namely, that it is not the "sheer number" of parental complaints but the nature of the complaints that are of import. This point is captured well by the ALJ when he states:

> It is one proposition to engage in dispassionate intercourse when dealing with parents and pupils and yet another, when demonstrating "demeaning, cynical, sarcastic, rude and discourteous" behavior. It is this latter manifestation of petitioner's conduct which gives import to the parental letter complaints; not the sheer number of complaints handled during the course of the school year. (Initial Decision, ante)

Further, the ALJ's citing of and quotation from the Sammons, supra, matter is deemed appropriate, namely, that there is a heavy duty for self-restraint and controlled behavior on the part of professional school employees that is rarely requisite to other types of employment. The fact that the complaints were parental "perception[s] of [petitioner's] demeanor when being told 'no'" (Petitioner's Exceptions, at p. 3) does not preclude the Board's consideration of them when determining to take adverse action against a teaching staff member. (Guerriero v. Bd. of Ed. of the Borough of Glen Rock, decided by the Commissioner March 4, 1985) Further, the Commissioner finds nothing contained in petitioner's exceptions to convince him that the conclusion of the ALJ, who is the trier of fact, warrants reversal.

Lastly, petitioner alleges that the ALJ erred in concluding that he "proffered no other evidence that he was excused from performing assigned evaluation duties***." (Petitioner's Exceptions, at p. 3) He offers the same arguments advanced during hearing, that is, the same number of evaluations was completed as the prior year, assumption that the call to the assistant superintendent had resulted in excusal of the duty, and implication of excusal by the principal while attending a meeting.

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JOHN J. DOWLING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were received by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner contends the ALJ erred in concluding that he did not fulfill his responsibility to supervise extracurricular activities. Upon review of the Discussion and Conclusions section of the initial decision, the Commissioner does not find the ALJ reached any such conclusion. If there were a conclusion worded as such, it would be in conflict with the language of the decision wherein it is stated that there was no showing by the Board that once petitioner was assigned to extra duty responsibilities, he failed to attend or perform his assignment.

What the Commissioner does find, however, in the initial decision, ante, is a conclusion reached by the ALJ which rejects petitioner's contentions that the Board's action to withhold his increment was arbitrary because (1) the supervision of extracurricular events should not have been part of his evaluation because the issue is a labor one to be resolved between the Board and the association and (2) he never failed or refused to attend an event once assigned. The specific conclusion does not state that petitioner failed to fulfill his responsibilities to supervise extracurricular events. Rather, it states that petitioner's argument completely misses the mark and is meritless, a conclusion with which the Commissioner concurs completely.

The supervision of extracurricular duties as assigned by the principal is a specific responsibility contained within petitioner's job description (R-1, item 7). The fact that such assignments are subject to collective negotiations or are a matter of dispute between management and labor does not provide justification for any teaching staff member to respond to such assignments in a manner which at best may be characterized as negative, recalcitrant, and begrudging and more readily may be characterized as verging on insubordination. The manner/attitude one exhibits in responding to assigned responsibilities is a legitimate and integral aspect of evaluating performance which a board has every right to consider even when a staff member does not refuse/fail to complete the assignment.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

18 August 1986
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

AUG 19 1986
DATE

DEPARTMENT OF EDUCATION

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It was also stated in Theodore C. Seamans et als. v. Bd. of Ed. of the Tp. of Woodbridge, 1968 S.L.D. 1, 5, 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."

Here, the principal and the Board were fully aware of its own policies. However, for them to be bound and fettered by the policy, in light of petitioner's behavior, conduct and failure to perform, would be counter-productive, would serve no useful purpose and would vitiate the Board's discretionary authority.

Accordingly, I **CONCLUDE** that the Board was neither arbitrary, capricious nor unreasonable in its action to withhold petitioner's employment and adjustment increments for the 1985-86 school year and, therefore, its action is hereby **AFFIRMED.**

ORDER

It is accordingly **ORDERED** that the herein Petition of Appeal be and is hereby **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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Petitioner argues, at Point II, that the Board's action to withhold his increment was in violation of the Board's own policy and procedures for evaluating administrative personnel (P-6, P-7). Petitioner cites Applegate v. Freehold Reg. H.S. Dist. Bd. of Ed., 1969 S.L.D. 56, which relies, in part, upon the holding in Fitzpatrick v. Montvale Bd. of Ed., 1969 S.L.D. 4, where, petitioner contends, the Commissioner has unequivocally determined that a local board of education is bound by its own rules.

Petitioner asserts that he was in receipt of the principal's interim evaluation on or about January 31, 1985. He argues that the Board's procedural policies required the principal to submit a second evaluation no later than February 28, 1985, in the event the principal anticipated or intended to recommend formal action against petitioner (P-7, p. 4, Item C.2, "Tenure Evaluatee," b). Petitioner contends he was in receipt of this second evaluation on June 6, 1985, a date beyond that prescribed policy. He further argues that as a consequence of the late submission of the second evaluation, he was deprived of the opportunity to remedy the principal's cited deficiencies.

The herein record demonstrates that principal Jackson executed an Interim Performance Report and conferred with petitioner with respect thereto on January 31, 1985 (P-1, p. 23). The principal testified, and the evidence so indicates, that he was not satisfied with petitioner's performance as evidenced by the absence of a checkmark in the block on the document which would indicate satisfactory performance. A source of the principal's dissatisfaction on January 31, 1985, was petitioner's failure to complete his staff evaluations as of December 31, 1984 (P-1, p. 23). In addition, the principal was in receipt of teacher and parent letter complaints subsequent to February 28, 1985. To suggest that the principal was bound by the Board's policy thereafter is to place form over substance. As the Commissioner said in In the Matter of the Tenure Hearing of Francis M. Starego, Borough of Sayreville, Middlesex Co., 1967 S.L.D. 271, 272: ". . . 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. . . ."

While the principal was dissatisfied with petitioner's performance on January 31, 1985, he became more so thereafter as a consequence of his "synthesis of observations made over a period of [extended] time" Id.

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demonstrating "demeaning, cynical, sarcastic, rude and discourteous" behavior. It is this latter manifestation of petitioner's conduct which gives import to the parental letter complaints; not the sheer number of complaints handled during the course of the school year.

The Commissioner has frequently addressed the importance of personal example that is incumbent on all public school teaching staff members. In In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional Camden Co., 1972 S.L.D. 302, 321, the Commissioner observed:

> . . . [T]eachers . . . are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. [emphasis added]

I **CONCLUDE** that petitioner's actions, as reflected by the parental letter complaints, demonstrate a clear lack of self-restraint and controlled behavior requisite to a professional employee and, more importantly, the sensitive administrative position which he occupies.

Petitioner contends that his completion of only one of his assigned staff evaluations was not unique to the 1984-85 school year inasmuch as he had completed only one such assignment during the 1983-84 school year. Petitioner further contends that subsequent to the Assistant Superintendent's reducing the number of petitioner's staff evaluations from ten to six evaluations for the 1984-85 school year, petitioner "assumed" the Assistant Superintendent had excused petitioner from all of his evaluation duties. There is nothing in this record, other than petitioner's testimony, to support this assumption. Petitioner proffered no writing or other evidence that, in fact, he was excused from performing this assigned duty. As a consequence of petitioner's neglect and failure to conduct the required staff evaluations he and the Board can be held to have violated the provisions as found at N.J.A.C. 6:3-1.19 and N.J.A.C. 6:3-1.21.

I **CONCLUDE**, therefore, that petitioner failed to perform five assigned teaching staff evaluations during the 1984-85 school year.

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While the herein record reveals other areas of petitioner's AWPR in which the principal is critical of petitioner's behavior, conduct and failure to improve, this concludes the recital of the relevant facts in this matter.

DISCUSSION AND CONCLUSIONS

Petitioner argues that the Board's action to withhold his 1985-86 employment and adjustment increments was arbitrary, unreasonable and/or capricious in that the reason for its actions are unsupported by the facts and, further, that the Board violated its own policy and procedure for evaluating petitioner, pursuant to Policy Nos. 308 (P-6) and 3008 (P-7). With respect to his first argument, petitioner contends, among other things, that the subject of supervision of extra-curricular events should not have been a part of his evaluation because this is a labor issue to be resolved between the Board and the MTASA. Petitioner further argues that he has never failed nor refused to attend an extra-curricular event once he was assigned to do so.

I **CONCLUDE** that petitioner's argument completely misses the mark and is without merit. The facts demonstrate that petitioner, rather than principal, has consistently raised the issue of extra-curricular supervision by asserting, among other things, that such supervision is not a part of petitioner's responsibilities; that his contract does not provide for extra duty; and, that his work day encompasses only seven hours per day during the regular school week. Petitioner's assertion flies in the face of his job description, of which he is well aware, and which specifically provides that he shall attend school-sponsored activities as assigned by the principal (R-1, Item No. 7). Notwithstanding that this item may or may not be the subject of collective bargaining between the Board and MTASA, petitioner is obligated to fulfill his obligations and comport with the provisions of his employment position until and/or unless modified by Board action.

Petitioner contends that the principal's receipt of only four letter complaints from parents speaks remarkably well for petitioner in view of the fact that he had 1,708 documented contacts with pupils and parents concerning pupil discipline. Here, again, petitioner fails to recognize the gravamen of the issue. For the most part, the parents supported the school's enforcement of disciplinary policies with respect to their child's errant behavior. Their complaints, however, were directed to petitioner's attitude and demeanor towards them and their children. It is one proposition to engage in dispassionate intercourse when dealing with parents and pupils and yet another, when

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Petitioner is also responsible for the use of South's facilities and the building permits by those persons officially connected with the school, i.e., pupils and staff members, pursuant to the Board's policies and procedures (P-11, P-12).

The parties stipulate that the Board has in force and effect policies concerned with evaluating administrative personnel (P-6), procedures with respect thereto (P-7) and provisions for increments and special bonuses (P-8).

As a consequence of the Board's Demand for Admissions, petitioner responded as follows:

1. On June 6, 1985, my Principal reviewed with me several items under the "Needs Improvement" section of my annual evaluation.

2. Among the items reviewed were five complaints from parents which include four written complaints.

3. I was notified by letter from my Principal, dated June 11, 1985, that he was recommending to the Board of Education the withholding of my employment and adjustment increments for the 1985-86 school year.

4. I was notified by letter from the Assistant Superintendent dated June 11, 1985, that the Principal's recommendation would be considered by the Board of Education on June 24, 1985 and was offered:

   (a) Pursuant to Open Public Meetings Act to have the recommendation discussed in open session, and

   (b) Pursuant to Board Policy 311 an opportunity to make an informal appearance before the Board of Education with a representative of my own choosing to discuss the recommendation.

5. I did avail myself of the opportunity to appear before the Board of Education with a representative of my own choosing on June 24, 1985.

6. I did receive on June 26, 1985, by certified mail, a letter from the Board of Education Secretary stating that the Board of Education did act to withhold my employment and adjustment increments for 1985-86, which letter identified the reasons for the Board's action. [R-2]

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V. PROFESSIONAL JUDGMENT-ARBITRARY BEHAVIOR

Principal Jackson was in receipt of a written complaint from a teaching staff member concerned with the disparity of pupil discipline treatment by petitioner as compared with the discipline meted out by Moreman concerning the same offense. The alleged incident occurred on Friday, March 8, 1985, where three male pupils fraudulently altered a "late pass" and arrived 30 minutes late to their sixth period chemistry class. The chemistry teacher's subsequent investigation showed that the pupils had misrepresented the reasons and time for their late arrival to the chemistry class. The chemistry teacher wrote up cut-slips and pink slips for the pupils and thereafter talked with Moreman. Moreman asserted that she would handle the matter. Two of the male pupils were under the supervision of Moreman (West House) and one pupil was under petitioner's supervision (East House). The two pupils under Moreman's jurisdiction were assigned to ASP; however, the pupil under petitioner's direction was not disciplined in any fashion. Moreover, the pupil's pink slip was never returned to the chemistry teacher—a standard operating procedure—nor could petitioner account for the pink slip (P-1, pp. 10-11).

The teacher's letter to the principal concluded by asserting:

> I rarely send pink slips but I feel that lying and misrepresentation are valid reasons to do so. I am upset and annoyed that no punishment was issued to [petitioner's pupil] and the pink slip is nowhere to be found. There must be consistency in the policy and procedures for handling these matters. . . . [P-1, p. 11]

VI. STIPULATED AND UNDISPUTED FACTS

Petitioner is and has been South's safety officer since the opening of the school facility. Petitioner is the most informed and knowledgeable person in the school district with respect to the physical layout of the building and has access to a complete set of blueprint drawings. Petitioner advises and instructs the custodians as to the location of the mechanical, electrical and plumbing components of the building. Petitioner is currently under a Workers' Compensation claim as a consequence of an injury he sustained while turning off a water supply valve located in a wall pit which was unknown to a building custodian.

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> To provide some background on [D.], she is a classified student as of this year. She has been in psychotherapy for approximately 2 years, the main thrust of which has been and is to alleviate depression. Despite some slow progress, [D.] continued to be depressed and, at times, suicidal until a recent breakthrough in her therapy. [D's] therapist feels this is the first step towards her recovery from traumatic incidents which occurred several years ago. Her reaction to these incidents manifests itself in the way she relates to adults, and men in particular.
>
> We certainly agree that [D.] must conform to the rules at Middletown South and pay the consequences when these rules are broken. Her signature below indicates her understanding of this. However, we feel that [petitioner's] approach to discipline could be damaging to her and will not benefit [D.], our family or the school.
>
> We look forward to our daughter's continued progress towards emotional health and her future educational success. We appreciate the efforts of many staff members at South, especially Mrs. [B.] and Mrs. [S.], and we thank you for your time and consideration in this matter. [P-1, pp. 28-29]

The principal reviewed the parental letter complaints with petitioner on May 6, 1985. Subsequently, on May 29, 1985, Jackson sent petitioner a memorandum of a summary conference with petitioner held on May 24, 1985, concerning a parental complaint. Therein, the principal referred to petitioner's AWPR and concluded thus:

> This is the fourth complaint I have received during the 1984/85 school year regarding your interpersonal relations with parents. In each instance the parents perceive that you are unwilling to consider their point of view. Viewed in light of your individual Professional Improvement Plan, which emphasized a need to improve your interpersonal relationships, these complaints do not indicate successful achievement of your objectives.
>
> In addition, your Interim Performance Report outlined a further example of the unsuccessful attainment of your outlined objectives.
>
> These stated deficiencies lead me to conclude that you have not met the objective dealing with interpersonal relationships.
>
> A full summary will be reviewed in your Annual Written Performance Report. [P-1, p. 19]

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upset with petitioner's, "obnoxious, arrogant and rude behavior" toward her. The parent, who introduced herself as a former teacher and strongly believed in enforcing pupil discipline, was greeted by petitioner with the reply of "so what." The parent continued to state:

> When I asked [petitioner] to look into the matter, he stated that he would do so only if [pupil] would 'squeal on his classmates.'
>
> During our 'discussion,' [petitioner's] mannerisms and tone of voice were nothing but cynical and sarcastic. So I wouldn't undermine his authority in front of the [pupil], I elected not to challenge his attitude or comments at that time.
>
> I can't believe that an individual with such a cynical and obnoxious attitude can be entrusted with these responsibilities. I've worked too long, too hard, and too closely with many principals and teachers in the Middletown District and respect the vast majority for their sincere efforts in the education of our children. I cannot comprehend the hypocrisy demonstrated by [petitioner] by belittling me in front of my son when all I was attempting to do was confirm the facts so I could administer my own discipline. [P-1, p. 15]

Another undated letter from a parent to the principal concerned petitioner's refusal to accept a pupil's written absence excuse because it was one minute late. The parent attempted to discuss the issue with petitioner. The parent asserted, however, that:

> [Petitioner] became very upset and hostile at this time, he screamed that I could not speak for him, as he was never late. (Sorry I didn't know he was perfect). If [petitioner] had said to me that these were the rules, we could have continued our conversation, however [petitioner's] hostile attitude prevented me from talking to him any longer. If this attitude represents [petitioner], he should not be in this position. [P-1, p. 17]

The principal was in receipt of a letter, dated April 2, 1985, over the signature of a pupil and her parents, which stated as follows:

> This letter is our formal request to transfer our daughter, [D.L.B.], from the East House to West House administration as soon as it can be arranged. We feel that further associations with [petitioner] would be counterproductive to the emotional well-being of our daughter. We also were treated as one of the students - rudely and discourteously - and were placed in a 'defense' mode during our interaction with him on March 29, 1985.

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ceased his investigation by way of Jackson's order and the Board subsequently brought an action against the teacher who sponsored and hosted the party.[1]

IV. PARENTS' COMPLAINTS - 1984-85

During the 1984-85 school year, the principal was in receipt of four letter complaints concerning petitioner's behavior and demeanor towards pupils and parents (P-1, pp. 14-18). The record demonstrates that a major component of petitioner's responsibility is the supervision and discipline of approximately 700 pupils in the school's East House. Petitioner is involved with pupil discipline on a daily basis, which concerns pupil absenteeism, truancy and class cutting, among other things. In the 1984-85 school year, petitioner handled approximately 1,200 incidents of class cutting alone. As a consequence of a pupil's violation of school rules and regulations, petitioner assigns the offending pupil to the school's Alternate School Program (ASP), an in-school suspension activity.

An undated letter from a parent addressed to the principal complained that her daughter was in jeopardy of failing presumably because of the pupil's absence or tardiness. The parent asserted that her daughter's bus pass indicated the bus was to arrive at the pupil's pick-up point at 7:30 a.m.; however, the bus was arriving at 7:13 a.m. The parent contended that the 15-minute differential was significant and when the parent complained twice to school authorities, it was to no avail.

Moreover, the parent was concerned about remarks allegedly made to the pupil where the parent stated: "I also resent the statement made to [the pupil] by [petitioner] that she is a loser. The remark upset her very much. . ." (P-1, p. 14)

In a letter from a parent to the principal, dated December 3, 1984, the parent acknowledged that her son had been properly disciplined with ASP for the pupil's rude behavior toward a substitute teacher. The parent, who happened to be at the school when her son was disciplined, accompanied her son to petitioner's office to discuss the matter with petitioner. In her letter to the principal, the parent asserted that she was extremely

[1] See: Middletown Bd. of Ed. v. John Ahern, OAL DKT. EDU 2891-85 (Comm. Dec. October 24, 1985)

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The herein record demonstrates that the Assistant Principal Job Description contains the following provisions:

> 7. Attends major special student events held to recognize student achievement, attends school sponsored activities, functions, and athletic events as assigned by principal to assure legal supervision.
>
> . . . .
>
> 12. Such other duties as assigned by the Principal or Superintendent. [R-1]

Notwithstanding the above-cited provisions, the assistant principal extra-duty assignments have created an ongoing controversy between the principal and assistant principals where petitioner and Moreman have filed grievances against the principal. One such grievance filed by the Middletown Township Administrators and Supervisors Association (MTASA) on December 9, 1984, concerned the extra-duty assignment on a legal holiday when the schools were officially closed (P-15, p. 8). This matter was resolved by the Board's grant of two compensatory days to petitioner and Moreman for work performed on Saturday, November 10, 1984 and Friday, November 23, 1984 (P-15, p. 6). A second grievance was filed on Moreman's behalf with regard to her extra-duty assignment to cover a Saturday evening soccer event. Moreman alleged, among other things, that the assignment was beyond the school day and normal school hours. The matter went to arbitration where it was decided in the Board's favor, grounded upon the Assistant Principal Job Description (R-1, Item No. 7 and Item No. 12).

There was no showing by the Board that once petitioner was assigned to extra duty responsibilities, that petitioner failed to attend or perform his assignment.

An incident occurred in mid-March 1985, concerning an after-school party at a Board employee's home where pupils and Board-employed teacher staff members were in attendance. Petitioner brought the matter to the attention of Jackson and proceeded to conduct an investigation of the alleged incident. Subsequently, Jackson advised petitioner to stop his investigation in order for the Superintendent and the Board Attorney to review the proper legal procedures to be followed with respect to an investigation. Petitioner contended that the principal was attempting to cover-up and "whitewash" the incident and threatened to file charges of dereliction of duty against the principal. Petitioner

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Tenure Teachers

February 10 if formal action is anticipated
May 15 if no formal action is anticipated [P-1, p. 23]

On October 30, 1984, Principal Jackson executed and completed petitioner's AWPR which included, among other things, under "Needs Improvement," item no. 3, which states, "complete assigned staff evaluation within allocated time frame" (P-1, p. 24). Petitioner was in receipt of the AWPR on November 9, 1984, upon which both he and Jackson affixed their respective signatures (P-1, p. 26).

During the 1984-85 school year, Moreman was assigned to observe and evaluate ten tenured and non-tenured teaching staff members. Moreman completed two observation/evaluations for each of the non-tenured staff members and one each for the tenured personnel assigned. During the 1984-85 school year, Jackson completed 33 staff observation/evaluations (R-4). All of South's subject area supervisors completed their assigned observations and evaluations for the 1983-84 and 1984-85 school years (R-3, R-4). Petitioner was not excused nor relieved of his duty to perform the five remaining teacher observation/evaluations for the 1984-85 school year.

During the 1983-84 school year, which is not in issue in the instant matter, petitioner was assigned the responsibility for the coordination of the school's audio-visual equipment. Petitioner's assignment carried over to the 1984-85 school year until November 1, 1984, at which time petitioner was relieved of the responsibility.

III. COOPERATION-RELATIONS WITH ADMINISTRATION

Principal Jackson alleges that when petitioner is requested to supervise after-school activities, petitioner asserts that: (1) such activities are not a part of petitioner's responsibilities; (2) petitioner's contract does not provide for such extra duty; (3) petitioner's duty hours are seven hours per school day, and (4) such extra duty is an infringement on petitioner's personal life and other responsibilities. The principal alleges, among other things, that petitioner refused to supervise an assigned school-sponsored dance on May 10, 1985, unless petitioner received a directive to do so in writing (P-1, Item No. 1, p. 6). Petitioner challenged the principal, contending that the proper building use permits had not been executed (P-11, P-12). Petitioner subsequently supervised the event as a "personal favor" to the Board's Assistant Superintendent.

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Petitioner has served as an assistant principal at the Board's Middletown High School South (South) since it opened for operation as a school facility in or about 1975. Two other school administrators form South's administrative team where they have worked together since the school's opening; i.e., Dennis M. Jackson, principal, and Carol Moreman, assistant principal. Petitioner and Principal Jackson are employed under twelve-month annual contracts while Assistant Principal Moreman is employed under a ten-and-one-half-month annual contract.

South is divided into two sections for administrative purposes where, among other things, petitioner is responsible for pupil discipline, scheduling, attendance and supervision in East House, while Moreman has similar responsibilities for West House. Petitioner and Moreman are assigned other administrative responsibilities by Principal Jackson on a regular annual basis or as ad hoc assignments, pursuant to the Assistant Principal Job Description (R-1) adopted by the Board.

II. EVALUATION

A regular annual assignment of the school's three administrators, among others, is the responsibility for the conduct of teaching staff member observations and evaluations, pursuant to N.J.A.C. 6:3-1.19 (nontenured) and N.J.A.C. 6:3-1.21 (tenured (R-1, Item No. 5). In the 1983-84 school year, petitioner was assigned the responsibility to observe and evaluate 11 teaching staff members. Petitioner completed one observation/evaluation in 1983-84 (R-3). In the 1984-85 school year, petitioner was assigned to observe and evaluate ten teaching staff members by Principal Jackson. Petitioner's staff evaluations were subsequently reduced to six by the Board's Assistant Superintendent. Petitioner completed one teaching staff member evaluation during the 1984-85 school year (R-4).

Teaching staff member observations and evaluations are to be completed by December 31 of each year of the first semester. The second semester required dates for the completion of staff evaluations are:

Non-Tenure Teachers

February 10 if formal action is anticipated
April 30 if no formal action is anticipated

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defenses, that its action was pursuant to N.J.S.A. 18A:29-14 and, further, that the Commissioner of Education (Commissioner) should not substitute his judgment for that of the Board.

PROCEDURAL ASPECTS

Petitioner perfected his Petition of Appeal before the Commissioner on September 9, 1985. The Board filed its Answer on October 10, 1985, and on October 11, 1985, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on November 27, 1985, where, among other things, the single issue for determination by this administrative tribunal was agreed upon and hearing dates were scheduled for April 8 through 10, 1986. The hearing was adjourned and rescheduled for June 2, 3 and 4, 1986. The hearing was conducted on June 2 and 3, 1986, at the Borough of Spring Lake Municipal Court. At the conclusion of the hearing, the parties requested and were granted leave to submit post-hearing memoranda. The last submission was received by the undersigned on July 14, 1986, which constituted the closing date for these proceedings.

FINDINGS OF FACT

Having carefully reviewed and considered the entire record before me, including certain stipulations, the testimony and other evidence offered by the parties, and having given fair weight thereto; and having observed the demeanor of the witnesses, and having assessed their credibility, I **FIND** the following **FACTS** in this matter.

I. UNDISPUTED FACTS

The basis for the Board's action to withhold petitioner's annual employment and/or adjustment increment for the 1985-86 school year is grounded, in major part, upon the principal's Annual Written Performance Report (AWPR) of petitioner, dated June 6, 1985 (P-1). The principal enumerated four areas of recommended "Needs Improvement" by petitioner, under the headings of "Cooperation," "Parents' Complaints - 1984-85," "Relations with Administration," "Professional Judgment-Arbitrary Behavior" and "[Staff] Evaluation" (P-1).

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6533-85
AGENCY DKT. NO. 310-9/85

JOHN J. DOWLING,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,
Respondent.

Wayne J. Oppito, Esq., for petitioner (New Jersey Principals & Supervisors Association)

Peter P. Kalac, Esq., for respondent (Kalac & Newman, attorneys)

Record Closed: July 14, 1986 Decided: August 18, 1986

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

Petitioner, an assistant principal with a tenure status in the employ of the Board of Education of Middletown Township (Board), alleges that the Board acted in an arbitrary, capricious and unreasonable manner to withhold petitioner's employment and adjustment increments for the 1985-86 school year, in contravention of N.J.A.C. 6:3-1.21, and the Board's adopted policy Procedure No. 3008, "Evaluation of Administrators and Supervisors." The Board denies petitioner's allegations and asserts, by way of affirmative

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receiving certification is able to apply the above knowledge in practical situations. In addition, every on-site evaluation team which visits teacher education programs to determine approval status shall have appropriate specialists in reading as members of the team;

iv. In addition to the course requirements for reading set forth above, colleges are directed to N.J.A.C. 6:11-7.65, Standards for innovative and experimental programs, and are encouraged to utilize these regulations as an alternate approach to meeting the reading requirements;

v. This shall be effective September 1, 1977.

Contrary to the ALJ's determination and in light of the reading requirement in effect at the time of petitioner's application for nursery school certification embodied in N.J.A.C. 6:11-8.2, the Commissioner does not find arbitrary or unreasonable the Board of Examiners' determination that petitioner lacked a course in reading and was therefore denied the certification she sought. Consequently, that part of the initial decision concluding that the "State Board of Examiners acted arbitrarily and unreasonably in not accepting petitioner's academic credentials and private studies as sufficient to satisfy the requirement that her studies include literature" is hereby reversed. (Initial Decision, ante)

Accordingly, the Commissioner affirms in part and rejects in part the initial decision. He adopts the ALJ's conclusion denying petitioner's application for certification as a nursery school teacher based upon the absence of student teaching. The Petition of Appeal therefore is dismissed.

COMMISSIONER OF EDUCATION

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(2) Knowledge of listening, language and functional learning/reading skills required for proficient reading of instructional material within the student's major field(s) of concentration;

(3) Knowledge of the relationship between content and functional learning/reading skills with emphasis on procedures for implementation during classroom instruction in the student's major field(s) of concentration;

(4) Knowledge of various classroom diagnostic procedures and techniques for effective assessment of a prescription based upon pupils' strengths and needs in the functional learning/reading skills as related to subject's specific content field(s);

(5) Knowledge of a variety of teaching techniques, organizational strategies and procedures for selecting appropriate instructional materials to adjust instruction according to the pupil's strengths and needs in reading as related to the student's major content field(s), and knowledge of ways to develop positive student attitudes toward reading which encourages lifetime reading habits.

ii. In the elementary teacher education programs, six semester-hours or at least two courses in the teaching of reading shall be so constructed that the following minimum specific knowledge is developed for these students:

(1) Understanding the nature of the reading process and the various approaches for teaching reading. Understanding of the components of the comprehensive reading program and how these are related to various pupil populations in the elementary school;

(2) Knowledge of listening, language, reading and conceptual skills necessary for the proficient reading in all areas of the elementary school;

(3) Knowledge of various classroom diagnostic instruments, procedures and techniques used for assessing students' strengths and needs in reading;

(4) Knowledge of ways to organize reading instruction and materials to meet individual needs as revealed through student assessment;

(5) Knowledge of ways to develop positive attitudes toward reading which encourage lifetime reading habits.

iii. The college dean recommending certification will attest that this reading knowledge is a component of each certification program at that college, and that each student

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College, the second entitled "Children's Literature," taken at Glassboro State. The record also indicates that petitioner withdrew from a third course entitled "Children's Literature - Early Childhood" while she was at Newark State. (See Exhibit P-1.)

The Commissioner observes further that on May 5, 1981, the Department of Education, Bureau of Teacher Certification and Academic Credentials notified petitioner that her credentials submitted in an effort to obtain nursery school certification "do not contain evidence of the completion of the requirements checked below:

> Professional Education
> __X__ study in each of the areas checked below:
>
> __X__ methods of teaching, including the following if they are checked:
>
> __X__ reading - (2 reading courses)***."
>
> (R-1)

Another area on this document, language arts, is not checked. Study in language arts is not equivalent to study in methods of teaching reading. As the ALJ properly noted, the relevant certification regulation in effect at the time of the Board's determination was N.J.A.C. 6:11-8.4(a)(13)(iii), which provided that a nursery school endorsement required "nursery school methods and curriculum including literature, story telling, music, art, and science for children two to five years of age." However, wholly separate from N.J.A.C. 6:11-8.4(a)(13), N.J.A.C. 6:11-8.2(a)(8), captioned "Common requirements; all teacher education programs," further required that any candidates for instructional certificate satisfactorily complete six credits or two courses in reading.

> 8. Reading requirements:
>
> i. All subject education teaching programs shall include six semester-hours or at least two courses in the teaching or reading as it pertains to the field for which certification is being sought. Such courses will be part of an approved program, and will be reviewed by the Bureau of Teacher Education and Academic Credentials before approval of their inclusion is forthcoming. In addition, the courses shall be constructed so that the following minimum specific knowledge is developed for students in subject teaching fields:
>
> (1) Knowledge of the reading process as it applies to the student's major field(s) of concentration and knowledge of the components of a comprehensive reading program and the relationship to the various student populations;

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BERNICE REGENSTEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE DEPARTMENT OF EDUCATION, DIVISION OF TEACHER PREPARATION AND CERTIFICATION,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

The record indicates that on May 5, 1981 the State Board of Examiners issued its determination pursuant to N.J.A.C. 6:11-3.23 denying petitioner's application to waive student teaching and for college course credit toward certification as a nursery school teacher. The specific areas in which petitioner's credentials were found to be deficient included credit in reading and student teaching.

The Commissioner is in accord with the ALJ's determination that

> the petitioner's lack of supervised student teaching or equivalent experience provided the Board of Examiners with a sufficient basis to conclude that she had not satisfied the requirements for certification as a nursery school teacher, and I CONCLUDE that the denial should be AFFIRMED [on] that basis and the appeal dismissed. (Initial Decision, ante)

However, the Commissioner does not agree with the ALJ's rationale regarding his conclusion that

> the State Board of Examiners acted arbitrarily and unreasonably in not accepting petitioner's academic credentials and private studies as sufficient to satisfy the requirement that her studies include literature. Therefore, I CONCLUDE that the denial of her application for certification on that basis should be REVERSED. (Initial Decision, ante)

The Commissioner's review of petitioner's transcript reveals that she completed two children's literature courses, one entitled "Language Arts in Early Childhood," taken at Newark State

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EXHIBIT LIST

R-1 Department of Education credentials review summary and supporting documents

P-1 Letter from Bernice Regenstein of May 3, 1986

WITNESSES

For petitioner:

Bernice Regenstein

For respondent:

Ida Graham, Assistant Director

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

Aug. 14, 1986
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

AUG 15 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 18 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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petitioner's alternative experience in reading. The basis for the credit given was the course taken by petitioner in language arts, according to testimony by Ida Graham. My review of her transcript indicates that she also had at least two courses in children's literature. While it is not my function to substitute my judgment for that of the Board of Education, but rather to ask whether its action was arbitrary and unreasonable, I note that the regulations relied upon do not specifically require any given number of reading courses, but refer to a program of college studies including nursery school methods and curriculum including literature, story telling and other subjects. Petitioner's academic work appears to adequately cover this area. Accordingly, I **CONCLUDE** that the State Board of Examiners acted arbitrarily and unreasonably in not accepting petitioner's academic credentials and private studies as sufficient to satisfy the requirement that her studies include literature. Therefore, I **CONCLUDE** that the denial of her application for certification on that basis should be **REVERSED**.

Notwithstanding that, I **CONCLUDE** that the petitioner's lack of supervised student teaching or equivalent experience provided the Board of Examiners with a sufficient basis to conclude that she had not satisfied the requirements for certification as a nursery school teacher and I **CONCLUDE** that the denial should be **AFFIRMED** that that basis and the appeal dismissed.

I also wanted to note for the record that the petitioner is obviously pursuring her goal of being certified as a nursery school teacher with great diligence and determination and hope that she can achieve her objective through further experience and with the continued assistance of the Department of Education.

DISPOSITION

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that the decision of the State Board of Examiners denying petitioner's application for certification as a nursery school teacher be affirmed and the appeal **DISMISSED**.

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There is no dispute as to the above facts and I so **FIND.**

DISCUSSION AND CONCLUSIONS OF LAW

The issue is whether the Board of Examiners acted arbitrarily and capriciously in denying petitioner's request for certification as a nursery school teacher based on her lack of student teaching and one additional reading course. Having reviewed the record and the regulations, I **CONCLUDE** that the denial should be affirmed as to the student teaching and the appeal dismissed.

Under N.J.A.C. 6:11-3.23 applicants are allowed to substitute alternative educational background and/or experience. The applicant lacking required preparation may supply evidence of alternative education or experience which is reviewed by the secretary of the Board, with the help of staff of the Department of Education and submitted to the Board for vote, which in this case was unanimous. See, N.J.A.C. 6:11-3.23(b), (c). As stated in the facts, the Board concluded that petitioner's experience did not make up for her lack of supervised student teaching required by N.J.A.C. 6:11-7.3. Although the Board may consider alternative experiences, the supervised student teaching is obviously an important component in the education of any teacher. While the petitioner has had a variety of experiences in the classroom as a substitute and camp or workshop teacher, these do not reflect the sort of extensive supervised experience as a student teacher required by the regulations. Given this, I cannot conclude that the Board of Examiners' decision not to accept petitioner's experience as an alternative to the basic elements of student teaching was arbitrary or unreasonable.

As for reading, the regulation in effect at the time of the Board's denial which has been modified to simplify the process of obtaining certification[1] provide that the nursery school certification shall require a program of college studies including literature. See, N.J.A.C. 6:11-8.4(a)(13)(iii). The regulation does not specify the number of credits in reading courses required for certification. As stated, the Board determined that two reading courses were required, and only one could be considered satisfied by the

[1]Due to substantial changes in the regulation, this reading requirement has been dropped and subsumed within overall regulatory requirements for certification. Although this has no effect on the issue before me since the issue concerns the previous Board action based on the early regulations, petitioner is not precluded from reapplying at this time for certification.

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PROCEDURAL HISTORY

The State Board of Examiners denied petitioner's request on November 15, 1984. The petition which forms the basis for this appeal was filed on December 10, 1985 and transferred to the Office of Administrative Law for hearing on January 23. A prehearing conference was conducted on March 3, 1986 and a hearing conducted April 23, 1986. The record closed on May 13, 1986 after receipt of post-trial submissions.

FINDINGS OF FACT

The facts are not in dispute. Ms. Regenstein sought certification from the State Board of Examiners to teach nursery school. The Board, as well as the staff of the Department of Education, had reviewed her academic credentials, as well as work experience, and determined that she lacked the necessary student teaching which her experience could not be substituted for and also required an additional reading course before certification could be granted. Ms. Regenstein's private readings as well as work experience were substituted for one reading course, but the Board determined that she still fell short of the required reading background. The specific experience considered by the Board in order to meet the student teaching and additional reading course requirement included her BA degree in early childhood from Glassboro, substitute teaching, work in various nursery schools and summer camps as well as reading on her own and her travels. Review of her transcripts indicates that she had two courses in children's literature, at Glassboro and Newark State College. As indicated, the Board gave credit for one of the two required teaching courses on the basis of her course work in language arts and efforts at self-education, which involved wide reading.

Ms. Regenstein testified as to her continuous efforts to get certification, including unsuccessful attempts to matriculate for the required reading course or obtain satisfactory supervised student teaching. Ida Graham, Assistant Director of the Office of Teacher Certification of the Department of Education also testified and indicated that she had assisted the petitioner by arranging contacts with various schools and colleges to enable her to obtain the required experience. Ms. Regenstein offered a list of her private readings of educational material focusing on the teaching of reading. She also described various experiences as a substitute teacher, in a variety of nursery schools and day camps and emphatically expressed her great desire to teach nursery school.

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 489-86
AGENCY DKT. NO. 416-12/85

BERNICE REGENSTEIN,
Petitioner,
v.
STATE DEPARTMENT OF EDUCATION,
DIVISION OF TEACHER CERTIFICATION,
Respondent.

Bernice Regenstein, petitioner, pro se

Arlene Lutz, Deputy Attorney General, for respondent (W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: May 13, 1986 Decided: August 14, 1986

BEFORE **RICHARD J. MURPHY**, ALJ:

STATEMENT OF THE CASE

Bernice Regenstein appeals from the denial by the State Board of Examiners on November 15, 1984 of her request for certification to serve as a nursery school teacher under N.J.A.C. 6:11-3.31. The denial was based on the fact that her credentials lacked supervised student teaching and an additional course in reading. The issue is whether the State Board acted arbitrarily and capriciously in denying the request for certification. This opinion affirms and dismisses the appeal.

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was made specifically in light of the Levine precedent, insofar as "parallel and not distinguishable" (at 147).

Moreover, given the prior remand of the Commissioner, State Board and Court in Matawan, supra, should the Board vote to deny the request for paid extended sick leave, the Board is ordered to clearly articulate why the Thomas circumstances do not parallel or are distinguishable from Levine.

The Commissioner retains jurisdiction in this matter.

COMMISSIONER OF EDUCATION

September 24, 1986

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the mere act of denying the request. He concurs with the ALJ that it may well be that the Board did consider the Levine precedent as directed by the Appellate Division but that nothing was presented to the record to demonstrate that its members were informed that the Levine precedent was to be weighed, as well as the four recommended factors when reaching a decision and nothing was provided to inform why the Thomas circumstances were not parallel/distinguishable from Levine.

In this respect, the Commissioner believes that the Board in the instant matter has the same responsibility on remand as the Molina board did. In Molina it is stated, "Should the Board ultimately decide not to grant Molina's request, it must clearly articulate its reason why 'special case' status ought to be denied on the individual facts of this case." (at p. 8) Thus, it is determined that the Board herein likewise had the responsibility to clearly articulate not only the factors it considered but also why the request was denied, given the Levine precedent.

In other words, within the context of this case, the mere vote of "yes" and "no" and a preprinted agenda, do not demonstrate whether or not the Board considered the Levine precedent as required by the Court, nor does it provide a scintilla of information for the record as to why or on what basis Russell Thomas' circumstances were not "parallel and not distinguishable" from Levine. (Matawan, supra, at 147) Without such information the Commissioner or other review body cannot ascertain if the action was in keeping with the standard of uniformity under substantially similar circumstances. (Id. at 148)

Accordingly, the Commissioner adopts the initial decision for the reasons expressed therein and in this decision, including the determination that the matter is not barred on the basis of res judicata but excluding the discussion on the Open Public Meeting Act (OPMA) as there is no need to reach a determination with respect to that issue given the above. The Commissioner does, however, correct the ALJ's statement in the initial decision, ante, that the Commissioner does not have jurisdiction to void or to restrain actions of nonconforming meetings. While it is true that the Commissioner does have circumscribed authority with respect to violations of OPMA, he does have full authority to address OPMA issues relating/impinging on school law, including voiding and restraining a board of education's actions if a violation of the OPMA implicating school law occurred.

The matter is, therefore, remanded to the Matawan-Aberdeen Board to fulfill the requirements of the Matawan, supra, decision. Moreover, it is ordered that it fulfill that responsibility in an expeditious manner as this matter has been protracted now for over four years. Further, the Board's action with respect to this matter must be sufficiently clear and documented so as to be able to assess whether or not such action is reasonably supported by the record it had before it, is not violative of the standard of uniformity under substantially similar circumstances (Matawan, supra, at 148), and

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While the Board is correct in arguing that there is no specific legal mandate for a board to provide a statement of reasons in exercising its discretion under N.J.S.A. 18A:30-6, this does not eliminate the necessity of having sufficient information brought to the record to meet the standard of review for challenges to denials under that statute which was articulated by the State Board in Liebeskind, supra as based on its review of the court decision in Matawan, supra.

In Liebeskind, supra, the State Board determined that failure to provide the precise reasons for the board's denial does not necessarily mean that the denial constituted an abuse of its discretion under N.J.S.A. 18A:30-6. Rather, it states that it "***would uphold the propriety of the Board's decision if it is reasonably supported by the record the Board had before it and if it is not shown that the Board's decision violated the standard of uniformity under substantially similiar circumstances. [Matawan, supra]." (at pp. 9-10)

Thus, in order to grant the Board's motion for summary decision in its favor in this matter, the above standard of review would have to be met and, in this particular case, the specific additional requirement of Matawan, supra, namely, that the matter was considered in light of the Levine precedent "insofar as parallel and not distinguishable."

Upon careful review of the initial decision, ante, and the decision as a whole, the Commissioner does not find that the ALJ ever stated that N.J.S.A. 18A:30-6 requires a statement of reasons. Rather, what the ALJ does address in detail is his conclusion that the Matawan-Aberdeen Board

> is required by the statute as interpreted by the Appellate Division [Matawan, supra], as well as the prior Commissioner decision in the Molina [case], to clearly articulate the basis for the exercise of its decision in the individual case of Petitioner Thomas's request.*** (emphasis supplied) (Initial Decision, ante)

In the instant matter, the record demonstrates that the Board's personnel committee considered the same factors as were present in the Matawan, supra, case, namely, length of service, reason for request, nature of illness, number of days requested. Further, it was recommended that all Board members consider the same factors. See preprinted agenda for October 21, 1985 Board meeting. What the record fails to establish is whether or not the Board's decision (1) was reasonably supported by the record, (2) was not in violation of the standard of uniformity under substantially similar circumstances and (3) was reached specifically in light of the Levine precedent. Matawan, supra

It is in this sense that the Commissioner agrees with the ALJ that the basis for the decision, notwithstanding knowledge of the four factors considered, was not articulated and communicated by

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elements of which bear repeating. The Matawan decision determined that no specific legal standards exist to govern the exercise of a board's discretionary authority under N.J.S.A. 18A:30-6 with respect to granting requests for extended paid sick leave beyond annual and accumulated sick leave (202 N.J. Super. 142, 145 (App. Div. 1985)). Thus, what must be determined in cases of this nature is whether the Board violated its statutory mandate to determine whether to grant benefits in each individual case. (Id. at 148) See also the recent State Board decision in Liebeskind v. Bd. of Ed. of Bradley Beach, decided May 7, 1986. For four of the five staff members before the court in Matawan, it was determined that the denial of extended sick leave was reasonably based on the record before it and was neither arbitrary nor in violation of the Molina, supra, standard of uniformity under substantially similar circumstances. (Matawan at 148)

However, as regards Russell Thomas, while the court rejected the argument that the State Board should have ordered payment for the extended sick leave requested, it affirmed the remand of his individual case to the Matawan-Aberdeen Board as stated below:

> On appeal the principal argument on behalf of Thomas's estate is that he was entitled to one week's extended sick leave based on the precedent of Albert Levine, a 30-year employee with a serious heart affliction, who, the year before, had been granted four extra days' paid sick leave prior to his retirement at the end of the school year. According to this argument, the State Board of Education, which affirmed the Commissioner of Education, should not have remanded the Thomas application but should have ordered that the Board pay the additional sick day benefits in accordance with the Administrative Law Judge's recommendation. We disagree. The Board should have the opportunity to review the Thomas application as an "individual case", in the light of the Levine precedent, insofar as parallel and not distinguishable, and to exercise the discretion vested in it by N.J.S.A. 18A:30-6. (emphasis supplied) (at 147)

As pointed out by the State Board in Liebeskind, supra, the Matawan court did not specifically address the question of whether a statement of reasons is required when a Board exercises its discretion under N.J.S.A. 18A:30-6. This issue of statement of reasons is another exception raised by the Board, i.e., it objects to the ALJ's conclusion that it was required by 18A:30-6 to issue a statement of reasons for its decision regarding the extended paid sick leave, specifically referencing page 8 of the initial decision. Further, it excepts to the conclusion that the basis of the Board's decision was not communicated to petitioners.

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MATAWAN REGIONAL TEACHERS ASSOCIATION AND THE ESTATE OF RUSSELL L. THOMAS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the Board within the time required by N.J.A.C. 1:1-16.4a and b and are summarized below.

The Board excepts to what it terms "entry of a summary decision in favor of the Petitioners." (at p. 1) More specifically, it asserts that because petitioners did not move for summary decision, the Board was denied an opportunity to respond to their arguments since such arguments were contained in the brief in opposition to the Board's motion for summary decision. It also excepts to the ALJ's conclusion that the verification contained in the Petition of Appeal complied with N.J.A.C. 6:24-1.3(c).

As regards these contentions, the Commissioner is unpersuaded by the Board's arguments that the ALJ erred in his determination that the verification was not procedurally flawed. On the contrary, he finds the ALJ's reasoning sound and adopts the conclusion as his own for the reasons expressed in the initial decision.

Further, the Commissioner finds as meritless the Board's argument that the ALJ's recommended disposition of this matter constitutes a procedural flaw because the Board did not have an opportunity to respond to petitioners' arguments contained in their brief in opposition to the Board's motion for summary decision. That petitioners themselves did not file a motion for summary decision does not prevent the ALJ from recommending to the Commissioner an order requiring the Board to fulfill the express remand of the Appellate Division in Matawan, supra, assuming that the record established that the Board had in fact failed to fulfill the judicial requirements of that decision. That such an order may be construed as "favorable" to petitioners is of no moment whatsoever.

Given the above, it is now necessary to determine if the Commissioner accepts the ALJ's conclusion that the Board failed to meet the requirements of the Matawan, supra, decision, the key

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

Aug. 12, 1986
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

AUG 1 4 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 1 4 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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(5) Counsel Fees

Both sides seek the award of attorneys' fees and costs. Respondent seeks the award of attorneys' fees on the grounds that the petition was brought for purposes of harassment and delay, and the petitioners respond by seeking costs of suit as well as counsel fees for the Board's alleged delay, bad faith and violation of the Appellate Division order. I **CONCLUDE** that the award of counsel fees or cost to either party is not appropriate in this case for the reasons set forth below.

Respondent cites the case of Gibson v. Newark Board of Education, OAL DKT. EDU 6160-83, decided by Comm., March 30, 1984, in which counsel fees were allowed by the Commissioner to reimburse the petitioner for a suit brought to gain a judicial interpretation of the language of a statute and to compel a Board of Education to comply with that act. Gibson did not involve a lawsuit for personal reasons or monetary damages intended to benefit an individual, but rather concerned a decision which would benefit all of the Board members and the system as a whole. This is not the case here. Petitioners have sought a reconsideration of the merits of Mr. Thomas's individual case under the additional sick leave statute. Although the standards enunciated by the Appellate Division may have some benefit to other individuals in future cases, petitioner Thomas's prime concern was to obtain six paid days of sick leave. This case is therefore distinguishable from Gibson. Nor is there any showing of bad faith or deliberate delay of the sort that might warrant award of attorneys' fees to an agreed party under N.J.A.C. 1:1-3.5. Suddenly there is no evidence that petitioners' appeal was filed to harass the respondent and also no proof that the Board acted in bad faith or sought to deliberately and unduly delay consideration of petitioner's request for additional sick leave. Under these circumstances, neither counsel fees nor costs of suit are in order.

DISPOSITION

On the basis of the above findings of fact and conclusions of law, it is hereby **ORDERED** that the action of the Board of Education of October 21, 1985, in denying petitioner's request for additional sick leave, be reversed, and the matter be remanded to the Board for further proceedings consistent with the decision of the Appellate Division in this opinion.

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Appellate Division, obtained an exercise of discretion in the individual case of the Thomas estate, but without a clear articulation of the basis for that decision, they are in the dark and unable to assess or appeal it. Though the exercise of discretion under the statute may not have specific standards as such, it must not be arbitrary and should seek uniformity with matters in substantially similar circumstances. This cannot be accomplished without a clearly and publicly articulated basis for the decision, and that the apparent intent of the remand.

I further **CONCLUDE** that the petition of appeal is not barred by the doctrines of res judicata or collateral estoppel. The decision of the Appellate Division affirmed the remand directed by the State Board affirming the Commissioner's decision, which found it appropriate that the Board carefully reexamine and consider the petitioner's request. Indeed, part of the basis for the Appellate Division's decision is that no decision, whatsoever, was rendered on petitioner Thomas's application for one-week's extended sick leave because of administrative oversight or confusion. See, Appellate Division opinion at 4. Therefore, it can hardly be said that the Commissioner of Education, State Board, or Appellate Division upheld the denial by the Board of Education so as to make the matter res judicata. To the contrary, a remand was ordered seeking a basis for the decision consistent with Molina and the overall concern that the action have a reasonable basis on the record.

(4) Exercise of Discretion Under N.J.S.A. 18A:30-6

There can be no determination as to whether the Board's exercise of discretion in the petitioner's individual case was proper and not arbitrary, unreasonable or capricious, until the basis for that decision is clearly and publicly articulated. Only then can it be determined if the action of the Board was reasonably based on the record before it and consistent with the Molina standard of uniformity under substantially similar circumstances. Because the record does not now reflect the basis for the Board's decision, no determination can be made as to whether the exercise of its discretion was proper, and I so **CONCLUDE**.

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In particular, I **CONCLUDE** that the Board of Education is required by the statute as interpreted by the Appellate Division, as well as the prior Commissioner decision in the Molina decision, to clearly articulate the basis for the exercise of its decision in the individual case of petitioner Thomas's request. While the Appellate Division notes that no specific legislative standards are prescribed by N.J.S.A. 18A:30-6 (a defect which petitioners have not challenged), it is none-the-less clear that its concern is that the Board's exercise of discretion in each individual case be reasonably based on the record before it (see page 5). The court was specifically concerned that the Board have an opportunity to review the Thomas application in light of the precedent set in the Levine case insofar as it was a parallel and not a distinguishable case. The Appellate Division further determined that the Board's decision in the four other applications was neither arbitrary nor in violation of the Molina standard of uniformity under substantially similar circumstances, thereby adopting that standard to be applied in the instant case. In Molina, which concerns the question of whether a particular request for additional sick days would be considered a "special case," the ALJ recommended that the Board be reversed and the matter remanded so that it could clearly articulate its reason why such status should be denied on the individual facts of that case. See, Molina at 8.

A concern of both the Appellate Division and the Commissioner of Education was that the Board of Education exercise its discretion in each individual case and do so upon some clearly articulated and reasonable basis upon the record before it. Clearly, neither the Commissioner nor the Appellate Division intended that the requirement that the exercise of discretion not be arbitrary could be satisfied by the Board's action in merely listing several factors to be considered on its agenda and then summarily voting, with or without some closed session discussion, and without any clear articulation of the basis for that decision. It may be that the Board of Education in this instance did consider and discuss the Levine precedent and other matters in closed session so that its decision was reasonably based upon the record before it, but this is not enough. In order for the petitioner, the Commissioner, or the Appellate Division to be in a position to assess whether the exercise of discretion in this individual case was arbitrary or in violation of the Molina standards, the basis for that decision must be clearly articulated and communicated. It is not sufficient that the Board consider in closed session (assuming that it did so here) those factors which provide the reasonable basis of its decision upon the record without some indication on the public record as to a precise basis of that decision. The petitioners have, through the intervention of the Commissioner and

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(3) The Appellate Division Decision

The respondent Board argues that the petition of appeal does not allege any facts which would constitute a violation of the Commissioner of Education's decision or the ruling of the Appellate Division. Specifically, respondent notes that the Commissioner did not order the Board to reconsider his decision but merely found it appropriate that the Board carefully reexamine and consider its action. The respondent argues that it did so, and considered a list of factors in exercising its discretion under the act. By reconsidering and reexamining the petitioners' request, respondent argues that it also complied with the Appellate Division's decision affirming the remand.

The petitioners first contend that the Commissioner's decision rejecting the administrative law judge's order was mandatory in the sense that it required the Board of Education to carefully reexamine and consider its action. As to the Appellate Division, respondent argues that the court affirmed the State Board's remand out of concern for the principle established in Molina v. Board of Education of East Orange, OAL DKT. EDU 7276-82, decided by Comm., May 3, 1983, 1983 S.L.D. _____, that the Board's exercise of discretion out of this statute must be clear and consistent and applicable to all persons in substantially similar circumstances. Thus, the Board did not have the option of superficial affirmance of its past decision without full consideration of the merits and of persons in similar situations. The Appellate Division was particularly concerned that petitioners' case be viewed in light of the prior decision of the Board in the Levine matter. Petitioners conclude that the reporting of the list of factors considered and a summary vote by the respondent Board, without any indication of the basis for the decision, was not adequate to address the concerns of either the Commissioner of Education or the Appellate Division and, therefore, should be reversed.

I agree with the petitioners and recommend that the decision of the Board denying benefits be reversed, and the matter remanded for further proceedings consistent with the concerns expressed in the Appellate Division opinion.[4]

---

[4]The question of compliance with the Appellate Division is more properly a decision for the Appellate Division. In this case, however, that court did not specifically remand the matter and retain jurisdiction, but rather affirmed the decision of the State Board of Education to remand the matter to the Board of Education for further proceedings.

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actions void or grant injunctive orders or other remedies to ensure compliance. See, N.J.S.A. 10:4-15,16.[3] Neither the Office of Administrative Law nor the Commissioner of Education has jurisdiction to void actions of nonconforming meetings, or to restrain them. The Appellate Division has held that the Commissioner has incidental jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to school law controversies. See, e.g., Sukin v. Northfield Board of Education, 1980 S.L.D. _____ (Nov. 20, 1980). A public body accused of a violation does have the power to take corrective or remedial action by acting de novo at a public meeting held in conformity, but the Board in this instance shows no inclination of doing so voluntarily.

Under the Open Public Meetings Act, the subject of petitioner's request for paid sick leave is clearly a matter involving the terms and conditions of employment of a current public employee within the meaning of N.J.S.A. 10:4-12b.(8). To allow the subject of the request to be discussed in closed session under the exception for pending or anticipated litigation would not only be inaccurate since the request and not the litigation is the subject of this matter, but also would defeat the purpose of the remand, which is to provide an opportunity to review the application on an individual basis and exercise discretion vested by N.J.S.A. 18A:30-6. Therefore, if petitioner Thomas's request was discussed in closed session, I **CONCLUDE** that such action violated the Open Public Meetings Act.

I further **CONCLUDE**, however, that there is no need for the purposes of this summary decision motion to decide the factual issue of whether a closed session discussion of petitioner's request for sick leave occurred because, even if it did, it does not satisfy the concerns underlying the remand directed by the State Board and affirmed by the Appellate Division as discussed in the next point.

---

[2]Violations of the Open Public Meetings Act can also result in fines which are enforceable by the County District Court upon complaint of the Attorney General of County Prosecutor.

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> supporting them which have given rise to a dispute under the school laws, and must be verified by oath. (Emphasis added.)

Specifically, respondent claims that the allegations and facts of the petition are not verified by the oath of any of the petitioners and that the certification of counsel concerns only the procedural history of this matter. Petitioners reply that the certification of counsel, who is a representative of both the estate and the Association, is sufficient in this instance because petitioner Thomas, being deceased, is unavailable and the contents of the petition relate entirely to procedural history in this case, which is based on claims of procedural abuse.

I agree with the petitioners and **CONCLUDE** that the certification of counsel in this instance is adequate. A review of the complaint indicates that the allegations contained largely reflect prior proceedings in this matter or facts that are well established or within the knowledge of counsel. Given this, it cannot be said that the verification is defective within the meaning of the rule, which does not require verification by any particular person.

(2) Open Public Meetings Act

Petitioners, who allege that no discussion of the denial of sick days took place, argue that by discussing the request in closed session despite Mr. Thomas's waiver of his right to privacy, the Board violated N.J.S.A. 10:4-12 et seq. Petitioners also argue that summary decision is inappropriate so long as the contents of any closed session held are unknown. In addition, petitioners argue that this matter was not within the exception for pending or anticipated litigation, which allows closed session discussions by public bodies. See, N.J.S.A. 10:4-12b.(7). Respondent replies that, first, there is no allegation in the petition or evidence in the record to support the conclusion that the petitioners' request was discussed in closed session, nor is there any requirement that any discussion be held prior to a vote. Even if there was such a closed discussion, respondent argues secondly, it was allowable under the Open Public Meetings Act, which permits discussion of pending or anticipated litigation.

I note first that enforcement of the Open Public Meetings Act is vested by statute in Superior Court by way of proceeding in lieu of prerogative writ to declare

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ISSUES

1. Whether the petition of appeal is void and should be dismissed for failure to comply with the certification requirements set forth in N.J.A.C. 6:24-1.3(c).

2. Whether the respondent Board of Education violated the Open Public Meetings Act by its action on October 21, 1985, and whether the matter of petitioner's sick leave was a personnel matter not required to be discussed in public session under that act.

3. Whether the action of the respondent Board on October 21 violated the Appellate Division's decision, and whether the petition is barred by collateral estoppel and res judicata by virtue of the rulings of the Commissioner of Education, State Board of Education, and Appellate Division.

4. Whether the respondent properly exercised its discretion under N.J.S.A. 18A:30-6 in denying sick leave benefits on October 21, 1985, or whether that action was arbitrary, unreasonable and capricious, in violation of the statute.

5. Whether respondent or petitioner should be awarded attorneys' fees and costs in this instance.

DISCUSSION AND CONCLUSIONS OF LAW

(1) Verification of the Petitioner

Respondent argues that the petition is defective and should be dismissed because it does not contain a sufficient verification under N.J.A.C. 6:24-1.3, which provides:

> (a) The petition must include the name and address of each petitioner, the name and address of or a description sufficient to identify each party respondent, and a statement of the specific allegation(s) and essential facts

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After the Appellate Division's affirmance of the State Board's remand, respondent Board of Education voted on October 21, 1985, to deny the request of Russell L. Thomas for extended sick days. The preprinted agenda for the meeting contained the following item:

> d. RECOMMEND: That the Board of Education reconsider the request of Russell L. Thomas for extended Medical Leave as per 18A:30-6 from June 23-30, 1982, inclusive, with pay.
>
> RECOMMEND ALSO: That the Board of Education deny said request.
>
> RATIONALE: The Board of Education has the discretion under the statute to approve or deny these requests on a case by case basis. The Board previously denied the request of Mr. Thomas. The Board has, however, agreed to reevaluate the request in light of the decision of the Commissioner of Education, the State Board, and the Appellate Division.
>
> Factors that the committee has considered and the Board should also consider with this and other requests are as follows:
>
> 1. Length of Service.
> 2. Reason given by employee for the request.
> 3. Nature of the illness.
> 4. Number of days requested.

Several days earlier, counsel for Thomas had notified the Board that he wished to waive his right to privacy under N.J.S.A. 10:4-12b. and requested that all discussions be held in public session. The Board voted without public discussion to deny the request. The petition appealing this denial was filed on January 15, 1986, and answered on January 23. The petition alleges that the vote for the denial was without discussion, which is denied by the respondent.

The matter was again submitted to OAL on January 29 and a prehearing was held on March 18, resulting in summary decision motions and briefs being filed on April 21 by respondent, and May 2 by the petitioner. The record was closed on May 6.

There is no dispute as to the above procedure or facts and I so **FIND**.

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Education, and Appellate Division. This opinion concludes that the respondent Board failed to articulate the basis for its decision denying leave in Russell Thomas's individual case and recommends that the matter be remanded so that the basis may be clearly set forth.

PROCEDURAL HISTORY AND FACTS

This matter was referred to the Office of Administrative Law (OAL) as a contested case on January 29, 1986. The matter had previously been before OAL in 1983,[1] when, on October 14 of that year, ALJ Beatrice Tylutki concluded and ordered that the respondent Board should pay the sick day benefits in question because such benefits had been paid to another teacher in a similar situation. The Commissioner of Education rejected this recommendation as a usurpation of the Board's authority on December 2, 1933, and dismissed the petition. In doing so, the Commissioner found it appropriate that the Board carefully reexamine and consider its action to petitioner's request. On appeal, the State Board remanded the Thomas application to the Board of Education and further appeal was taken to the Appellate Division, which affirmed that remand.[2] The Appellate Division stated the following:

> On appeal the principal argument on behalf of Thomas's estate is that he was entitled to one week's extended sick leave based on the precedent of Albert Levine, a 30-year employee with a serious heart affliction, who, the year before, had been granted four extra days' paid sick leave prior to his retirement at the end of the school year. According to this argument, the State Board of Education, which affirmed the Commissioner of Education, should not have remanded the Thomas application, but should have ordered that the Board pay additional sick day benefits in accordance with the Administrative Law Judge's recommendation. We disagree. The Board should have the opportunity to review the Thomas application as an "individual case," in light of the Levine precedent, in so far as parallel and not distinguishable, and to exercise the discretion invested in it by N.J.S.A. 18A:30-6. Matawan Regional Teachers Association v. Board of Education of Matawan-Aberdeen Regional School District, 202 N.J. Super. 142 (App. Div. 1985). (Emphasis added.)

[1]The findings of fact of OAL DKT. NO. EDU 8595-82 are incorporated herein by reference.

[2]The case before the Appellate Division, as well as that considered by the Commissioner of Education and ALJ Tylutki also reviewed and upheld the denial of additional sick days with pay to four other teachers.

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 629-86
AGENCY DKT. NO. 16-1/86

MATAWAN REGIONAL TEACHERS ASSOCIATION AND THE ESTATE OF RUSSELL L. THOMAS, DECEASED,
Petitioners,
v.
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT,
Respondent.

Mark J. Blunda, Esq., for petitioners (Oxfeld, Cohen & Blunda, attorneys)

Andrew J. DeMaio, Esq., for respondent (DeMaio & DeMaio, attorneys)

Record Closed: May 6, 1986 Decided: August 12, 1986

BEFORE **RICHARD J. MURPHY**, ALJ:

STATEMENT OF THE CASE

The petitioners, Matawan Regional Teachers Association, and Estate of Russell L. Thomas, a deceased teacher, appeal from the respondent Board's denial of a request for additional sick days in June 1982, pursuant to N.J.S.A. 18A:30-6. The Board's denial followed a remand from the Commissioner of Education, State Board of Education, and Appellate Division. The essential issue is whether the respondent Board, which denied the request summarily without a clear articulation of the basis for its decision, properly reviewed this individual case and exercised its discretion to deny additional sick leave under N.J.S.A. 18A:30-6 as interpreted by the Commissioner of Education, State Board of

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Pursuant to a request from counsel for petitioner in this matter oral argument was heard by way of telephone conference call by a representative of the Commissioner on September 17, 1986. By way of said argument petitioner stressed that the purpose of the rule in the NJSIAA Handbook was to prevent athletic advantage.

Since athletic advantage was not the reason for the transfer in this particular case, the transfer rule requiring a 30-day waiting period should not apply. Further, petitioner's counsel sought to set the record straight by pointing out that petitioner was pro se before the Eligibility Appeals Committee and was unfamiliar with the process. The fact that petitioner could not recall the name of M.S.'s original treating psychologist should not be held against him. Rather, petitioner argues, the Committee should have permitted time for proof of said treatment to be presented to it.

Respondent's rebuttal pointed out that the Eligibility Appeals Committee hears between 20 and 30 eligibility appeals each year, most in which petitioners are without representation by counsel. Further, argues respondent, since petitioner requested the appeal hearing and decision on an expedited basis prior to the end of the 1985-86 school year, to assert that time was not given for providing additional evidence was improper. Despite the rendering of its decision on an expedited basis as requested by petitioner, petitioner did not file this appeal for summary proceedings until August 27, 1986 more than two months after the denial of the waiver.

The Commissioner has reviewed the transcript of the hearing before the Eligibility Appeals Committee of the NJSIAA, as well as the papers filed by the parties, and considered the oral argument. Based upon such review, the Commissioner finds and determines that petitioner in this matter has failed to demonstrate that the actions of NJSIAA in denying a waiver of the eligibility rule upon transfer were either arbitrary or capricious, nor has petitioner succeeded in demonstrating that the application of the rule has worked any hardship upon M.S. The question of whether the factual situation in this particular case represents an extraordinary circumstance for granting a waiver as comtemplated within the NJSIAA rules and interpretive guidelines is a matter which the Commissioner believes is best left to the judgment of the NJSIAA whose rules he has approved. Thus, unless he finds the action of the NJSIAA in applying its eligibility rules to be clearly and demonstrably arbitrary and capricious, he will not substitute his judgment for that of the Eligibility Appeals Committee of the NJSIAA. Burnside, supra; Northern Highlands Regional, supra

The Petition of Appeal in this matter is dismissed.

COMMISSIONER OF EDUCATION

September 19, 1986

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hearing as required by various decisions of the Commissioner and the Courts, the actions of the NJSIAA should be upheld and the petition dismissed.

In conclusion, respondent argues that petitioner has failed to demonstrate that extraordinary circumstances existed that would justify the waiver sought. Respondent argues instead that the circumstances in this case represent a "classic reason" why the 30-day rule is a valid one in light of the following circumstances:

> ***This is a student who faired well academically, according to the testimony of his father, until he achieved athletic success. Upon attaining star status with the Freehld soccer team, he became "very cocky" and acted like a "big shot..." and he "was very immature, extremely immature..." and "his athletic prowess was kind of like the way that he thought he was going to get through high school..." (Tr. 140, 141). He then played all but one game of the soccer season while maintaining this "horrible academic" record, according to his father, and transferred to a private academy at the expense of his parents. Suddenly, his grades went from all "D's" and "E's" to mostly "A's" and "B's." In addition, since [M.S.] did not play in any interscholastic sport but soccer, absent the application of the 30-day waiting period, the student would have substantially improved his academic record while continuing to play on the same interscholastic soccer team, despite two transfers. Given the scenario, not only would a waiver be the substitution by the Commissioner of his judgment, over that of the educators assigned to deal with eligibility questions, but would create a very unwise precedent, of allowing students who have the economic resources to transfer to a school outside of their district to improve their academic record, only to return to their former school and participate in interscholastic sports, without ever suffering one day's loss of eligibility. One only has to recall the circumstances presented in the Burnside case, where 13 outstanding student-athletes were not allowed to participate because of their deficient academic records. Given the transcript of [M.S.'s] academic progress, there is indeed a good likelihood that had he not transferred for a short period of time to Princeton Academy, he would not only have been ineligible for 30 days, but for the entire soccer season, pursuant to Article V, Section 4E of the Bylaws.
>
> (Respondent's Brief, at pp. 8-9)

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rule upon transfer was granted. Such inflexibility, contends petitioner, is inherently arbitrary. In summary, petitioner contends as follows:

> The action of the Association in this matter however was arbitrary and capricious. The denial of the waiver serves absolutely no legitimate purpose and has no rational basis related to any legitimate public policy. The transfer in this case cannot be considered for athletic advantage such as seeking a superior athletic team; seeking a relief due to conflict with an administrator, coach, or teacher; seeking a team consistent with petitioners athletic abilities; seeking to nullify punitive actions by the previous school. Compelling psychological reasons prevented [M.S.] from completing his sophomore academic and soccer year at his hometown school.
>
> The priority in decisions made in this case were (sic) in keeping with the purposes of education and the welfare of the student and sports were not a consideration.
>
> (Petitioner's Brief, at p. 7)

Respondent NJSIAA disputes the contention that M.S. transferred for compelling psychological reasons contending instead that M.S. was not treated by a psychiatrist until after his transfer to Princeton Academy. Relying upon citation from the transcript of the testimony before the Appeals Committee, respondent points out petitioner was unable to provide the name of the psychologist who allegedly treated M.S. prior to his transfer to Princeton Academy. (Exhibit A, at pp. 136-137) Thus, it is respondent's contention that no evidence was presented to the Committee that M.S.'s transfer to Princeton Academy was prompted by compelling psychological reasons beyond his control. Further, contends respondent, petitioner has set forth no evidence that the 30-day waiting period would in any way damage M.S. other than having to answer the questions of other students as to why he could not play soccer immediately.

By way of legal argument respondent sets forth the finding by the Appellate Division in Burnside v. NJSIAA (unpublished decision of the Appellate Division, November 15, 1984, Docket Number A-625-84T7) wherein the Court approved the findings of the Commissioner that participation in athletics is voluntary and subject to the rules of eligibility as developed by NJSIAA and approved by the Commissioner.

The specific rule in question,. namely eligibility upon transfer, contends respondent, has been specifically upheld by the Commissioner and the Appellate Division. (Board of Education of Northern Highlands Regional v. NJSIAA et al., Docket Number A-5857-82T2, decided October 17, 1984) Consequently, since the validity of the rule has been upheld by both the Commissioner and the Court and since petitioner has been afforded a due process

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5. Princeton Academy is a private school without an interscholastic athletic program.

6. While at Princeton Academy, M.S.'s grades improved dramatically and, upon recommendation of a psychiatrist who was treating him, his parents determined to return him to Freehold Borough High School.

7. Pursuant to the aforecited rule of eligibility upon trnasfer, M.S. was determined by the NJSIAA to be ineligible to participate in any interscholastic game or scrimmages for 30 days although he is permitted to be on the team and practice with it.

8. An appeal of the eligibility determination by NJSIAA was taken by petitioner on June 11, 1986 to the NJSIAA Eligibility Appeals Committee who refused to grant a waiver.

9. On August 27, 1986, petitioner filed the appeal before the Commissioner pursuant to the provisions of N.J.S.A. 18A:11-3.

While acknowledging that the 30-day waiting period required by the rule in question is a valid exercise of the authority of NJSIAA and serves a commendable purpose of prohibiting transfers for athletic advantage, petitioner contends that the transfer involved in this case does not represent a transfer for said purpose but is, in fact, one which was compelled by circumstances beyond the control of M.S. Petitioner contends that the transfer of M.S. from Freehold Borough High School to Princeton Academy and back again was for compelling psychological reasons and represents the extraordinary circumstances as comtemplated in the "NJSIAA Interpretive Guidelines." Petitioner contends that the erroneous decision of the Appeals Committee was based upon "two significant factors, both of which are incorrect." (Petitioner's Brief, at p. 4)

The Appeals Committee, asserts petitioner, erroneously concluded that there was no compelling psychological reasons for transfer because the Committee concluded that M.S. was not under psychological treatment until after enrollment at Princeton Academy. In fact, claims petitioner, despite the fact that he could not recall the name of the treating clinical psychologist at the hearing, M.S. was under treatment some six months prior to his transfer to Princeton Academy. Secondly, the Committee's second mistaken fact upon which it based its conclusion was that M.S. would only miss four games over the 30-day period and that these missed games would represent a minor inconvenience. In fact, however, M.S., if not granted a waiver, will miss seven games.

Based upon the aforesaid erroneous assumptions, petitioner contends that the Committee's determination should be reversed by the Commissioner. The "compelling psychological reasons" for the transfer clearly demonstrate, say petitioner, that there was no desire on the part of M.S. to seek athletic advantage and, on the contrary, should be regarded as meeting the test of those extraordinary circumstances justifying a waiver as described in the "Guidelines." Petitioner further argues that the NJSIAA was not able to demonstrate one circumstance in which a waiver of the 30-day

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> student has had to repeat a semester or more because he or she was absent from school because of medical or psychological reasons or because that student was required to be home with a parent or guardian who was ill, or to a classified student whose Individual Education Program (IEP) mandated that that student extend his or her schooling beyond the normal eight semester program.
>
> Member schools must be aware of the fact that waivers are only intended to equalize opportunities among otherwise eligible students who cannot strictly comply with the eligibility rules because of circumstances beyond their control, and is not intended to provide such students with an actual advantage over the great majority of students who maintain appropriate academic standards over the normal eight semester secondary program. Accordingly, waivers of these rules are never granted where it would allow a student to participate in more than four seasons in any one sport or where a student has repeated an academic semester or year of secondary school for academic reasons.
>
> While it is expected that waivers of the academic and eight semester rules will continue to be granted; where it is determined that a student cannot comply because of circumstances beyond his/her control, as noted, waivers from the age and 30 day transfer rules will be granted only in the most extraordinary cases. However, waivers will not be granted for Student-Athletes who have reached the age of 20 prior to the beginning of a particular sports season, whatever the circumstances. (at p. 57)

In seeking reversal of the Eligibility Appeals Committee determination, petitioner sets forth the following factual circumstances.

1. M.S. entered Freehold Borough High School as a freshman in September 1984, his family having been residents of the Borough for 14 years.

2. Despite success in athletics, M.S. developed problems which reflected themselves in his attitude, behavior and school work.

3. During his freshman year, M.S.'s mother was hospitalized for four months.

4. In November 1985 M.S. was transferred from Freehold Borough High School where his academic record was close to failing to Princeton Academy.

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S.S., parent ad litem for M.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	
	:	

This matter was opened before the Commissioner upon filing of a Petition and Application for Summary Proceedings or Temporary Waiver. Petitioner seeks an order of the Commissioner setting aside the determination of the Appeals Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying a waiver of Article V, Section 4 K(2). The aforesaid rule provides that:

> (2) A student transferring from one secondary school to another, except for the cases provided for in Paragraph (1) of these transfer provisions shall be eligible after the expiration of 30 calendar days during the school year provided that both principals and athletic directors sign an appropriate waiver form indicating that there has been no recruitment. (NJSIAA Constitution, Bylaws, Rules and Regulations, at p. 40)

In the "NJSIAA Interpretive Guidelines for Student-Athlete Eligibility" the Association addresses the issue of waivers of eligibility rules as follows:

> 5. WAIVERS
>
> In appropriate cases, the Eligibility Committee or the Eligibility Appeals Committee may grant a waiver from the strict application of any eligibility rules, where the overall objectives of the Association and its member schools will not be undermined. Specifically, waivers of these provisions have been granted in the past where it was shown that a student could not maintain the required academic standards or that he or she had to continue secondary schooling beyond the eighth semester because of circumstances beyond that student's control. By way of illustration, waivers have been granted from the academic requirements because of language handicaps or because a student is a classified pupil who could not carry a full academic load. Correspondingly, waivers of the eight semester rule have been granted where a

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> ***[A]lthough petitioners were hired on a full-time basis and reported to the schools daily, the purpose of their hiring was "to act in place of" regular classroom teachers who were temporarily absent***. (Partial Initial Decision, ante, quoting Zaremba, supra, at pp. 6-7)

Consequently, the Commissioner affirms the findings and determination of the Office of Administrative Law for the reasons stated therein and as supplemented herein. Accordingly, this aspect of the instant Petition of Appeal is dismissed with prejudice. Pool substitutes will not be considered part of the class action on appeal in the instant matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 16, 1986

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The Commissioner cautions the Board that it is contrary to the intent of the State Board regulations that one who serves as a substitute but is not certified and endorsed in the area in which he is substituting be permitted to serve in that capacity for longer than twenty days. The testimony of Mr. Jencarelli indicates that the Board is aware of the 20-day substitute rule, but conflicting testimony on this matter makes it unclear as to whether it is always complied with. Accordingly, the Commissioner concurs with the ALJ's conclusion that "[n]o persuasive evidence was offered to provide a basis for me to reject Jencarelli's testimony that pool substitutes are used essentially as 'pinchhitters' for the temporarily absent regular classroom teacher." (Partial Initial Decision, ante) The Commissioner does note, for the record, an error in the Yanowitz et al., supra, decision. Based on a reexamination of the six Yanowitz petitioners' qualifications, the Commissioner is now convinced that although the standard for determining what constitutes a regular teaching staff member was correctly determined, not all petitioners therein were properly endorsed for the positions in which they served. Thus, the Commissioner hereby corrects his earlier determination made in Yanowitz et al. wherein he concluded that "The record before the Commissioner discloses that in each instance petitioners were holders of appropriate State certificates***." (1973 S.L.D. at 76)

The Commissioner concludes, as did the ALJ, no intent on the Board's part to employ these pool substitutes as regular teachers. Rather, he finds the instant situation akin to that which existed in Frank J. Zaremba et al. and Middlesex County Vocational and Technical High School Teachers Association v. Board of Education of the Middlesex County Vocational and Technical School District, decided by the Commissioner March 31, 1983, State Board aff'd October 5, 1983, Superior Court, Appellate Division, aff'd November 7, 1984. Both Zaremba and Packer were certified, the former as a history teacher, the latter as an English teacher. As noted by the ALJ:

> [T]hey received no contractual benefits, except health benefits and personal days, although they did receive statutory sick leave. Both petitioners reported daily to the office of the principal for assignment to the classroom of absent teachers and most of those assignments were limited to one or two days. When no teachers were absent, the petitioners were assigned to hall duty or administrative functions in the office. (Partial Initial Decision, ante)

The Commissioner found in Zaremba that such service constituted employment as a substitute and, thus, did not accrue credit toward tenure and seniority; the State Board affirmed as did the Appellate Division. The Commissioner notes with approval the ALJ's inclusion in his partial initial decision of the following paragraph from the Appellate Court decision in Zaremba, which states:

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Now, a pool sub -- if a pool sub is certificated in the area that the teacher is who is absent, and that absent teacher continues his or her absence until the end of the year, that pool substitute is no longer considered a pool substitute, but offered a contract, retroactively.

Q. What is the triggering event for that decision?

A. The triggering event for the offer of a contract is a determination as to how long the absent teacher will, in fact, not be on duty.
(Tr. 1-29-30)

***

Q. If I am teaching in the place of an absent teacher who has now given the superintendent notice that he or she is not returning to school, may I be removed and another substitute be placed in and given a contract, in effect, to fill in for that teacher?

A. No. If you are properly certificated, as you should be -- if you're filling in for a full term beyond 21 days, you have to be certificated in the area of the absent teacher.

Now, if that absent teacher does not return, you are offered the contract, retroactively.

Q. Now, other than the designation "pool substitute teacher," does the Jersey City Board of Education have any other designations for substitute teachers?

A. Oh, yes. We have what we call a "germ diem." That's a substitute that's used on a daily basis, and a per diem substitute does not need to have a standard certificate.

Q. What are the other differences between a per diem substitute and a pool substitute teacher?

A. Well, a per diem substitute teacher, as I say, functions from day to day. If the teacher for whom that per diem substitute is substituting for (sic) returns, then that per diem may be sent to another school where a teacher is absent and may not be employed, and may be given one hour's pay if the services are not needed within the district. (Tr. 1-31-32)

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A. A standard certificate had to be issued for them to be offered a pool substitute assignment. (Tr. 1-21)

***

Q. Now, may a particular substitute teacher be assigned to teach any grade level any subject area?

A. Yes. If he's designated as a pool substitute, his function is to substitute for a teacher who is absent, and depending upon the teacher who is absent, what that certification is, the pool substitute does not have to be certified in the area of the teacher who is absent. (Tr. 1-24)

However, on the issue of appropriate certification, a hypothetical posited by the ALJ did reveal the following inconsistent testimony concerning how long the pool substitutes serve in a capacity wherein they are not endorsed:

Q. Assume, in a hypothetical situation, when a teacher is absent for -- say 30 days. May a pool substitute teacher be assigned for a full 30 days to fill in for that absent teacher?

A. Yes.

Q. Okay. Supposing a teacher is out for three months.

A. A pool substitute may fill in for a three-month period, also.

Q. May a substitute teacher fill in for the entire school year?

A. No. There is a distinction there, you see, in a pool substitute. And the reason for the pool substitute is so that there was no break in the continuity in the child's education, and this is the reason why it was requested by my office at the time that the pool substitute be fully certificated before being hired.

If a teacher were to have been hired, a contract teacher, he would have to be hired in the appropriate area of certification to fill a vacancy.

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***

Q. Now, are there any practices that you're aware of, or any Board resolutions, which automatically offers (sic) a contract to a pool substitute after a given amount of time?

A. No. The only practice wherein a pool substitute is offered a contract is as I referred to earlier.

If that pool substitute is filling in for a teacher who is absent, has the appropriate certification; and the teacher who is absent is going to be out until the end of the year, that becomes a vacancy. Then a contract is offered to that pool substitute. (Tr. 1-39)

Further, testimony revealed that the certification requirements are more nearly tailored to those of per diem substitutes than regular teachers. In response to petitioners' counsel's inquiry regarding what happens when a pool substitute arrives for work and the function and certification under which he is employed, Mr. Jencarelli responded:

A. He reports to the principal, indicating that he has been assigned as a pool substitute, and then the principal makes the determination as to what absent teacher he will fill in for on that particular day.

Q. Okay. And if, in fact, there is an absent teacher in that particular school, what happens to the pool substitute teacher?

A. The pool substitute teacher fills in for that particular teacher, and doesn't necessarily -- isn't necessarily certificated in the same area that the absent teacher has been or was or is.

Q. Now, with reference to the qualifications, what are the qualifications for a pool substitute teacher with the Jersey City Board of Education?

A. That has changed over the years. There was a time when pool substitute teachers did not have to be certificated in a particular area. However, I think from the late seventies, forward -- '78, forward, there was a requirement that they be certificated.

Q. And what type of a certificate would qualify them to become a pool substitute?

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For instance, are they offered a contract? What is evidence of their employment?

A. Generally speaking, they were employed as a result of a Board resolution and were paid a stipend for such employment. They were paid semi-monthly. They were employed by the month but paid semi-monthly.

Q. Okay. And this Board resolution, does it refer to any type of a contract or contractual period for --

A. No.

Q. --for said employment?

A. No, it does not. (Tr. 1-2)

***

Q. To your knowledge, has a written contract ever been offered to a pool substitute teacher --

A. No.

Q. -- to perform as a pool substitute teacher?

A. No.

Q. To your knowledge, is there any kind of a contract whatsoever offering a pool substitute teacher guaranteed employment for the entire school year?

A. No.

Q. With reference to the termination of pool substitute teachers, what is your understanding as to how a pool substitute teacher is terminated and on what grounds if any?

A. A pool substitute -- it's not my understanding -- it's my practice over the years.

Q. Again, I'm talking about the practice of the Jersey City Board of Education.

A. A pool substitute may be terminated at any time for whatever reason, and we try to give a reason for such termination. (Tr. 1-44)

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EDWARD L. LOWICKI, BRUCE THOMAS and all others similarly situated,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

PARTIAL DECISION

The record and partial initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions were not filed within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Having carefully reviewed the record in this matter, the Commissioner finds and determines that the pool substitutes herein must be excluded from the class of petitioners in the Lowicki case currently before OAL because they function in a capacity similar to per diem substitutes, not as regular teachers.

Initially, the Commissioner agrees with the ALJ's conclusion that "[n]othing that Jencarelli said would reasonably support a conclusion that the Board deliberately intended to create the pool substitute position in order to prevent persons in that position from receiving the same benefits or entitlements as other teachers." (Partial Initial Decision, ante) The Commissioner concurs with the ALJ that petitioners fail to establish by a preponderance of the evidence that there was a deliberate subterfuge on the part of the Board to hire fully qualified teaching staff members and yet preclude them from acquiring "regular" status by dubbing them other than regular teachers.

The transcript of James Jencarelli's testimony taken on November 19, 1985 did reveal that the intent of the Board in hiring the pool substitutes was similar to that of per diem employees. The following direct examination of Mr. Jencarelli by petitioners' attorney, combined with Exhibits R-1 through R-6, convinces the Commissioner that the pool substitutes were hired on a month-to-month basis, without a written contract, and without other emoluments except the provision of one sick day per month of service. While required to hold New Jersey certification, they are not usually required to hold the endorsement for the classes they assume. The Commissioner finds, therefore, that they serve on a temporary basis, are not "regular" teachers and, thus, there is no expectation of reemployment or tenure under the Spiewak three-pronged test.

> Q. How are these so-called "pool substitute teachers" employed? What is the mechanism for their employment?

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

August 4, 1986
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

AUG 6 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 6 1986
DATE

Ronald L. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

md/e

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My reading of the foregoing cases, as well as others cited by counsel, leads me to conclude that given the undisputed facts in this case as related in my Order of January 29, 1986, and as reinforced by Jencarelli's additional testimony before me in June 1986,* the pool substitute teachers should be considered "substitutes" and not "regular teachers." The arguments advanced by petitioners essentially rest upon an interpretation of the case law which simply does not square with the facts that exist in this case. No persuasive evidence was offered to provide a basis for me to reject Jencarelli's testimony that pool substitutes are used essentially as "pinchhitters" for the temporarily absent regular classroom teacher. Combined with the total absence in this record of any demonstration that the Board's creation of the category and its use of the persons filling them was a sham or a subterfuge, I am convinced that these individuals are not to be treated as "regular teachers." The six petitioners in Yanowitz were held not to be substitutes because the board, in the Commissioner's view, had used them as regular teachers on a full-time basis and paid them less than they should have received by calling them something else. Thus, he cited the following language as being "particularly pertinent": "The courts have condemned evasions of the tenure statute and refused to countenance the subterfuge of designating a teacher as a substitute where the service rendered and intended to be rendered was that of a regular teacher." See, Yanowitz, at 75, citing Downs v. Bd. of Ed. of Hoboken, 13 N.J. Misc. 853 (Sup. Ct. 1935) (emphasis added). No such circumstances are present here, nor does any other basis exist to elevate the pool substitutes to a status to which they are not entitled by the facts in this record. The only relevant similarity between the Yanowitz petitioners and the pool substitutes in this case is that all are fully certified, report to work daily and had or have the same employer. However, unlike the Yanowitz petitioners, the pool substitutes were not relegated to some inferior category so as to give the Board an excuse not to properly compensate them for their services. Accordingly, I **CONCLUDE** that the pool substitutes are not to be considered regular teachers.

*The factual findings set forth on pages 6 to 8 of my previous Order are incorporated by reference herein.

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The Appellate Division in Zaremba reviewed applicable statutory and case law in this area and determined for present purposes as follows:

> Petitioners contend that they were not hired to act in place of an absent employee, but were full-time employees, paid on an annual basis and not per diem as other substitutes and performed the same services as regular staff teachers, relying upon Spiewak v. Rutherford Bd. of Ed., supra, 90 N.J. 63, and Sayrveville Education Assn. v. Bd. of Ed. of Sayreville, 193 N.J. Super. 424 (App. Div. 1984). We disagree. In Spiewak, the question was whether remedial and supplemental instructors who met all the criteria of "teaching staff members" should be deprived of their tenure rights. The court held that since none of the remedial teachers was a temporary replacement, N.J.S.A. 18A:16-1.1 did not apply. In Sayreville, the Court concluded that the substitute teacher technique was not available for filling what was a permanent vacancy rather than a temporary absence. . . . Each case expressed the rule that N.J.S.A. 18A:16-1.1 ". . . is limited to employees hired to take the place of an absent teacher." . . . Although petitioners were hired on a full-time basis and reported to the schools daily, the purpose of their hiring was "to act in place of" regular classroom teachers who were temporarily absent.... See, Zaremba, at pp. 6-7.

Similarly, in another unreported Appellate Division decision, Wygand v. Bd. of Ed. of the Tp. of Marlboro (N.J. App. Div., Nov. 19, 1985, A-764-84T7) (unreported), the court had to consider the effect of the service of appellant between April 28 and the end of the school year in June 1980 when he was filling the position of a teacher who had resigned. Wygand was thereafter employed as a regular classroom teacher for the next succeeding three school years. When he received notice that his employment would not be renewed for the fourth school year (1983-84), he appealed to the Commissioner claiming that the service during April-June 1980 had to considered in determining whether he had tenure. The administrative law judge concluded that his services during that period were as a regular teacher and not as a substitute and recommended Wygand's reinstatement. The Commissioner and the State Board both affirmed, as did the Appellate Division. However, in reaching that decision, the Appellate Division specifically noted that since Wygand "was not filling a vacancy caused by the temporary absence of a regular teacher whose return to duty was contemplated," his service during April to June 1980 could not be deemed that of a substitute teacher as defined by N.J.S.A. 18A:16-1.1.

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the rights and benefits to be accorded to regular teaching staff members. Sayreville thus stands for the essential proposition that a "substitute" is one who is hired to take over a position which is "temporarily unoccupied," not one which is "vacant. See also, Ujhely v. Linden Bd. of Ed., 1985 S.L.D. _____, (Aug. 26, 1985). "Regular" teaching staff status therefore may be withheld only from someone who fills a position during a time that the assigned teacher is temporarily absent.

Two relatively recent unreported Appellate Division decisions also relate directly to what I believe to be the essential area of inquiry in this case. In the decision in Zaremba v. Bd. of Ed. of the Middlesex County Vocational & Technical School District (N.J. App. Div., Nov. 7, 1984, A-1295-83-T2) (unreported), the court affirmed the decision of both the Commissioner and the State Board with respect to certain teachers who had served for years as permanent substitutes. In that case, the employees originally were hired under the CETA Program and paid an annual salary as opposed to a per diem stipend normally given to substitutes. They received no contractual benefits, except health benefits and personal days, although they did receive statutory sick leave. Both petitioners reported daily to the office of the principal for assignment to the classroom of absent teachers and most of those assignments were limited to one or two days. When no teachers were absent, the petitioners were assigned to hall duty or administrative functions in the office.

In 1977, approximately three years after they were first engaged under the CETA Program, one of the petitioners was hired as a regular teaching staff member and placed on step one of the appropriate salary guide. The other petitioner was hired as a regular staff member on step one of his guide the following year. In 1981, they both filed a petition of appeal with the Commissioner complaining about their initial placement at step one and asserting that the board thereby had deprived them of seniority credit for their years of service as CETA employees. The Commissioner rejected their arguments and held that they were not to receive seniority credit since their prior service was as substitutes and therefore did not accrue credit toward tenure and thus seniority. The State Board affirmed and the appeal followed.

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Board deliberately intended to create the pool substitute position in order to prevent persons in that position from receiving the same benefits or entitlements as other teachers.

This is not to say that I agree with the Board that the inquiry must end there. To the contrary, it now is incumbent upon me to continue to consider the thrust of the Yanowitz decision and other cases in order to determine whether or not the 40 or so employees here involved, regardless of the Board's intent, are to be treated as "regular teachers."

The nub of the problem seems to me to stem from the fact that pool substitutes are hired for what normally is expected, and usually turns out to be, a long-term basis, but to perform a series of short-term jobs. Indeed, the predicate for the creation of the category was to introduce continuity with respect to the Board's ability to "plug-in" a replacement teacher where the regular classroom teacher is temporarily absent. The Board did not want to continue to rely upon the often unsatisfactory method of either having to call in per diem substitutes who might arrive late, if they were available at all, or to have another teacher "cover" the class. Thus, the instant situation immediately implicates the decision in Sayreville Education Assn. v. Bd. of Ed. of Sayreville, 193 N.J. Super. 424 (App. Div. 1984) where the Appellate Division held that a board may not fill a teaching staff vacancy occurring after commencement of the academic year by appointing someone as a substitute teacher for the balance of the school year. While noting that N.J.S.A. 18A:16-1.1 provides statutory authority temporarily to employ persons as substitute teachers, the court held that the thrust of that statute is clearly aimed at those situations in which the services of a substitute are required because of a temporary absence, even if protracted, of a teacher whose return to duty was contemplated. Thus, pointing to the specific statutory language, "to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee," the court held that it was the engagement of a teacher for a period which was essentially only a temporary arrangement that marked the true "substitute" status. Where, however, as in Sayreville, the board filled a vacancy which it knew would continue for the balance of the school year, it could not deprive the person filling that vacancy of

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DISCUSSION

There is practically no dispute as to the essential facts in this case. Rather, there exists a sharp disagreement as to the legal consequences that flow from those facts. Thus, I agree with petitioners when they point out that the descriptive words chosen should not control the ultimate decision; rather, the obligation of this tribunal is to review and consider the facts in this case in light of Yanowitz and subsequent cases dealing with the concept of "substitutes."

According to the Board, its determination to create the category of "pool substitute teacher" was solely designed to ensure that because, in the normal course of things, teachers do incur absences, there would always be, as nearly as possible, a person or persons available at each school temporarily to fill in for absent teachers on an expeditious basis. Only where there is a known or reasonably expected prolonged absence would a pool substitute ever serve over a long period of time in the same classroom. Indeed, Jencarelli repeated at the June 1986 hearing that when such a situation does arise, the pool substitute is offered a regular contract, retroactive either to the beginning of the school year or to when he or she actually went into the classroom. Thus, the Board continues to insist that under established case law, and absent proof of any malevolent intent to deprive pool substitutes of their rightful entitlements, the facts clearly reveal that the appointment, functions and expectations of the persons serving as pool substitutes clearly distinguish them from what normally would be characterized as "regular teachers."

I have considered in light of Yanowitz the question of whether there was any malevolent intent surrounding the Board's creation and use of pool substitutes, and I find no sufficient proof in the record to support such a proposition. This conclusion, of course, immediately and critically distinguishes the present matter from the Yanowitz case where the Board's actions were found by the Commissioner to be tantamount to a deliberate subterfuge. Nothing that Jencarelli said would reasonably support a conclusion that the

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underlying facts, the late Judge Berman in his Initial Decision sympathetically referred to petitioners as "retarded in their advancement" and criticized the fact that they were known variously as "teachers in training, contract teachers, emergency certificated teachers, or by other less frequently used euphemisms." See, In the Matter of Edward L. Lowicki and Bruce Thomas, et al. v. Bd. of Ed. of City of Jersey City, OAL DKT. NOS. EDU 2902-79 and EDU 2582-79 (consolidated) (January 28, 1981). After disposing of various and sundry defenses raised by the Board, Judge Berman directed the respondent immediately to comply with the Yanowitz case with respect to all petitioners whose claims were not barred by the Statute of Limitations and who were members of the New Jersey Education Association at the time the Yanowitz litigation commenced.

As I noted in my Order of January 29, 1986, the instant litigation is a small piece of the larger picture. It is limited to a determination of the precise status of approximately 40 employees who are functioning in the position known as "pool substitute teacher."

Following the Commissioner's reversal of my Order, it was determined that an additional hearing day would be scheduled in order to take the further testimony of James Jencarelli, the respondent's Deputy Superintendent of Schools who had testified at some length at the original hearing in November 1985. Ultimately, an additional hearing day was conducted in late June 1986 (due to the inability to schedule an earlier hearing because of illness). On that date, Jencarelli repeated much of the previous testimony he had given as to his knowledge of the creation of the category of pool substitutes and his understanding of what they did and why they did it. He took the opportunity to stress, however, that it was his understanding that these persons were engaged essentially to perform on a temporary fill-in basis for absent classroom teachers and it was not the Board's intent, nor did the Board in practice utilize these persons on a long-term basis to fill a permanent vacancy created by the prolonged absence of the classroom teacher.

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N.J.A.C. 1:1-9.7, reversed my determination. See, Commissioner of Education, Decision on Motion, March 13, 1986. The Commissioner held that the precise issue to be addressed in this phase of the case was limited to the question of whether the pool substitute teachers were to be accorded the status of "regular teachers" rather than "substitutes," and that an analysis and comparison of their status with those of the petitioners in in Yanowitz, et al. v. Jersey City Bd. of Ed., 1973 S.L.D. 57, appeal dismissed, 1973 S.L.D. 79, "remains to be argued and considered." See, Commissioner's Decision on Motion, at 3.

In the Yanowitz case, the Commissioner had reviewed the employment history and salary claims of six individuals employed by the Jersey City Board of Education. He rejected, inter alia, a Board defense to the effect that each was paid less as a "long-term substitute" for several years because they were not functioning as "regularly-appointed" teachers. The Commissioner noted as follows:

> The Commissioner agrees that there is a definite distinction between the conception of the classification "teacher" and "teaching staff member" as used in the school law and in school practice, as opposed to the the definition of "substitute teacher." In the judgment of the Commissioner, petitioners clearly were not "substitute teachers" during their full-time employment for several school years under proper State certification. See, Yanowitz, at 74.

The Commissioner also reviewed the case and statutory law as of 1973 and determined that since the employment of each of the six Yanowitz petitioners was on a full-time teaching basis, the Board's practice of referring to them as "contract teachers" or "teachers-in-training" in order to pay them less was improper. Thus, the Board's placement of each of them on the first step of the particular salary guide, without giving them credit for their prior experience, was in deprivation of their rights.

The instant matter, which was commenced in 1979, was brought by and on behalf of several teachers employed by the Jersey City Board of Education who claimed that they, too, were being deprived of their salary entitlements similar to the Yanowitz petitioners and contrary to the Commissioner's order in that case. In relating the

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

PARTIAL
INITIAL DECISION
OAL DKT. NO. EDU 2505-81
REDOCKET OF EDU 2902-79 and EDU 2582-79
AGENCY DKT. NOS. 181-5/79A and 264-7/79A

EDWARD L. LOWICKI, BRUCE THOMAS,
AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY
OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Jeffrey Barton Cahn, Esq., for petitioners (Sills, Beck, Cummis, Zuckerman, Radin, Tischman & Epstein, attorneys)

Philip Feintuch, Esq., for petitioners (Feintuch & Porwich, attorneys)

John A. O'Shaughnessy, Esq., for respondent (William A. Massa, attorney)

Record Closed: July 9, 1986, Decided: August 4, 1986

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

In an Order dated January 29, 1986, in this matter I determined that approximately 40 "pool substitute teachers" employed by respondent were eligible for enrollment in the Teachers' Pension and Annuity Fund (TPAF) and were entitled to participate in whatever benefits were to be awarded to the petitioners and the class they represent. The Commissioner of Education, on interlocutory review pursuant to

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the Board's district are paid annually and thus are contracted to a position for a full academic year. Therefore, any such permanent substitute is not a day-to-day substitute, the single excluded group from the Act.

The final inquiry under the instant circumstances is to determine if said permanent substitutes function as full-time employees, in compliance with N.J.A.C. 6:20-5.6(b). Once again, Exhibit II is conclusive. The job description for permanent substitutes lists first under "specific responsibilities":

> 1. Reports to school and remains at school in accordance with current teacher contract hours.

Consequently, since permanent substitutes in the Rumson-Fair Haven School District are not employed on a day-to-day basis, are contracted to a position year-to-year and hold a position with the Board under an appropriate certificate, the Commissioner finds and determines that they are entitled to the benefits of N.J.S.A. 18A:29-5. Further, since the Commissioner finds the permanent substitutes herein are full-time employees, there is no need to reach a discussion of Joan Driscoll v. Board of Education of the City of Clifton, 79 N.J. 126 (1979).

Accordingly, the initial decision is rejected for the reasons stated herein. Summary decision is granted in favor of petitioners. The permanent substitutes in the Rumsom-Fair Haven School Regional District are entitled to the benefits of N.J.S.A. 18A:29-5.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 16, 1986

Pending State Board

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> 6:3-1.21 and who is not employed as a substitute on a day-to-day basis, shall be $18,500.00 for an academic year and a proportionate amount for less than an academic year. (emphasis supplied)

N.J.S.A. 18A:29-5 also sets forth a definition of "full-time":

> For the purpose of this amendatory and supplementary act, "full-time" means the number of days of employment in each week and the period of time in each day required by regulations of the State board to qualify a person as a full-time teaching staff member.

N.J.A.C. 6:20-5.6(b) defines "full-time":

> For the purpose of the Teacher Quality Employment Act, full-time employment shall mean the number of hours in a day and the number of days in a week the district board of education prescribes for a teaching staff member to receive the full salary designated for their step on the district board of education's salary schedule.

The initial inquiry under the instant circumstances is to determine whether permanent substitutes in the Board's district meet the requirements of N.J.S.A. 18A:1-1, which defines a teaching staff member as a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school

1. "holding office, position or employment***." Permanent substitutes in the district do in fact hold office, position or employment by virtue of the employment contract issued by the Board, which, for the 1985-86 school year, was at the annual salary of $9,250. (See Exhibit V.)

2. "***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***." Permanent substitutes in the district must and do hold a "New Jersey Secondary Teacher Certification." (See Exhibit II.) The Commissioner notes said certification is referred to in Exhibit II erroneously by the Board. It should be "instructional certificate." The Commissioner further notes that an instructional certificate is appropriate for the "office, position or employment***" of a permanent substitute.

The next inquiry under the instant circumstances is to determine whether permanent substitutes herein comport with N.J.S.A. 18A:29-5, which requires that those entitled to the minimum salary of $18,500 not be employed as a substitute on a day-to-day basis. Exhibit V establishes irrefutably that the permanent substitutes in

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Association argues that "these permanent substitutes are full-time teaching staff members, who are subject to a written contract for the entire academic year and perform the same duties as other full-time teaching staff members in the school district." (Exceptions, at p. 2)

The Association also avers that the ALJ "improperly made findings of fact which are not established in the record." (Exceptions, at p. 2) It suggests that the only evidence presented in the matter was its Motion for Summary Judgment, which was supported by an affidavit and exhibits, including the job description for permanent substitutes, a portion of the collective bargaining agreement and an employment contract for a permanent substitute, observation and evaluation reports, citing its Motion for Summary Judgment in support of this statement. The Association objects to the ALJ's conclusion "that [a] permanent substitute's 'function does not otherwise differ from a substitute without an annual contract, unless assigned to fill in for a full-time teacher on a long-term basis.'***" (Exceptions, at p. 2, quoting the Initial Decision, ante) It also objects to the ALJ's finding of fact on page 3 of the initial decision comparing permanent substitutes to day-to-day substitutes because, it suggests, it is unsupported by any evidence in the record.

The Association submits that the Commissioner must reject the initial decision and must conclude that permanent substitutes are covered by the Act.

For the reasons which follow, the Commissioner rejects the findings and determination of the ALJ and concludes that permanent substitutes are entitled to benefits of N.J.S.A. 18A:29-5.

N.J.S.A. 18A:1.1 defines the meaning of "teaching staff member":

> "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.

N.J.S.A. 18A:29-5 sets the minimum salary for full-time teachers in the State of New Jersey:

> The minimum salary of a full-time teaching staff member, in any school district, who is certified by the local board of education as performing his duties in an acceptable manner for the previous academic year pursuant to N.J.A.C. 6:3-1.19 and

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NJEA avows that the permanent substitute position in this case is an annual position requiring permanent substitutes to report to work each day, and it cites the ALJ at pages 2 and 3 in recognition of this point. Applying the test for determining eligibility for $18,500 as suggested by the ALJ is wrong, however, contends NJEA. Rather, argues NJEA, the Act imposes three conditions, which the pool substitutes in the instant matter meet:

1. full-time employment

2. teaching staff member status

3. employment not on a day-to-day basis.

NJEA avers that since all pool substitutes in the district are required to hold teaching certification, are employed for the entire school year under annual contract on a full-time basis, and are not substitutes on a day-to-day basis, they are eligible for the $18,500 annual salary.

Further, NJEA excepts to the ALJ's analogizing the duties of the permanent substitute to the day-to-day substitute. It avows that the Act is unequivocal; the test of eligibility under N.J.S.A. 18A:29-5 is not duties but, rather, whether the employment is on a long-term or day-to-day basis.

Finally, NJEA posits that the logic, policy and equities of the situation dictate that a day-to-day substitute is not necessarily committed to teaching as a career, and could thus logically be excluded from the Act's coverage. By contrast, NJEA argues, the permanent substitute, because of the nature of the position, must depend upon such employment for his essential livelihood. Such commitment is consistent with the nature of the position and the legislative goals. Thus, NJEA asserts, the ALJ erred, and the Commissioner should reverse the initial decision and grant the relief requested by the Association.

The Association adopts and incorporates by reference the exceptions filed by NJEA, as well as the legal arguments presented to the ALJ in support of its Motion for Summary Judgment. Further, the Association avers the ALJ has improperly expanded the Legislature's exemptions from the minimum salary provision of the Act to include permanent substitutes whereas "[t]he only exclusion which the Legislature engrafted on the statute was for an individual 'employed as a substitute on a day-to-day basis.'***" (emphasis in text) (Association's Exceptions, at p. 1) Citing Ricci v. Ricci, 96 N.J. Super. 214, 246 (Juvenile and Domestic Relations Court, 1967), the Association avers that had the New Jersey Legislature intended to exclude permanent substitutes from the statute, it would have said so.

The Association further contends that the ALJ incorrectly "juxtaposed the facts and issue in this case to conclude that since permanent substitutes perform the same duties as day-to-day substitutes, they must be treated as day-to-day substitutes." The

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RUMSON-FAIR HAVEN EDUCATION ASSOCIATION AND BRAD WILBUR,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the Rumson-Fair Haven Education Association (Association) as well as the New Jersey Education Association (NJEA) within the time prescribed by N.J.A.C. 1:1-16.4a, b and c. The Commissioner observes that it is unclear from a review of the record exactly what status the ALJ granted NJEA herein. There is a clear distinction in the Office of Administative Law rules between Intervenors, N.J.A.C. 1:1-12.1, and Participants, N.J.A.C. 1:1-12.6, and their rights are different. See also, N.J.A.C. 1:1-12.5. However, as a consequence of the confusion and so as not to allow the lack of clarity to affect the parties' rights, the Commissioner will accept and consider NJEA's exceptions.

The Commissioner further notes that the initial decision fails to state that Petitioner Brad Wilbur withdrew from this case on May 13, 1986. Thus, while the initial decision does not relate to Brad Wilbur individually, any conclusion and orders contained in this decision relate to any individuals similarly situated and represented by the Association herein.

NJEA avers that it concurs with that part of the initial decision wherein the ALJ concluded that teachers employed as permanent substitutes replacing teachers on leave of absence are covered by the Teacher Quality Employment Act (Act) pursuant to N.J.S.A. 18A:29-5 et seq. However, NJEA argues that the ALJ's conclusion that other permanent substitutes are not covered by the Act construes the Act too narrowly and is wrong.

Citing N.J.S.A. 18A:29-5 et seq., Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74-75 (1982), Barnes v. Jersey City Bd. of Ed., 85 N.J. Super. 42, 45 (App. Div. 1964) and Geller v. TPAF, 53 N.J. 591, 597-598 (1969), NJEA argues that the Act is remedial and is thus to be construed liberally. Furthermore, NJEA avers, the remedial aim of the Act is not simply to attract new teachers, but also to retain teachers, and the Act by its plain language applies both to new teachers and teachers employed prior to its passage.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

DATE Aug 7, 1986

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

DATE 8/7/86

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE AUG 11 1986

OFFICE OF ADMINISTRATIVE LAW

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short-term and who is a long-term substitute, to use Justice Pashman's phrasing in Driscoll, but this will have to wait for other cases or guidelines by the Department of Education. The essential functional test of entitlement to the minimum salary would focus on when a substitute stops performing day-to-day substitute services in covering different classes or several classes with the same teacher and takes over the full-time teaching function with all its longer term goals and considerations. This opinion is in no way meant to derogate or minimize the contributions of substitute teachers, whose function is both critical and difficult, but it is meant to effectuate the clear intent, the plain language of the statute which makes a distinction between substitutes handling classes on a day-to-day basis for teachers who may be briefly absent or unavailable and those who are taking the teacher's place on a more long-term or permanent basis.

DISPOSITION

On the basis of the above findings of fact and conclusions of law, it is hereby **ORDERED** that the action of the respondent Board of Education in denying payment of the minimum salary under the Teacher Quality Employment Act to the so-called "permanent" substitute teachers involved in this case is **AFFIRMED** and the appeal **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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functions on a day-to-day basis in the sense that they receive their assignments on a daily basis.

It is reasonable, and consistent with the intent of the legislature as well as the plain language of the statute, to conclude that the meaning of the phrase "employed as a substitute on a day-to-day basis" meant to address the very concerns raised in Driscoll, infra, with respect to making distinction between the so-called short-term substitute who is filling in for a day or so for an absent teacher and the long-term substitute who is covering for a teacher on an extended period of leave, and thereby responsible for the more comprehensive duties and responsibilities of the full-time teacher; including tests, homework and extended evaluations of students. Spiewak, cited by the petitioner, also supports this conclusion in that it establishes the principle that statutory rights are to be awarded according to the function and not merely contract. To conclude that the Teacher Quality Employment Act intends to exclude regular substitutes and include permanent substitutes, who are permanent only in the sense that they show up every day under contract for year, is an interpretation that allows the form of employment to triumph over the function and substance of it. This is not consistent with Spiewak and it is not consistent with the plain language of the act, which merely seeks to distinguish between a substitute who performs day-to-day functions covering different classes and a teacher who is hired as a long-term substitute to fill in for a full-time teaching-staff member who is for some reason unavailable or on leave. This conclusion is buttressed by the fact that the act makes very clear that the minimum salary of $18,500 for an academic year is to be awarded in "a proportion amount for less than an academic year." See, N.J.S.A. 18A:29-5. Clearly, the legislature intended that the minimum salary requirement applied to a substitute teacher who is filling in on a long-term extended basis for a full-time teacher on leave.

Accordingly, I **CONCLUDE** that the minimum salary provisions of the Teacher Quality Employment Act do not apply to the so-called "permanent" substitutes performing the same functions as regular substitutes, lacking an annual contract and waiting for a call in the morning. I further **CONCLUDE**, by way of dicta because the facts have not been presented in this case, that the act does require that the minimum salary be given to a permanent substitute, or substitute by any other name, who is filling in for a teacher on leave of absence for an extended period amounting to some proportion of the academic year. I recognize that there may be problems of interpretation in determining who is a

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Against that factual backdrop, the petitioner Association contends that "permanent" substitutes are entitled to the minimum salary because they are not employed as a substitute on a day-to-day basis and, further are both full-time and teaching-staff members within the meaning of the regulations. See, N.J.A.C. 6:3-1.13, 6:11-3.4.

It is possible, based on the above language, to conclude that the legislature intended to pay permanent substitutes the same salary as full-time teaching-staff members despite the fact that they perform virtually the same duties as so-called day-to-day substitutes, apart from the fact that they report to school each morning. But this is an unreasonable and absurd result which is not mandated by the language and does not consider other sections of the act which express its intent. The express concern of the act was that of attracting and retaining able individuals to teach. In this regard, the specific concern of the legislature was that "[T]he starting salary level for new teachers have fallen significantly behind the starting salaries paid to other recent college graduates" and, further," [a] competitive starting teacher's salary is an additional means of attracting and retaining outstanding individuals in the teaching profession." N.J.S.A. 18A:29-5.2. In addition, the legislature expressly excluded from the minimum salary any teacher employed as a substitute on a day-to-day basis. The clear meaning of the language of the act is to establish competitive starting salaries for teachers in order to attract and retain qualified full-time teachers, and not to increase the salary of substitute teachers, whose day-to-day functions differ substantially from the regular teaching staff. To conclude that the legislature intended to exclude substitute teachers, who wait at home in the morning for a call to get their assignment, and include permanent substitutes, who report to the school, is unreasonable and absurd and not dictated by the plain language of the statute when construed as a whole. Such a construction is to be avoided. See, Davis v. Heil, 132 N.J. Super. 283 (App. Div. 1975) aff'd 68 N.J. 423 (1975). Isolated terms of the statute cannot be used to defeat its reasonable construction and a court is obligated not only to look at the words but also to the internal sense and objectives which the legislature sought to accomplish. See, Giles v. Gassert, 23 N.J. 22 (1956). The legislative concern with establishing competitive starting teacher salaries simply does not apply to substitute teachers, who perform a different and inherently day-to-day function than the full-time teacher. It is clear that the legislature simply did not consider the purely contractual and administrative distinction between the so-called permanent substitute and the regular substitute teacher, given the fact that both perform their

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substitutes, they are not responsible for homework, or testing, or the functions and duties which fall upon the full-time teaching-staff member. Accordingly, respondent concludes that permanent substitutes should receive substitute pay for substitute work and are not entitled to the minimum full-time teaching-staff member salary established by the Teacher Quality Employment Act.

DISCUSSION AND CONCLUSIONS OF LAW

The question presented is whether the minimum salary provision of the Teacher Quality Employment Act covers permanent substitute teachers performing substitute teacher functions on a daily, full-time basis pursuant to contract. I agree with the argument of the respondent and conclude that permanent substitutes are not entitled to the minimum salary for the reasons set forth below.[2]

It is first noted that the only substantive and functional difference between permanent substitutes and substitutes working on a day-to-day basis is that the former report to school each day under contract and then are assigned the same duties as a substitute working on a day-to-day basis. This arrangement is obviously a benefit to both the Board, which has a pool of substitutes readily available without the need for even a phone call, as well as to the permanent substitutes, who are contractually guaranteed regular and full employment. But in terms of function, there is no meaningful difference between a so-called permanent substitute and the substitute employed on a day-to-day basis. Unlike full-time teaching-staff members, substitutes do not become involved in homework, testing, or other long-term duties, unless they are assigned to fill in over an extended period for regular teachers. By any other name, then, a substitute is a substitute and the daily work arrangement established for administrative convenience does not alter the substance of the daily work.

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[2]The facts of this case do not present the issue of whether a substitute teacher assigned over an extended period to cover the classes of a teacher on leave is entitled to the minimum salary under the act in that he or she would be performing the functions of a regular teacher and not a substitute in terms of homework, tests and all the other concomitant duties and responsibilities.

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> For the purpose of this amendatory and supplementary act, "full time" means the number of days of employment in each week and the period of time in each day required by regulations of the State board to qualify a person as a full-time teaching staff member. [emphasis added] N.J.S.A. 18A:29-5.

Petitioner argues that the only group of teachers expressly excluded by this remedial legislation are teachers employed as substitutes on a day-to-day basis. Thus, by statutory construction, permanent substitutes would be implicitly included since they are employed on an annual basis and fall within the definition of a full-time teaching-staff member by virtue of the hours worked. See, N.J.A.C. 6:3-1.13. Beyond the express language, the petitioner argues that permanent substitutes are among teachers that the act was intended to attract and retain. The Education Association further cites Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), for the proposition that the right to minimum salary under the Teacher Quality Employment Act is to be based on consideration of function, rather than contractual attributes of a teacher's employment and that permanent substitutes, who are certified and work on a full-time basis, are entitled to the same projection as other full-time teaching staff members.

The intervenor New Jersey Education Association concurs with this position which is based on the purportedly clear and unambiguous language of the statute. The New Jersey Education Association (NJEA) also stresses the distinction between day-to-day substitutes, who work sporadically on call, and permanent substitutes who report to school each morning just as the regular full-time teaching staff members. It notes the concurring opinion of Justice Pashman in Driscoll v. Bd. of Education of the City of Clifton, 79 N.J. 126 (1979), which upholds a Board decision to pay substitutes less than others, but accepts the need to distinguish between short-term and long-term substitutes who perform duties commensurate with those of a full-time teacher. The Driscoll case involved the issue of the proper compensation for a substitute who is replacing a teacher on leave.

Respondent Board of Education argues in opposition that permanent substitutes, by any other name, are still substitute teachers who differ only from normal substitutes in that they report to school on a daily basis under an annual contract and are not on call. Other than that, the respondent argues that permanent substitutes perform the same function as regular substitutes, often teaching out of their area of certification. As

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substitute teachers are certified teachers who substitute on a full-time, daily basis and are assigned to cover various classes. They are employed on a contractual basis for the entire year and work the same workday and work week as other full-time teaching-staff members. They are observed in the performance of their duties and receive a written observation report, as well as a written summary evaluation report at the end of the school year. Permanent substitutes are also expected to attend all faculty meetings and perform other duties, such as cafeteria supervision, as assigned by the principal who also designates the classes they are expected to cover for absent teachers each day. These assignments include classes outside their area of certification.

Permanent substitutes perform the same functions as regular substitutes but report to school each day rather than wait for a call at home. This arrangement is an administrative convenience for both the school and the substitute. Permanent substitutes cover classes for absent teachers, often in areas for which they are not certified. As such, they do not generally become involved in such longer term functions as homework and testing. If assigned to fill in for a full-time teacher on leave for an extended period of time, the permanent substitute may perform those long-term teaching functions. There is no evidence that petitioner Wilbur is filling in for a full-time teacher on a long-term basis that would require him to perform teaching functions beyond that of the daily substitute.

There is no dispute as to the above facts and I so **FIND.**

ARGUMENTS OF THE PARTIES

The petitioner Education Association contends that the express language of the Teacher Quality Employment Act applies to permanent substitutes and requires that they be paid the minimum $18,500 salary established. It cites the statute, which provides that

> The minimum salary of a full-time teaching staff member in any school district who is certified by the local board of education as performing his duties in an acceptable manner for the previous academic year . . . and who is not employed as a substitute on a day-to-day basis shall be $18,500 for the academic year and a proportionate amount for less than an academic year.

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where they are assigned classes or other duties by the principal. Their function does not otherwise differ from a substitute without an annual contract, unless assigned to fill in for a full-time teacher on a long-term basis. The issue is whether such permanent substitutes are entitled to the annual minimum salary of $18,500 set by the Legislature in N.J.S.A. 18A:29-5 for full-time teaching-staff members who are not employed as substitutes on a "day-to-day" basis. This opinion concludes that permanent substitutes performing substitute work are not entitled to the minimum salary established by the Teacher Quality Employment Act. It further concludes that substitute teachers filling in for teachers on leave for extended periods, and performing long-term teaching functions as a result, are entitled to the minimum salary under the act. In a phrase, the plain meaning and intent of the Teacher Quality Employment Act in the context is that teachers receive substitute pay for substitute work.

PROCEDURAL HISTORY

Rumson-Fair Haven Education Association and permanent substitute teacher Brad Wilbur filed a petition on February 6, seeking to find the respondent Board in violation of N.J.S.A. 18A:29-5 for failing to pay the minimum salary. The Board answered the complaint on February 24, and the matter was transmitted to the Office of Administrative Law (OAL) on February 26. On April 14, a prehearing conference was held to settle the issues and it was determined that the matter would proceed by way of summary decision motion by the petitioner, which was filed on May 5, with briefs and accompanying affidavits. The New Jersey Education Association moved to participate and filed a brief on May 15. Respondent replied to petitioner's brief on June 23, and the record was closed.

FINDINGS OF FACT

There is no dispute as to the facts. The petitioner Education Association is an employee representative organization for a bargaining unit including all full-time and part-time certified classroom teachers and has as a member Brad Wilbur, a secondary physical education teacher, who was hired in the 1985-86 year as a permanent substitute teacher at a salary less than the $18,500 established by the Teacher Quality Employment Act, N.J.S.A. 18A:29-5 et seq. for full-time teaching-staff members.[1] Permanent

[1] Brad Wilbur's salary for the 1985-86 was $9,250.

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1273-86
AGENCY DKT. NO. 43-2/86

RUMSON-FAIR HAVEN EDUCATION ASSOCIATION AND BRAD WILBUR,
Petitioners,
v.
BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL SCHOOL DISTRICT,
Respondent.

Mark J. Blunda, Esq., for petitioner (Oxfeld, Cohen & Blunda, attorneys)

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Bruno & Barger attorneys)

Richard A. Friedman, Esq., for intervenor (Ruhlman, Butrym and Friedman, attorneys)

Record Closed: June 23, 1986 Decided: August 7, 1986

BEFORE RICHARD J. MURPHY, ALJ:

STATEMENT OF THE CASE

The petitioner Education Association appeals from the action of the respondent Board of Education (Board) in declining to pay so-called "permanent" substitute teachers the minimum salary established by the Teacher Quality Employment Act for full-time teaching-staff members. See, N.J.S.A. 18A:29-5 amended by P.L. 1985, c.321. "Permanent" substitute teachers work under annual contract and report to school each day

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Since petitioner seeks relief not on her established salary from July 24, 1984 forward as Director "C" but rather for retroactive pay to at least July 1, 1976, the Commissioner finds, as did the ALJ, that "petitioner could have and should have simultaneously filed a Petition of Appeal before the Commissioner of Education within 90 days from at least August 9, 1984 when she disclosed knowledge that the Board determined not to grant her retroactive pay." (Initial Decision, ante)

In light of the above-stated finding, the Commissioner does not reach the merits of the claim herein. Accordingly, the Petition of Appeal is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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GLORIA B. GIBSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were not filed within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Upon review of the record in this matter, the Commissioner is persuaded, as was the ALJ, that the instant Petition of Appeal is untimely. The record is unequivocal that petitioner had knowledge of her appointment to the Director "C" position as of August 9, 1984, and that it would carry with it no retroactive pay. (P-16) (See also Initial Decision, at p. 8) That petitioner elected to file a grievance at that time as opposed to filing a petition of appeal before the Commissioner is no bar to the application of the 90-day rule. See Sarah Riely v. Board of Education of Hunterdon Central High School, Hunterdon County, decided by the Commissioner on motion, September 19, 1978, N.J. Superior Court, Appellate Division rev'd and rem'd 1980 S.L.D. 1532, State Board dismissed on remand, April 8, 1980, wherein the Court stated:

> The commissioner's rationale is buttressed by the recent case of Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 311, 326-327, n. 4 (1979), in which the court cautioned that while advisory arbitration was an appropriate intermediate procedural step for handling a dispute over the withholding of a teacher's salary increment, a matter otherwise within the managerial discretion of the board of education, a teacher who proceeds to arbitration is not thereby relieved from compliance with the 90-day requirement of N.J.A.C. 6:24-1.2 for filing a petition of appeal with the commissioner. In such case, the commissioner will await the completion of the arbitration proceedings and the rendering of an advisory decision before conducting a hearing on the petition.
>
> (1980 S.L.D. at 1533)

See also Charles R. Stockton v. Board of Education of the City of Trenton, Mercer County, decided by the Commissioner November 19, 1984, State Board rev'd April 3, 1985, Superior Court rev'd/rem'd 210 N.J. Super. 150 (App. Div. 1986).

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

August 1, 1986
DATE

DANIEL B. MC KEOWN, ALJ

AUG 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

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Two, while it is recognized petitioner insists she was the Board's "negotiator" for the food service workers, the evidence she produced at hearing is insufficient to establish that assertion as fact. While petitioner may have assisted either the Board appointed negotiating committee which consisted solely of Board members, or the employee relations officer, or the professional negotiators, such assistance does not translate into being the Board's "negotiator". Neither the assistant superintendent's testimony at hearing nor the 1983 memorandum he authored is persuasive that petitioner was or is the Board's negotiator for food service employees. In fact, food service workers were not organized until 1984. Consequently, before organization negotiations with these workers were not legally required.

Petitioner has produced no evidence to demonstrate any nexus between the duties and responsibilities she performed as Director of Food Services as compared with Director "C" of Food Services to translate into a retroactive position of confidential status. The fact that the duties and responsibilities of both titles are identical does not translate into the position of Director being that of a confidential status because the superintendent had not recommended petitioner be of a confidential status until July 1984. Furthermore, the total evidence of record considered as a whole clearly shows that one who is of a confidential status in the Board's employ simply cannot be a member of any recognized negotiating unit. That petitioner had been a member of the Association until she was specifically appointed to the position Director "C" defeats her claim of retroactive confidential status.

Consequently, I **CONCLUDE** that on the merits of the case, even if the Petition of Appeal was not time barred nor barred through the application of the equitable doctrine of laches, petitioner failed to establish by a preponderance of credible evidence any entitlement from the Board to retroactive salary. For all the foregoing reasons, the Petition of Appeal is **DISMISSED**. There is no need to consider the element of damages in light of the foregoing.

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retroactive salary does not justify the 13 month delay in filing the instant Petition of Appeal. Rather, petitioner could have and should have simultaneously filed a Petition of Appeal before the Commissioner of Education within 90 days from at least August 9, 1984 when she disclosed knowledge that the Board determined not to grant her retroactive pay.

Consequently, given the facts established at hearing, I must **CONCLUDE** that the Petition of Appeal is time barred by the application of N.J.A.C. 6:24-1.2.

Moreover, the Petition of Appeal must be dismissed upon the equitable doctrine of laches. Petitioner herself testified that in 1976 when the confidential positions were created by the Board she believed she was a confidential employee. However, the then superintendent rejected that claim and advised he would not recommend her to that status. Laches, as noted by the Board, reflects the public policy that claims for redress resulting from the injurious acts of others be settled relatively soon. Laches requires claims to be asserted within a reasonable time so that the party accused has a fair opportunity to defend. In this case, petitioner knew since 1976 what her perceptions of her employment status were but waited until September 1985 to assert such claims. The nine year delay in asserting such claims and seeking relief from 1976 forward is the kind of claim the equitable doctrine of laches seeks to prohibit.

Consequently, I **CONCLUDE** that the Petition of Appeal must be **DISMISSED** upon the equitable doctrine of laches.

Even if N.J.A.C. 6:24-1.2 and the equitable doctrine of laches would not apply in this case, petitioner's claim for retroactive relief must be rejected on its merits. One, N.J.S.A. 18A:16-11 imposes no obligation upon the Board of Education to grant petitioner retroactive salary relief. It must be remembered that petitioner at all times between her initial employment in 1969 through July 1984 was a member of the Association. As such, the Association negotiated with the Board on her behalf for salary she had received. That negotiated salary became in law "* * * the emoluments and compensation appropriate thereto * * *" as required by law. The statute of reference does not require the Board, having upgraded petitioner's position to Director "C" as a means of affording her a salary increase to now go back to July 1976 and renegotiate or reestablish her salary for each of the intervening years. Such an obligation imposed upon the Board would indeed be an anomalous result, not intended by the statute.

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the Board argues that the relief requested in the petition is barred by the equitable doctrine of laches because she seeks retroactive pay to July 1, 1976. Next, the Board contends petitioner did not possess confidential status prior to July 1984 because she was, in fact, an Association member who negotiated Association agreements for Association members. Finally, the Board contends petitioner has failed to demonstrate by a preponderance of credible evidence that she is entitled to any back pay whatsoever.

FINDINGS, DISCUSSIONS AND CONCLUSIONS

When the Board's motion to dismiss the petition as being time barred through the application of N.J.A.C. 6:24-1.2 or upon the equitable doctrine of laches was initially denied, the Board was also granted leave to renew the motion at the close of petitioner's case-in-chief, which it did. Once again, the motion was then denied.

However, having had the opportunity of considering all relevant facts in the matter it is now readily apparent that N.J.A.C. 6:24-1.2 does apply and that the Petition must be considered time barred.

N.J.A.C. 6:24-1.2 provides at paragraph (b) as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

Petitioner seeks relief not on her established salary from July 24, 1984 forward as Director "C". Her claim goes directly to retroactive pay to at least July 1, 1976. Petitioner's memorandum of August 9, 1984 to the assistant superintendent clearly demonstrates that on at least that date she had knowledge her appointment to the Director "C" would carry with it no retroactive pay. (P-16). Petitioner elected to file a grievance at that time through the local grievance procedure as opposed to filing a petition of appeal before the Commissioner of Education within the 90 day time period. That petitioner went through the local grievance process for a favorable determination by the full Board on its public employee relations committee recommendation to grant her

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and petitioner were then holding the same status, Director "C". (P-8). Consequently, Ms. Pearson moved petitioner's grievance to the next higher level which was the Board's public employees relations committee. This committee is comprised of four Board members. The committee heard petitioner's grievance for retroactive wages on December 11, 1984 and recommended to the full Board as follows:

> Grievant [petitioner] is entitled to confidential status, salary and benefits retroactive to July 1, 1976 the date that the Trenton Board of Education recognized those district employees whose job functions made membership in any bargaining unit inappropriate.
>
> Level III, based upon the confidential duties assigned to the grievant, grants relief sought.
>
> (P-11)

On January 1, 1985, the Trenton Board of Education became an appointed board as opposed to an elected board. On that date, a new board of education was to take office. Accordingly, on December 20, 1984 the then still sitting elected Board determined to hold in abeyance all matters it received by way of recommendations from its public employees relations committee, including the recommendation on petitioner's retroactive salary. (P-12). On February 26, 1985, the now sitting appointed Board discussed the matter of the public employees relations committee recommendation that petitioner be granted retroactive pay without taking action on such recommendation. (P-13). Petitioner was advised by memorandum dated February 28, 1985 that the Board requested more time to consider her claim. (P-9). From February 28, 1985 and despite requests from petitioner, the Board has taken no action on the committee recommendation to award her back salary.

BOARD'S DEFENSES

The Board repeats its argument advanced February 19, 1986 that the Petition of Appeal is time barred by N.J.A.C. 6:24-1.2 which requires petitions to be filed within 90 days of the date the action complained of was taken. The Board says petitioner knew her salary as Director "C" was effective July 24, 1984 without retroactive pay but that she did not file the petition until September 12, 1985, more than 13 months later. Alternatively,

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> A person who holds de facto any office, position or employment in a school district and who performs the duties thereof shall be entitled to the emoluments and compensation appropriate thereto for the time the same is so hold in fact and may recover therefor in any court of competent jurisdiction.

A comparison of the job description for the position Director of Food Services (P-4) as compared to the job description for the position Director "C" Food Services (P-5) discloses no difference in either position's duties and responsibilities. The superintendent explained that he recommended petitioner's title be upgraded to Director "C", despite no change in duties or responsibilities, as a means to afford her an increase in salary. The superintendent explained that on or about July 24, 1984 petitioner was earning the maximum salary available for the position director and he saw the upgrade of her title to Director "C", a higher paying title, as a means to provide her a salary increase.

The assistant superintendent testified in support of petitioner's claim that she did perform confidential duties for the Board since at least July 1, 1976 because she did negotiate for the Board with the food service workers. In fact, petitioner points to a memorandum the assistant superintendent wrote to the superintendent on September 14, 1983 wherein the assistant superintendent recognized that petitioner "* * * did all the negotiations for the * * * food service workers * * *". (P-6).

Petitioner testified she did, in fact, negotiate with the food service workers on behalf of the Board and that she continues to be the Board's negotiator in this regard. While she admits her job description as either Director or Director "C" does not mention negotiations as part of her duties and obligations, she explained she performs many duties and responsibilities which are not written in either job description. Petitioner explained that despite the fact she was aware in 1976 of the creation of the position Director "C" and that she was then the Board's "negotiator" with food service workers which would make her a confidential employee, the then superintendent of schools refused to recommend her to that status.

Petitioner testified that when she discovered her salary as Director "C" was effective only since July 24, 1984 without back pay she filed a grievance. (P-7). The Board's designated hearing officer for filed grievances, Jeanne O. Pearson, refused to hear the grievance because she felt a conflict of interest existed in view of the fact both she

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PETITIONER'S PROOFS ON HER CLAIM OF BACK WAGES

After petitioner was appointed Director "C" July 25, 1984 and learned her salary as of that date, she wrote the following memorandum to the assistant superintendent:

> According to the N.J.S.A. Statute 34:13A-3(g), which states "'confidential employees'" of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties. Based on this ruling, I should have been a confidential employee since the inception of the confidential unit at the Trenton Board of Education. Therefore, I am requesting my confidential title be made retroactive to 1969 and that I be granted retroactively all of the rights, privileges and salary afforded other employees in the district performing like duties.
>
> Research your records to verify the authenticity of this request, after which, I am sure you will find my request not only legally, but morally right. Therefore, I feel certain the Board will want to rectify their error and compensate me for the confidential duties I have performed for the district since 1969.
>
> (P-16)

Immediately it must be noted that confidential positions were not created by the Board until July 1, 1976. Consequently, petitioner's claim of retroactive salary to 1969 is rejected out of hand.

Petitioner's claim, nevertheless, of retroactive salary to July 1, 1976 is bottomed on at least two arguments. One, petitioner claims because she was the Board's "negotiator" with food service workers between 1976 through the present she is by statutory definition a "confidential" employee and as such she should have been compensated as a confidential employee since at least July 1, 1976. Two, petitioner contends that regardless of the statutory definition of confidential employee as contained within N.J.S.A. 34:13A-3(g) the fact that her duties did not change on July 24, 1984 from the duties and responsibilities she had been performing as a director obligates the Board under N.J.S.A. 18A:16-11 to compensate her as a Director "C" retroactively to July 1, 1976. In this latter regard, it is noted that N.J.S.A. 18A:16-11 provides in full as follows:

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proposal submitted by TFSPA, and is privy to the proposals of the board prior to their public dissemination. In the performance of these duties, the Director has access to information regarding wages and budgetary matters.

The Director's responsibilities and/or knowledge in connection with the issues involved in the collective negotiation process make his/her membership in any appropriate negotiating unit incompatible with his/her official duties.

(P-2)

The Board, at a meeting conducted July 24, 1984, approved the superintendent's recommendation and upgraded petitioners' position from Director of Food Services to the position of Director "C" Food Services. Petitioner was also advised of her salary, effective July 25, 1984 as Director "C". (P-3).

From petitioner's initial employment in 1969 through July 25, 1984 she belonged to the Trenton Administrators and Supervisors Association (Association), a recognized employee organization negotiating unit under N.J.S.A 34:13A-5.3 for its membership. Petitioner admits that when she was assigned the title of Director "C" she was prohibited from continuing her membership in the Association. During the time petitioner was an Association member, however, she was on its negotiating team in 1980-81 for the membership in negotiations with the Board. During the period 1970-1976, prior to the time the cafeteria workers organized into its Food Service Personnel Association, petitioner also assisted the cafeteria employees' "negotiating team" to prepare for negotiating sessions with the Board. Petitioner would present the workers' package to the Board's negotiators, who at that time were Board members, to discuss the proposals. Petitioner would share those discussions with the Board negotiators then with the employees.

Between 1976 through 1980, the Board had its own employee relations officer do actual negotiations for it. From 1981 forward, the Board engaged outside professional negotiators to represent it in all agreements to be negotiated district-wide.

This concludes a recitation of the underlying facts of the matter.

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Director "C". While petitioner's duties and responsibilities as Director "C" were not changed from her duties and responsibilities as Director, the Board did grant petitioner a salary increase on July 25, 1984 when her title was changed to that of Director "C".

In the Board's table of organization a Director "C" is a confidential employee who, in such position, may not be part of any negotiating unit. The confidential employee title was first created by the Board as of July 1, 1976 following the Board's acceptance of a so-called Williams salary study report. This report recommended that as of July 1, 1976 any employee whose duties and responsibilities were such so as to have them acquire intimate and personal knowledge of the Board's strategies particularly in regard to labor negotiations with the various recognized units should be recognized as a confidential employee. As a confidential employee, such a person was precluded from belonging to any negotiating unit. The confidential employee in the Board's table of organization is similar, though not identical, to confidential employee as defined in the New Jersey Employer-Employee Relations Act, codified at N.J.S.A. [illegible]A-1 et seq., where at N.J.S.A. 34:13A-3(g) confidential employee is defined as one

> whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

In regard to the appointment of persons to confidential positions, the superintendent recommends such appointments to the Board for its approval. In this case, the superintendent recommended to the Board that the position Director of Food Services be upgraded to Director "C" Food Services. The superintendent explained in a report to the Board as follows:

> The Director of Food Services is closely involved in the collective negotiation process with respect to the Trenton Food Service Personnel Association (TFSPA)[2]. The Director sits in on all negotiation sessions, and is the primary source of involvement for the professional negotiator with respect to the contract proposal of both the board and TFSPA. The Director reviews and evaluates the

[2]Cafeteria or food service workers in the Board's employ were not "organized" into an association until the commencement of the 1984-85 year.

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May 13, 1986 following three separate adjournments granted petitioner. The record closed June 17, 1986 following receipt of the Board's brief in opposition to that of petitioner's filed June 6, 1986.

ISSUES

The issues framed at the prehearing conference conducted by Administrative Law Judge Law are these:

1. Whether petitioner is entitled to retroactive pay in the position of Director "C" to which she was appointed by the Board on July 25, 1984?

   a. If so, when did such entitlement to retroactive pay commence?

2. Whether petitioner is barred to bring the herein action by virtue of her failure to file her Petition of Appeal within the ninety (90) day requirement, pursuant to N.J.A.C. 6:24-1.2?

3. Whether petitioner is barred by the statute of limitations; i.e., the equitable doctrine of estoppel and/or laches and/or limits to the relief which petitioner seeks?

An adjudication of any one of these issues requires a consideration of the underlying facts of the matter.

FACTS

The evidence of record, including the testimony of witnesses and documents entered, established the following facts. Petitioner was first employed by the Board during September 1969 as its Cafeteria Supervisor. During December 1971, the Board promoted petitioner to the position of Director of Cafeterias. As Director, petitioner was responsible for the direction of district-wide school lunch programs which were to be operated consistent with federal and state law and Board policies. (P-4). Petitioner continued in this position until July 25, 1984 when her title was "upgraded" (P-1) (P-2) to

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6627-85
AGENCY DKT. NO. 316-9/85

GLORIA B. GIBSON,
Petitioner,
v.
TRENTON BOARD OF EDUCATION,
Respondent.

Paul D. McLemore, Esq., for petitioner (McLemore & McElroy, attorneys)

Robert B. Rottkamp, Jr., Esq., for respondent (Rottkamp & Flacks, attorneys)

Record Closed: June 17, 1986 Decided: August 1, 1986

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Gloria B. Gibson (petitioner), employed by the Board of Education of the City of Trenton (Board) in the present position of Director "C" in charge of the food service department, claims in a Petition of Appeal filed September 12, 1985 before the Commissioner of Education entitlement to at least $36,331 in back wages allegedly due her from the Board. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case on October 11, 1985, a prehearing conference was conducted November 27, 1985 by the then assigned Administrative Law Judge Lillard Law. A hearing was scheduled at that time for February 19, 1986 at the Office of Administrative Law, Mercerville. On January 7, 1986, the matter was reassigned to this judge who, on February 19, 1986, entertained oral argument on the Board's motion to dismiss filed February 4, 1986. After the motion was denied[1] the hearing was conducted

[1]See, letter ruling dated February 19, 1986 which confirmed the ruling entered on the record following oral argument.

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Accordingly for the reasons expressed herein the Commissioner affirms the ALJ's determination in dismissing petitioner's seniority claim to those family life classes already litigated in his prior decision in Hart, supra.

However, the ALJ's findings and conclusions with respect to petitioner's further seniority claims to those career education classes taught by Donald Celidonio and the fifth and sixth grade classes assigned to Roslyn Fernhoff are hereby reversed.

In view of the above, the Commissioner finds and determines that the instant Petition of Appeal can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

September 8, 1986

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In the Commissioner's judgment, petitioner's attempt to force the Board to work out all possible permutations in the full-time assignments of other tenured teachers who, as part of their full-time teaching duties, are teaching some classes of family life, career education and seven periods per week of home economics at the elementary level, in order to create a part-time teaching position for herself is without merit for the same reasons expressed in Davis v. Ewing, supra. In that decision, the Commissioner determined that the Board did not have to adjust its teachers' schedule in order to arrange a position for petitioner. Specifically, the Commissioner concluded the following:

> ***The Commissioner observes that this same argument has been advanced and rejected by him and the panoply of the Courts in Paul Fitzpatrick et al. v. Board of Education of Weehawken, 1980 S.L.D. 595, aff'd State Board of Education, March 4, 1981, aff'd Superior Court of New Jersey, Appellate Division, A-3278-80T3, June 16, 1982 wherein the Court said:
>
> > ***In support of these claims petitioners urge that, upon a reduction in work force, respondent board of education was obligated to protect seniority rights by working out all the possible permutations in assignments for which available teaching personnel had credentials and, thus, to restructure, if necessary, its entire teaching staff.***
> >
> > (Slip Opinion, at p. 3)
>
> Further the Court said:
>
> We reject petitioners' argument. We are of the view that the obligation to protect seniority rights goes no further than that recognized in Downs and Seidel and that any requirement of working out the possible permutations in assignments, which might, for example, result in reassignment of a highly skilled and successful teacher in one academic field to another academic field, would infringe unduly on respondent board of education's predominant responsibility to maintain a thorough and efficient system of education, N.J.S.A. 18A:7A-1 et seq. (at p. 4)***
>
> (Slip Opinion, at p. 12)

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> person shall be qualified and he shall be reemployed by the body causing dismissal***.
> (emphasis supplied)

The undisputed facts in this matter clearly establish that at all times relevant herein a vacant teaching position did not occur in the special subject field category of home economics to which petitioner was entitled pursuant to N.J.A.C. 6:3-1.10 et seq. In his prior decision in Hart, supra, which was affirmed by the State Board of Education on December 4, 1985, the Commissioner had determined that petitioner was not entitled by virtue of her seniority to lay claim to certain family life courses assigned to tenured teaching staff members Jay Levine and Ladislava Krawiec. For the reasons expressed in that decision, the Commissioner hereby affirms the ALJ's dismissal of petitioner's renewed claim to seniority in family life education in this matter.

It is further noted that petitioner now makes a similar claim to those classes in career education which continue to be part of Donald Celidonio's teaching assignment at the high school. In this regard, the Commissioner cannot agree with the ALJ's conclusion that petitioner had a vested seniority entitlement to the career education classes taught by Celidonio. It is determined that the career education course classes taught by Celidonio are not a special subject field category pursuant to N.J.A.C. 6:3-1.10, nor is career education an endorsement on any certificate issued by the State Board of Examiners. It is further determined that the course offering in career education is vocationally oriented and the Board had properly assigned Celidonio to teach career education which is more closely aligned to those certificated endorsements which he possesses in Industrial Arts and Teacher-Coordinator of Cooperative Vocational-Technical Education Programs.

Finally, the Commissioner cannot agree with those findings and conclusions reached by the ALJ which hold that petitioner is entitled by virtue of her seniority in home economics to those fifth and sixth grade classes in home economics assigned to Roslyn Fernhoff as of the 1985-86 school year. Those classes are taught by Ms. Fernhoff seven periods per week and represent approximately 20 percent of her full teaching load. The balance of Ms. Fernhoff's instructional teaching load is at the secondary level.

The specific reason for this determination by the Commissioner is based upon the fact that no vacant position existed in home economics for the 1985-86 school year under which petitioner could exercise her seniority rights pursuant to N.J.S.A. 18A:28-12.

The Board's assignment of the fifth and sixth grade home economics classes to Ms. Fernhoff was not taken in bad faith, but rather was a proper exercise of its discretion to efficiently operate its school program by assigning those classes to her in order to retain one full-time teacher of home economics on a district-wide basis. In the Commissioner's judgment, petitioner may not seek to create a new part-time position of employment for herself by attempting to fragment those classes assigned to Ms. Fernhoff on a full-time basis.

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MARY T. HART,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

It is observed that exceptions to the initial decision have been filed by Intervenors Roslyn Fernhoff and Donald Celidonio and the Board joins in the exceptions to the initial decision. Petitioner has filed her reply to those exceptions, all of which were filed pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

It is observed that the parties, through their exceptions and replies to exceptions, advance the identical arguments previously addressed in detail in the initial decision and incorporated by reference herein.

The substance of petitioner's claims is that, as a tenured teaching staff member who has been affected by a reduction in force, she is entitled by seniority to be reemployed by the Board in a teaching position to be created by fragmenting the existing positions held by other tenured teaching staff members through the consolidation of individual classes assigned to them.

It is noted that petitioner's claims herein are not premised upon a charge that the Board acted in bad faith when it abolished her tenured teaching position at the conclusion of the 1984-85 school year due to declining pupil enrollment. Consequently, in order for petitioner to prevail in the instant matter, she is required to establish that a vacant teaching position existed at the commencement of the 1985-86 school year to which she was entitled by virtue of her seniority in accordance with the provisions of N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10 et seq.

The applicable provisions of N.J.S.A. 18A:28-12 read in pertinent part as follows:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

July 15, 1986
DATE

JAMES A. OSPENSON, ALJ

JUL 23 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 24 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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Celidonio's 8 years of seniority under his educational services certificate endorsement since 1977-78, citing Rogan v. Bd. of Ed., Twp. of Edison, 1985 S.L.D. —(May 17, 1985), and German v. Bd. of Ed., Cape May Voc. Tech., 1984 S.L.D. — (January 12, 1984); aff'd State Board, 1984 S.L.D. — (Aug. 10, 1984).

Celidonio as intervenor, for his defense, asserted that the same principles that apply to family life assignments apply to career education, which, it was said, like family life, can be taught by staff members with a number of different certifications; that the Board can assign teachers in the same fashion as it assigned teachers in family life classes; and that career education assignment is not subject to competing seniority claims. But he offered no decisional authority for that position.

In my view, there is nothing in the evidential record to show petitioner Hart with her home economics K-12 certification and cognate seniority at both elementary and secondary levels is not properly certified for the position of teacher of career education. That conclusion depends merely, however, on the circumstance that the Board has not apparently complied with N.J.A.C. 6:11-3.6(a):

> District boards of education shall assign position titles to teaching staff members which are recognized in these rules.

The Board has ascribed no reason for failure so to assign a position title and/or to specify certificate requirements. Under the circumstances, I **CONCLUDE** petitioner is at least as equally qualified for the position of teacher of career education as intervenor Celidonio and was so equally qualified for 1985-86. The Board is **ORDERED**, therefore, to compensate her in salary and benefits for failure to have recognized her seniority for 1985-86. The Board further is **ORDERED** (1) to comply forthwith specifically with N.J.A.C. 6:11-3.6(a), (b); (2) thereafter for the future to establish an immediate and appropriate certificate qualification for the position; and (3) to make a redetermination of petitioner's relative seniority rights to the position vis-a-vis the seniority of intervenor Celidonio.

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Accordingly, I **FIND** petitioner's claim to the position of 5th and 6th grade home economics teacher held by intervenor Fernhoff during 1985-86 to be sustained upon the ground petitioner has greater seniority thereto under N.J.A.C. 6:3-1.10(a)(15)(iii), (16)(ii). The Board is **ORDERED** (1) to install petitioner in that challenged position for 1986-87 should grade organization within the district remain the same as in 1985-86; (2) to adjust seniority records in petitioner's favor to reflect such service; and (3) to accord her all benefits by way of back pay and emoluments, subject to appropriate mitigation.

III

Petitioner's claim to the position held by Donald Celidonio is grounded on facts found in finding no. 15: that is, since 1977 Celidonio has been continuously employed as cooperative industrial education coordinator, having taught C.I.E.-related subjects as well as career education at the high school level, and industrial art at the elementary level. For 1985-86 Celidonio taught C.I.E. and industrial art classes, as well as one period of career education per day five days per week. The claim is solely as to the latter five periods of high school instruction in career education. The Board has made no certificate specification for service as teacher of career education. Finding no. 16. Celidonio is certified in industrial art and as a C.I.E. teacher/coordinator, an educational services endorsement required for the position of teacher and coordinator of part-time cooperative vocational education in skilled trade, industrial and/or service occupations. The endorsement entitles the holder to teach related vocational subjects in such classes and to act as coordinator between school and industry. N.J.A.C. 6:11-12.3(a).

Petitioner argued that because the Board had not made any particular certificate requirement for service as teacher of career education, she is entitled to that five periods of career education instruction because her general seniority under her instructional certification as home economics teacher K-12 of 18 years at the secondary level surpasses

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Intervenor Fernhoff argued petitioner could make no claim to the incidental hours to which Fernhoff had been assigned in the elementary school because, under the holding in Godwin-Davis v. Bd. of Ed. Ewing Twp., 1985 S.L.D. — (April 29, 1985), a school board is not required to adjust or modify its curriculum schedule for the sole purpose of creating a part-time position for petitioner or provide her with the maximum possible caseload. (Slip op. at 13-14). While the proposition may appear valid, it is my view the case is not apposite factually because the administrative law judge in that case found expressly that Godwin-Davis had not shown "there was a position for which she was qualified that was occupied by a less senior teacher." (Id.; slip op. at 9). Here, on the contrary, the evidence showed petitioner Hart has established that while she and intervenor Fernhoff were qualified as district-wide home economics teachers, only she, Hart, had any actual service in elementary classes when her employment was terminated and when Fernhoff was assigned for 1985-86 to 5th and 6th grade home economics for the first time. At that moment in time, therefore, Hart's seniority out-stripped Fernhoff's. Cf. Peterson v. Bd. of Ed., Twp. of Willingboro, 1985 S.L.D. — (Dec. 12, 1985).

A Position Statement of the New Jersey State Department of Education by the Commissioner in June 1983, in explaining new seniority regulations in N.J.A.C. 6:3-1.10, specifically noted the new regulations were intended carefully to retain the distinction between "secondary" and "elementary" categories in special subject field endorsements like art, music and physical education, as well as for non-instructional personnel like school nurses and librarians. Id. at 2. The revisions distinguish between "certification" (having the appropriate license) and "qualification" (having the experience and ability to teach a given subject at a given level). Id. at 3. Thus, the Commissioner said, a special subject teacher hired by a local board for service in elementary schools will not acquire seniority at the secondary level (even though his or her certificate endorsement is for grade K-12) unless he or she teaches at secondary level. Id. at 2. In my view, the endorsement of home economics is such a special subject field endorsement as described in the Commissioner's commentary, which is, therefore, of application to the evidence here because the converse, I submit, is also true.

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service experience, on the other hand, from 1967 through 1985 included regular and consecutive service in not only grade 6 but grades 7 and 8. Finding no. 2. Thus, petitioner argued, while Fernhoff had some 20 years of secondary home economics seniority, she had no seniority in elementary home economics, under N.J.A.C. 6:3-1.10(l)(15)(iii), which provides:

> Any person employed at the secondary level in a position requiring. . . a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such . . . special subject field endorsement.

N.J.A.C. 6:3-1.10(l)(15)(i) provides:

> Any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsement(s) under which he or she has actually served.

N.J.A.C. 6:3-1.10(l)(16)(ii) provides:

> Any person employed at the elementary level in a position requiring . . . a special subject field endorsement shall acquire seniority only in the elementary category and only for the period of actual service under such . . . subject field endorsement.

In short, petitioner claimed 18.52 years of elementary and secondary seniority under her home economics endorsement while proof showed Fernhoff had 20 years of secondary home economics seniority and no seniority in elementary home economics. Thus, petitioner claimed bumping rights to the seven periods per week of 5th and 6th grade home economics taught, during 1985-86, by Fernhoff, under N.J.A.C. 6:3-1.10(i) which provides:

> Whenever any person's particular employment shall be abolished in a category, he or she shall be given employment in the same category to which he or she is entitled by seniority.

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Ridgefield Bd. of Ed., 1985 S.L.D. — (June 7, 1985); aff'd State Bd. of Ed., 1985 S.L.D. — (Dec. 6, 1985; appeal pending, App. Div.) bars consideration of seniority rights in claims to family life work. She acknowledged the case dealt with the 1984-85 school year and that neither the administrative law judge nor the Commissioner can overrule the State Board of Education. The issue is re-presented here, petitioner said, so as to preserve her rights in the 1985-86 school year in the event of reversal on appeal.

It was ruled in Hart generally that this petitioner accrued no family life seniority under her home economics endorsement by merit of any authorization under N.J.A.C. 6:29-7.1 to assist in an interdisciplinary family life education program. Both the Board and intervenors agree, as conceded by petitioner, that the ruling in Hart, until and unless reversed on appeal, precludes re-litigation of that issue and effectively bars petitioner's recovery herein, under doctrines of res judicata and collateral estoppel. Accordingly, I **CONCLUDE** petitioner's seniority claims in respect of positions currently held by Levine and Krawiec should be, and are hereby, **DISMISSED**.

II

Petitioner's claim to the position held by intervenor Roslyn Fernhoff does not entail seniority arising from service as teacher in any family living program. It entails instead a comparison of the relative seniority experience of the two as of, as petitioner alleges, June 30, 1985. According to stipulated facts, both petitioner and Fernhoff hold subject field endorsement as teachers of home economics, which authorizes them to teach home economics in all public schools, under N.J.A.C. 6:11-6.2(a)(12). Effective for 1985-86, petitioner's teaching assignment contract was terminated for reasons of declining enrollment. Finding no. 3. Fernhoff's experience and actual service in the district as a home economics teacher was solely at the high school level from 1965 through 1982, at the 8th grade and high school from 1982 through 1985 and for 1985-86 both at 7th grade and high school levels as well as seven classes per week of 5th and 6th grade home economics. Finding no. 17. This last is the disputed position. Petitioner's actual

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classes per week of 5th and 6th grade home economics with the balance of her full time schedule dedicated to 7th grade and high school home economics. Fernhoff is certified as a home economics teacher (K-12), under N.J.A.C. 6:11-6.2(a)(12). Fernhoff taught aspects of family living as part of her home economics curriculum starting in 1965 until family living became a separate, formally organized course.

18. If petitioner Hart had been employed by respondent for 1985-86 she should have been paid at the maximum step of the district's bachelor's degree salary guide (prorated for any part-time status) plus a $100 unprorated longevity increment.

DISCUSSION

I

Petitioner's claims to the positions currently held by Jay Levine and intervenor Ladislava Krawiec relate solely to their current service as teachers of family life, which is currently offered by the Board as a separate course during specified class periods devoted strictly to family life instruction. It had been so organized since its inception in 1983-84. Finding no. 10. Levine was initially hired by the Board in 1970 as a teacher of physical education, driver education, first aid and health and served full-time through June 30, 1983. For 1983-84, 1984-85, 1985-86, Levine taught high school family life for one period per day, five days per week in addition to subjects previously taught. He was a full-time employee the past three years. Findings no. 11, 12. Krawiec has been employed as a school nurse since 1967 and for 1985-86 taught three periods of 6th grade family life per week with the balance of her full-time scheduled dedicated to school nurse services. Finding no. 14.

Petitioner acknowledged (petitioner's brief at 4-6) the decision in Hart v.

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14. Ladislava Krawiec was employed by respondent as a part-time school nurse from September 1967 through June 1977. From September 1977 through June 1985 Krawiec was a full-time school nurse. For 1985-86 Krawiec taught three periods of 6th grade family life per week, with the balance of her full-time schedule dedicated to school nurse services. Krawiec served the K-6 grade levels from 1967 to 1977; K-8 grade levels from 1977 to 1983; and K-7 grade levels from 1983-85. Krawiec holds a certificate as a school nurse. [See N.J.A.C. 6:11-12.9].

15. Donald Celidonio was initially employed by respondent full-time under a contract effective July 1, 1977, with actual teaching duties beginning in September 1977 at the opening of school for that year. He has been continuously employed since that time. He has been a cooperative industrial education (C.I.E.) coordinator and has taught C.I.E.-related subjects, as well as career education, all at the high school level. He has also taught industrial art at the elementary level. For 1985-86 Celidonio teaches one period of career education per day, five days per week, with the balance of his full time schedule dedicated to C.I.E. and industrial art work. Celidonio is certified in industrial art and as a C.I.E. teacher/coordinator. [See N.J.A.C. 6:11-6.2(a)(13); and N.J.A.C. 6:11-12.3].

16. Respondent has not designated, by resolution or job description, which particular educational certificate or endorsement is required to teach career education, nor has any such specification been obtained in writing from the county superintendent of schools or the State Department of Education.

17. Roslyn Fernhoff has been employed full time by respondent since September 1965. Fernhoff taught home economics solely at the high school level from September 1965 through June 1982. She taught home economics at the 8th grade level and the high school level from September 1982 through June 1985. For 1985-86 Fernhoff taught seven

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6. A normal full-time teaching load in Ridgefield is 25 periods per week (five periods per day, five days per week).

7. The Board initiated its family life education program, as currently constituted, in the 1983-84 school year.

8. Prior to 1983-84 petitioner taught aspects of family living (exclusive of sex education) in such areas as "getting along with family and friends" and "understanding one's self" as part of her 6, 7 and 8th grade home economics curriculum. That began in 1978.

9. Petitioner's 1984-85 family life assignment included all aspects, including sex education.

10. Family life is currently offered by respondent as a separate course offered during specified class periods devoted strictly to family life instruction. It has been so organized since its inception in 1983-84.

11. Jay Levine was initially hired by the Board in September 1970 as a teacher of physical education, driver education, first aid and health and served in that capacity full-time through June 30, 1983.

12. For 1983-84, 1984-85 and 1985-86, Levine has taught high school family life for one period per day, five days per week, in addition to subjects previously taught. Levine has been a full-time employee for 1983-84, 1984-85 and 1985-86.

13. Levine has been certified as a teacher of physical education (K-12) and as a teacher of health (K-12) since his career in Ridgefield began. He is also certified as teacher of driver education and principal and supervisor. [See N.J.A.C. 6:11-6.3(a)(2)(iv); and N.J.A.C. 6:11-10.8, 9].

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1968-69	Home economics grades 6, 7, 8	full time
1969-70	Home economics grades 6, 7, 8	full time
1970-71	Home economics grades 6, 7, 8	full time
1971-72	Home economics grades 6, 7, 8	full time
1972-73	Home economics grades 6, 7, 8	full time
1973-74	Home economics grades 6, 7, 8	full time
1974-75	Home economics grades 6, 7, 8	full time
1975-76	Home economics grades 6, 7, 8	full time
1976-77	Home economics grades 6, 7, 8	full time
1977-78	Home economics grades 6, 7, 8	full time
1978-79	Home economics grades 6, 7, 8	full time
1979-80	Home economics grades 6, 7, 8	full time
1980-81	Home economics grades 6, 7, 8	full time
1981-82	Home economics grades 6, 7, 8	full time
1982-83	Home economics grades 6, 7 and high school	full time
1983-84	Home economics grades 6, 7 and high school	full time
9/1/84-12/31/84	Home economics grades 6 and 7 and family life grade 6	part-time (2/5)
1/1/85-6/30/85	Home economics grades 6 and 7 and family life grade 6 high school	part-time (3/5

3. By letter of April 18, 1985 petitioner was advised that her employment was terminated effective for the 1985-86 school year. (J-1).

4. Respondent's seventh and eighth grades are departmentalized and have been so organized throughout all periods relevant hereto.

5. Petitioner has possessed certification as a home economics teacher (K-12) throughout her employment in Ridgefield. [See N.J.A.C. 6:11-6.2(a)(12); and N.J.A.C. 6:3-1.10(b).]

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towards establishing stipulations of all relevant and material matters of fact, together with appropriate documentation, which thereafter were to be filed in the cause before hearing. The matters then were to be addressed and resolved, it was ordered, as if on cross-motions for summary decision pursuant to N.J.A.C. 1:1-13.1 et seq. on pleadings, admissions, stipulations, documentation and memoranda of law, examination and cross-examination of witnesses having been waived. At issue generally, it was determined, were the following:

a. Whether the Board violated petitioner's tenure and seniority rights under N.J.S.A. 18A:28-5 and N.J.A.C. 6:3-1.10 et seq. when, following reduction in force, petitioner's position was abolished and another or others less senior than she were continued in employment in home economics and/or family life instruction and/or other areas; and

b. Whether petitioner's family life teaching experience results in creditable seniority or whether, as urged by the Board, such contention is barred by the doctrines of res judicata and/or collateral estoppel.

All submissions by the parties as directed having thereafter been made, the record closed.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so stipulated or admitted, I make the following Findings of Fact:

1. Petitioner was a tenured teaching staff member in respondent's employ until her termination.

2. Petitioner has been employed by respondent as follows:

1966-67	Home economics grades 6, 7, 8	full time
1967-68	Home economics grades 6, 7, 8	full time

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employing other persons with less seniority than she for 1985-86 in her categories of seniority was violative of her tenure and seniority rights under N.J.S.A. 18A:28-5 and N.J.A.C. 6:3-1.10 et seq. She sought judgment directing the Board to reinstate her to a full-time teaching staff position for 1985-86 and retroactively to compensate her for all salary or benefits lost as a result of Board action, including appropriate retrospective seniority credit. The Board admitted petitioner's teaching service generally and petitioner's most recent seventh and eighth grade teaching assignments in home economics and family life in a departmentalized setting. In addition, the Board pleaded in bar of petitioner's claims for relief the doctrines of res judicata and collateral estoppel. See Hart v. Bd. of Ed. Borough of Ridgefield, 1985 S.L.D. — (June 7, 1985; appeal pending, State Board). No issue of propriety of reduction in force vel non under N.J.S.A. 18A:28-9 is presented.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on July 16, 1985. The Board's answer was filed there on September 6, 1985. Before answer, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on August 21, 1985 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, a prehearing conference was conducted in the Office of Administrative Law on October 3, 1985 and an order entered.

Paragraphs 1, 2, 3 and 4 of the petition of appeal were admitted by the Board. Petitioner was directed to give notice of pendency of action to those persons junior to her in seniority whose positions were presumptively affected and were claimed by petitioner in order to afford such parties opportunity to move to intervene or participate in the matter under N.J.A.C. 1:1-12.2 et seq. On December 13, 1985, Ladislava Krawiec, Roslyn Fernhoff and Donald Celidonio, on application made without objection and on order of the administrative law judge, intervened in the matter in opposition to petitioner's claims. By prehearing conference order, the parties were directed to confer with a view

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DOCKET NO. EDU 5301-85
AGENCY DKT. NO. 224-7/85

MARY T. HART,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,
Respondent.

Louis P. Bucceri, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Dennis G. Harraka, Esq., for respondent/Board
(Gallo, Geffner, Fenster, Farrell, Turitz & Harraka, attorneys)

Alfred F. Maurice, Esq., for Intervenors Ladislava Krawiec, Roslyn Fernhoff and Donald Celidonio

Record Closed: June 8, 1986 Decided: July 18, 1986

BEFORE **JAMES A. OSPENSON,** ALJ:

Mary T. Hart, a tenured teaching staff member employed since 1966 by the Board of Education of the Borough of Ridgefield, Bergen County, alleged action of the Board in abolishing her home economics teaching staff position for 1985-86 and in

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KARL HUETTEMANN ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner agrees with the recommendation of the Office of Administrative Law granting the Board's Motion for Summary Decision and adopts it as the final decision in this matter for the reasons expressed in the initial decision. The Petition of Appeal is accordingly dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 3, 1986

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to an extent sufficient to deny summary decision on the merits. In short, with respect to the second ground for its motion, I believe that the Board has failed to show that no genuine issues of material fact exist as a matter of law. See, N.J.A.C. 1:1-13.2(a).

Accordingly, based upon my review and consideration of the undisputed facts, I **CONCLUDE** that petitioners lack standing as "interested persons" to bring this action, and the Board's motion for summary decision on that ground is granted.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if **Saul Cooperman** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

July 25, 1986
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

JUL 29 1986
DATE

Receipt Acknowledged:
Saul Cooperman
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 30 1986
DATE

Ronald L. Parke /x.s
OFFICE OF ADMINISTRATIVE LAW

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me that either the principals themselves and/or a representative association on their behalf would be the proper parties to bring this suit. See, Winston v. Bd. of Ed. of South Plainfield, 125 N.J. Super. 131 (App. Div. 1973), aff'd 64 N.J. 582 (1974).

Accordingly, since none of the four petitioners have demonstrated that they will be "substantially, specifically and directly affected" by the outcome of this case, they are not "interested persons" within the meaning of N.J.A.C. 6:24-1.1 and their action cannot continue in this forum.

B. The Merits

As noted, the Board's motion for summary decision was in two parts. The second argued that the petition should be dismissed as a matter of law, even assuming the requisite standing. For purposes of completeness, even though I have dismissed the petition on the first ground, I will address this issue as well since the Commissioner may reject my "standing" issue recommendation.

With respect to all motions for summary decision before the Office of Administrative Law, the principles of law that apply to motions for summary judgments in the courts (see, R. 4:46-1) apply with equal force. See, N.J.A.C. 1:1-13.1 et seq. Petitioners have alleged that the Board's action was precipitous in nature and taken without appropriate consultation with and/or the receipt of a favorable recommendation from its Superintendent, if not other senior administrative staff as well. Although neither side has proffered any sworn testimony by way of affidavit bearing upon the underlying facts, the oral argument which I entertained in connection with the application for a stay did result in my issuance of an Order which set forth some of the undisputed facts, (see, Order, pp. 2-3). I noted there that the Board's decision on the proposed transfers did not appear to have been made known to the principals themselves until approximately one week before the action was taken. Moreover, the Superintendent of Schools actually opposed the transfers. So, too, petitioners raised questions regarding the negative effect of the transfers on the school system. In a very broad sense, the question of possible possible arbitrary or capricious decision making is implicated, at least

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specifically and directly affected by the outcome of a controversy before the Commissioner." See, N.J.A.C. 6:24-1.1, as amended, April 10, 1986, see 18 N.J.R. 976.

In the case of Kenwood v. Bd. of Ed. of Montclair, OAL DKT. NO. EDU 8858-81, dec'd April 23, 1982, adopted by the Commissioner, June 14, 1982, petition dismissed State Board of Education, September 8, 1982, the administrative law judge's Initial Decision devoted a good deal of attention to the case law involving standing to sue. He noted that in order to be entitled to bring an action, a petitioner must demonstrate "a sufficient stake in the outcome of the proceedings" and to show that if the requested relief is not granted, there will be a substantial likelihood of harm. See, Home Builders League of South Jersey, Inc. v. Berlin Tp., 81 N.J. 127 (1979). He further observed that there must be some demonstration of a direct impact on the personal rights of the complaining party, as a litigant may not ordinarily claim standing in order to assert the rights of another. See, Jersey Shore Med. Center-Fitkin Hospital v. Estate of Baum, 84 N.J 137 (1980).

Two cases were cited by the administrative law judge in the Kenwood decision which would appear to me to apply to the facts herein. In Riccardelli v. Bd. of Ed. of Newark, OAL DKT. NO. EDU 1894-79 (dec'd Sept. 26, 1979), adopted Commissioner of Education, November 16, 1979, the Commissioner held that a taxpayer and resident of the school district does not have standing to challenge the legality of a decision by the board to transfer personnel. In Delaney v. Bd. of Ed. of Woodbridge, OAL DKT. NO. EDU 382-79 (Dec. 12, 1979), adopted Commissioner of Education, June 11, 1980, a suit by a resident and taxpayer challenging board's appointments was rejected since the petitioner was neither a candidate for appointment nor a representative of the candidates.

Bearing in mind the accepted principles of law which were cited by the administrative law judge in the Kenwood case and applying them to the matter herein, I believe that the Board has amply demonstrated that the petition should be dismissed since none of the pro se petitioners have the requisite standing to challenge the Board's action. Rather, they are attempting to serve as advocates for the two principals and it seems to

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three K-4 schools, and the principal of those three schools will become principal of the intermediate school. The petitioners maintained that the Board's decision was precipitous in nature, and had been taken without prior planning and review, and was in disregard of the contrary recommendation of the Superintendent of Schools. In their petition, the parents also asked for a stay of the Board's action pending a final decision in the case. I recently entertained oral argument in connection with that stay application and entered an Order Denying Stay which is presently pending review of by the Commissioner.

The Board has now moved for summary decision to dismiss the petition upon the following grounds:

(A) That the petitioners lack the requisite "standing" to bring an action of this sort; and

(B) That regardless of the standing question, the Board's action is required to be upheld as a matter of law.

For the reasons which follow, I have determined to grant the Board's motion for summary decision on the first ground (standing), but to deny summary decision as to the second basis for the motion.

DISCUSSION

A. Standing

In its motion for summary decision on the ground that the petitioners lack requisite standing to sue, the Board maintains that none of the petitioners are sufficiently connected with the action complained of to entitle them to challenge it in this proceeding. I agree. In order to be eligible to maintain an action before the Commissioner of Education within his controversies and disputes jurisdiction, a person or persons must be "interested" in the subject matter of the dispute. An "interested person" is specifically defined in the regulations as someone who "will be substantially,

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 4100-86
AGENCY DKT. NO. 194-5/86

KARL HUETTEMANN, ANTHONY PARISE, LUCY PARISE and MADELINE SHON,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY,
Respondent.

Karl Huettemann, Anthony Parise, Lucy Parise and **Madeline Shon**, petitioners, pro se

Peter F. Bariso, Jr., Esq., for respondent
(Lamb, Hartung, Gallipoli & Coughlin, attorneys)

Record Closed: July 22, 1986 Decided: July 25, 1986

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

The four petitioners in this case are parents of children who attend elementary school in the respondent school district. On May 30, 1986, they filed a petition of appeal with the Commissioner of Education challenging the Board's decision of the previous month, which determined that effective September 1986, the two principals of the district's four elementary schools would "switch" positions. In essence, one principal is to be moved from the grade 5-8 intermediate school to be principal of the

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question of the rule of limitations or the calculation of seniorities if, in fact, petitioner waived his seniority rights by refusing the position offered him when he knew or should have known that to do so would constitute a waiver." (Initial Decision, ante) Having determined herein that petitioner did, in fact, relinquish his tenure and seniority rights upon his refusal of full-time permanent employment with the New Milford School District, the Commissioner finds no need to reach the issue of whether his claim to a later vacancy with the Board was time barred by N.J.A.C. 6:24-1.2.

Accordingly, the Commissioner adopts as his own the findings and conclusions of the ALJ in this matter for the reasons stated therein and as supplemented herein. It is therefore ordered that the petition be dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 3, 1986

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> School Dist. of Wilkesbarre Tp., 355 Pa. 449, 50 A. 2d 354 (Sup. Ct. 1947); State ex rel. Ford v. Board of Education of City School Dist. of City of Cleveland, 141 Ohio St. 124, 47 N.E. 2d 223 (Sup. Ct. 1943). The Department of Education has consistently recognized that the refusal of reemployment by a tenured teacher, dismissed because of a reduction in force, constitutes a relinquishment of tenure and a waiver of rights to future employment. See Boguszewski v. Bd. of Ed. of Demarest, 1979 S.L.D. 398; DeSimone v. Fairview Bd. of Ed., 1966 S.L.D. 43. Of course, to constitute an effective waiver, it must be evident that a known right was intentionally relinquished. (Slip Opinion, at pp. 10-11)

The Commissioner's review of the record comports with the finding of the ALJ that

> Superintendent Owens had a lengthy conversation with petitioner on Friday, October 7, 1983 ***, the purpose of which was to offer him a full-time physical education position and during which he advised Collins he would lose his seniority if he didn't take it." (Initial Decision, ante)

Exhibit J-11, the letter sent by Superintendent Owens which contained the formal job offer, is clear and unequivocal evidence that petitioner knew or should have known the position he was offered was a permanent, full-time position, which, if he declined to accept, would result in forfeiture of his tenure and seniority rights. The testimony of witnesses Ross, Coco, Carroll and Owens lends further credence to this conclusion.

By virtue of the fact that the position offered petitioner was vacant at the time the offer was tendered to petitioner, and thus was not a substitute position, the Commissioner concurs with the ALJ that:

> It would be unfair and not in accordance with the statutory intent, if a teacher could refuse a position and subsequently demand it from others on the seniority list who had accepted it in good faith. This would be true even if a board desired to favor the teacher who declined an offer. Old Bridge Education Ass'n v. Bd. of Ed. of Old Bridge, [decided by the Commissioner August 8, 1985]. (Initial Decision, ante)

The Commissioner also agrees with the ALJ that "[t]he filling of positions cannot await the running of the entire appeals process." (Initial Decision, ante)

Finally, the Commissioner is in accord with the determination of the ALJ that, "It is not necessary to reach the

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4.	October 17, 1983	Offer of employment by Board to petitioner put in writing.
5.	October 24, 1983	Petitioner officially declined offer of full-time employment in vacant position at New Milford H.S.
6.	December 5, 1983	Commissioner denied stay of Nogaki decision.
7.	January 1984	Phys. Ed. position offered to Intervenor Carroll upon petitioner's declining Nogaki position.
8.	April 4, 1984	State Board of Education issued Stay and reinstatement of Nogaki to phys. ed. position at New Milford H.S.
9.	May 1985	Petitioner substituted in New Milford District.
10.	August 14, 1985	Petitioner filed Petition of Appeal with Commissioner.

Having carefully reviewed the record herein, the Commissioner cannot accept as plausible petitioner's contention that he is entitled to the position currently held by Ms. Carroll as a physical education instructor at New Milford H.S. For whatever reason petitioner attempts to justify his rejecting the offer of employment tendered him by the Board on October 17, 1983, the fact remains that he was offered full-time employment in a position for which he was duly certified, and to which he was duly entitled by virtue of his tenure and seniority. The issue of his right to claim the employment that evolved after the reinstatement of Mr. Nogaki, following the State Board's decision of April 4, 1984, is made moot not by any action taken by the Board, but by petitioner's unilateral decision to decline the position offered to him in due course on October 17, 1983. Petitioner thereby waived his right to tenure and seniority in the New Milford District.

The Commissioner agrees with the ALJ that petitioner knowingly waived his rights to further employment with the Board. "When a tenured teacher whose petition is abolished refuses an assignment within the scope of his or her certificate, that teacher abandons a right to tenured employment. Ann Clark v. Board of Education of Margate, 1974 S.L.D. 678; aff'd St. Bd. 1975 S.L.D. 1082, aff'd N.J. Superior Ct., App. Div., [1976 S.L.D. 1134]." (Initial Decision, at p. 7) See also Annette O'Toole v. Larry Forestal et al., decided by the Commissioner March 5, 1984, aff'd State Board September 5, 1984, aff'd Superior Court, Appellate Division, June 30, 1986. The Court in O'Toole stated:

> Tenure and reemployment rights may be voluntarily relinquished. N.J.S.A. 18A:28-8; see Lange v. Bd. of Ed. of Borough of Audubon, 26 N.J. Super. 83, 88 (App. Div. 1953); see also Jacobs v.

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> collective bargaining agreement between the parties. To argue, as Petitioner does, that the subsequent reinstatement of Nogaki somehow changes this position into a long-term substitute employment fails to recognize the facts -- the determination as to what kind of position exists turns on when the position was offered, not what subsequently occurs.
>
> Dismissal of a tenured teaching staff member produces removal from the payroll and their employment from the school. There is never any guarantee that such a dismissal will be upheld.*** (emphasis in text)
>
> (Board's Reply Exceptions, at p. 8)

The Board argues that the cases cited by petitioner as supporting this doctrine of "***'long-term substitute' conversion" (Id., at p. 9) do not hold for that proposition. Spiewak holds, states the Board, "that a temporary employee is only an employee who is hired to take the place of an absent employee." "Douglas Nogaki was not absent; he was terminated," the Board suggests. (Id., at p. 9) Further the Board argues that the Driscoll case holds for the proposition that the time frame upon which one must determine eligibility or non-eligibility is the time at which the job is offered. In the instant matter, at the time petitioner was offered the job as physical education teacher, Mr. Nogaki was not an employee of the Board since he had been dismissed by the Commissioner. Finally, the Board avows that the Sayreville case holds for the proposition that as long as there is a substantial period of time in which a person is replacing another person, that person is not considered a long-term substitute, but a full-time permanent employee. Thus, states the Board, the law supports the proposition of the Board that at the time the position was offered to petitioner, it was a full-time permanent position with all the rights of tenure and seniority afforded a full-time employee. When petitioner refused acceptance of the position, the Board argues, he forfeited his tenure and seniority rights. Therefore, the Board requests that the Commissioner reject the arguments made by petitioner in his exceptions and uphold the decision of the ALJ dismissing the petition with prejudice.

For the record, the Commissioner sets forth the following chronology:

1. June 30, 1983	RIF at New Milford H.S. resulting in petitioner's position being eliminated.
2. September 26, 1983	Nogaki's employment terminated as result of Commissioner's decision dated September 26, 1983.
3. October 7, 1983	Petitioner offered Nogaki's position because he was first on preferred eligibility list developed at time of RIF.

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protection -- the type of job that the Board offered Petitioner and Petitioner rejected." (emphasis in text) (Id. at p. 5) Further, the Board argues that petitioner was fully aware at the time of his refusal on October 24, 1983 that failure to take the position in question would end his tenure and seniority rights with the Board, and that he thereby waived such rights in declining said employment.

As to petitioner's claim that the position offered him on October 7, 1983 was a long-term substitute position because Mr. Nogaki's dismissal was ultimately overturned by the State Board of Education, the Board argues that petitioner's potential employment with the Board had nothing to do with the absence, disability or disqualification of Mr. Nogaki. The Board argues that Mr. Nogaki's lack of employment with the Board was not due to his disqualification, but due to dismissal under the Tenure Employees Hearing Act. Therefore, the Board contends, Mr. Nogaki's position did not fall under the parameters of N.J.S.A. 18A:16-1.1 as petitioner avers and, thus, was not substitute employment.

The Board notes in reply exceptions that:

> On October 7, 1983, the Board, through its Superintendent, offered Petitioner a full-time position as physical education teacher within the district. That offer was placed in writing on October 17, 1983. On October 24, 1983, Petitioner rejected the position. On December 5, 1983, Douglas Nogaki, through his attorneys, was denied a stay by the Commissioner of Education to stop his continued dismissal. Only on April 4, 1984, when the State Board overruled the Commissioner did Douglas Nogaki have the right to return to the position of physical education teacher with the New Milford Board of Education.
>
> A board of education, in its duties as an employer of teaching staff members, has the right to fill positions when vacancies occur. The determination of when the vacancy must be filled and the type of vacancy that is in existence is determined at the time the vacancy occurs -- whether it be by resignation, retirement, death or dismissal, rather than facts that happen subsequently. When the Board offered Petitioner the physical education job on October 7, 1983, Douglas Nogaki had been dismissed by the Commissioner and had been removed from the Board's payroll effective September 27, 1983. Therefore, the board's decision to offer Collins the job was based on Nogaki's dismissal which removed Nogaki from their employ. That employment was a permanent position, with tenure and seniority rights, as well as all privileges and benefits which inure to a teaching staff member in accordance with the law and the

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> the offer; and, that on October 24th (seventeen [17] days after the first offer), Petitioner advised the Board of his refusal. Therefore, the protracted amount of time spent in discussing the offer and the amount of time Petitioner considered the offer clearly indicates that Petitioner was aware of his various alternatives before making the decision in question.
>
> Furthermore, the testimony of the Superintendent shows that the job offered was not of a temporary inconsequential nature, which is equally reflected by the amount of time given to the Petitioner to make up his mind to take or not take the position. A key to this case is not when Douglas Nogaki was reinstated to his position in April 1984, or when Petitioner filed his Petition in August 1985, but the situation between the Petitioner and the Board in October 1983. At that time, the position was a vacant full time position in the physical education department due to Nogaki's termination. The Initial Decision clearly holds for the proposition that the Petitioner was well aware of the scenario as to his tenure at the time he refused the job and that Petitioner's testimony was less than credible.
>
> (Board's Reply Exceptions, at p. 2)

The Board urges that the Commissioner uphold the standard of review on matters of credibility and fact as stated in Rova Farms Resort v. Investors Insurance Co., 65 N.J. 474, 484 (1974), quoting Fagliarone v. Township of North Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963), cert. den. 40 N.J. 221 (1963), as well as Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). The Board contends the court below determined the Board witnesses to be more credible than petitioner and those credibility arguments are not only set out in the decision, but in the findings of fact as well. The Board contends that the decision in this case rests on the credibility of the witnesses and that the Commissioner, sitting as a review authority, should uphold the decision below based on the record and that the ultimate determination of witnesses and factual credibility rests with the trial court.

Further, the Board cites Old Bridge Education Association v. Board of Education of Old Bridge, decided by the Commissioner August 8, 1985, for the proposition that "one cannot hold a position open for a teacher simply because he refuses to take the position at hand." (Board's Reply Exceptions, at p. 5) The Board refutes petitioner's argument and recitation of case law regarding the doctrine of waiver stating that "in spite of Petitioner's statements, relinquishment of tenure rights can be accomplished other than through resignation or acceptance of a position without tenure protection -- it can be done by the refusal to accept a position within the teacher's scope of employment which affords

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available position. Thus, contends petitioner, there can be no waiver under these circumstances. He also cites Carney v. Bd. of Ed., City of Summit, 1980 S.L.D. 1110, 1118 for the standard of review in such cases, suggesting that

> ***in order to find that Collins waived his tenure and seniority, the respondent must establish that the petitioner was fully aware that refusing the Nogaki position would end his tenure and seniority and that, with this knowledge, he acted voluntarily.
> (Petitioner's Exceptions, at p. 4; Post-hearing Brief, at p. 9)

Petitioner further argues that as a result of the State Board's decision of April 4, 1984, reinstating Nogaki and also granting Nogaki's motion to stay the Commissioner's order of dismissal, Nogaki's employment in New Milford was, as a matter of law, never terminated and the employment of any individual in his position between September 26, 1983 and April 4, 1984 was as a substitute. He cites Spiewak et al. v. Rutherford Board of Ed., 90 N.J. 63 (1982); Sayreville Education Association v. Bd. of Ed., 193 N.J. Super. 424, 433 (App. Div. 1984); and Driscoll v. Clifton Bd. of Ed., 165 N.J. Super. 241 (App. Div. 1977), aff'd o.b., 79 N.J. 126 (1979). Additionally, petitioner avers that a tenured teacher, including a teacher on a preferred eligibility list after a reduction in force, is not obligated to accept an offer of employment as a substitute teacher, citing South River Education Association v. Board of Education of the Borough of South River, 1980 S.L.D. 334. Petitioner contends that since an employee can gain neither tenure nor seniority as a substitute, he cannot be compelled to take such a post. Payne v. Board of Education of the Village of Ridgewood, 1976 S.L.D. 605. Thus, argues petitioner, the two legal determinations contained in the initial decision are incorrect. Petitioner did not waive his tenure rights. Even assuming, arguendo, the rejection of an employment offer, there was no knowing waiver and no impropriety in declining an offer to be a substitute. For these reasons, petitioner contends that the initial decision should be reversed and this matter remanded for a determination of petitioner's seniority and tenure rights as well as the remedy for the Board's violation of these rights.

The Board's reply exceptions request that the Commissioner flatly reject all of petitioner's arguments including that which suggests the initial decision should be reversed because the determination was improper since there was an insufficient factual basis to support a finding of voluntary waiver to the position in question. The Board contends, instead, that:

> It is apparent from the facts that an offer of employment was made by the New Milford Board of Education to Petitioner in early October 1983; that Petitioner requested a certain amount of time to make up his mind, which was given; that Petitioner requested additional time to consider

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RICHARD COLLINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by petitioner pursuant to N.J.A.C. 1:1-16.4a, b and c, as was the Board's reply. However, Intervenor Leslie Plumb's reply was untimely.

Petitioner's exceptions reiterate those arguments advanced in his post-hearing brief, which is incorporated herein by reference. Petitioner excepts to the finding that he waived his tenure in the New Milford School District avowing that there is an insufficient factual basis to support a finding of voluntary waiver. More specifically, he asserts that the initial decision misconstrues the doctrine of waiver as applied to the statutory right of tenure and urges that the tenure act mandates a liberal approach to its interpretation and application to factual situations.

Petitioner contends, inter alia, that the only way a person can voluntarily relinquish tenure rights is by separation from tenurable employment, i.e., legitimate resignation or voluntary acceptance of a position known to be without tenure protection. He cites Elaine Solomon v. Bd. of Ed. of the Princeton Regional School District, 1977 S.L.D. 650, aff'd State Board 657 and Quinlan v. Bd. of Ed. of the Township of North Bergen, 1961-62 S.L.D. 228, decision of Superior Court, Appellate Division, 73 N.J. Super. 40 (App. Div. 1962) for this proposition.

Further, petitioner repeats in his exceptions the waiver argument he posited at hearing and in his post-hearing brief at pp. 7-8, averring that it is inappropriate for a board to impose restriction on tenure rights by reaching unwritten "understandings" with a teacher which are not embodied in an employment contract. Siedel v. Board of Education of Ventnor City, 110 N.J.L. 31 (Sup. Ct. 1932) Petitioner suggests Lange v. Bd. of Ed. of the Audubon, 26 N.J. Super. 83 (App. Div. 1953) is the leading case dealing with the issue of waiver of tenure, stating that this decision explicitly determines that a teacher cannot waive tenure and, by implication, seniority rights, while acting in some way to maintain those rights. Petitioner avows that he relied on the assurances of Superintendent Owens that he would not lose his tenure or seniority in declining the Nogaki position and that he would be given the next

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LIST OF EXHIBITS

J-1 to 15 are stipulated items.

J-1	Stipulation and Collins' employment history
J-2A, B & C	Salary guides
J-3A through 3I	Seniority lists
J-4	Deborah Carroll's employment history
J-5	Leslie Plumb's employment history
J-6	Carroll's schedules 1984-85
J-7	Carroll's schedules 1985-86
J-8	Plumb's schedules 1984-85
J-9	Plumb's schedules 1985-86
J-10	October 17, 1983 letter, Owens to Collins
J-11	October 24, 1983 letter, Collins to Owens
J-12	July 16, 1985, letter from Collins to Board
J-13	Nogaki decision of September 26, 1983
J-14	Commissioner's decision, dated December 5, 1985, on motion
J-15	State Board's Reversal of Nogaki decision, dated April 6, 1984
P-1A-F	Records of Collins' wages
R-1	Minutes of closed meeting of October 11, 1983

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interpreted as such, then no teacher who accepted such a position could be considered as a teaching staff member even though reinstatement of the teacher originally holding it might come many years later after the case is decided by the Supreme Court. The filling of positions cannot await the running of the entire appeals process. **I CONCLUDE** the Nogaki position was vacant when the Commissioner determined he should be terminated and the petitioner refused a full-time permanent position within the scope of his certification.

It is therefore **ORDERED** that the petition be **DISMISSED** with prejudice.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

July 24 1986
DATE

NAOMI DOWER-LaBASTILLE, ALJ

JUL 25 1986
Received/Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 24 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

jrp

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seniority was in jeopardy, but he indicated his loyalty to Nogaki was more important than his job (Coco's testimony).

17. When Carroll was offered Nogaki's position, she asked Owens, "didn't you call Dick Collins?" and Owens replied he had and that he was telling her just what he had told Collins, that if she did not accept she would be forfeiting her seniority. She asked why petitioner had refused, and Owens told her it was apparently out of loyalty to Nogaki.

DISCUSSION and CONCLUSION

In his brief, counsel for intervenors Ross and Carroll aptly characterized the testimony inferences and facts which lead to the conclusion that petitioner knowingly waived his seniority rights when he refused a position. Petitioner had not nearly so accurate a memory concerning the facts as did witnesses for the other parties. What petitioner did and why he did it clearly emerges from the testimony. It is thus not necessary to address any other issues.

When a tenured teacher whose position is abolished refuses an assignment within the scope of his or her certificate, that teacher abandons a right to tenured employment. Ann Clark v. Bd. of Ed. of Margate, 1974 S.L.D. 678; aff'd State Bd. 1975 S.L.D. 1082, aff'd N.J. Superior Ct., App. Div., January 8, 1986, A-2196-74 (unreported). I CONCLUDE petitioner knowingly waived his rights. It would be unfair and not in accordance with the statutory intent, if a teacher could refuse a position and subsequently demand it from others on the seniority list who had accepted it in good faith. This would be true even if a board desired to favor the teacher who declined an offer. Old Bridge Education Ass'n v. Bd. of Ed. of Old Bridge, 1985 S.L.D. _____ June 11, 1985, aff'd with mod., 1985 S.L.D. August 8, 1985.

The position offered petitioner was vacant at the time of the offer and had to be so regarded by the Board at the time, regardless of the fact that appellate authority might reinstate the incumbent. The position was not a substitute position. If it were

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10. Owens told Carroll if she did not take the position, she would lose her tenure and seniority rights, so she said she would accept it but asked for some time to obtain a babysitter or other child care facilities.

11. Carroll took the position January through April, but was RIFFed from that position when Nogaki was reinstated.

12. Classes at the high school had grown and the Board was obligated to give Carroll 60 days' notice, which two factors influenced a decision to start team teaching at the high school so that Carroll served until the end of the school year. The team teaching worked so well, with Carroll in a one-half time position, that the Board decided to continue it in the fall, establishing a full-time position.

13. Many teachers in the high school were aware of petitioner's problem of whether to accept his friend's vacant position in the fall of 1983.

14. Ross saw petitioner while he was subbing in the winter of 1983-84; he indicated he was only subbing because he needed a fill-in job in wintertime, that he was contented with the nonteaching job he had the rest of the year, that the money was good and there was a lot of cash.

15. Ross saw petitioner again at a social affair at Nogaki's house in late January or early February 1984. He knew Carroll had taken the high school position and that Ross was also teaching. Again, petitioner indicated that his compensation in his nonteaching job was good, that is, close to what he had been making in school and that there was less aggravation than he experienced in teaching.

16. It was common knowledge around school that petitioner had been offered Nogaki's job and in the presence of several other teachers, on two occasions, he was asked why he did not want to take it when his

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3. Petitioner was uncertain and wanted more time to consider the offer; he expressed concern because of his friendship with Nogaki, whom he thought would return and with falling enrollment in the district, which might make the position uncertain for the future on a separate grounds.

4. Owens was sympathetic with respect to petitioner's concerns about his friend Nogaki, but did not suggest at this time or in a subsequent phone call that he could have the next position which might open because he knew he did not have the authority to do so.

5. On October 11, Owens related to the Board that he had offered the position to petitioner but petitioner asked for more time to think it over and was not certain he would take it. The Board indicated that a decision should be made on filling this position.

6. After consulting with the Board's seniority list adviser, Strauss, Owens called petitioner's home on October 15, but he was not in. The next day, Sunday, October 16, Owens and petitioner got together on the telephone.

7. Owens told petitioner he had to have a decision, that he had had a reasonable time to decide and that he (Owens) would send him a letter formally offering him the position.

8. Owens sent petitioner a letter with a formal job offer on October 17 (J-11) and petitioner refused the position, in writing, by a letter dated October 24, 1986, which information was immediately relayed to the Board.

9. Upon direction of the Board and its consultant, Owens offered the position to the next person on the seniority list, Deborah Carroll, who initially did not want to accept it because she preferred an elementary to a high school position.

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circumstances. Strauss advised Owens this was a serious matter and that he should advise petitioner in writing that if he refused, he would lose his tenure and seniority rights. Thus Strauss essentially corroborated Owens' version of his communications with petitioner as did Owens' letter (J-10) and the Board minutes (R-1).

The testimony of Ross, Coco and Carroll supported Owens version of the eents in that it explained why petitioner refused a position and revealed his intent in doing so. Collins was a close friend of Nogaki and intensely loyal to him. He felt that Nogaki would return and that his position should not be considered vacant. Petitioner was also concerned about declining enrollment in the district, which might mean another RIF. Meanwhile, petitioner had found lucrative work outside teaching which he did not want to give up for a temporary position. Petitioner worked for a lawn irrigation company, but the occurrence of a draught in the area reduced petitioner's prospects in that work, so that he wanted his teaching job back and his wishful interpretation of the events surrounding his refusal of Nogaki's job eventually impelled him to file this complaint. Since he had substituted in the schools after his refusal, he had reason to be aware of all that had occurred, and should have known the situation long before filing a complaint.

FINDINGS OF FACT

1. Petitioner was number one on the physical education teacher seniority list at the time of the June 30, 1983 RIF and was offered Nogaki's position which was vacant after September 26, 1983, when the Commissioner determined that Nogaki should be terminated on tenure charges.

2. Superintendent Owens had a lengthy conversation with petitioner on Friday, October 7, 1983 beginning around 2:15 p.m., the purpose of which was to offer him a full-time physical education position and during which he advised Collins he would lose his seniority if he didn't take it.

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1. Did the Superintendent advise petitioner that he could refuse the position offered and still remain on the preferred list?

2. If so, did the Superintendent have authority to do so?

3. Did petitioner waive his seniority rights?

4. Did he have a right to refuse without waiver due to the nature of the position?

5. Can such action of the Superintendent, if authorized, affect the operation of the statutes and seniority rules?

It is not necessary to reach the question of the rule of limitations or the calculation of seniorities if, in fact, petitioner waived his seniority rights by refusing the position offered him when he knew or should have known that to do so would constitute a waiver.

THE TESTIMONY

The parties entered into a stipulation (J-1 to 15) of the basic facts of petitioner's employment history, the reduction in force on June 30, 1983, the grade level organization of the New Milford schools, the teaching schedules of the parties and the history of the tenure charges against Douglas Nogaki. The principal dispute of fact was whether or not the Superintendent told petitioner that he could refuse the employment offered and would be given the next job opening and whether or not petitioner knew or should have known when he refused Nogaki's position that he was waiving his seniority rights. The principal witnesses on that point were petitioner himself and Superintendent Owens. The Board and intervenors backed up the testimony of Owens with that of Robert Strauss, a consultant who makes up the Board's seniority lists, Marie Ross, Louis Coco and Deborah Carroll.

Owens' testimony was directly contrary to that of petitioner on the circumstances of his refusal of a position. Owens consulted Strauss after learning the Commissioner's decision supporting termination of Nogaki on tenure charges and Strauss advised him to call the next person on the seniority list, who was petitioner. Owens subsequently told him petitioner had turned it down and asked what petitioner's rights were in such

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Petitioner's complaint, which was dated August 8, 1985, was received by the Commissioner on August 13, 1985. The Board did not file an answer until after transmission to the OAL. A prehearing was held on October 23, 1985, the Board filed its answer on November 25 and hearings were scheduled for December 12 and 13, 1986. The OAL was to send intervention notices in November, but on December 5, the undersigned ALJ discovered that notices had not been sent. One intervenor (Deborah Carroll) had heard about the case, and her attorney contacted the ALJ. Due to late notice and intervention, the December hearing dates had to be adjourned. Subsequently, two teachers filed for intervention, a telephone conference was held in late December and I scheduled a new trial date of February 28, 1986. Shortly before that date, a new intervenor appeared (Marie Ross). The undersigned ALJ was in any event forced to adjourn the February date due to personal illness.

I scheduled April 21 and May 1, 1986 as the new hearing dates. The matter was heard on April 21 but one witness was unavailable on May 1, and the hearing had to be continued to May 14, 1986, when it concluded. The last responsive brief was filed June 19, 1986, when the record closed. A list of the exhibits entered into evidence is appended to this decision.

THE ISSUES

Petitioner, a tenured physical education teacher, was RIFFed at the conclusion of the 1982-83 school year. In the fall of 1983, he was offered a position which fell vacant due to the Commissioner's decision that another tenured teacher (Nogaki) be terminated. Petitioner did not accept the position, but alleged he was promised the next open position. He claimed that he filed his complaint as soon as he learned that someone else was serving in the position which he was promised. In the context of this background, the issues as stated in the prehearing order were as follows:

A. Is the case barred by the rule of limitations?

B. Were petitioner's seniority rights violated?

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5847-85
AGENCY DKT. NO. 281-8/85

RICHARD COLLINS,
Petitioner,
v.
NEW MILFORD BOARD OF EDUCATION,
Respondent.

Gregory Syrek, Esq., for petitioner (Bucceri & Pincus, attorneys)

Eric Martin Bernstein, Esq., for respondent (Gerald L. Dorf, P.A., attorney)

Alfred F. Maurice, Esq., for intervenors Marie Ross and Leslie Carroll

Harold Springstead, Esq., for intervenor Leslie Plumb (Aronsohn & Springstead, attorneys)

Record Closed: June 19, 1986 Decided: July 21, 1986

BEFORE **NAOMI DOWER-LaBASTILLE:**

Richard Collins alleged that the New Milford Board of Education (Board) violated his tenure and seniority rights by employing less senior teaching staff members. The Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case on September 18, 1985 pursuant to N.J.S.A. 52:14F-1 et seq.

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G.C., a minor by his guardian, J.Q.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner agrees with the recommendation of the Office of Administrative Law readmitting G.C. to Emerson High School for the 1986-87 school year and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

September 3, 1986

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

July 24, 1986
DATE

KEN R. SPRINGER, ALJ

JUL 24 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 29 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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subject to modification to protect the best interests of the child. Finality has little meaning in the context of child custody adjudication. Borys v. Borys, 76 N.J. 103, 111 (1978).

As set forth by N.J.S.A. 18A:38-2, a school board must admit any student placed in the home of a resident "by order of a court of competent jurisdiction." School boards have no legitimate interest to intrude in a dispute involving family relationships. Consequently, a school board has no business looking behind the face of a valid court order. The order itself triggers operation of the statute. Once a court has determined who is entitled to custody of a child, the board's simple duty is to honor the court's order unless and until it is superceded by a subsequent order. Operative facts of this case are that the Chancery Division has awarded custody of G.C. to the grandmother and that G.C. currently resides with her in Union City. Given these facts, the Board is legally obligated to allow G.C. to attend public school in the district. Remarks by a federal district judge in another context are equally fitting here: "A child who is entitled to be educated need not await the end of bureaucratic wrangling in order for such education to commence." Rabinowitz v. New Jersey State Bd. of Educ., 550 F. Supp. 481, 483 (D.N.J. 1982).

Order

It is **ORDERED** that the Board readmit G.C. to its high school for the 1986-87 school year.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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In response, the Board argues that N.J.S.A. 18A:38-1(a) is inapplicable because of the settled rule in New Jersey that an unemancipated minor child has the same domicile as his father. Fantony v. Fantony, 31 N.J. Super. 14, 20 (App. Div. 1954); Edwards v. Edwards, 8 N.J. Super. 547, 550 (Ch. Div. 1950). But see Little Egg Harbor Twp. Bd. of Educ. v. Galloway Twp. Bd. of Educ., 145 N.J. Super. 1, 12-13 (App. Div. 1975) (Morgan, J.A.D. dissenting), rev'd 71 N.J. 537 (1976), which recognizes the "traditional rule" only in the absence of any parent substitute who provides the child with financial support and has assumed responsibility for the child's care, custody or control. With regard to N.J.S.A. 18A:38-1(b), the Board insists that G.C. does not satisfy the statutory requirement that his grandmother support him "gratis." A recent amendment clarifies that the child's parent must certify "that he is not suporting the child." L. 1985, c. 6. Here, of course, it is stipulated that the father is contributing $30 per week to his son's support. Moreover, the Board challenges the applicability of this statute for the reason that G.C. has no intention of remaining with his grandmother beyond completion of the school term.

It is unnecessary to decide the arguments made by the parties because the case can be fully resolved on clearer and less controversial grounds. N.J.S.A. 18A:38-2 provides:

> Public schools shall be free to any person over five and under 20 years of age nonresident in a school district who is placed in the home of another person, who is resident in the district, by order of a court of competent jurisdiction of this state . . . but no district shall be required to take an unreasonable number of persons under this section except upon the order of the commissioner issued in accordance with rules established by the state board.

While the record indicates that the schools of Union City are overcrowded, the district has neither argued nor proven that it has been forced to accept an "unreasonable number" of nonresident students within the meaning of this statute. Insofar as the Board may object that the custody order is only "temporary," it misconstrues the basic nature of a custody disposition. Custody orders are always "temporary" in the sense that they are

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Nor does the other evidence on which the Board relies provide much support for its position. Many children are habitually late to school. Certainly that does not necessarily mean that they live outside the district. Addresses on school records prior to November 1984 are irrelevant to the narrow question of where G.C. has been living since his enrollment in the Union City school system. Since the father was apparently paying for G.C.'s private schooling, it is not surprising that the father's residence is listed on private school records as the student's "home address." Any apparent inconsistency regarding the reasons for the grandmother's custody is also easily explained. At the time G.C. resumed living with his grandmother in November 1982, he was 13 years old and less capable of fending for himself. In any case, it is debatable whether a 17-year-old male teenager requires less close supervision at night than his younger brother and sister, who might reasonably be expected to be asleep in bed.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board must provide G.C. with a free public education.

Petitioner contends that he meets the requirements of N.J.S.A. 18A:38-1(a) for free education of any person over five and under 20 years of age "who is domiciled within the school district." Alternatively, petitioner maintains that he qualifies as a so-called "affidavit student" under N.J.S.A. 18A:38-1(b). That statute provides for the free education of any person of appropriate age

> . . . 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, 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 for a longer time than merely through the school term [.]

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Findings of Fact

After careful consideration of all the evidence, I **FIND** that G.C. resides with his grandmother in Union City and visits his father in Jersey City only on weekends, holidays or short vacations.

Sworn testimony by family members that G.C. lives, eats and sleeps at his grandmother's house in Union City on weekdays was inherently believable. Testimony given by the elderly grandmother, who was respectful of the court-like surroundings and took her oath seriously, was particularly impressive. Each family member gave essentially the same story, but not in a manner which seemed rehearsed or memorized. Adding to this sense of credibility was the willingness of petitioner's witnesses to admit certain facts which might be unfavorable. Their testimony was not merely self-serving. Illustratively, petitioner's witnesses candidly admitted that G.C. spent weekends and holidays in Jersey City, that the father contributed to his support, and that the father paid his medical bills. If the witnesses had gone to the trouble of fabricating their testimony, they could have invented a much better story. These minor admissions against interest make the remaining portion of the witnesses' testimony that much more convincing.

In marked contrast to the strong proofs presented by petitioner, the Board's case was weak and superficial. Officer Costa conducted a sloppy and inconclusive investigation. He could not remember the exact date of his visit to the grandmother's premises or identify the woman who was the source of his information. More importantly, his revelation that no one by the name of "J.C." resides at the grandmother's apartment is fully consistent with petitioner's evidence that the father (not the son) lives in Jersey City. Officer Rubbinaccio's investigation was hardly more thorough. Whomever Rubbinaccio may have telephoned on November 12, 1985, I accept G.C.'s testimony that he never participated in any telephone conversation with an attendance officer. Even if G.C. happened to be visiting his father's house and did answer the phone on one isolated instance, that fact alone would be insufficient to establish a pattern of residency in Jersey City.

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look for "J.C."[2] Costa testified that an unidentified woman answered the door and informed him that no one by the name "J.C." lived at that address. He did not know who the woman was or whether she lived in the apartment. Aside from this hearsay testimony, the Board failed to call any neighbor, landlord, or other person who might have personal knowledge of living arrangements at the grandmother's apartment. Costa visited the premises only once and kept no notes of his observations. Another attendance officer, Louis Rubbinaccio, telephoned the father's home in Jersey City on November 12, 1985 to check the reason for G.C.'s absence from school on that date. Someone who identified himself as the student allegedly said he was sick. G.C. could not remember the specific incident and denied ever talking to an attendance officer over the telephone. Rubbinaccio never visited the grandmother's apartment in Union City or the father's residence in Jersey City.

The Board points to additional circumstances in support of the inference it seeks to draw that G.C. actually resides in Jersey City. Although the grandmother's apartment in Union City is located "about four blocks" from Emerson High School, G.C. was late to school at least 22 times in 1984-85. Such repeated tardiness suggests to the Board that G.C. may be transported from a longer distance, presumably his father's house in Jersey City. Admitting that he was late often last year, G.C. attributed his lateness to his morning routine of taking a shower and eating breakfast. Further, the Board introduced proof that the student transcripts of Garden State Academy and St. Joseph's show the father's Jersey City residence as A.M.'s "home address." Finally, the Board argues that its "most compelling evidence" is the alleged discrepancy between the testimony of petitioner's witnesses that G.C. needed the care and supervision of his grandmother and the fact that his younger brother and sister live at the father's house "without supervision."

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[2]Father and son have the same surname. The first name of the son is the anglicized equivalent of the father's first name. Thus Costa was looking for the son, but inadvertently used the father's name when making his inquiry.

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Summary of Disputed Evidence

Conflicting testimony was presented about where G.C. has been residing since November 1984. G.C. testified that on weekdays he lives with his grandmother and two adult cousins at an apartment on 18th Street in Union City. According to G.C., he eats breakfast and dinner at his grandmother's apartment and lunch at school. Mondays through Fridays, he sleeps at his grandmother's house. Most of his personal belongings are kept at his grandmother's apartment. Friends with whom he socializes live in Union City and not Jersey City. On weekends, holidays and a portion of summer vacation, he stays with his father in Jersey City. Last summer, however, he spent all but a "few weeks" at his grandmother's apartment in Union City. Originally, he went to live with his grandmother because his father worked the night shift and there was nobody at home to supervise him. He remained because he loves his grandmother and feels "comfortable" living with her. G.C.'s version was fully corroborated by the sworn testimony of his grandmother, father and aunt. Both grandmother and father confirmed that G.C. lives, eats and sleeps in Union City five days per week. Similarly, the aunt verified that she regularly encounters G.C. on her frequent visits to the grandmother's apartment in Union City.

To counter this direct proof, the Board offered nothing but circumstantial evidence. School officials' suspicions were first aroused when a letter addressed to the parent or guardian of G.C. at the 18th Street apartment in Union City was returned by postal authorities stamped "attempted not known." Only one letter was returned undelivered, although the school normally sends two or three such letters in the course of a school year. Indeed, petitioner produced a sample of other envelopes sent to the identical address, which the post office had managed to deliver.

Two attendance officers conducted an investigation for the Board. Neither was able to state unequivocally that G.C. does not reside in Union City. On November 28 or 29, 1985, attendance officer Peter Costa paid a visit to the grandmother's apartment to

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bank account of about $10,000 available for any family need which may arise. Often the aunt makes small monetary gifts to G.C. as well as to her other nephews living with the grandmother. The father, J.C., works as a bus driver in New York City. G.C. is covered under a health insurance policy provided by his father's employer. Consequently, J.C. pays for all his son's medical bills. J.C. has claimed G.C. as a dependent on his federal income tax return for the last four years. Because the grandmother has so little income, she files no tax return.

Shortly after G.C. enrolled in the Union City public schools in November 1984, the grandmother filed a complaint for custody of her grandson with the Family Part of the Chancery Division, Superior Court of New Jersey. J.Q. filled out the court papers herself without assistance of legal counsel. For reasons which are unclear, that case never went to trial. Later, in December 1985, school officials reviewed the student records and realized that the grandmother's application for custody was "incomplete." Joseph Calabria, principal of Emerson High School, advised the family either to complete the custody proceeding or provide suitable proof that G.C. lived in the district. At the administrative hearing, Calabria admitted that he never asked the grandmother to complete the affidavit commonly used for children residing with relatives in the district. Instead, Calabria indicated his willingness to accept a custody order issued by a court of appropriate jurisdiction.

As a result, the grandmother retained legal counsel and instituted a new custody proceeding. On December 16, 1985, Superior Court Judge J. Leonard Hornstein entered an order granting J.Q. custody of her grandson G.C. "until further order of the court." The Board does not contend that the court lacked jurisdiction or that the order is defective in any other respect. Nonetheless, the Board refused to accept the order as dispositive of G.C.'s entitlement to a free public education in the district. Although its reasoning was never fully explained, the Board apparently regards the order as inadequate because it provides for "temporary" rather than "permanent" custody.

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On his father's side, G.C.'s family has always been close-knit and protective. G.C.'s paternal grandmother, J.Q. is 67 years old and a long-time resident of Union City. An aunt described J.Q. as a "tremendous source of strength and stability" for the entire family. In the aunt's words, we "gravitated to [J.Q.] all our lives." When G.C. was a young child, he and his father lived at the house then owned and occupied by his grandmother on 7th Street in Union City. At that time, J.Q. was the person primarily responsible for G.C.'s physical care and supervision.

Throughout his schooling, G.C. has attended a series of different private and public schools. In kindergarten, he went to public school in Union City. Then he moved with his father to Jersey City. From first to fifth grades, he attended St. Paul of the Cross in Jersey City. In sixth grade, he transferred to another parochial school, St. Anthony's, located in Union City, where he remained to the end of eighth grade. While in eighth grade, in November 1982, he returned to live with his grandmother in Union City. He started his freshman year of high school at St. Joseph's in West New York. Next, he spent the first two months of his sophomore year as a residential student at the Garden State Academy in Tranquility, New Jersey. Unhappy with this experience, he reentered the Union City public schools as a high school sophomore. One year later, in December 1985, school officials told him he could no longer attend on a tuition-free basis.

Financial support for G.C. comes mainly from his grandmother, J.Q. She buys his food and clothing and pays the rent and utilities for an apartment in Union City. Retired from active employment, J.Q. receives monthly social security benefits of $365 and a union pension of $100. G.C.'s father regularly contributes $30 per week toward support of his son. J.Q. gives this $30 allowance directly to G.C., who uses it for school lunches and recreational expenses such as movies, sporting events and restaurant meals. Occasionally, the father will purchase articles of clothing for G.C. None of the father's payments are intended to compensate J.Q. for her services in taking care of G.C. Rather, the money is devoted exclusively to the benefit of G.C. Additionally, the aunt, who has a successful theatrical career, helps out financially whenever she can. She has opened a

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18A:38-1 et seq. Although the pleadings raised certain constitutional issues as well, petitioner voluntarily withdrew those issues prior to hearing.

Procedural History

On or about December 5, 1985, respondent Union City Board of Education ("Board") refused to allow petitioner G.C. to continue attending its high school unless he could provide satisfactory proof of residence within the district. Petitioner's grandmother, J.Q., obtained a court order granting her custody of her grandson. When the Board still refused to admit G.C. to its schools, on December 19, 1985 petitioner filed this appeal to the Commissioner of Education. In its answer filed on January 21, 1986, the Board denied that J.C. resides or is domiciled in Union City. Meanwhile, the Board had consented to readmit G.C. to its high school on January 6, 1986 "pending the outcome of the legal proceedings."[1] Subsequently, on January 23, 1986, the Commissioner transmitted this matter to the Office of Administrative Law for handling as a contested case. The Office of Administrative Law held a hearing on April 29, 1986. Upon receipt of additional papers from the parties, the record closed on May 14, 1986. Time for preparation of the initial decision has been extended to July 24, 1986.

Undisputed Facts

Many of the background facts are undisputed. G.C. is 17 years old. At the time of the Board's action, he was a junior at Emerson High School in Union City, New Jersey. G.C.'s parents have been separated for many years. His father, J.C., resides on Hancock Avenue in Jersey City, together with G.C.'s younger sister, age 14, and brother, age 5. His mother lives in Maryland.

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[1]Since G.C.'s expulsion from school occurred at the time of the Christmas recess, he actually missed less than a month of classes.

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INITIAL DECISION
OAL DKT. NO. EDU 0486-86
AGENCY DKT. NO. 425-12/85

G.C., a minor
by his guardian, J.Q.,
Petitioner,
v.
BOARD OF EDUCATION
OF UNION CITY,
Respondent.

Hector R. Velazquez, Esq., for petitioner
(Plant & Velazquez, attorneys)

Allen Susser, Esq., for respondent
(Fischer, Kagan, Ascione & Zaretsky, attorneys)

Record Closed: May 14, 1986 Decided: July 24, 1986

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

This is an appeal on behalf of a high school student from the denial of his admission to the public schools of Union City. The sole issue is whether petitioner satisfies the statutory requirements for attendance at school free of charge. N.J.S.A.

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OAL DKT. NO. EDU 2293-86

IN THE MATTER OF THE TENURE	:	
HEARING OF DORA HALL, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF TRENTON,	:	DECISION
MERCER COUNTY.	:	

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

Upon a careful review of the record in this matter, the Commissioner affirms the findings and determination of the Office of Administrative Law. Accordingly, the Commissioner directs that the employment of Dora Hall as a secretary with a tenure status in the employ of the Board of Education of the City of Trenton is automatically forfeited by operation of N.J.S.A. 2C:51-2 as of April 28, 1986, as a result of her convictions and sentencing on that date for one count of theft by deception, N.J.S.A. 2C:20-4 and two counts of receiving stolen property, N.J.S.A. 2C:20-7.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

UGUST 25, 1986

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2C:51-2. Accordingly, I **CONCLUDE** Dora Hall has, by operation of law, forfeited her public employment and tenure rights with the Board of Education of the City of Trenton by virtue of her convictions and sentencing for theft by deception and receiving stolen property. The forfeiture of employment occurred April 28, 1986. It is noted that between February 28 through April 28, respondent had been suspended without pay under the provisions of N.J.S.A. 18A:6-14. Because respondent has not been vindicated of the charges brought against her, the Board has no obligation to compensate respondent for the salary withheld during that period of time.

It is **ORDERED** that the employment of Dora Hall as a secretary with a tenure status in the employ of the Board of Education of the City of Trenton is automatically forfeited by operation of N.J.S.A. 2C:51-2 as of April 28, 1986.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

July 24, 1986
DATE

David B. McKeown
DANIEL B. MC KEOWN, ALJ

JUL 24 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 28 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

bc

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The Board contends that respondent, as a secretary in its employ, holds public employment and is subject to the provisions of N.J.S.A. 2C:51-2, and because she was convicted under the laws of this State of offenses involving dishonesty, theft by deception and receiving stolen property, the law requires a forfeiture of her public employment. The Board says a hearing on the merits of the tenure charges in which it would carry the burden to prove the truth thereof is not necessary.

LAW AND DISCUSSION

The Forfeiture of public office statute, N.J.S.A. 2C:51-2, provides in part as follows:

> a. A person holding any public office, position, or employment * * * who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty * * *
>
> b. The forfeiture set forth in subsection a. shall take effect:
>
> (1) Upon finding of guilt by the trier of fact or a plea of guilty, if the court so orders; or
>
> (2) Upon sentencing unless the court for good cause shown, orders a stay of such forfeiture * * *

Theft by deception and receiving stolen property are individually offenses involving dishonesty under the laws of the State of New Jersey. The mere fact respondent through her plea of guilty was convicted of theft by deception and receiving stolen property discloses conduct which is otherwise not trustworthy.

CONCLUSION

The Board, the Department of Education's Bureau of Controversies and Disputes, and the Office of Administrative Law have taken reasonable steps necessary to advise respondent of the pendency of the charges brought against her, the Board's motion for summary decision that she has forfeited her employment, and to encourage respondent to appear and defend herself. That she has elected not to defend herself leaves no alternative given the facts of the matter other than to apply the provisions of N.J.S.A.

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"unclaimed". No communication, orally, written, nor through third parties, has been received from respondent.

Board counsel appeared promptly at 9:00 a.m. on May 16, 1986 for the plenary hearing. When respondent did not appear by 10:00 a.m., Board counsel was excused. Prior to his departure, however, Board counsel advised he recently learned respondent pleaded guilty in the Hamilton Township Municipal Court of one count of theft by deception, N.J.S.A. 2C:20-4, and two counts of receiving stolen property, N.J.S.A. 2C:20-7. Counsel further advised respondent's guilty plea was accepted by the court and sentence was imposed upon her. Consequently, rather than proceed with proofs on the merits of the tenure charges against respondent the Board elected to move for summary decision that respondent, by virtue of her convictions in Hamilton Township Municipal Court, forfeited her employment with it as a matter of law under the provisions of N.J.S.A. 2C:51-2, Forfeiture of public office.

As earlier noted, the Board's brief in support of its motion was filed June 17, 1986 and, to this date, no response thereto has been received from respondent.

FACTS

In support of its motion for summary decision, the Board relies upon a letter dated May 15, 1986 it received from the deputy court clerk of the Hamilton Township Municipal Court, Mercer County, which advises, in part, as follows:

> * * *
>
> Please be advised that [Dora E. Hall, respondent herein] appeared in the Hamilton Township Municipal Court on April 28, 1986 [and] the disposition of the case is as follows:
>
> Ms. Hall pled guilty to two counts of 2C:20-7 and one count of 2C:20-4, the two counts of 2C:20-7 were merged with 2C:20-4 and Judge Neil H. Shuster sentenced [respondent] to six months in Mercer County Detention Center (suspended), restitution to be made to the Clover Store in the amount of $359.76, one year supervised probation with therapy, $25.00 court costs and $25.00 [Violent Crimes Compensation Board]. Restitution to be made over a six month period * * *

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PROCEDURAL HISTORY

On or about January 30, 1986, the superintendent filed with the Board written charges against respondent of (1) theft of personal property of a fellow employee, and (2) drug and alcohol addiction. Simultaneously, the superintendent filed a Statement of Evidence, executed under oath, in support of the charges against respondent. N.J.S.A. 18A:6-11.

On January 31, 1986, the Board secretary sent by regular mail a copy of the charges and of the Statement of Evidence executed under oath to respondent at her last known address. The Board received no response thereto. On February 27, 1986, the Board determined probable cause existed to credit the evidence in support of the charges against respondent and certified the charges to the Commissioner for determination. The Board simultaneously determined to suspend respondent from her employment, without pay.

The Board sent to respondent a copy of the charges certified against her, and notice of the fact of her suspension without pay, by certified mail, return receipt requested on February 28, 1986. The Board simultaneously hand-delivered the charges to the Department of Education's Bureau of Controversies and Disputes on the same date. The Bureau acknowledged receipt of the written charges to the Board and to respondent, with the latter acknowledgement being sent certified mail, return receipt requested, to respondent's last known address. The acknowledgement of the charges to respondent was returned to the Department of Education as "unclaimed".

After the matter was transferred to the Office of Administrative Law as a contested case on April 3, 1986, respondent was notified by regular mail on or about April 9, 1986 at her last known address that a prehearing conference was scheduled for April 24, 1986. When respondent failed to appear, a letter was sent her to her last known address by regular mail and by certified mail, return receipt requested, which advised her that a hearing was scheduled for 9:00 a.m., May 16, 1986 at the Office of Administrative Law, Mercerville. Respondent was further advised that the Board had the obligation to prove the truth of the charges against her and that she may submit evidence in opposition to the charges. Respondent was advised of the potential consequences of the matter and was encouraged to appear to defend herself against the charges. The letter sent regular mail was not returned; the letter sent certified mail, return receipt requested, was returned as

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2293-86
AGENCY DKT. NO. 58-2/86

CITY OF TRENTON
BOARD OF EDUCATION,
Petitioner,
v.
DORA HALL,
Respondent.

Robert Rottkamp, Esq., for petitioner (Rottkamp & Flacks, attorneys)

No appearance by or on behalf of respondent

Record Closed: July 7, 1986 Decided: July 24, 1986

BEFORE **DANIEL B. MC KEOWN,** ALJ:

This matter was initiated by the Board of Education of the City of Trenton (Board) through its certification of tenure charges against Dora Hall (respondent), a secretary with a tenure status in its employ, to the Commissioner of Education for determination under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., the Board, while not abandoning the charges against respondent, moved for summary decision by which it seeks a declaration respondent forfeited her tenure and employment with it as a matter of law. The Board filed a brief in support of its motion June 17, 1986 and, having received no response from respondent within 20 days as required at N.J.A.C. 1:1-9.2(a), the record closed July 7, 1986.[1]

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[1] Twenty days from June 17, 1986 is July 4, 1986, a public holiday. Accordingly, the record closed the next following business day, Monday, July 7, 1986.

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a full-time position. The cause of action in Ackerman (in which Intervenor Schlenker herself is a petitioner) accrued over the manner in which the Board executed a reduction in force commencing at the beginning of the 1984-85 school year. The controversy in the instant matter was an outgrowth of a second reduction in force relative to the 1985-86 school year effective June 30, 1985. The specific cause of action was not the calculation of seniority or petitioners' absence from the preferred eligibility list (Exhibit B), rather it was the appointment to a full-time position of a teacher with lesser seniority than each petitioner.

Further, dismissal of Ackerman on the basis of untimeliness does not prevent petitioners from establishing facts and being awarded relief which are rooted in the initial 1984-85 reduction as the new cause of action itself requires reaching to the Board's action at that time since it was then that their seniority rights were first vested.

Accordingly, the Commissioner adopts the findings and conclusions of the ALJ with respect to Petitioner Baten's entitlement to the full-time position assigned to intervenor.

Petitioners, although agreeing with the ALJ's determination on that issue, except to her determination that Petitioner Baten is not entitled to seniority credit for the year that Intervenor Schlenker improperly served. They also except to that portion of the decision which denied them any relief at all to the improper appointment of Intervenor Schlenker. They view this as inequitable as intervenor gained a year's seniority which pushed her farther ahead on the seniority list; thus, their relative standing to her was damaged solely through the Board's improper appointment. As such, they urge that the Commissioner award seniority credit to Petitioner Baten and that he fashion an appropriate remedy to insure that the relative standing of petitioners on the eligibility list is not adversely affected.

Upon review of the record in this matter, the Commissioner determines that the ALJ erred in her denial to Petitioner Baten relief to receive credit for the difference between seniority accrual for the part-time service rendered and the full-time service improperly withheld from her. Her entitlements extend to all those which serve to make her whole, i.e. all emoluments and benefits she would have received had she been properly assigned by the Board, including any difference in seniority credit between that actually received and what she would have received had she actually filled the position. Such relief does not extend to any other petitioner, however, as none was improperly denied a position to which he/she had a legal entitlement. Thus, no relief is due them.

Consequently, the Commissioner adopts the partial initial decision in this matter, except as modified above, for the reasons expressed therein. The Board is to comply with the orders set forth in that decision.

COMMISSIONER OF EDUCATION

August 25, 1986

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The Board and Intervenor Schlenker except to the ALJ's determination that this matter is not time barred pursuant to N.J.A.C. 6:24-1.2. Intervenor argues that petitioners had actual and constructive notice that she was assigned first position on the preferred eligibility list for reemployment as of September 1, 1984. As they did not file a complaint arising out of their failure to be placed on the list, the Petition of Appeal filed 14 months later should be time barred. The Commissioner was not made aware of and was unable to locate in the record provided him any preferred eligibility list for reemployment as of that date. The only preferred list reviewed was compiled as of June 30, 1985. (See Petition of Appeal, Exhibit B.)

The Board argues that the ALJ's failure to time bar the petition is contrary to the purpose of the regulation and it is inconsistent with her determination in Case 1, Ackerman herein. The Board reasons that since petitioners were barred in that matter, they should be barred in the instant matter as well. Of this it states:

> Since the Administrative Law Judge correctly concluded that the first petition (Ackerman v. Oakland Bd. of Ed) which challenged the reduction in petitioners' hours for the 1984-1985 school [year] was untimely, the same petitioners should be barred from contending in another lawsuit that the Board had acted improperly for failing to place them on a preferred eligibility list as a result of the allegedly improper reduction in force. Placement on a preferred eligibility list would have been part of the relief afforded to the petitioners in Ackerman v. Oakland Bd. of Ed. if the petition was not barred by N.J.A.C. 6:24-1.2. The dismissal of the first petition, however, constitutes a judicial determination that the Board can legitimately treat its decision to reduce the petitioners' hours as having been correct -- their tenure and seniority rights were not violated. Therefore, petitioners should be precluded from challenging the Board's decision to reemploy them as part time remedial teachers for the 1985-1986 school year and not employ petitioner, Carol Baten, to a vacant full time elementary teaching position since there was no reason to place them on a preferred eligibility list. (Board's Exceptions, at p. 3)

The Commissioner finds no bases in either intervenor's or the Board's exceptions to reverse the determination of the ALJ that this matter is not time barred. The analysis of the issue is thorough, detailed and accurate. Despite arguments to the contrary, the matter is not untimely in that a new cause of action accrued on August 26, 1985 when the Board approved intervenor's appointment to

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JUDITH S. ACKERMAN ET AL.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,

RESPONDENT.

CAROL A. BATEN ET AL.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY.

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and initial decision rendered by the Office of Administrative Law in the above-captioned matters have been reviewed. Exceptions were filed by the parties within the time requirements of N.J.A.C. 1:1-16.4a, b and c.

Case 1: Ackerman et al.

The Ackerman petitioners contend that the time bar determination in this matter is in error as it leads to a manifest injustice in denying relief to individuals who, by the Board's own admission, had their hours reduced in a reduction in force. Therefore, they believe the Board's violation of their tenure and seniority rights cannot go unchallenged or unheard. Thus, N.J.A.C. 6:24-1.19 should be applied because equitable considerations are at play. Arguments presented in support of petitioners' position are essentially those presented to and considered by the ALJ.

Upon review of the record including petitioners' exceptions and the Board's reply, the Commissioner is in agreement with the ALJ's determination that this matter is time barred pursuant to N.J.A.C. 6:24-1.2. Further, he is unpersuaded that compelling circumstances exist to justify relaxation of the time limit. He, therefore, adopts the initial decision for the reasons well delineated by the ALJ.

Accordingly, the Petition of Appeal is dismissed with prejudice.

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

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

July 15, 1986
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

JUL 18 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 21 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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It is further **ORDERED** that petitioner Baten should receive appropriate back pay and other emoluments of that full-time teaching position; and

It is further **ORDERED** that no relief shall be granted to the other petitioners in Case No. 2 as their lesser seniority when compared with Baten's would have precluded them from filling the full-time position; and

It is further **ORDERED** that as a result of the conclusions reached in this case, counsel should confer to determine the appropriate placement of the remaining petitioners in Case No. 2, as well as intervenor Schlenker, on any preferred eligibility list, as well as the entitlement of said petitioners and intervenor to part-time and/or full-time positions for the 1986-87 school year; and

It is further **ORDERED** that said appropriate placement and preferred eligibility list must be filed with the Commissioner of Education no later than Friday, August 22, 1986; and

Should counsel not be able to agree to said appropriate placement, it is further **ORDERED** that a hearing in regard to said placement and entitlements shall be held on August 28 and 29, 1986, at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey.

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IV

Order

Accordingly, based on the foregoing stipulated and uncontroverted facts and analysis of law, it is hereby **ORDERED** that the petition in Case No. 1 be, and is, hereby **DISMISSED** for failure to file within the 90-day period of limitations established by N.J.A.C. 6:24-1.2; and

It is further **ORDERED** that the reduction in the hours of employment and compensation of the petitioners in Case No. 1 be, and is, hereby declared the equivalent of a reduction in force; and

It is further **ORDERED** that the petitioners in Case No. 1 are entitled to no relief as their claims are time barred; and

It is further **ORDERED** that the motion to dismiss the petition in Case No. 2 for failure to file the claim within the 90-day limitation period of N.J.A.C. 6:24-1.2 be, and is, hereby **DENIED**, as the 90-day rule does not bar petitioners' claims in Case No. 2; and

It is further **ORDERED** that the reduction in the hours of employment and compensation of the petitioners in Case No. 2 be, and is, hereby declared the equivalent of a reduction in force; and

It is further **ORDERED** that the Board's failure to acknowledge the seniority rights of the petitioners in Case No. 2 to the full-time vacancy which occurred in the 1985-86 school year was a violation of those petitioners' seniority rights; and

It is further **ORDERED** that petitioner Baten, having the most seniority, should have been awarded the full-time position to which intervenor Schlenker was appointed on August 26, 1985; and

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tenured applicant. The local Board and the State Board clearly erred in failing to consider appellant's seniority and to grant her the employment for which she applied." Id. at 369. Seniority regulations are to be interpreted as allowing a pro rata calculation of seniority based upon the total accumulated service within a specific category. Id. at 368.

The Lichtman holding establishes the rights of part-time teachers to full-time positions within the category of their employment. The Commissioner's decision in Lichtman provided that the petitioner was to be placed in the full-time position then occupied by the Board's appointee, 1980 S.L.D. at 584. The ruling also provided for an award of back pay calculated at the salary the petitioner would have received had she been appointed to the full-time appointment. Ibid. Petitioners here do not request either appointment to the full-time position or an award of back pay. (See, Kleinbaum brief, May 20, 1986, at 5.) The request for relief is limited to a credit for each petitioner of one year of full-time seniority, due to the Board's intention to abolish the full-time position presently occupied by the intervenor, Schlenker.

Counsel does not cite any precedent for an award of a credit of one year of full-time seniority to a teacher denied a position in violation of his/her seniority rights. Research has disclosed no cases which award seniority credit where no service was performed by the teacher. Petitioner Baten has the highest seniority of all the petitioners in Case No. 2, so she would have had a valid claim to the position subsequently filled by Schlenker. All other petitioners in Case No. 2 have less seniority than Baten and would thus have no claim to the full-time position. These petitioners are entitled to no relief since they could not have filled the position even if the Oakland Board had properly considered their seniority. As Baten had the most seniority, she would be entitled to an award of back pay as well as to an appointment to the full-time teaching position. Lichtman, 1980 S.L.D. at 584. Baten is not entitled to an award of one year's full-time seniority credit as such relief does not appear to be permissible under New Jersey School Law. Schlenker and the other petitioners in Case No. 2 are to be placed on a preferred eligibility list, in order of seniority, which will establish the recipient of the next vacant full-time position in the District.

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person is qualified. N.J.S.A. 18A:28-12. It is the Board of Education's responsibility to determine the seniority of persons affected by a reduction in force. N.J.S.A. 18A:28-11. In Popovich v. Bd. of Ed. of Wharton, 1975 S.L.D. 737, 745, the Commissioner stated, "The burden of determining seniority rights rests squarely on the Board in such instances. This is so, regardless of whether or not petitioner asserted her seniority rights at the time she was notified of the reduction of her work week" (citations omitted). In Popovich, a full-time teacher was reduced to part-time employment while another teacher with less seniority remained employed in a position within Popovich's category. Id. at 738. The Commissioner held that the Board was statutorily required to consider the petitioner's seniority when it acted to reduce her employment. Id. at 745. A similar duty was placed upon the Oakland Board when it sought to fill a full-time vacancy within the petitioner's category in 1985-86. The Board cannot argue that its failure to place petitioners on a preferred eligibility list in 1984-85 now precludes petitioners' assertion of seniority rights in a subsequent vacancy. Ibid., see also, Fallis, Comm. of Ed. at 19.

The holding of Godwin Davis is not applicable to the present action. In Godwin Davis, the petitioner asserted seniority rights to positions for which she neither possessed the proper endorsement nor had accumulated any actual service time. Godwin Davis, at 5-6. Those facts are clearly distinguishable from the facts here, where petitioners are asserting seniority rights to a position within their category of service.

The seniority rights of part-time teachers to full-time positions within the category of their employment service were established by the Supreme Court in Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983). In Lichtman the petitioner acquired tenure and seniority as a part-time librarian with the Ridgewood School District. Her position was eliminated in a RIF, and while the Board recognized petitioner's seniority, it limited it to a part-time position. Id. at 364. Petitioner applied for a position as full-time librarian, which was denied by the Board in favor of a nontenured applicant. Id. at 365. The Commissioner of Education ruled that this action violated the petitioner's seniority and tenure rights, but was reversed by the State Board of Education. Ibid. In reinstating the Commissioner's decision, the Supreme Court held that, "The service and experience she compiled in this position - her seniority - properly entitled her to a preference over a non-

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E. SINCE THE 1984-85 REDUCTION OF HOURS TAUGHT BY THE PETITIONERS IN CASE NO. 2 WAS THE EQUIVALENT OF AN ACTUAL RIF, TO WHAT POSITION IS EACH PETITIONER AND INTERVENOR ENTITLED AND TO WHAT REMEDIES ARE PETITIONERS AND INTERVENOR ENTITLED?

In August 1985, the Board filled a full-time teaching vacancy in 1985-86 by hiring a former part-time teacher who had been dismissed in 1984-85 and who had the most seniority on its existing preferred eligibility list. Ms. Schlenker, the teacher selected, had accrued 2.6 years of seniority at the commencement of the 1985-86 school year. Every petitioner in Case No. 2 possessed more seniority than did Schlenker at that time. Furthermore, the full-time position to which Ms. Schlenker was appointed was within the same category in which each of the petitioners had accrued their seniority. Petitioners assert that the Board was required to appoint one of them to that full-time vacancy due to their higher seniority.

The Board argues that the petitioners were not entitled to be placed on any preferred eligibility list due to their violation of N.J.A.C. 6:24-1.2, which would have been part of their petitioner's relief had they filed a timely claim for the 1984-85 RIF. I have not accepted that argument and have already concluded that the petition in Case No. 2 was timely filed.

Intervenor agrees with the Board, and also argues that the petitioners in Case No. 2 are, in essence, seeking a rearrangement of the Oakland teaching staff schedule to maximize the teaching hours available to part-time teachers. He cites Godwin Davis v. Bd. of Ed. of Ewing Twp., OAL DKT. EDU 6539-84 (March 14, 1985) adopted, Comm. of Ed. (Apr. 29, 1985), for the proposition that such a claim should be rejected.

As has been established, the reduction in work hours of the petitioners in 1984-85 was a RIF which requires recognition of the petitioners' seniority rights. Von Schalscha, at 8. Upon a RIF, a teacher must be placed upon a preferred eligibility list in order of seniority for reemployment, whenever a vacancy occurs in a position for which such

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district-wide RIF, will provide that teacher with preferential seniority in other positions within her category. Von Schalscha v. Bd. of Ed. of Tenafly, OAL DKT. EDU 7945-82 (July 15, 1983) at 8-9, adopted, Comm. of Ed. (Sept. 2, 1983). The petitioner in Von Schalscha was reduced from 15 to nine work hours per week. At the same time, the Board hired two additional part-time teachers at 24 hours per week, within the petitioner's category of employment. Id. at 7. By denying the petitioner's preclusive seniority rights in the two new positions, the Board was ordered to pay back compensation to the petitioner of fifteen hours per week. Id. at 9.

As in Von Schalscha, the petitioners in the present cases have had their work hours reduced despite their tenured status. Von Schalscha, at 8-9. The Board's attempt to argue that the petitioners were unaffected by the 1984-85 RIF is refuted by the Commissioner's decision in Von Schalscha. Such a reduction in hours as part of a RIF will trigger the seniority rights of the affected teachers. Id. at 9. I conclude that the 1984-85 reduction of hours taught and compensation received by these petitioners was the equivalent of an actual reduction in force.

D. SINCE THE 1984-85 REDUCTION OF HOURS TAUGHT BY PETITIONERS IN CASE NO. 1 WAS THE EQUIVALENT OF AN ACTUAL REDUCTION IN FORCE, TO WHAT POSITION AND REMEDIES ARE THE PETITIONERS IN CASE NO. 1 ENTITLED?

It is clear that the petitioners in Case No. 1 are entitled to no relief whatsoever for the RIF which occurred in 1984-85. I have concluded that petitioners' failure to file a timely claim with the Commissioner prevents them from receiving either retroactive or prospective relief for the 1984-85 RIF. See, Gordon, State Bd. of Ed., at 6. Since they have not presented any justifiable circumstances for the relaxation of the 90-day rule, the petition in Case No. 1 must be dismissed.

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The petitioners in both of these cases taught fewer hours as part-time teachers in 1984-85 than they had taught in 1983-84. They are all acknowledged as tenured part-time teachers of the Oakland school district.

The Board clearly concedes that a RIF did occur in September 1984 for the 1984-85 school year, only arguing that it did not affect these petitioners as they were all offered reemployment. The intervenor's attorney argues that any seniority rights which the petitioners in Case No. 2 may have are only applicable if a RIF occurred. Therefore, since they were all offered employment (albeit part-time and less than the previous year), they were unaffected by the 1984 RIF and therefore have no seniority rights to assert. The petitioners in both Case No. 1 and Case No. 2 assert that a reduction of a part-time teacher's hours and compensation is a RIF for which seniority rights became applicable.

New Jersey School law provides that teachers with tenure, ". . .shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause. . ." N.J.S.A. 18A:28-5. The tenure statute does not prohibit a school Board from reducing the size of its teaching staff for reasons of economy or because of a reduction of the number of pupils within a district. N.J.S.A. 18A:28-9. Any reduction in the number of hours taught by the petitioners automatically causes a reduction in compensation because they are paid on an hourly basis. As tenured part-time teachers, such a reduction in compensation could only occur pursuant to tenure charges being filed under N.J.S.A. 18A:28-5 or pursuant to a reduction in force done in conjunction with the provisions of N.J.S.A. 18A:28-9. As there are no tenure charges filed against any of the petitioners in either case, the reduction in petitioners' work hours automatically constitutes a reduction in force as to these petitioners. See, Kaufman v. Bd. of Ed. of Lower Alloways Creek, OAL DKT. EDU 6843-80 (Sept. 28, 1981), adopted, Comm. of Ed. (Nov. 13, 1981).

A reduction in force may validly eliminate a tenured teacher's 75 percent position and replace it with a 65 percent position. Pallingston v. Bd. of Ed. of Mendham, OAL DKT. EDU 3971-81 (May 6, 1982), adopted, Comm. of Ed. (June 24, 1982). But, it has also been held that the reduction of a part-time tenured teacher's work hours, pursuant to a

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days of said "nonplacement" thus precludes any claim to the full-time position for the 1985-86 school year. This theory means that failure to contest an improper RIF when it occurs precludes any assertion of a teacher's seniority rights in the future.

In the Fallis case, the Commissioner rejected an argument very similar to that advanced by the Oakland Board here. See, Fallis v. South Plainfield Bd. of Ed., Commissioner's decision at 19. Fallis was reduced in force in 1981, at which time the Board failed to create a preferred eligibility list as required by school law. The petitioner filed no claim at that time contesting the propriety of the Board's action. Id. at 7. The Board argued that the petitioner's failure to file a claim within 90 days of the 1981 action precluded him from asserting seniority rights in 1984 to another position created by the Board. Ibid. The Commissioner rejected this argument and stated that the Board's failure to acknowledge petitioner's seniority rights in 1984 was a new and separate cause of action distinct from any claims as to the propriety of the RIF. Id. at 19. The Commissioner concluded that the petitioner satisfied the requirements of N.J.A.C. 6:24-1.2 by filing his claim in relation to the Board's failure to appoint him to the vacant position within 90 days of that act. Ibid.

As in Fallis, the failure of the petitioners in Case No. 2 to contest the propriety of a RIF for 1984-85 within 90 days of it occurring does not preclude them from asserting seniority rights to subsequent vacancies. Fallis, Commissioner's decision, at 19. Their cause of action accrued on August 26, 1985, the date when Ms. Schlenker's hiring was approved by the Board at a public meeting. The petition contesting this action was filed on November 7, 1985, 73 days later. Therefore, petitioners in Case No. 2 have filed their petition within 90 days of the action which forms the basis of the complaint: the Board's refusal to honor their seniority rights to a vacant position. These petitioners have met the requirements of N.J.A.C. 6:24-1.2 with respect to that claim.

C. WHETHER THE 1984-85 REDUCTION OF HOURS TAUGHT BY THE PETITIONERS IN BOTH CASE NO. 1 AND CASE NO. 2 WAS THE EQUIVALENT OF AN ACTUAL REDUCTION IN FORCE?

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rights to a vacant position in 1984, stating that the Board had failed to establish a preferred eligibility list when Fallis was reduced in force in 1981. Commissioner's decision at 19. The 90-day rule did not apply to his seniority claim, which was based on statutory entitlement. The Commissioner concluded that by filing a claim within 90 days of his denial to the 1984 vacancy, Fallis met the limitation requirement with respect to that violation. Ibid.

Petitioners' attorney characterizes the State Board's application of the Lavin rule in Gordon and Weir as an "absurd construction," and cites several cases which define tenure as a statutory right unaffected by any contractual agreement between a teacher and a school board. He argues that Lavin should be construed to mean that the 90-day rule does not apply to such a statutory right, as distinguished from a right contained in an employment contract. Even if the argument might be seen as compelling, the Commissioner of Education, and thus this judge, is required to apply the law as enunciated by the State Board of Education and/or the Appellate Division. See, Quinlan v. Bd. of Ed. of North Bergen Twp., 73 N.J. Super. 40, 51 (App. Div. 1962). The State Board and the Appellate Division have made it clear in Gordon that failure to contest a RIF within 90 days of its occurrence will preclude the assertion at a later time of a violation of tenure and seniority rights as a result of that specific RIF. Therefore, petitioners' claims in Case No. 1 are barred by the 90-day limitation period contained in N.J.A.C. 6:24-1.2.

B. WAS THE PETITION IN CASE NO. 2 FILED IN VIOLATION OF N.J.A.C. 6:24-1.2?

The petitioners in Case No. 2 filed a claim on November 7, 1986, alleging that they possessed seniority rights to a full-time position which had become vacant just before the 1985-86 school year. The Board hired Ms. Schlenker, intervenor, to fill this position at a public meeting held on August 26, 1985.

The attorney for the Board argues that the petition in Case No. 2 was untimely due to the occurrence of the de facto RIF in 1984. At that time, petitioners in Case No. 2 were not placed on a preferred eligibility list. Their failure to file a petition within 90

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Petitioners' statutory argument in regard to the filing of the petition in Case No. 1 is clearly belied by the Supreme Court's holding in North Plainfield and its distinguishing of Lavin. In reversing the Appellate Division, the Supreme Court in North Plainfield found that the Appellate Division had ". . . misperceived the increment as a statutory entitlement unrelated to the teachers' qualifications, performance or quality of teaching services rendered." 96 N.J. at 593. See also, Weir v. Bd. of Ed. of Northern Valley Regional High School District, OAL DKT. NO. EDU 8609-83 (June 7, 1984), adopted Comm. of Ed. (July 20, 1984), aff'd, State Bd. of Ed. (March 6, 1985), aff'd (N.J. App. Div., April 9, 1986, A-3520-84T6) (unreported), at 3-5. The State Board has similarly rejected arguments that teachers' tenure and seniority rights represent statutory entitlements. See, for example, Gordon v. Bd. of Ed. of Passaic Twp., OAL DKT. NO. EDU 4416-83 (Sept. 12, 1983), adopted, Comm. of Ed. (Oct. 31, 1983), rev'd, State Bd. of Ed. (March 8, 1985) at 7, aff'd (N.J. App. Div. May 27, 1986, A-3294-84T7) (unreported). The State Board ruled that tenure and seniority rights, unlike credit for military service, are predicated on the performance of one's duties as a teacher. Gordon, State Bd. of Ed., at 4. These seniority rights accrue only after a staff member has rendered satisfactory services over a period of time sufficient to confer tenure, and are "functionally related" to teaching experience. Ibid. Gordon's cause of action accrued on the date he became aware that a new position was created to which he might be entitled by virtue of his seniority. Id. at 5. Failure to file a petition within 90 days of that date foreclosed all rights he may have had to the position. Ibid. In accord, Weir v. Bd. of Ed. of Northern Valley, OAL DKT. NO. EDU 8609-83 (June 7, 1984), adopted, Comm. of Ed. (July 20, 1984), aff'd, State Bd.of Ed. (March 6, 1985), aff'd, (N.J. App. Div. April 9, 1986, A-3520-84T6) (unreported), at 5-6. See also, Polaha, State Bd., at 4-5.

In Fallis v. South Plainfield Bd. of Ed., OAL DKT. NO. EDU 5934-84 (January 16, 1985), adopted, Comm. of Ed. (March 4, 1985), aff'd, State Bd. of Ed. (Sept. 4, 1985), it was held that the petitioner had a statutory entitlement to assert seniority rights to a vacant position, which would not be barred by the 90-day rule. However, Fallis is distinguishable from the cases already discussed. The Commmissioner rejected the Board of Education's argument that the 90-day rule precluded petitioner from asserting seniority

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compliance with the 90-day filing requirement. Therefore, at best, the state of the law was unclear insofar as the applicability of the 90-day rule in cases where settlement is attempted. The State Board relied heavily on the Bernards Twp. decision in its Polaha decision. But, not only could the petitioners not rely on the Commissioner's decision on Polaha, given the Bernards Twp. case, they did not even attempt to settle this case until more than 90 days had elapsed. Accordingly, the efforts to avoid litigation do not constitute a compelling circumstance sufficient to relax the 90-day rule of N.J.A.C. 6:24-1.2. Petitioners have not alleged any other compelling circumstances sufficient to justify relaxation of the 90-day rule. In the absence of compelling circumstances, such as a delay caused by a school board or the presence of a constitutional issue, relaxation of the 90-day rule is not warranted. See, Polaha, State Bd. of Ed., at 5.

Petitioners also argue that the 90-day rule does not apply to a claim involving tenure and seniority rights because they are statutory entitlements. The New Jersey Supreme Court has held that filing to redress violations of a teacher's statutory entitlement is not subject to any time limitations, including the 90 days of N.J.A.C. 6:24-1.2. Lavin v. Hackensack Bd. of Ed., 90 N.J. 145, 150-151 (1982). Military service credit provided to teachers by N.J.S.A. 18A:29-11 is specifically the type of statutory entitlement to which a statute of limitations does not apply. Lavin, at 150. The test applied by the Lavin court to determine whether a benefit is a "statutory entitlement" is, "Where the benefit is not directly related to the employment services, but is being awarded for a totally unrelated reason, the recipient is truly the beneficiary of a statutory entitlement quite apart from the employment as such." Ibid. Thus, credit for service in the military is awarded, not because it is a result of improved performance by a teacher or improves a teacher's performance, but because the legislature sought to reward the fact of military service. Id., at 150-151.

Subsequently, the Supreme Court rejected an argument that a teacher's annual increment is a statutory entitlement to which the 90-day limitation period would not apply. North Plainfield Educ. Ass'n v. Bd. of Educ. of North Plainfield, 96 N.J. 587 (1984). This is because the annual increment was subject to denial for discretionary reasons and thus could not be seen to be a benefit quite apart from employment. Id. at 594.

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resolve the matter without litigation. An attempt was made to settle prior to the institution of litigation and, in fact, a tentative settlement agreement was reached. However, this tentative settlement was not finalized and the litigation proceeded. Counsel argues that as a result of notice given to the Board on February 12, 1985, and as a result of the mutual desire of the parties to avoid the expense of litigation by reaching an amicable resolution, the relaxation rule contained in N.J.A.C. 6:24-1.17 should be applied as strict adherence to the 90-day rule would cause a manifest injustice to the petitioners in Case No. 1. Counsel relies on the Commissioner's decision in Polaha v. Bd. of Ed. Buena Regional School Dist., 1984 S.L.D. - (Dec. 17, 1984), which found that the 90-day rule should be relaxed during a period of settlement negotiations. That decision was reversed by the State Board of Education on October 16, 1985, after the filing of the claim in this case. Since the State Board did not reverse Polaha until after the filing of this petition, counsel argues that the good-faith effort to avoid litigation, relying on existing school law, should justify relaxation of the 90-day rule.

After considering the arguments of petitioners and the Board in Case No. 1, I conclude that the petition in Case No. 1 is barred by the 90-day provision of N.J.A.C. 6:24-1.2. The verified petition was filed more than one year after commencement of the alleged violation of the petitioners' tenure and seniority rights. Furthermore, even if notice of the claims occurred on February 12, 1985, this was far more than 90 days after the September 1984 commencement of the reduction in hours and compensation.

The settlement negotiations did not toll the 90-day rule. As petitioner acknowledges, Polaha was reversed by the State Board of Education, which held that the 90-day rule must be measured from the date the cause of action accrued, despite any efforts of settlement. State Board at 4-5. Although petitioners argue that the standard applicable at the time petitioners chose to negotiate was the Commissioner's decision in Polaha, and thus a relaxation of the 90-day rule is justified, said reliance is inapposite. See, Board of Ed. of Bernards Twp. v. Bernards Twp. Ed. Ass'n, 79 N.J. 311, 326-327, n. 4 (1979), which discusses the applicability of the 90-day rule in the context of binding or advisory arbitration, somewhat analogous to settlement negotiations. The Supreme Court clearly indicated that a teacher who proceeds to advisory arbitration is not relieved from

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It is uncontroverted that none of the petitioners in Case No. 2 who had their hours reduced in 1984-85 were placed on that preferred eligibility list. An additional reduction in work hours and compensation occurred in 1985-86 for petitioners Ackerman, Baten, Klaskow and Spalt. Petitioner Baten has the most seniority of all petitioners, with 5.6 prorated years of seniority as an elementary education teacher. Schlenker has 2.6 prorated years of seniority as an elementary education teacher.

III
Conclusions of Law

A. WAS THE PETITION IN CASE NO. 1 FILED IN VIOLATION OF N.J.A.C. 6:24-1.2, THE 90-DAY REGULATION OF LIMITATIONS?

The petitioners in Case No. 1 filed their claim with the Commissioner of Education on September 30, 1985, alleging a violation of their tenure and seniority rights because their hours of employment and compensation had been reduced for the 1984-85 school year. The Board has filed a motion for summary decision urging dismissal of the petition in Case No. 1 because it was filed in violation of N.J.A.C. 6:24-1.2, which provides that a petition to the Commissioner, ". . . must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested." The attorney for the Board argues that the 90-day rule is strictly applied in cases involving questions of tenure or seniority rights and points out that the 90-day rule is relaxed only under "compelling circumstances," which he argues are not present in this case. The Board states that this petition filed on September 30, 1985, more than one year after the reduction in hours and compensation which constitutes the basis of the complaint, clearly violates the 90-day rule.

Petitioners' attorney argues that the Commissioner has the authority, pursuant to N.J.A.C. 6:24-1.17, to relax the 90-day rule in appropriate circumstances. He points out that on February 12, 1985, he notified the Board's attorney of the fact and nature of the claims raised by the petitioners in Case No. 1, both in a telephone conversation and in a letter mailed on that date. On February 20, 1985, it was clear that all parties wanted to

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Cross-motions for summary decision and supporting briefs were timely filed, as was a response by the Board. The record closed on June 3, 1986.

II

Stipulations of Fact and Generally Uncontroverted Facts

Counsel stipulated, in writing, to certain facts concerning the certification, tenure status and rates of pay of all petitioners in both cases. In that stipulation, counsel also agreed that the Board was notified of the claims made by petitioners in Case No. 1 on February 12, 1985. It is stipulated that the parties attempted to reach an amicable resolution of these claims prior to the institution of any litigation. The stipulation of facts is attached to this Initial Decision and incorporated herein as if set forth at length.

A review of the certifications and statements of facts in all posthearing filings leads me to find the following version of events uncontroverted. Petitioners have been employed by the Board as part-time remedial teachers and have gained tenure as a result of their service in the Oakland school district. Commencing with the 1984-85 school year, petitioners' hours of employment and compensation were reduced by the Board, when compared to their hours and compensation for the 1983-84 school year. At the conclusion of the 1984-85 school year, four part-time teachers with less seniority than petitioners in both cases herein were laid off as a result of a RIF. This RIF was effective June 30, 1985. As a result, the four teachers who were laid off were placed on a preferred elementary teacher eligibility list prepared by the Board.

In August 1985, a full-time position became available in the Oakland school district as the result of the retirement of one of its full-time teaching staff members. This position was within the scope of the certificate of each petitioner in Case No. 2. On August 26, 1985, the position was offered to Patricia Schlenker, intervenor, the first teacher on the preferred eligibility list prepared by the Board. Ms. Schlenker accepted the position. It is uncontroverted that Ms. Schlenker has less seniority than each petitioner in Case No. 2. Petitioners in Case No. 2 filed their petition on November 7, 1985, 73 days after the Board hired Patricia Schlenker.

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A. The legal issues to be determined concerning Case No. 1 are:

(1) Whether the 1984-85 reduction of hours taught by these petitioners were the equivalent of an actual reduction in force (RIF)?

(2) If the answer to Question 1 is yes, to what position is each petitioner entitled?

(3) To what remedies are petitioners entitled?

(4) Was the petition in Case No. 1 filed in violation of N.J.A.C. 6:24-1.2, the 90-day regulation of limitations?

B. The legal issues to be determined concerning Case No. 2 are:

(1) Whether the Board's failure to offer the 1985-86 full-time position to presently employed part-time teachers (petitioners herein), who had higher seniority than the part-time teacher who had actually been RIFfed and who received the job, violated these petitioners' seniority rights? Subsumed in this issue are the following questions:

a. Whether the 1984-85 reduction of hours taught by these petitioners is the equivalent of an actual RIF?

b. If the answer to subissue a is yes, to what position is each petitioner and intervenor entitled?

c. If the answer to subissue a is yes, to what remedies are petitioners and intervenor entitled?

d. On February 18, 1986, the Board raised the issue of whether the petition in Case No. 2 was filed in violation of N.J.A.C. 6:24-1.2.

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On November 4, 1985, several of the petitioners from Case No. 1 filed a second verified petition, alleging that the Board violated their tenure and seniority rights when it failed to offer a full-time position to one or more of them, despite the fact that they were part-time teachers and had higher seniority than a teacher (intervenor herein) who was offered and who accepted the full-time position. This full-time position occurred in September 1985 when a vacancy became available in the Oakland school district which was within the endorsement held by each of the petitioners in Case No. 2. The Board offered the position to intervenor Schlenker, one of the four part-time teachers who lost their positions as a result of the reduction in hours and compensation in the 1984-85 school year. Ms. Schlenker, the first person on the preferred eligibility list prepared by the Board, accepted the position in September 1985. None of the petitioners in Case No. 2, who had had their hours reduced in 1984-85, were placed on that preferred eligibility list.

On December 5, 1985, the Board answered the verified petition in Case No. 2, responding that it had filled the vacant full-time classroom teaching position by offering employment to the most senior teacher on the preferred elementary teacher eligibility list.

Both cases were forwarded to the Office of Administrative Law for determination as contested cases on December 12, 1985, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On February 4, 1986, a motion to intervene was filed by Patricia A. Schlenker, which was granted by the Honorable Ward Young, ALJ, on or about February 5, 1986. The Order granting intervention is incorporated in this Initial Decision as if set forth at length.

On February 10, 1986, a prehearing conference was held, at which time all counsel agreed that both cases should be consolidated because of common issues of law and fact. An Order of Consolidation was entered as part of the Prehearing Order. On that date, counsel agreed to the following:

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Alfred F. Maurice, Esq., for intervenor, Patricia Schlenker, in Case No. 2

Stephen R. Fogarty, Esq., for respondent, in Case No. 1 and Case No. 2
(Fogarty and Hara, attorneys)

Record Closed: June 3, 1985 Decided: July 15, 1986

BEFORE **SYBIL R. MOSES,** ALJ:

I
Procedural History

Petitioners in Case No. 1 and Case No. 2 are tenured teaching staff members employed by the respondent, Oakland Board of Education (Board), as part-time remedial (Compensatory Education, Supplemental, Small Group, Bedside and Title I) teachers. The petitioners in Case No. 1 allege that their hours of employment were reduced by the Board during the 1984-85 school year, which reduction in hours and thus compensation violated their tenure and seniority rights. As a result of this reduction in force, part-time teachers who are not petitioners in Case No. 1 lost their part-time positions.

It is accepted as fact that on September 30, 1985, petitioners in Case No. 1 filed a verified petition with the Commissioner of Education, alleging, inter alia, that petitioners' hours of employment and compensation had been reduced by the Board when compared to their hours and compensation for the 1983-84 school year. The Commissioner acknowledged receipt of the verified petition on October 2, 1985.

The Board filed an answer on or about October 28, 1985 and an amended answer on January 3, 1986, generally denying the allegations of the verified petition and asserting that petitioners' claims in Case No. 1 were barred by the 90-day limitation in N.J.A.C. 6:24-1.2.

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7017-85
AGENCY DKT. NO. 337-10/85
(Case No. 1)

JUDITH S. ACKERMAN, CAROL A. BATEN, ALICE FORBES, GAIL EHRLICH GRAHAM, NITA KLASKOW, PATRICIA S. SCHLENKER, JANET C. SEMENDINGER and JAYNE A. SPALT,
Petitioners,
v.
OAKLAND BOARD OF EDUCATION,
Respondent.

and

PARTIAL INITIAL DECISION
OAL DKT. NO. EDU 7871-85
AGENCY DKT. NO. 383-11/85
(Case No. 2)
(CONSOLIDATED CASES)

CAROL A. BATEN, ALICE FORBES, JAYNE SPALT, GAIL EHRLICH GRAHAM, JANET C. SEMENDINGER and NITA KLASKOW,
Petitioners,
v.
OAKLAND BOARD OF EDUCATION,
Respondent.

Gregory T. Syrek, Esq., for petitioners in Case No. 1
(Bucceri and Pincus, attorneys)

Paul L. Kleinbaum, Esq., for petitioners in Case No. 2
(Zazzali, Zazzali & Kroll, attorneys)

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> b. For service in the military of this country one year credit on schedule for each year served to a maximum of 4 years credit.
>
> In order to advance one step on a guide, an employee must have served at least one-half of the prior fiscal year with the district. (J-18)

It was not until April 1985 that petitioner claims she became aware of the effect of the salary policy (J-18) in question which accorded other teachers year-for-year credit on the salary guide when they were reassigned from part-time to full-time teaching positions. This lack of awareness on petitioner's part continued for approximately seven years (1978-79 through 1984-85) during which time she made no attempt to apprise the Board of what she considered to be her claim to proper salary guide placement.

The Commissioner is not persuaded by the position taken by petitioner that the provisions of N.J.A.C. 6:24-1.2 do not effectively bar her appeal in the instant matter as being untimely.

Moreover, the Commissioner cannot accept as plausible petitioner's contention that for a period of seven years she was totally unaware of the May 17, 1978 salary placement policy (J-18) adopted by the Board. Petitioner's silence with respect to such Board action until the institution of her Petition of Appeal on November 19, 1985, clearly justifies the imposition of the time bar contemplated by the provisions of N.J.A.C. 6:24-1.2 essentially for the same reasons laid down by the Court in North Plainfield, supra. Having so determined, the Commissioner finds it unnecessary to reach a further disposition on the merits of petitioner's claim against the Board for proper retroactive or prospective salary guide placement.

Accordingly, the Commissioner affirms the initial decision as modified above. The Board's Cross-Motion for Summary Judgment is granted and the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

August 22, 1986

Pending State Board

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> November 19, 1984, rev'd State Board April 3, 1985, rev'd/rem. 210 N.J. Super. 150 (App. Div. 1986)]. Since the petition in this matter was filed within 90 days of the start of the school year, N.J.A.C. 6:24-1.2 is not applicable, at least as to this school year.
>
> The Appellate Division's decision in Stockton, supra, is also applicable because it holds that the time for filing an action commences not when an individual might have speculative knowledge as to a potential claim but when the board of education actually takes some action resulting in the accrual of a cause of action. This accrual did not occur until the Board's denial of her actual request for guide advancement in 1985.***"
>
> (Exceptions, at p. 3)

In the Commissioner's judgment, petitioner's reliance upon Stockton is misplaced inasmuch as the action complained of therein specifically related to the triggering of the 90 day rule (N.J.A.C. 6:24-1.2) which occurred during the 1983-84 school year. The Court ruled therein that petitioner's appeal which was filed with the Commissioner on April 23, 1984 was timely by virtue of the fact that the 90 day provision was triggered on February 8, 1984 when petitioner's request for appropriate salary guide placement was denied by the superintendent.

The facts in this matter, however, relate to an action taken by the Board at the commencement of the 1977-78 school year whereby petitioner was assigned to full-time employment and placed on Step 4 of the existing teachers' salary guide. Petitioner did not at that time take issue with the Board regarding her salary guide placement. Similarly, petitioner took no further action regarding placement when the Board subsequently adopted a salary policy (J-18) on May 17, 1978 which reads:

> The Board retains the authority to specify the salary of new positions and to determine the credit to be awarded for placement on an existing salary schedule.
>
> The Superintendent is authorized to credit for placement on the salary schedule past service of an applicant for employment in this district on the following basis:
>
> > a. One year credit for each year of teaching in a public school or private school located in this State, or in any State or territory under U.S.A. cognizance, to a maximum of 8 years of credit,

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BARBARA SPOONER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

It is observed that exceptions to the initial decision were filed by petitioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Upon review of the record, the Commissioner finds and determines that the sole issue herein relates to the Board's Cross-Motion for Summary Judgment with regard to whether or not petitioner's claim is time barred pursuant to the 90 day rule in accordance with the provisions of N.J.A.C. 6:24-1.2. In this regard, petitioner argues that the ALJ improperly applied the limitations set forth in the provisions of N.J.A.C. 6:24-1.2 by failing to take into account the fundamental State law pertaining to the accrual of a cause of action. Petitioner maintains that a cause accrues when the right to institute and maintain a suit first arises. Rosenau v. City of New Brunswick and Gamon Meter Co., 51 N.J. 130, 137 (1968)

Petitioner, relying on Rosenau and other court cases cited in her exceptions, incorporated by reference herein, argues that the ALJ erroneously concluded that she had such knowledge with regard to her salary entitlement as of the commencement of the 1977-78 school year. Petitioner maintains that the conclusion reached by the ALJ is based on speculation rather than evidence. According to petitioner, the specific evidence in the record supports her contention that she had no knowledge of her salary entitlement until April 1985.

More specifically, and in pertinent part, petitioner makes the following claim:

> ***Petitioner's claims relate in part to her salary guide placement for the 1985-86 school year. The action was commenced prior to the start of the school year and, consequently, prior to the receipt of the first salary check for the year. See generally, Stockton v. Bd. of Ed., City of Trenton, [decided by the Commissioner

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written or pervasive unwritten Board policy; (5) Board policy no. 328, adopted May 17, 1978, post-dated petitioner's accession to full-time employment and carries no retroactive effect; (6) by petitioner's silence in 1977 and thereafter to date of institution of suit, her present claims for corrective guide placement are barred by N.J.A.C. 6:24-1.2; and (7) the petition of appeal, therefore, should be, and is hereby, **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

July 9, 1986
DATE

JAMES A. OSPENSON, ALJ

JUL 11 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 14 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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> Baker, supra, has bearing herein because in order to reach a determination that petitioners in that case were time-barred the administrative law judge and the Commissioner had to first determine whether or not they were entitled by statute to in-district part-time experience when moving to full-time positions. Thus, the substantive discussion contained in that decision is not obiter dictum, as contended by petitioners herein. Rather, it is apposite and the administrative law judge was correct in relying on it in the present matter. . . Moreover, movement from part-time hourly wage status to full-time teachers' salary guide placement constitutes, in the present matter, initial employment pursuant to N.J.S.A. 18A:29-9, whereby salary is negotiated between the employee and the board and, thus, does not constitute a statutory entitlement. Therefore, any claims with respect to such initial salary are subject to the provisions of N.J.A.C. 6:24-1.2. [Id. at 33-35].

In short, in my view, petitioner here in moving from half-time employment to full-time employment beginning September 1977 for the 1977-78 school year was likewise entering upon her initial employment with the Board under N.J.S.A. 18A:29-9, which requires that:

> . . .[Her] initial place on the salary schedule shall be at such point as may be agreed upon by the member and employing board of education.

Having so agreed with the Board here in 1977 and thereafter silently until institution of suit, petitioner may no longer claim retrospective or prospective rectification of her guide placement, even though, as contended in finding no. 9, she would seek to prove "essential compulsion" so to agree: that which once was disputable is not now material.

CONCLUSION

Based on the foregoing, therefore, I **CONCLUDE** (1) petitioner had no statutory right to full-time guide placement at step no. 7 in 1977; (2) the Board was free then to negotiate for and set petitioner's salary at step no. 4; (3) her full-time employment in 1977 was the equivalent of "initial" placement on the full-time salary guide within the meaning of N.J.S.A. 18A:29-9 despite antecedent part-time employment in the district from 1971-77; (4) her 1977 guide placement at step no. 4, with her step progression therefrom since then, was but equitable salary calculation not expressive originally of any

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limitation. Id. at 593-5. Relief sought by petitioner here does not derive from statutory entitlement under N.J.S.A. 18A:29-8, since the legislation upon its face in N.J.S.A. 18A:29-9 makes initial or original guide placement a matter of negotiation between employer and employee. To that extent, therefore, the holding in North Plainfield is in apposition and controlling. Interposition of the bar, moreover, is consistent with prior decisions of the Commissioner. See Kelly v. Bd. of Ed, Borough of Collingswood, 1981 S.L.D. — (July 6, 1981). Petitioner has long since agreed to initial salary guide placement within the meaning of N.J.S.A. 18A:29-9, that is, in employment contracts for 1977-78 (J-3G, J-3H), more than 90 days before her petition was filed, as well as for succeeding years to date (J-3I to J-3(O)). Passage of time has barred past, present or future correction. Cf. Conner et al v. Bd. of Ed., Borough of River Vale, 1986 S.L.D. —(Feb. 18, 1986; slip op. at 34-35); and Gratta, supra, slip. op. at 6.

II

Since, as suggested above, there does not appear to be any rational basis for concluding existence of an unwritten policy for promotion of part-time teachers along a salary guide before assumption of full-time employment, the question remaining, perhaps, is whether the Board is otherwise required to accord such newly appointed full-time teachers to specific, comparable steps on the full-time teachers' salary guide. In Conner, supra, the Commissioner said:

> Unlike the factual circumstances in Ball v. Teaneck Bd. of Ed., 1984 S.L.D. — (Aug. 31, 1984), there does not exist herein a multi-step salary guide for part-time teaching staff members. Rather, "a flat rate" hourly wage has been negotiated by the teachers' association for part-time teachers. Thus, there is not the question of movement from a multi-step salary guide (which already incorporated in-district experience) to full-time salary guide placement as was found in Ball, supra, and Walter v. Bd. of Ed., Teaneck, 1985 S.L.D. — (July 22, 1985).
>
> Rather, the circumstances of the present matter are more analogous to Baker, supra, wherein it was determined placement of part-time hourly wage teaching staff on a teaching salary guide when moving to full-time position was, for compensation purposes, considered to be initial employment pursuant to N.J.S.A. 18A:29-9.

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It is my view evidence in the stipulated record falls short of demonstrating existence of any pre-existent unwritten policy or practice for assumption of full-time employment by district part-time teachers, since at very least the process by which this petitioner assumed full-time employment in September 1977 was singular and not pervasive. Although that assumption was a pro-ration of her half-time to full-time salary, and although in her previous years of service as part-time employee from September 1971 to June 1977 she was compensated at 50 percent of salary paid to full-time teachers and increased ratably over those six years, it is equally as plausible for the Board to have used her experience as half-timer as a ready method of computing her compensation equitably without intending to express implicitly what it did not express explicitly in written policy. What can be said from the evidence, in any event, is that there does not appear to have been any negotiated agreement by which petitioner and those like her on half-time status were governed so far as progression of salary over years of half-time service was concerned. To that extent, therefore, decisional authorities relied upon by petitioner for invalidation of improperly followed "unwritten policy practices" are not apposite here. Cf. Gratta, supra, slip op. at 3, 9 (petitioners had received credit for guide placement for prior service under past practice not embodied in any written policy.)

A fundamental question presented, in my view, is whether petitioner's claims here are barred, both retrospectively as well as prospectively, by the 90-day limiting period of N.J.A.C. 6:24-1.2. In North Plainfield Education Assn. v. Bd. of Ed., Borough of North Plainfield, 96 N.J. 587 (1984), the claims of two teachers to annual increments under N.J.S.A. 18A:29-8 were held subject to denial by a school board for good cause under N.J.S.A. 18A:29-14. An annual increment for meritorious service, said the Court, was not a statutory entitlement and claims for it were subject to the 90-day limiting period of N.J.A.C. 6:24-1.2. The Court noted petitioners in the case were aware their annual increments had been denied more than nine months before commencement of the 90-day limiting period. It concluded petitioners' interrupted annual advances on the salary guide should continue in future years and barred them from relief as if for continuing future violations by the board. The result was merely, said the Court, from the effect of an earlier employment decision, one that is protected by the regulatory period of

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The Board argued petitioner's claims should be dismissed under the doctrine of laches and/or the bar of the limiting period of N.J.A.C. 6:24-1.2, citing North Plainfield Education Assn. v. Bd. of Ed., North Plainfield, 96 N.J. 587 (1984); Stockton v. Bd. of Ed. of Trenton, 1985 S.L.D. — (St. Bd. of Ed., April 3, 1985); and Baker v. Bd. of Ed., Clifton, 1985 S.L.D. —(Oct. 18, 1985). The bar clearly relates, said the Board, to all claims for the 1977 through 1984. It argued as well a continuing bar for 1985-86 exists since the Supreme Court in North Plainfield specifically rejected a claim that improper salary guide placement was a continuing violation subject to renewal each year. The Board argued further there was no "unwritten policy" within the district that credited half-time employment on a two-for-one basis. Moreover, said the Board, its only written policy was Board policy no. 328, adopted May 17, 1978 (J-18), which authorized credit for one year of teaching in a public school in the state for placement on the salary schedule, to a maximum of eight years of such credit. Adoption of that written policy, it was pointed out, post-dated petitioner's assumption of full-time employment in September for the 1977-78 school year. Any comparison to the situations of Amelia Vaughan and Barbara Sullivan, therefore, said the Board, is logically misplaced since their assumption of full-time district employment only began, respectively, with the 1983-84 and 1981-82 school years. There being no policy, written or unwritten, in existence at the time petitioner assumed full-time employment in 1977, the Board argued, it was thus free to negotiate as it did, under the holding in Gratta v. Bd. of Ed., Borough of Fairview, 1983 S.L.D. —(June 6, 1983), a case in which a board was faced with a similar issue where no prior policy, written or unwritten, or any past practice upon which the board could base a decision, existed. The Commissioner ruled there the Fairview Board could use its discretion in setting initial salary guide placement pursuant to N.J.S.A. 18A:29-9 by agreement with the applicant. Id. at 6. Adoption of salary guides by boards of education under N.J.S.A. 18A:29-4.1 apply only to full-time teaching staff members, it was urged, finally, and thus compensation statutes under N.J.S.A. 18A:29-6, 7, 8, 9, 10, and 11 have no applicability under Hyman v. Bd. of Ed., Teaneck, 1985 S.L.D. — (St. Bd., March 6, 1985; affirmed, Appellate Division, February 26, 1986, docket no. A-3508-84T7; pet. for certif. pending, Supr. Ct.).

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9. The Board contends, and would offer testimony in the event of a full hearing, that petitioner negotiated with the Board, through the superintendent of schools, for salary guide placement upon her conversion from part-time to full-time. The superintendent of schools would testify that direct discussions were held with petitioner concerning this issue. Petitioner does not stipulate that these negotiations took place but contends that there were no such negotiations and that she was essentially compelled to accept guide placement at step no. 4.

DISCUSSION

I

Petitioner argued generally that school boards under N.J.S.A. 18A:29-8 may adopt salary schedules and that such schedules shall be binding. In the present case, it was said, the Board has adopted schedules for the 1977-78 through 1985-86 school years. Petitioner's claim here is that she has been improperly placed on those adopted salary guides, because based on specific statutory language of the salary schedules for her years of full employment, she has been wrongfully denied credit for years of experience in the district. She has been so denied that credit, it was said, because of "an unwritten interpretation imposed by the Board, . . . the use of an unwritten policy or interpretation to restrict salary guide placement," citing Siebold v. Bd. of Ed., Borough of Oakland, 1980 S.L.D. 520, aff'd State Bd. of Ed., 1980 S.L.D. — (Oct. 1, 1980), aff'd Sup. Ct., App. Div., Dkt. No. A-787-80 (June 3, 1981); McAllen v. Bd. of Ed., Borough of North Arlington, 1975 S.L.D. 90, aff'd St. Bd. of Ed., 1975 S.L.D. 92; Ford v. Bd. of Ed., Twp. of South Hackensack, 1980 S.L.D 616 (June 18, 1980); Ross v. Bd. of Ed., City of Rahway, 1968 S.L.D. 26, aff'd St. Bd. of Ed., 1968 S.L.D. 29; and Chaump v. Bd. of Ed., Belleville, 1979 S.L.D. 241. In the present case on the evidence, it was said, there is no indication of any history of treating similarly situated individuals in the same manner as petitioner. To the contrary, it was urged, the only known examples were Barbara Sullivan and Amelia Vaughan, who were given one step of credit for each year of part-time experience on assumption of full-time employment.

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1977-78 (J-3G)
Revised 1977-78 (J-3H)
1978-79 (J-3I)
1979-80 (J-3J)
1980-81 (J-3K)
1981-82 (J-3L)
1982-83 (J-3M)
1983-84 (J-1N)
1984-85 (J-1(O))

(d) Documents relative to Barbara Sullivan:

Motion dated August 26, 1971 (J-19) (Spooner)
Employment record (J-4) (Sullivan)
Motion dated August 24, 1977 (J-20) (Spooner)
Motion dated September 16, 1981 (J-5) (Sullivan)
Motion (rescinded), dated August 26, 1981 (J-6) (Sullivan)
Motion dated June 17, 1980 (J-7) (Sullivan)
Motion dated May 16, 1979 (J-8) (Sullivan)
Motion dated October 18, 1978 (J-9) (Sullivan)

(e) Documents relative to Amelia Vaughan:

Permanent Record (J-10)
Motion dated June 13, 1984 (J-11)
Motion dated August 9, 1983 (J-12)
Motion dated May 17, 1983 (J-13).
Employment Contracts:
1985-86 (J-14)
1984-85 (J-15)
1983-84 (J-16)

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8. The following documents are admitted into evidence and marked as exhibits:

(a) Salary Guide:

1971-72 (J-1A)
1972-73 (J-1B)
1973-74 (J-1C)
1974-75 (J-1D)
1975-76 (J-1E)
1976-77 (J-1F)
1977-78 (J-1G)
1978-79 (J-1H)
1979-80 (J-1I)
1980-81 (J-1J)
1981-82 (J-1K)
1982-83 (J-1L)
1983-84 (J-1M)
1984-85 (J-1N)
1985-86 (J-1(O))
1986-87 (J-1P)

(b) Permanent Record, Barbara Spooner (J-2)

(c) Spooner employment contracts and salary notices:

1971-72 (J-3A)
1972-73 (J-3B)
1973-74 (J-3C)
1974-75 (J-3D)
1975-76 (J-3E)
1976-77 (J-3F)

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(a) Amelia Vaughan

1983-84 - Step 1 - part-time art teacher
1984-85 - Step 2 - full-time elementary teacher*
1985-86 - Step 3 - full-time elementary teacher
(* She was given year-for-year salary guide credit for her part-time experience in Palisades Park. J-18).

(b) Barbara Sullivan

1972-73 to 1977-78 - six years full-time experience in another district
1978-79 - Step 7 - part-time LDT/C
1979-80 - Step 8 - part-time LDT/C
1980-81 - Step 9 - part-time LDT/C
1981-82 - Step 10 - full-time LDT/C*
1982-83 - Step 11 - full-time LDT/C
1983-84 - Step 12 - full-time LDT/C
1984-85 - Step 13 - full-time LDT/C
1985-86 - Step 14 - full-time LDT/C
(* She was given year-for-year salary guide credit for her part-time experience in Palisades Park. J-18).

7. The above employees, however, were employed by the Board after all of the facts pertaining to petitioner's claim had occurred. Additionally, the Board of Education adopted a policy on May 17, 1978 (Exhibit J-18) which controlled the Sullivan and Vaughan matters but was not in effect at the time of the Spooner matter.

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The parties having so stipulated, I make the following additional, more specific Findings of Fact:

1. Petitioner is a tenured teaching staff member employed by respondent Board of Education. Petitioner acquired tenure as of September 1, 1974.

2. Respondent is the designated authority charged with responsibility of administering the public schools of the Borough of Palisades Park.

3. Petitioner's employment history in Palisades Park is as follows:

   (a) From September 1971 to June 1977 - petitioner was a half-time kindergarten teacher. She worked five days a week - mornings only. She worked the regular teacher work year.

   (b) From September 1977 to present - petitioner has been a full-time elementary teacher paid full salary on the teacher guide.

4. During the period of petitioner's half-time employment (September 1971 - June 1977), she was paid 50 percent of the appropriate step on the Palisades Park salary guide and she was moved up on the guide on a year-for-year basis during that period of time.

5. Upon being assigned to a full position in September 1977, petitioner was placed on step 4 of the then applicable salary guide. J-20; J-3G; J-3H.

6. The Board employs other tenured teaching staff members whose part-time salary guide placement credit was not prorated, but rather was determined on a one-for-one basis. For example:

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ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

Basic facts in the matter are not disputed, and I so shall find. Petitioner is currently employed as a full-time elementary teacher by the Board. Her employment history is as follows:

YEAR	EMPLOYMENT	GUIDE STEP
1971-72	Half-time kindergarten	1
1972-73	Half-time kindergarten	2
1973-74	Half-time kindergarten	3
1974-75	Half-time kindergarten	4
1975-76	Half-time kindergarten	5
1976-77	Half-time kindergarten	6
1977-78	Full-time elementary	4
1978-79	Full-time elementary	5
1979-80	Full-time elementary	6
1980-81	Full-time elementary	7
1981-82	Full-time elementary	8
1982-83	Full-time elementary	9
1983-84	Full-time elementary	10
1984-85	Full-time elementary	11
1985-86	Full-time elementary	12

(Findings nos. 3, 4, 5)(J-3A to J-3(O)).

At the time petitioner commenced employment as a full-time teacher, she was given one year of salary guide credit for each two years of prior half-time service. Thus, her guide placement was the equivalent of one half at step 6 for the 1976-77 school year but at step 4 for the 1977-78 school year.

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total of three years experiential guide credit. In a petition of appeal filed with the Commissioner of the Department of Education, she alleged the Board improperly, unlawfully and in violation of its own policies failed to accord proper credit for her teaching experience. She sought judgment declaring her tenure rights were violated by Board failure to award her full (six year) salary guide placement and restoring her to proper placement on the guide, together with differential back pay and interest. The Board admitted petitioner's employment history generally but denied improper action. The Board pleaded the bar of the doctrine of laches and/or the limiting period of N.J.A.C. 6:24-1.2, contending petitioner's salary guide placement was otherwise lawful and consistent with N.J.S.A. 18A:29-9.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on November 15, 1985. The Board's answer was filed there December 18, 1985. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on December 19, 1985 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, a prehearing conference was conducted in the Office of Administrative Law on February 4, 1986 and an order entered. The parties were directed to confer for the purpose of establishing stipulations of all relevant and material propositions of fact, together with documentation as necessary, which were to be filed in the cause no later than ten days before hearing. Thereafter, the matters at issue were to be addressed and resolved as if on cross-motions for summary decision in accordance with N.J.A.C. 1:1-13.1 et seq., on pleadings, admissions, stipulations, documentation and memoranda of law. At issue was whether petitioner shall have proven by a preponderance of the credible evidence improper salary guide placement as alleged; and if so, whether she is entitled to relief as demanded.

All submissions having been submitted, the record closed on June 6, 1986.

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8112-85
AGENCY DKT. NO. 391-11/85

BARBARA SPOONER,
Petitioner,

V.

BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,
Respondent.

Sheldon H. Pincus, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Joseph J. Rotolo, Esq., for respondent

Record Closed: June 6, 1986 Decided: July 9, 1986

BEFORE **JAMES A. OSPENSON,** ALJ:

Barbara Spooner, a tenured teaching staff member employed by the Board of Education of the Borough of Palisades Park, Bergen County, was employed from 1971-77 as a half-time kindergarten teacher. Beginning in September 1977 (and until the present time), she was employed as a full-time elementary teacher, after being placed, in 1977, on step 4 of the then applicable full-time salary guide. Her placement was determined by prorating her prior six years of experience on a one-for-two basis for a

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April 17, 1985. To hold otherwise would, as the Board points out in exceptions, suggest that "petitioners may defeat the 90 day rule simply by writing letters requesting reconsideration of the decision of a Board of Education." (Board's Exceptions, at p. 2) The Board was fully and fairly apprised of the family's residency situation a full year before the matter was presented for its consideration. All pertinent facts were before the Board at the time the matter was decided. The Commissioner finds no basis whatsoever for extending the date for filing a petition to reflect the time that lapsed after the Board's final determination in the matter.

Accordingly, N.J.A.C. 6:24-1.2 applies and the instant Petition of Appeal is dismissed with prejudice as untimely.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 22, 1986

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August 16, 1984	Superintendent replies to petitioners' correspondence of August 8, 1984 stating that request would be considered by Board. (P-8)
December 21, 1984	Petitioners notified district's attendance officer of new address in Teaneck. (R-11)
January 3, 1985	Petitioners sent written confirmation of residency to superintendent with renewed request for refund of full tuition. (R-18)
January 17, 1985	Board informed petitioners that no refund would be granted.
February 22, 1985 (also March 5, 1985)	Petitioners wrote directly to Board objecting to vote against waiving tuition and asking for reconsideration. (R-17; P-13)
May 16, 1985	Board replies to petitioners' letter of February 22, 1985 stating that following Board executive meeting on matter, no exception to be made. (P-15)
October 24, 1985	Board informs petitioners that their request to appear before it to ask again for reconsideration of tuition refund decision was refused. Board states that decision not to refund tuition is firm. (P-18)

Notwithstanding the argument suggested by the ALJ that the 90-day rule should not be applied to preclude reasonable efforts to resolve disputes at the local level (see Charles R. Stockton v. Board of Education of the City of Trenton, Mercer County, decided by the Commissioner November 19, 1984, rev'd St. Bd. April 3, 1985, rev'd/rem'd 210 N.J. Super. 150 (App. Div. 1986)), the instant circumstances militate against such a relaxation of the 90-day rule. Under the Stockton facts, petitioner therein was unaware of the reason why his paycheck reflected a lower figure or whether the board therein authorized it, but immediately set about resolving the matter by corresponding with the administration. Upon finally receiving some indication as to the reason why his paycheck had been reduced and who had taken the action, which was more than a year after he initially noted the reduction in pay, petitioner thereafter promptly filed his petition of appeal with the Commissioner. Ultimately, the Superior Court in Stockton held that N.J.A.C. 6:24-1.2 should be relaxed. To allow otherwise, the Court reasoned, "***would open the floodgates to petitions to the commissioner before the dispute really evolved into a 'controversy'.***" (Stockton, at 157-158)

In the instant matter, petitioners were apprised of the final determination of the Board disallowing a tuition refund on January 17, 1985. The 90 days for filing a petition of appeal, therefore started running on January 18, 1985 and closed on

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The Board contends its interpretation of Policy No. 501, which represents the Board's approach to students who wish to attend Teaneck schools but who have not yet become residents, is straightforward -- if residence is not established within two months, tuition will not be refunded unless the Board so determines. The Board argues that the policy is rational and was clearly understood by petitioners as noted by their letter of August 8, 1984 to the Superintendent of Schools. (P-4) Petitioners wrote, "I want to ask the Board to consider giving us four months to move into residency and to receive a tuition refund, rather than two months." (Board's Exceptions, at p. 4, quoting P-4) The Board bolsters this contention citing P-7, a letter from Senator Feldman dated August 15, 1984, wherein it was stated, "[H]e has asked you to recommend that the Board of Education extend the period of time to move into residency from 2 months to 4 months, thereby still being eligible for a tuition refund." (emphasis in text) (Board's Exceptions, at p. 4, quoting P-7)

The Board contends that the ALJ has formulated an interpretation of the policy which neither petitioners nor the Board ever contemplated. Petitioners, avows the Board, understood that Policy No. 501 did not grant any refund of tuition if residency was established beyond two months. They requested a waiver of the policy so that all four months of tuition should be refunded, argues the Board. The Board's interpretation of its own policy is that refunds would be granted only if residency was established within two months, after which no refund was available unless the Board so ordered. The Board perceives the ALJ's interpretation of the policy as granting relief that petitioners did not seek and giving them a windfall based on an interpretation that none of the parties contemplated. Citing Kopera v. Board of Education of the Town of West Orange, 60 N.J. Super. 288 (App. Div. 1960) and In re Appeal of Lembo, 151 N.J. Super. 242 (App. Div. 1977), the Board argues that in the present circumstances, the Board's implementation of its own policies is entitled to a presumption of correctness absent a demonstration that it acted in an arbitrary, capricious or unreasonable fashion. The Board contends that not only have petitioners failed to demonstrate that its actions were arbitrary, but also it urges that it acted in a reasonable manner, having made clear to petitioners even before they moved into Teaneck that this would be its interpretation of Policy No. 501. The Board avers that petitioners have not been misled and have not been prejudiced.

The threshold issue for determination in this matter is whether this litigation is precluded by application of N.J.A.C. 6:24-1.2, the 90-day rule. For the reasons that follow, the Commissioner finds that it is, as of 90 days after January 17, 1985, the date the Board herein first informed petitioners that no refund would be forthcoming.

For the record, the following chronology is noted:

August 8, 1984	Petitioners wrote local superintendent asking Board to provide four months rather than two in which to establish residency and thereby to receive tuition refund. (P-4)

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MARVIN J. MARKMAN AND SUSAN M. MARKMAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the Board within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

The Board's exceptions raise two points.

I. THE INITIAL DECISION IMPROPERLY DISMISSED THE BOARD'S CLAIM THAT THE LITIGATION IS PRECLUDED BY THE 90-DAY RULE.

The Board submits that the ALJ has improperly applied the 90-day rule. It avers that the decision of the Board not to refund tuition for September through December 1984, was communicated to petitioners via a letter of January 17, 1985. It was reiterated in another letter of May 16, 1985. Finally, it was repeated once again in October 1985. The Board contends that the consequences of the ALJ's relaxation of the 90-day rule are such that a petitioner hereafter may defeat the 90-day rule simply by writing letters requesting reconsideration of the decision of a board of education. The Board argues that the 90-day limitation expired on or about April 17, 1985, 90 days after the Board's decision was first communicated. In the alternative, and accepting that the reconsideration of a decision by a board is a basis for relaxation of the 90-day rule, the Board urges that such a relaxation should only be permitted to occur when there is a single request for reconsideration. In the present circumstances, the Board points out, there were two requests for reconsideration. The Board further argues that while petitioners herein may have believed that the issue was still pending before the Board during the period of January through December 1985, petitioners have pointed to no correspondence from the Board or Board policy upon which they could have reasonably relied to conclude that the matter was still under active consideration by the Board. The Board submits that the 90-day limitation period has been clearly violated by the petition that was filed on December 17, 1985, eleven months after the Board's initial "final decision" and approximately seven months after the Board's second "final decision" and, thus, must be summarily dismissed.

II. THE INITIAL DECISION'S INTERPRETATION OF THE TEANECK BOARD POLICY WAS IN ERROR.

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And it is further **ORDERED** that, in the event that the Board fails to satisfy the judgment within 60 days from the date of the final decision of the Commissioner of Education, post-judgment interest at the rate of 9.5% per annum be added to the principal sum, in accordance with N.J.A.C. 6:24-1.18.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

July 15, 1986
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

JUL 17 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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Accordingly, the Board policy will be interpreted to require a refund (not to exeed two months tuition) to future residents of Teaneck who enroll their children in the district's school system and subsequently complete their move into the district. That construction fully carries out the Board's objective of restricting its schools to children of residents and persons with definite arrangements to become residents, without placing an intolerable burden on individuals seeking to enter the district. To the extent that the Board's action may be seen as unwillingness to refund more than two months tuition, the determination will be upheld. The Markmans have not proven special hardship or other extraordinary circumstances entitling them to a greater refund than new residents normally receive.

Short shrift may be made of the Markmans' remaining arguments in support of a four-month refund. Estoppel is not applied against public entities, except to prevent manifest wrong or injustice. Feldman v. Urban Commercial, Inc., 70 N.J. Super. 463, 477-78 (Ch. Div. 1961). Erroneous representations made by individual members or employees are not binding on the full board of education. Dorrington v. North Bergen Bd. of Educ., 1982 S.L.D. 256 (Comm'r of Ed. 1982); Brennan v. Pleasantville Bd. of Educ., 1977 S.L.D. 1059 (Comm'r of Ed. 1977). Public bodies cannot act "informally," but only through resolution or an equivalent formal undertaking. Woodsum v. Pemberton Twp., 172 N.J. Super. 489, 520 (Law Div. 1980), aff'd 177 N.J. Super. 639 (App. Div. 1981). The Markmans' estoppel claim is further undercut by the factual finding that Mr. Markman could not have reasonably relied on any promises by Angeli or Tenenbaum. Lastly, there is insufficient evidence on which to base a finding that the Board has engaged in a pattern of discrimination.

Order

It is **ORDERED** that the Board promptly refund to petitioners the tuition payments collected for September and October 1984 in the amount of $1,759.

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Unfortunately, the Board has failed to articulate any reasons why it voted not to waive its policy in this particular instance. President Angeli mentioned that the major purpose of the Board in adopting its policy was to exclude the large number of students who were not bona fide residents, such as foster children and residents of women's shelters.[3] She also indicated that one of the Board members had voted against the request because "too much time had elapsed" before the Markmans moved into the district of Tenafly.

Assuming such are the reasons for the Board's denial, it is difficult to see how the legitimate interests of the Board would be advanced by denying any refund whatsoever. As far as residence is concerned, no one has challenged the genuineness of the Markmans' arrangements to establish residence in Tenafly. The Board has not suggested that the purchase of a home was a sham or that the Markmans had no real intention of moving to Teaneck. Proofs show that it was advantageous for the district as well as the Markmans to avoid the disruption caused by a mid-year transfer from another school. Delay in the construction of their new house was beyond the power of the Markmans to control. Any legitimate need of the Board to discourage an unnecessarily long lapse of time could just as easily be served by limiting the waiver of tuition to a maximum of two months per family. Otherwise, the Markmans would be penalized for building a new house, while other parents who buy existing property or rent in Teaneck would qualify for a refund. Such distinction would achieve no educational or other valid purpose. Where a policy may be given two different interpretations, one of which is favorable and the other hostile to its principal design, the favorable meaning will prevail. Lloyd v. Vermeulen, 22 N.J. 200, 205 (1956); Gualano v. Bd. of Estimate of Elizabeth Sch. Dist., 72 N.J. Super. 7, 27 (Law Div. 1962), aff'd 39 N.J. 300 (1963).

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[3]This decision does not express any view on the legality of such a policy.

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The Markmans' written request for a meeting was dated February 22, 1985. Not until October 24, 1985 did the Board formally deny the Markmans' request for a personal appearance. During the interim, the Markmans still held out hope that they might persuade the Board to change its decision, as Corbin had done after two appearances before the Board. After the Board finally closed that avenue of possible relief, the Markmans filed this appeal on December 17, 1985, within 90 days of the last notice from the Board. Moreover, N.J.A.C. 6:24-1.19 [now N.J.A.C. 6:24-1.17] authorizes the Commissioner to relax the general rules when strict adherence "may be deemed inappropriate or unnecessary or may result in injustice." Even if the petition were out of time, the circumstances are suitable for the Commissioner to exercise his discretionary power to relax the 90-day limitation in the interests of justice. See Brown v. Sussex Voc. Sch. Bd. of Educ., No. A-4854-83 (N.J. App. Div. April 4, 1985).

Turning to the merits of the case, it is clear that the Board was not obligated to open its school doors to anyone residing outside the district. N.J.S.A. 18A:38-3 provides:

> Any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe.

Having chosen to allow certain nonresident students to attend school in the district, however, the Board must apply its own standards for admission fairly and reasonably. On its face, the policy adopted by the Board is inherently ambiguous. The last sentence of Policy No. 501 states: "Such procedure will be employed for no longer than two months; thereafter the Board of Education will act on individual cases extending beyond that time." That language is susceptible of two conflicting interpretations. On the one hand, as the Board urges, the policy could mean that a family must move into the district within two months, but the Board may act in individual cases to extend that deadline. On the other hand, the policy could mean that tuition will be refunded for no more than two months, unless the Board acts in individual cases to approve a greater refund of tuition.

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manner in which he presented his own case at the hearing that Mr. Markman possesses intelligence and a considerable degree of legal sophistication. He either knew, or ought to have known, that any refund of tuition could be approved only by vote of the whole Board.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board acted arbitrarily, capriciously and unreasonably.

At the outset, the threshold issue is whether this litigation is precluded by the 90-day rule.[2] Prior to its recent revision, N.J.A.C. 6:24-1.2 provided that a petitioner must file a petition with the Commissioner of Education "within 90 days after receipt of notice by the petitioner of the order, ruling or other action concerning which the hearing is requested." Generally, courts have strictly enforced the 90-day rule where a petitioner was aware of an adverse action by a board of education and delayed in seeking a remedy. North Plainfield Educ. Ass'n v. Bd. of Educ., 96 N.J. 587 (1984); Riely v. Hunterdon Central High Sch. Bd. of Educ., 173 N.J. Super. 109 (App. Div. 1980). Nonetheless, the rule should not be applied to preclude reasonable efforts to resolve disputes at the local level. Here the Markmans made repeated requests to be allowed to discuss their problem with members of the Board. Certainly this was a reasonable approach for a citizen to take before resort to review by the state regulatory agency. Parenthetically, it should be noted that it might have been useful if the Board had been willing to talk with the Markmans, even though the opportunity for such face-to-face discussion is not required by law. Cf. Donaldson v. North Wildwood Bd. of Educ., 65 N.J. 236, 246 (1974).

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[2] Although the Board raised this defense in its pleading, it did not press the issue either at the hearing or in its post-hearing papers.

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Angeli remembered both conversations, but differed on the details of when and where the discussion with Mammano took place. Moreover, Angeli had a markedly different recollection of the substance of these conversations. Angeli recalled telling Mammano that she personally supported the Markmans' request for a refund, but that she was only one of nine votes on the Board. Indeed, the record reflects that Angeli was the only Board member who voted in favor of the Markmans' request. With regard to the Irene Greene conversation, Angeli informed the lawyer of the two-month policy and "the possible waiver after two months." However, Angeli insisted that she never stated or implied that there would be no problem in obtaining the waiver.

Mr. Markman also claims that he was misled by the statements of Milo Tenenbaum, an employee in the Board's business office. Tennenbaum was the person to whom the Markmans delivered their checks for tuition. While collecting payments, Tannenbaum reportedly assured the Markmans that they had "nothing to worry about" and would get a refund if the family actually moved into town. Because Tennenbaum was authorized to collect the money, Mr. Markman assumed she was also knowledgeable about the procedure for refunds.

Findings of Fact

I **FIND** that the opinions expressed by Angeli were purely personal views and could not reasonably have been understood as binding on the full Board. Similarly, the off-hand comments by Tennenbaum during performance of an administrative function could not reasonably be regarded as a definite commitment. Angeli was a particularly credible witness, since she was obviously sympathetic to the Markmans' cause. There is no reason to doubt her testimony that she never promised a favorable outcome to the Markmans. Surely the lawyer, Irene-Greene, must have realized that a single Board member speaks only for herself and not the entire body. Although Angeli's observations may have conveyed the impression that chances for a refund were good, Mr. Markman was unjustified in placing total reliance on such an expectation. It was apparent from the

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claim. After two personal appearances at Board meetings, Corbin persuaded the Board to reverse itself. The Board suddenly refunded her tuition, without giving any explanation for its change of mind. At the hearing, Board president Margaret Angeli explained that the Board was impressed by Corbin's personal hardship and her good faith attempt to satisfy the two-month limit. In any event, Corbin is a case wherein the Board voted to waive the November 1st deadline.[1]

Summary of Disputed Evidence

Insofar as the facts are in dispute, the controversy relates to assurances allegedly made by Board representatives that the Markmans would be entitled to a refund. Some of these assurances were said to have been made to third parties by Board president Margaret Angeli. Mr. Markman's sister-in-law, Nina Mammano, is employed by the Board as a teacher and has a "friendly relationship" with Angeli. Before the 1984-85 school year, Mammano contacted Angeli on behalf of the Markmans "to get [her] input on the situation." According to Mammano, Angeli informally told her that anyone who moved into town after paying tuition would "probably" get their money back. Mammano admitted that Angeli qualified her advice by saying it was merely her "personal opinion." This testimony is corroborated by a hearsay report of another discussion between Angeli and a lawyer named Linda Irene-Greene. In the course of that discussion, Angeli purportedly indicated that "the Board had never refused to return tuition to someone who had actually moved into Teaneck." Greene herself was never called as a witness, although apparently she was available.

[1] Apparently the Board used November 1st as the automatic cutoff date for tuition refunds, without regard to actual first day of school in any particular year. Consequently, it is unclear whether or not Corbin's move on November 5th occurred within two months from the start of school for that year (1984-85).

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Apart from the facts of their own case, the Markmans point to the experiences of five other families which supposedly demonstrate "non-uniform and thus arbitrary and unfair treatment" by the Board. Two cases (Harris and Bond) are situations where the Board refused to grant a waiver of tuition. On that basis alone, those cases are consistent with the present position taken by the Board. Unlike the Markmans, Harris had not yet contracted to purchase a house in Teaneck prior to commencement of the school year. The Board simply enforced its policy that refunds are available only to parents with "pending arrangements" to move to Teaneck. Bond had paid tuition to enroll her son for September and October, but did not get any of her money back because she never consumated her planned move to Teaneck. Originally, Bond had signed a lease for an apartment in Teaneck and anticipated moving by November 1st. As noted by the Markmans, the Board had tentatively approved a refund of tuition despite the fact that Bond postponed her move to November 15th. Since Bond ultimately abandoned her plan to live in Teaneck and forfeited any right to a refund, the case does not represent a genuine example of unequal treatment.

Two other cases mentioned by the Markmans (Birchette and Yousufi) involve tuition refunds to parents who became residents within two months after the start of the school year. Birchette paid tuition in advance, which was refunded when the family moved into Teaneck prior to November 1st. Yousufi also obtained a tuition refund after moving to Teaneck before November 1st. Neither of these cases provides support for the Markmans' claim of unjust discrimination.

Only one case (Corbin) is arguably analagous to the Markman matter. Corbin paid tuition for September, October and November. She had purchased a Teaneck house unavailable for occupancy until the following January. To comply with the two-month requirement, Corbin made interim arrangements to rent an apartment in Teaneck until her house could be ready. Due to logistical difficulties, Corbin did not move into the apartment until November 5th. Erroneously believing that Corbin did not complete her move until sometime between November 7th and 13th, the Board initially denied her

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wanted his children to attend school in Teaneck, Mr. Markman confided that he would not have sent them "if we had thought the money would not be returned." Through the end of December 1984, the Board collected tuition payments for the Markman children totalling $3,517.

Meanwhile, construction of the new house continued on schedule. Title to the Teaneck property was transferred to the Markmans on December 12, 1984. One week later, on December 20, 1984, the Markmans finished moving into their new home. Next day, December 21, 1984, Mr. Markman notified the district's attendance officer of the family's new address. Soon thereafter, on January 3, 1985, Mr. Markman sent written confirmation of his move to Dr. Mulcahy and renewed his request for refund of the full amount of tuition paid.

There followed a series of correspondence between the parties, culminating in the Board's refusal to refund the tuition. On February 22, 1985, the Markmans wrote directly to the Board objecting to the Board's vote "against waiving tuition for our two children" and requesting that the Board "meet with us to discuss this further." A reply from the Board, dated May 16, 1985, stated:

> . . . the Board has considered this matter again in executive session and concluded that they (sic) will not make an exception to Policy #501. As a consequence, the tuition will not be refunded.

No reason was given as to the basis for this determination. Nor was the Board willing to grant the Markmans' request for an opportunity to meet with it. This is apparent from an additional letter from the Board, dated October 24, 1985, which informed the Markmans:

> . . . your request to appear before them to discuss tuition paid last school year has been turned down. The Board has examined all of the related facts at meetings subsequent to each of your prior requests. Their decision, therefore, is firm; they feel the matter has reached its conclusion.

Again, the Board's letter was silent on the reasons for its decision.

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the Bronx High School of Science in New York City, testified that it can be "disruptive" for a newcomer to enter an existing class. For its part, the Board did not offer any evidence to refute Markman's assertion that allowing his children to start school with the rest of the class would be educationally beneficial to the children themselves as well as the other students. Thus, the uncontradicted record establishes that it would be better for all concerned for the Markman children to start school in September rather than December.

By letter dated August 8, 1984, Mr. Markman wrote to Dr. Eugene Mulcahy, Teaneck superintendent of schools, advising of his plan to build a new house and asking the Board to consider giving the family "four months . . . rather than two months" to establish residency and receive a refund. Dr. Mulcahy wrote back on August 16, 1984, enclosing a copy of Board Policy No. 501. The text of that policy statement reads:

> Students whose parents have pending arrangements for establishing residence within the district may enroll and attend school during any particular month provided that the full tuition rate for that month be paid in advance to the School Business Administrator/Board Secretary with the understanding that the money will be refunded on actual establishment of residence. Such procedure will be employed for no longer than two months; thereafter the Board of Education will act on individual cases extending beyond that time.

In his letter, Dr. Mulcahy further expressed the Board's "willingness to consider the case under the final phrase of the policy" which authorizes it to "act on individual cases[.]" However, Dr. Mulcahy added that the request was premature and warned the Markmans that they must pay tuition "until such time as you move into the community."

Encouraged by what they interpreted as a positive response to their inquiry, the Markmans proceeded with arrangements to send their children to the Teaneck public schools in September. Matthew, age 15, entered Teaneck High School as a sophomore. Lisa, age 12, entered the seventh grade at Thomas Jefferson Middle School. In order to pay the tuition charges, Mr. Markman borrowed the money from his in-laws. Much as he

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tuition-paying basis. Upon completion of their move into the district, the Markmans asked respondent Teaneck Board of Education ("Board") for a refund of tuition under a policy applicable to families with "pending arrangements for establishing residence within the district." When the Board turned down their request, the Markmans instituted the present proceeding. They contend: first, that the Board acted arbitrarily, capriciously and unreasonably; second, that the Board's policy is vague and ambiguous; third, that the Board failed to follow its own policy in this particular case; fourth, that the Board is estopped by virtue of assurances made by its own authorized representatives; and, fifth, that the Board treated others differently under similar circumstances. The Board denies these allegations on the merits. In addition, the Board contends that the Markmans' complaint is time-barred under the 90-day rule, N.J.A.C. 6:24-1.2.

Procedural History

On December 17, 1985, petitioners filed a verified petition with the Commissioner of Education. Respondent filed its answer on January 14, 1986. Subsequently, on January 15, 1986, the Commissioner transmitted this matter to the Office of Administrative Law for handling as a contested case. The Office of Administrative Law held a hearing on April 4, 1986. Both parties filed post-hearing memoranda. The record closed on April 21, 1986, on receipt of the last document filed. Time for preparation of the initial decision has been extended to July 15, 1986.

Undisputed Facts

Most of the operative facts are undisputed. In or around July 1984, the Markmans entered into a contract to purchase a house being built on vacant land in Teaneck. Construction did not actually commence until late July 1984. At the time of purchase, the Markmans understood that they would be unable to take possession until mid-December 1984.

Nevertheless, the Markmans wanted to avoid having their children change schools after a new term had already begun. Mr. Markman, who teaches social studies at

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0317-86
AGENCY DKT. NO. 421-12/85

MARVIN J. MARKMAN and
SUSAN M. MARKMAN,
Petitioners,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF TEANECK,
Respondent.

Marvin J. Markman and Susan M. Markman, pro se

Sidney A. Sayovitz, Esq., for respondent
(Greenwood & Sayovitz, attorneys)

Record Closed: April 21, 1986 Decided: July 15, 1986

BEFORE **KEN R. SPRINGER,** ALJ:

Statement of the Case

This is an appeal by parents seeking refund of tuition charged for attendance of their two children in the Teaneck school system during the first four months of the 1984-85 school year. Petitioners Marvin J. Markman and Susan M. Markman had contracted to purchase a new house in Teaneck which would not be ready for occupancy until December 1984. As of September 1984, they enrolled their children in the Teaneck schools on a

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Campbell's reliance upon Martin, supra, and Littman, supra, are distinguishable and have no relevance or precedential value to the case at bar. The Commissioner finds such exceptions to be devoid of merit for the reasons expressed in the initial decision. Further, the Commissioner notes that there is no requirement in law that the superintendent conduct evaluations of teachers and, thus, there is no basis for distinguishing Martin from the instant circumstances on such grounds. The Commissioner also disagrees with the basis upon which petitioner would distinguish Littman. Instead he concurs with the ALJ that petitioner "knew or should have known that his superordinates were not satisfied with his performance" for the reasons suggested therein. (Initial Decision, ante)

Consequently, the Ruling and Order on Motion to Compel Discovery and the Initial Decision in the instant matter are affirmed. It is hereby ordered that the salary and adjustment increment of Kenneth Deveney was properly withheld for the 1985-86 school year. The instant Petition of Appeal is accordingly dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 22, 1986

Pending State Board

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algebra classes." (emphasis in text) (Ruling and Order on the Motion to Compel Discovery, at p. 8, quoting Petitioner's Supplemental Brief, dated March 31, 1986, at p. 1) Neither does he agree with petitioner that "[t]he primary reason for withholding the petitioner's increment was the grades that his students received in his algebra classes." (Exceptions, at p. 4) The Commissioner is persuaded, as was ALJ Reback, that

> Petitioner chooses to ignore the broader more pervasive assertions underlining the denial of the increment which engender not merely the issue of the numbers of failures and poor grades allotted to pupils but rather perceptions by supervisors of Mr. Deveney that he was unwilling and unable to effectively teach certain courses, the necessity to reassign him from certain courses on two successive school years, significant numbers of requests of students for transfers out of his classes, apparent efforts to ameliorate and improve pedagogical techniques which were unsuccessful, significant numbers of adverse responses from parents of students assigned to Mr. Deveney concerning the ongoing learning experience, as well as the alleged profoundly disproportionate number of d's and f's allotted to classes in which the students were, pursuant to Mr. Cirafesi's representation, "randomly selected and [not] classified as uneducable." Respondent's Brief at 12.
> (Ruling and Order on Motion to Compel Discovery, at p. 4)

Based on the standard of review of a local board's action to withhold an increment, as set forth in Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 296 (App. Div. 1960) as well as in Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Assn., 79 N.J. 311 (1979), Littman, supra, and Martin, supra, the Commissioner agrees with ALJ Reback that "none of the information sought by interrogatories 5 through 8 is material nor is it reasonably calculated to lead to any evidence which would otherwise be admissible" to the instant matter. (Ruling and Order on Motion to Compel Discovery, at p. 9) Furthermore, the Commissioner wishes it noted for the record that pursuant to N.J.A.C. 6:3-2.1 et seq. petitioner has no right to review the confidential records of students. Thus, the Commissioner adopts as his own the findings and determination of the Ruling and Order on Motion to Compel Discovery, dated April 10, 1986.

Similarly, the Commissioner finds no basis in the record for disputing the conclusion of ALJ Campbell, based on the selfsame standard of review and case law that the South Plainfield Board of Education had good cause to withhold the salary and adjustment increments of Kenneth Deveney for the 1985-86 school year. Petitioner's exceptions are largely a reiteration of the arguments he proffered by way of oral argument and post-hearing briefs. Said exceptions bring nothing new to the record beyond arguing that ALJ

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July 20, 1984, aff'd St. Bd. February 6, 1985, aff'd N.J. Superior Court, Appellate Division, November 8, 1985. Petitioner avers that the ALJ's findings are misleading and inaccurate. In support of this allegation, petitioner reasserts the arguments he raised at hearing as well as in his post-hearing brief and proffers his exhibits and testimony also developed at hearing. Such arguments and evidence are incorporated herein by reference. Additionally, petitioner reiterates in exceptions the argument developed in his post-hearing brief that Carney requires that a withholding must not come as a surprise to the teaching staff member. (Exceptions, at pp. 11-12, quoting Carney at p. 18) Petitioner asserts again that he was never notified that his increment might be withheld until June 1985 (Petitioner's Exceptions, at p. 5; Post-hearing Brief, at p. 7) and that he was not afforded a reasonable length of time to correct any deficiences. (Exceptions, at p. 12; Post-hearing Brief, at p. 8)

Finally, petitioner avers in exceptions that the ALJ's reliance upon Martin v. Board of Education of the Borough of Keyport, 1981 S.L.D. 461 and Lawrence Littman v. Board of Education of the Township of Cranford, 1981 S.L.D. 897 are "clearly distinguishable and have no relevance or precedential value to the case at bar." (Exceptions, at p. 13) Petitioner argues Martin is distinguishable because the superintendent evaluated Martin's classroom performance while, in the instant matter, the superintendent never evaluated petitioner. Further, in Martin, petitioner contends, the evaluations were highly critical. Petitioner's evaluations were excellent throughout the 1984-85 school year, he claims. Petitioner suggests, therefore, that the holding in Martin is limited to its particular facts. Similarly, in Littman, avows petitioner, the problem of failing to maintain discipline was brought to Littman's attention for approximately nine years. By contrast, petitioner denies there were any major problems with his students' discipline during the 1983-84 school year, and during the 1984-85 school year; he argues that he was never notified that there was a major problem with his students' discipline until the day before being notified of his removal from his algebra class.

Petitioner avers that, in light of the facts and controlling law, it is clear that the actions of the Board were arbitrary, capricious and unreasonable. Therefore, petitioner prays that the ALJ's decision be reversed by the Commissioner.

Having reviewed the record herein and the exceptions filed by petitioner, the Commissioner is in agreement with the conclusions of fact and law expressed by ALJs Reback and Campbell in the Ruling on Motion to Compel Discovery dated April 10, 1986 and the Initial Decision decided on July 21, 1986. He concurs with ALJ Reback's determination that the only issue herein is whether the "Board of Education had before it a reasonable basis to conclude that sufficent (sic) cause existed to deny Mr. Deveney his increment. See, Bernards Township Board of Education v. Bernards Township Educational Association, 79 N.J. 311, 321 (1979)." (Ruling and Order on the Motion to Compel Discovery, at pp. 8-9) He agrees completely with ALJ Reback that the central issue in this case is not "***the intelligence and work habits of the petitioner's students in his

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KENNETH DEVENEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

Petitioner excepts to the whole of the initial decision rendered by ALJ Campbell and also to the pre-trial order of ALJ Reback prohibiting petitioner from obtaining discovery. Petitioner argues that both ALJs failed to interpret and apply properly the controlling law and fact and, thus, that the Commissioner should reverse their decisions. He posits two exceptions.

> I. JUDGE REBACK'S DECISION DENYING THE PETITIONER'S MOTION TO COMPEL DISCOVERY WAS UNWARRANTED AND REQUIRES THE COMMISSIONER TO REMAND THIS MATTER FOR A NEW HEARING.

Citing Myers v. St. Francis Hospital, 91 N.J. Super. 377, 385 (App. Div. 1966), R. 4:10-2 on the scope of discovery, and Rios v. Read, 73 F.R.D. 589 (E.D.N.Y.), petitioner contends "[t]he primary reason for withholding [his] increment was the grades that his students received in his algebra classes.***" (J-14) (Petitioner's Exceptions, at p. 4) Petitioner avers that the ALJ's order refusing him access to the students' intelligence test scores and a copy of the high school transcript, "information which is highly probative of the students' academic abilities and study habits", "contravened [his] interest of justice as well as the relevant statutory and case law." (Exceptions, at pp. 4, 7) Petitioner submits that the Commissioner should order that this matter be remanded and that the Board produce the information requested in his motion.

> II. THE ADMINISTRATIVE LAW JUDGE ERRED IN HIS FINDING THAT THE PETITIONER SHOULD NOT RECEIVE A SALARY AND ADJUSTMENT INCREMENT [INITIAL DECISION, AT 14-16].

Petitioner avers that the ALJ's findings of law and fact are not an accurate reflection of the testimony of petitioner, the documentary evidence and the relevant case law, particularly the controlling case of Walter Carney v. Board of Education of the Freehold Regional High School District, Monmouth County, decided by the Commissioner

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

21 JULY 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

JUL 21 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 23 1986
DATE

Ronald J. Parker
OFFICE OF ADMINISTRATIVE LAW

ij

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The petitioner's own testimony further establishes that he knew or should have known that his superordinates were not satisfied with his performance. He stated, in reference to a meeting with his chairman concerning Exhibit J-1, that the chairman did comment concerning pupil grade distributions. Petitioner could not recall the specifics of the conversation. He did recall being removed from three algebra classes in 1983-84.

Furthermore, exhibit J-3 refers to concern over saving "low ability pupils." This shows some problems even acknowledging that petitioner was dealing with low level achievers.

Throughout his testimony, petitioner's recall was vague on certain points but quite candid on others. For example, petitioner acknowledged occasional tension in his class and that he knew from as early as February 1984, that, rightly or wrongly, his chairman and principal were telling him his pupils viewed him as remote and inflexible, that he needed to teach to their level, that his pupils were not picking up proficiencies they were expected to gain, that petitioner was not testing what was taught and that his grade distribution in comparison to that of other teachers was disproportionately low. In addition, pupils, supported by their parents, were asking for transfers out of his class.

The Board is correct when it asserts Carney is inapposite to the case. The petitioner here cannot be said to have lacked advance notice of alleged deficiencies. His own testimony establishes that he knew some fifteen months before the withholding was voted that he had certain problems to correct in order to meet the expectations of his chairman and principal.

Failure to adjust teaching methods to pupils, evidenced by poor pupil grades, is good cause for a withholding action. Martin, above. Failure to maintain discipline also constitutes good cause for a withholding action and additional charges need not be proven. Littman v. Cranford Tp. Bd. of Ed., 1981 S.L.D. 897.

Considering the clear instruction of Kopera, Quinlan, and the other above cited cases, I **CONCLUDE** that the South Plainfield Board of Education had good cause to withhold the salary and adjustment increments of Kenneth Deveney for the 1985-86 school year. Therefore, I **CONCLUDE** that the present petition is without merit and must be **DISMISSED**. I so **ORDER**.

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5. In the 1984-85 school year, petitioner was once again assigned two periods of Algebra I, part 1.

6. For the first two marking periods, the grade distribution in these two classes was far below average.

7. The second marking period reflected a deterioration from the standards of the first marking period.

8. The school administration and the superintendent commenced a period of active communication with the petitioner, a study of his pupils and their abilities, a review of petitioner's tests and grading and a review of his classroom teaching performance.

9. Effective March 1985, the administration again removed petitioner from his Algebra I teaching assignments.

10. The principal and department chairman, while noting many deficiencies, nevertheless recommended petitioner for a salary and adjustment increment.

11. The superintendent, notwithstanding the recommendations of the principal and chairman, recommended to the Board that petitioner's salary and adjustment increment be withheld, informing the Board that he was making this recommendation over the recommendation of the principal and chairman.

12. On June 24, 1985, the Board considered the superintendent's recommendation, and voted a resolution to withhold the petitioner's salary and adjustment increments.

13. The petitioner was properly notified of this action within 10 days pursuant to N.J.S.A. 18A:29-14.

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rated petitioner as one who was not satisfactorialy performing his responsibilities, did not recommend to the superintendent the withholding of petitioner's increment. Nevertheless, the cases are clear that the decision to withhold or not withhold an increment is not the decision of a principal or a department head, but rather, must be made by the board of education. Further, the Board may rely upon the judgment and recommendation of the superintendent of schools in this respect. Stephenson above.

The recommendation of the superintendent, accepted by the Board, had a more than reasonable basis in fact and the Board's action, therefore, can in no way be characterized as arbitrary or capricious. In light of continuing criticism of him, the petitioner over two years had clear notice that his superordinates were not satisfied with his performance. He could not have been surprised by the decision of the superintendent to recommend the withholding.

DISCUSSION AND DETERMINATION

Having considered the whole record in this matter, I FIND:

1. The petitioner has been employed as a teacher of mathematics in the South Plainfield school district since September 1967.

2. In the 1983-84 school year, he was assigned to teach courses which included Algebra I, part 1.

3. In February 1984, his schedule was changed so that his algebra classes became the responsibility of another teacher and his own schedule consisted of Everday Mathematics classes, Computer Program classes and administrative duties.

4. The petitioner was notified at the time of the 1984 schedule change that it was the result of poor grade distributions reflecting inefficient instruction, many requests from parents and students for transfers, a large number of disciplinary problems and the belief he would meet with better success working with a smaller number of students (R-2).

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petitioner had notice of deficiencies in his performance and many opportunities to improve that performance. The Board urges that the issue is not whether the petitioner was notified in advance by his direct supervisors of a potential recommendation by them to withhold his increment, but rather the record as a whole demonstrates that the Board could reasonably concur with the recommendation of the superintendent.

The record discloses that as early as February 1984, petitioner was aware of deficiencies in his performance. In that month, petitioner was removed from his Algebra I, part 1 classes based on the fact that the grade distribution indicated ineffective instruction, based upon the requests of over half his pupils supported by their parents for transfer out of the class and based upon a large number of disciplinary problems (R-1, R-2). Exhibit R-1 establishes that prior thereto there were "previous joint attempts to correct an unfortunate situation."

At the beginning of the 1984-85 school year, the petitioner was advised by his principal in a letter dated September 4, 1984, that the principal was looking for improvement in his performance with respect to his relationship with his pupils (R-3).

The record is replete with documentation commenting upon deficiencies noted in petitioner's performance in the 1984-85 school year. Thus, in his memorandum of February 11, 1985, the principal called to the petitioner's attention the disproportionate scale of poor and failing grades and asked for his response to the analysis contained in this memorandum (J-2). In his memorandum of February 15, the department chairman apprised the petitioner of a perception by his pupils and the pupils' parents that he was inflexible and insensitive. The chairman asked petitioner to "try to present your students with the image of a teacher that is concerned about the achievement of his students" (J-3).

These and other communications, see, e.g., J-5 and J-11, made it abundantly clear to petitioner that problems existed.

Based upon all these observations and the entire history of petitioner's performance and his apparent inability to respond to the specific deficiencies noted, the principal finally determined once again to remove petitioner from his algebra classes for the second year in a row. It is true that the principal and chairman, even though they

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> Boards of education must of necessity concern themselves with the grades assigned by teachers. The must similarly be concerned with faculty selection and the establishment of appropriate academic standards and reasonable pupil performance expectations. (Id. at 773).

The Board also urges that petitioner is not helped by arguing his principal did not also recommend withholding of his increment. It is the superintendent who is obliged to make his own decision and recommendation. The Board is free to accept or reject the superintendent's recommendation or that of the principal. The Commissioner in Stephenson v. Greenbrook Bd. of Ed., 1980 S.L.D. 17, upheld the Board of Education (and reversed the hearing examiner), holding that it is not even necessary that "independent considerations" by the Board of the superintendent's or principal's recommendation be reflected in the Minutes. Id. at 719. The only things required are "good and sufficient reasons" for the recommendation. Ibid.

The Board's procedure here was fully within the discretion granted by the Legislature in N.J.S.A. 18A:29-14.

The Board also asserts it acted reasonably here because the petitioner's classes, for the second consecutive year, were unable to meet average grading standards, necessitating a change of teachers. When a Board decides to withhold an increment, and follows the procedures required by the statute, its decision is entitled to a presumption of reasonableness. Kopera, above, 60 N.J. Super. at 294. In order to overcome this presumption, the petitioner must prove that the Board's action was illegal, improper, or arbitrary, capricious, or unreasonable. Quinlan v. North Bergen Bd. of Ed., 73 N.J. Super. 40, 47-48 (App. Div. 1962). This burden of proof rests with the petitioner and does shift to respondent. Id.

The petitioner's reliance on Carney above, is misplaced. That case is clearly distinguishable on the facts. Even if the standard used by the ALJ in Carney were applied here, the Board nevertheless acted reasonably and in a nonarbitrary and a noncapricious manner.

Carney was bottomed on the lack of advance notice of alleged deficiencies and a preceived absence of a reasonable length of time to allow for improvement. Here, however, the record more than abundantly establishes over a two-year period that the

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> [t]he purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance. Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 321 (1979).

Administrative law decisions have given similar guidance, noting, for example, that an increment is a reward for meritorious service. The Commissioner of Education has pointed out that salary increments are to reward only those who have contributed to the educational process. Bialec v. Teaneck Bd. of Ed., OAL DKT. NO. EDU 7908-84 and 8107-84 (May 30, 1985) adopted Comm't of Ed. (July 19, 1985). A Board must determine whether a teacher has contributed to the educational process sufficiently, contributed sufficiently meritorious service in the school system and performed efficiently enough to merit a salary increment for a given year. It has been held that a board of education may continue the granting of an increment upon the provision of "favorable reports by superintendents." Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 228, 294 (App. Div. 1960). Among the reasons held sufficient to withhold increments are a teacher's failure to supervise; meet with parents and supply information to guidance counsellors; leaving school without notifying the office, and refusing to issue interim reports to failing pupils.

In Martin v. Keyport Bd. of Ed., 1981 S.L.D. 461, it was held that since at least some of the criticisms on a teacher's evaluations were true (pupil grades disproportionately low, signifying lack of achievement; teacher's lesson plans deficient; teacher failed to maintain order, and teacher failed to maximize instructional time), the withholding of an increment was justifiable. This case is particularly applicable here because the complaints made are similar to those in the present case.

Finally, it is established in New Jersey Education Law that an inordinate proportion of failing grades is in itself a sufficient reason for the imposition of sanctions, including the refusal of a contract to a nontenured teacher. Fox v. Watchung Hill Reg'l H.S. Dist. Bd. of Ed., 1980 S.L.B. 763, aff'd St. Bd. 1981 S.L.D. 1426. In that matter, the Commissioner said:

> A rate of over 40 percent D's and F's among college preparatory biology students over each of two academic years represents a sufficient basis for the determination reached by the Board, without regard to the grades assigned by other teachers. (at 770).

Further, the Commissioner stated:

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not until February 20, that other alleged deficiencies in petitioner's performance were brought to light. One week later, petitioner was notified that he was being removed from his algebra class. Further, he was never notified that his increment might be withheld until June 1985. He simply was not afforded a reasonalbe length of time in which to correct any deficiencies. The withholding was a surprise.

Similarly, the remaining undisputed facts demonstrate that the Board did not have a reasonable basis for its action. The facts show that petitioner cannot be held responsible for the poor grade distribution of his pupils. These grades were an accurate measure of the pupils' performance. Obviously, a teacher would violate his professional responsibilities if he gave students undeserved high grades. The evidence before this tribunal is that the pupils were receiving grades consistent with their abilities and efforts.

The petitioner received excellent evaluations through February 19, 1985. His final evaluation, 3 (or lowest score) for the 1984-85 school year, is tainted and should not be given waiver credibility. See Carney above, in which the Appellate Division analyzed petitioner's evaluations and scrutinized his ratings in 19 specific categories. In the present case, in addition to the excellent evaluations petitioner was receiving through February 19, 1985, 75 percent of the ratings in this final evaluation were high or medium (1 or 2).

BOARD'S ARGUMENTS

The Board contends it has a statutory right and responsibility to withhold a teacher's salary increment for inefficiency or other good cause, including his failure to instruct pupils adequately, as reflected by a disproportionate number of poor and failing grades. The Board's discretion to withhold, purusant to N.J.S.A. 18A:29-14, based as it must be upon "inefficiency or other good cause" necessarily depends on evalution of the services the teacher has performed. It is a matter of managerial prerogative. School boards can and do withhold salary increments where they determine that the teacher's performance has been unsatisfactory.

The New Jersey Supreme Court has expanded upon the "inefficiency or other good cause" language of the statute, holding that:

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petitioner was not testing what was taught, that his grade distributions did not compare with those of other teachers and that parents and pupils were asking for transfers out of petitioner's class.

Nevertheless, petitioner believes that an attitudinal problem was at the root of all problems. These pupils felt unsuccessful and may have blamed him. He had conferences with some of the most negative pupils. He did some reteaching. In February, he analyzed some problems that he had presented to his class. He and the chairman decided that he should go back and reteach a part 1 unit on the basis of this analysis. Petitioner states that reteaching was successful.

Concerning the distribution of his grades in the 1984-85 year, petitioner states the pupils had given up. He made many efforts to get them back on track. These included calling parents and asking individual pupils to come in for help.

The period from February 11 to Februay 27 was not ample time for him to correct the problems his superiors perceived. Although petitioner does not disagree in great part with the observations of him on February 26, and 27, 1985, he maintains that a little more than two weeks was insufficient time for him to correct the problems his superiors pointed out to him.

PETITONER'S ARGUMENTS

The petitioner argues that there is no substantial basis for the Board's withholding of his increment. In Carney v. Freehold Reg'l High School Bd. of Ed., OAL DKT. NO. EDU 6356-83 (June 12, 1984), adopted Comm'r of Ed. (July 20, 1984), aff'd St. Bd. (Feb. 1, 1985), the Commissioner adopted the ALJ's holding that:

> In order for an increment to be withheld and the withholding to be sustained on review, the withholding must not come as a surprise to the teaching staff member, as I am convinced it did here. The teaching staff member shall have plenty of advance notice of the alleged deficiencies and there should be a reasonable length of time between evaluations to allow for improvement. (Slip opinion at 18)

The petitioner urges that this principle was clearly violated in this case. He was removed from his Algebra I, part 1 classes exactly 16 days after the principal inquired for the first time about the grade distribution in the petitioner's classes. It was

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Petitioner acknowledged receipt of J-3 from his department chairman. The second paragraph expresses concern over "saving" low ability pupils. This shows some problems even while acknowledging that petitioner was dealing with low level achievers. Petitioner believed he talked with his chairman about how to work with these pupils. Another paragraph again mentions his reputation for inflexibility.

Petitioner had to deal with these perceptions of him even if they were not true in fact. He dealt with the preceptions by emphasizing that pupils had to do the homework, had to tell him when they were in trouble, by sending warning notices, and by approaching pupils he perceived to be in trouble.

Exhibit J-13, the observation of February 19, 1985, contains specific suggestions for the improvement of petitioner's teaching.

Petitioner responded in exhibit J-4 to a letter from the principal of February 11, 1985. Petitioner testified that the principal was in error concerning achievement test scores of his pupils. He acknowledges, however, occasional tension in the class. He does not teach "regular" pupils the same way as these pupils. Only five percent of the pupils in these classes were qualified on the basis of achievement test scores. Considering that, his failure rate was not excessive.

The principal's observation of February 26, does identify four areas in need of improvement (J-11). The principal gave the lesson a low rating.

The chairman observed a lesson and gave it a middle rating (J-19). He also noted four areas in need of specific improvement. He made specific suggestions to petitioner for improvement. Although petitioner recalled the observation, he could not say from memory whether any pupils left their seats to talk with other pupils. Petitioner believes the decision was made to move him out of the algebra classes before the chairman made this observation. It is possible, however, that the chairman's observation did contirbute to the principal's decision to move petitioner.

Petitioner knew from as early as February 1984, that, rightly or wrongly, the supervisor and principal were telling him that his pupils saw him as remote and inflexible, that he needed to teach to their level, that pupils were not picking up proficiencies, that

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teacher must lead pupils to learn and take control of the situation. Petitioner also stated he was aware of no parental complaints, direct or indirect, before receiving the memorandum of February 29, 1984 (R-2). He had no recall of a parent-teacher meeting with the chairman in 1984-84, in which dissatisfaction about him was expressed. He does recall one conference with a parent and the guidance director but cannot recall any parent meeting involving the chairman.

Exhibit J-1 is a generally favorable evaluation. However, on page 3, the chairman refers to the petitioner's reputation and manner apparently blocking his effectiveness, his need to take care in expressing goals for each lesson and preparing students for tests and quizzes, and testing material in exactly the same manner that it is presented. Petitioner believed his department chairman when the chairman said this was how pupils perceived him. Petitioner recalls one class in which negative feelings were expressed. He believes the pupils vaguely said that he was not "teaching it right."

The chairman did make comments to petitioner concerning petitioner's grade distributions, but petitioner cannot recall the specifics.

Petitioner was removed from three Algebra I, part 1 classes in the 1983-84 school year. He then filed a grievance. At the first level, he spoke to the principal and the principal expressed the reasons mentioned above for the petitioner's removal. The petitioner filed a Level II grievance. He and a union representative met with the prinicpal. The principal again gave the justification for the petitioner's transfer. The petitioner did not pursue the grievance farther. Petitioner acknowledged receipt of exhibit R-3 from the principal. The memorandum refers to the need of improvement in the teacher-pupil relationship. The prinicpal expressed the hope that it would improve.

The petitioner acknowledged a large number of grade drops between the first and second marking periods in the 1984-85 school year (J-2). Petitioner stated that the material gets harder. Some pupils realize that they are in over their heads by that time and just give up. He probably called some parents and undoubtedly sent some warning notices. These pupils were lesser achievers who were "trying out" algebra. Other teachers, however, have better pass rates with this type of pupil.

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increment was recommended. The petitioner emphasized that the Algebra I, part 1 class was the only class observed. He states he had no problems whatsoever with his Everyday Mathematics classes.

After removal from teaching Algebra I, part 1, classes, the petitioner still had one period per day available for extra help to pupils.

On or about June 17, petitioner received a memorandum from the assistant superintendent advising him that the Board would discuss, in a caucus meeting on June 24, a proposal of the superintendent that the petitioner's employment and adjustment increment for the 1985-86 school year be withheld. This was the petitioner's first notice of a possible withholding. On June 25, he received a letter from the Board Secretary stating that the Board had voted to withhold his employment and adjustment increment for the 1985-86 school year (J-16). The letter goes on to state that the withholding was effected for good cause based upon reasons expressed by the superintendent in a confidential memorandum to the Board dated June 14, 1985 (J-14), a copy of which was enclosed with the secretary's letter. Petitioner also stated that his response to his last evaluation was not included in the materials the Board provided.

During the 1984-85 school year, the petitioner gave many talks to this algebra group concerning the importance of homework. He stressed asking questions and asking for help. He called parents when he believed that to be appropriate. He was sure his pupils knew what they would be tested on. His removal and reassignment came as a surprise. His increment withholding for 1985-86 was not officially noticed in advance, but in view of the recent low ratings on his evaluations, he was not surprised.

The witness stated that he had no warnings of any major problems, yet acknowledged receiving a memorandum of February 9, 1984, from his department chairman making reference to "previous joint attempts to correct" (R-1). The petitioner believes the chairman referred to pupil's perception that he is a hard teacher. He and the chairman did work jointly to address the problem.

The petitioner acknowledged a notation on his observation of December 17, 1984, (J-12) that his students might benefit from a slower pace, but has no recall of discussing this point with the chairman. Teaching is more than presenting material. A

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The petitioner testified that the same thing had happened in the prior year. Exhibit R-2, a memorandum from the chairman to the petitioner, dated February 29, 1984, states:

> In response to your request, the reasons for the change in your schedule are enumerated below:
>
> 1. Your grade distributions indicate the ineffectiveness of your instruction.
>
> 2. The requests of over half of your students, supported by their parents, that they be transferred out of your class.
>
> 3. The large number of disciplinary problems you are encountering and the large number of disciplinary actions resulting.
>
> 4. The belief, based upon your past record, that you might meet with better success working with smaller numbers of students on a more individualized basis.

The petitioner responded to each of these points. Concerning number 1, petitioner states that grade distribution does not indicate the effectiveness of instruction. He was told by the chairman and the principal that low pupil ability plus lack of effort were the reasons for poor pupil performance. Concerning number 2, petitioner didn't know about any parental complaints until he received this memorandum. Concerning number 3, petitioner stated that not many pupils were problems. The same few pupils were problems many times over. The petitioner stated that number 4, "seems reasonable based on my past record."

On February 27, 1985, the petitioner was observed by his chairman. The chairman gave the lesson a middle rating (J-10). Petitioner was distrubed by the rating and wrote a two-page addendum. The chairman added a note to the observation after their conference concerning the observation.

In or about April 1984, the petitioner initiated a grievance because of his schedule change. He stated "it was sprung on me quite suddenly" and that he was given no indication of the problems before the change was made.

In March 1985, there was an exchange of memorandums between the petitioner and the prinicpal (J-7b, J-8). Also in March, the petitioner's Total Performance Evaluation for 1984-85 was completed (J-9). The overall rating was low, but a salary

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The department supervisor reviewed his lesson plans once or twice a month. The petitioner could remember no particular comments or perceived problems. The chairman also reviewed some of petitioner's tests to see if they were fair and appropriate.

On December 17, 1984, petitioner was observed by the chairman teaching an Algebra I, part 1 class (J-12). The chairman gave the lesson a high rating. Up to that point, the principal of the school had not spoken to petitioner concerning grades or grade distributions. On February 11, 1985, the principal sent petitioner a memorandum (J-2) concerning grades. On February 15, the chairman also wrote petitioner (J-3). The petitioner responded to the principal, making reference to the chairman's memorandum on February 19, (J-4). The petitioner stated that he did not know of any parental complaints prior to receiving the chairman's memorandum on February 15.

On February 19, he was again observed by the chairman. Again, the lesson was given a high rating. On February 20, the principal sent another memorandum to the petitioner (J-5). The memorandum emphasizes that petitioner must "present a more relaxed atmosphere in class." The principal notes an air of tension in the class. That tension, the principal believes, is because the students experience difficulty in class and because the petitioner knows of the concerns expressed by many about his grade distributions.

The principal concludes by stating:

> "I think it is extremely important that every effort be made to have a modicum of success for students in the Algebra I, part 1 class, realizing that these are students who are working and coming to you with a much lower ability. If this is recognized to the fullest, I am sure that the remainder of the year can be successful for both you and your students.

On February 26, the principal observed petitioner for the first time. He gave the lesson a low rating (J-11). The petitioner wrote an addendum (attached to J-11). Petitioner stated that at no place in this document is a withholding suggested. The petitioner also stated that he was not told of his removal from the Algebra class at that time.

One day later, February 27, 1985, petitioner recieved a letter from the principal stating that his assignment would be changed (J-6). Another teacher was assigned to teach Algebra I, part 1.

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For the following year, 1984-85, the principal evaluated the petitioner's performance and noted that "parents and students are kept informed of student progress by phone calls and warning reports. Grade distribution in Mr. Deveney's Everyday Math classes indicate satisfactory achievement. Grade distribution in Mr. Deveney's Algebra I, Part I, classes indicated unsatisfactory student achievement."

The superintendent notes that for the second time, the principal was compelled to remove the petitioner from the Algebra I class and transfer him to another class because of "poor student achievement and parent negatives...." As a consequence of his performance in the 1984-85 school year, both the supervisor and principal concluded that the petitioner was "one who is not meeting job responsibilities in an effective matter and needs to correct the specific deficiencies itemized in the attached evaluation form." Notwithstanding this determination, both recommended a salary increment. This was overruled by the superintendent who concluded that "Mr. Deveney has 19 years of teaching experience and his evaluated performance is unacceptable to me, as is the recommendation for his salary increment and adjustment." The superintendant recommended that the Board withhold the petitioner's salary and adjustment increments for the 1985-86 school year and the Board did so. This appeal followed.

RELEVANT EVIDENCE

The petitioner testified that his March 1984 Total Performance Evaluation by his Department Supervisor gave him the highest possible rating (J-1). In the 1984-85 school year he taught two classes of Algebra I, part 1 and three classes of Everyday Mathematics. Lower ability pupils were enrolled in the Algebra I, part 1 course. The witness stated their study habits were poor and they had a history of not completing assignments.

He told pupils they had to do all assigned work in order to succeed. He emphasized the need to do all work so many times he is sure the pupils got tired of hearing it. He offered support to his pupils in class and after school. He directly asked certain pupils to come in for extra help. He made contacts with parents via a form letter.

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A prehearing conference was held before another administrative law judge on November 18, 1985. Among other things, it was settled that the issue to be tried is whether, pursuant to N.J.S.A. 18A-29-14, the action of the Board in denying the petitioner his salary and adjustment increments is grounded in good faith or whether it is based upon arbitrary, capricious and unreasonable conduct. The matter was set down for hearing on February 24 and 25, 1986. By letter dated February 13, which reflected a telephone conference held several days earlier, the parties jointly requested an adjournment as a result of discovery problems. After the adjournment was granted, several discovery problems were informally resolved. However, the petitioner formally moved on March 13 to compel more complete answers to interrogatories five through eight. On April 10 the administrative law judge denied the motion. The matter was reset for hearing on May 13 and 14, 1986. On May 12, the matter was assigned to me for disposition.

The matter was heard on May 13, 1986 at the Office of Administrative Law, Trenton. Both parties filed posthearing submissions and the record closed with receipt of the respondent's submission on June 6, 1986.

CONTEXT OF THE CASE

The petitioner is a certified mathematics teacher who has been so employed by the Board since September 1967. He is currently assigned to the South Plainfield High School. On June 14, 1985, the superintendent of schools issued a memorandum to the Board (J-14) recommending that the salary and adjustment increments of the petitioner be withheld for the 1985-86 school year.

The memorandum first cites the petitioner's evaluation by his principal for 1983-84. The memorandum states "grade distributions indicate that students are not responding to instruction. If Mr. Deveney can overcome the students' negative feelings about his teaching, I believe it would be reflected in his grade distribution." The superintendent then indicates that the principal was compelled to remove the petitioner from a mathematics class to which he was assigned and transfer him to a different assignment because of the "poor student achievement and parents' negatives relating to Mr. Deveneys' instruction." The superintendent then notes that notwithstanding the removal, the supervisor and principal did conclude that there were no major concerns about the petitioner's effectiveness.

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6454-85
AGENCY DKT. NO. 320-9/85

KENNETH DEVENEY,
Petitioner,
v.
SOUTH PLAINFIELD
BOARD OF EDUCATION,
Respondent.

Peter Wint, Esq., for petitioner (Katzenbach, Gildea & Rudner, attorneys)

Robert J. Cirafesi, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: June 6, 1986 Decided: July 21, 1986

BEFORE **BRUCE R. CAMPBELL**, ALJ:

PROCEDURAL HISTORY

Kenneth Deveney (petitioner) filed a petition of appeal with the Commissioner of Education on September 16, 1985 in which he charges the action of the South Plainfield Board of Education (Board) withholding his salary and adjustment increments for the 1985-86 school year was improper. The petitioner asks that the Board be directed and compelled to restore his increments for the 1985-86 school year. The matter was joined when the Board filed its answer on October 8. The matter was transmitted to the Office of Administrative Law on October 9, as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

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weeks earlier than that set by the Board. The ALJ's analysis is thorough, well-reasoned and correct. Thus, the findings and conclusions with respect to the alleged resignation and tenure acquisition are adopted by the Commissioner for the reasons expressed in the initial decision. However, the determination that the petition is untimely is reversed for the reasons stated herein.

Accordingly, it is ordered that the Board acknowledge petitioner's tenure date as April 8, 1985.

COMMISSIONER OF EDUCATION

August 19, 1986

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was failing to recognize her as tenured at a time she believed she had acquired such status, the record does not in any way establish whether these minutes constituted sufficient notice as articulated by the State Board in its remand of Parisi, supra, and Meyer, supra, or by the Appellate Court in Stockton v. Bd. of Ed. of Trenton, 210 N.J. Super. 150 (App. Div. 1986). As the minutes were not submitted to the record, the Commissioner cannot concur with the ALJ's conclusion that the reading of the minutes constituted specific and definite notice.

Moreover, while it is undisputed that, upon reading the April 1985 minutes, petitioner took steps to seek clarification from her superiors as to tenure acquisition and these efforts apparently resulted in a letter which informed her that the Board would not recognize tenure acquisition until September 1986, the letter is not part of the record nor are there any minutes of a Board meeting to document that the Board acted to refuse to recognize tenure acquisition. The only evidentiary document submitted to the record (as part of petitioner's response to the Board's post-hearing brief) which goes to the issue of notice is a letter dated November 1, 1985 wherein the Superintendent advises petitioner that he does not plan to recommend to the Board that her tenure date of September 1986 be changed.

Given the incompleteness and lack of clear documentation in the record as to notice, it is determined that the Board has failed in its burden of proof of the untimeliness defense it so belatedly raised in this matter.

Further, it is determined that even if the record were sufficiently clear and complete as to when the cause of action accrued in this matter, the 90 day requirement would be waived due to the following. Tenure is a status granted by the Legislature which can neither be forfeited nor waived while an individual remains in a board's employ. Spiewak, supra As previously stated, so long as the individual meets the statutory requirements for tenure status, it is acquired independent of any board action. Thus, even if this particular petition were time-barred, it would not preclude petitioner from filing a petition of appeal if she were at some future time adversely affected by Board action, e.g. dismissed or reduced in salary or subject to a reduction in force. Consequently, the 90 day filing requirement would have been relaxed/waived in the interest of judicial economy and elimination of the need for costly litigation.

II. Tenure Acquisition

Upon a careful review of this matter, the Commissioner is in full agreement with the ALJ's conclusion that petitioner has met the requirements of N.J.S.A. 18A:28-5(c), having served the equivalent of more than three academic years within a period of any four consecutive academic years. It is abundantly clear that the Board acted in November 1982 to terminate petitioner's contract as of January 30, 1983 as part of a reduction in force due to financial exigency and that she was in reality requesting a "release date" two

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N.J.A.C. 6:24-1.2 governs any and all relief that may be afforded in this case. (emphasis supplied)
(Slip Opinion, at p. 7)

The fact that this matter was presented to the Commissioner as a request for declaratory judgment does not alter the above determination. Upon review of the request for declaratory judgment and the Board's response, it was determined that the matter was not ripe for declaratory judgment due to the existence of disputed facts of material substance as reflected by the Board's answer which denied virtually all the allegations and supportive facts laid out by petitioner. Thus, the matter was transmitted to the Office of Administrative Law for a plenary hearing on the merits of the case. Such action was without objection by the parties.

Having determined that the controverted issue in this matter, i.e. whether petitioner has attained tenure, is subject to the 90 day provision of N.J.A.C. 6:24-1.2, it now must be determined when the cause of action accrued. A cause of action accrues and the 90 day period begins only after receipt of notice by petitioner of the action concerning which the hearing is requested. In both Meyer, supra, and Parisi v. Bd. of Ed. of the City of Asbury Park, decided by the Commissioner January 23, 1984, reversed/remanded State Board October 24, 1984, decision on remand February 25, 1986, aff'd State Board July 2, 1986, the State Board stressed that the notice provided by the board of its action must be specific and definite so that a petitioner is informed both of the action taken by the board and the fact that the individual was affected by that action.

Upon review of the record of this matter, it is determined that the record is unclear and was woefully incomplete as to when the cause of action accrued. It is noted that the affirmative defense of untimeliness was not raised by the Board in its response to the petition, nor was it raised as either a pre-hearing issue or pleaded during the hearing itself. Rather it was raised by way of its post-hearing brief. Thus, the record is devoid of documentation as to when specific and definite notice was given to petitioner that the Board was refusing to recognize her attaining a tenure status in the district.

With respect to the issue of notice regarding tenure acquisition, it must be emphasized that such status is not dependent upon a board's action to grant or deny. Rather, one achieves such status upon meeting the specific conditions set forth in statute. Spiewak, supra Thus, it does not take any affirmative action on the part of a board to bestow tenure on an individual; rather, it accrues upon meeting the precise conditions laid out in N.J.S.A. 18A:28-1 et seq. In most instances a cause of action relative to tenure accrues when an individual has been dismissed, reduced in salary, or seniority rights are implicated, but such did not occur here.

While it can be stated that petitioner read some portion of board minutes in April 1985 which led her to believe that the Board

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"final order, ruling or other action" by the Board. (Id., at p. 4) Rather, it involves a petition for declaratory judgment by which she seeks purely prospective relief in the form of a declaration of her present tenure status, a status which the Board has refused and continues to refuse to recognize. She sees the matter as entirely distinguishable from Riely, supra, and Meyer v. Bd. of Ed. of Twp. of Wayne, decided by the Commissioner October 7, 1983 and December 20, 1984, aff'd/rev'd State Board March 6, 1986, both of which sought reversal of a local board's decision to dismiss a teaching staff member. Petitioner herein is not seeking to overturn a previous action by the Board, nor is she seeking retroactive relief from a previous violation of her tenure or seniority rights. Rather, she asserts that she is simply seeking to have her present tenure status declared over the Board's continuing failure to recognize it.

The Commissioner is unpersuaded by the arguments presented by petitioner with respect to the inapplicability of N.J.A.C. 6:24-1.2. The fact that Riely, supra, and Meyer, supra, are distinguishable does not serve to provide a basis upon which to reverse the ALJ's determination. Although the ALJ's treatment of the 90 day issue is cursory at best, he is nonetheless correct in concluding that the provision does apply as explained below.

There have been numerous school law decisions rendered recently which clearly establish that tenure does not constitute the type of statutory entitlement delineated by the New Jersey Supreme Court in Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982) and North Plainfield Ed'n Assoc. v. Bd. of Ed. of North Plainfield, 96 N.J. 587 (1984) as rendering the 90 day rule inapplicable. See Meyer, supra; Paul Gordon v. Bd. of Ed. of Passaic, N.J. Superior Court Appellate Division, May 27, 1986, Docket No. A-3294-84T7; Joyce Weir v. Bd. of Ed. of Northern Valley Regional High School District, N.J. Superior Court Appellate Division, April 9, 1986, Docket No. A-3520-84T6. Each of these decisions clearly expresses that although tenure is statutorily based, it is functionally related to one's service rendered as a teacher and therefore is subject to N.J.A.C. 6:24-1.2. Lavin, supra The following passage from the State Board's decision in Meyer, supra, expresses well the basis for the applicability of the 90 day requirement to cases involving tenure rights.

> In Gordon, the State Board held that petitioners asserting violations of tenure and seniority rights were not excused from compliance with N.J.A.C. 6:24-1.2. The State Board reasoned that tenure and seniority rights, unlike the right to military service credit, are predicated on rendering services as a teacher. Thus, although derived from statute, tenure and seniority rights are not absolute entitlements and therefore are not the kinds of statutory rights that render the 90 day rule inapplicable under the New Jersey Supreme Court's decisions in Lavin and North Plainfield. Accordingly, we conclude that

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MAUREEN DELK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the ALJ's determination that the petition is time-barred by N.J.A.C. 6:24-1.2. These exceptions are summarized below:

> (1) The 90 day limitations period in N.J.A.C. 6:24-1.2 is not applicable to this Petition for Declaratory Judgment, which seeks prospective relief only in the form of declaration of Petitioner's present tenure status pursuant to N.J.S.A. 18A:28-5(c).
>
> (2) Even if N.J.A.C. 6:24-1.2 were applicable to this type of action, the ALJ erred in allowing Respondent to raise the affirmative defense of untimeliness for the first time in its post-hearing brief in that such a defense, when neither pleaded nor raised at or before hearing, should be deemed waived.
>
> (3) The ALJ's conclusion that Petitioner had notice of Respondent's "decision" to deny her credit for her service prior to her alleged "resignation" in January of 1983, is unsupported by competent record evidence.
>
> (4) The Commissioner should, in any event, exercise his discretion pursuant to N.J.A.C. 6:24-1.17 to relax or dispense with the application of the limitations period in N.J.A.C. 6:24-1.2. (Exceptions, at p. 3)

I. N.J.A.C. 6:24-1.2

With respect to the first exception, i.e. the applicability of N.J.A.C. 6:24-1.2, petitioner asserts that the ALJ misconceived the nature of the dispute between the parties herein. She contends that the case does not involve an "appeal" from an identifiable

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CONCLUDE, therefore, that the petition is time-barred by N.J.A.C. 6:24-1.2. Riely v. Hunterdon Central High School Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980).

I **ORDER** that the petition of appeal be **DISMISSED** as untimely. The foregoing exposition of the relevant evidence, parties' arguments and discussion have been presented so that, if the Commissioner should determine the petition to be timely, the matter may be determined by the Commissioner without remand.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

8 JULY 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

JUL 10 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 11 1986
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I **FIND** that the petitioner here relied, to her detriment, on the representation of the then assistant superintendent that she would be given an early release if she could secure employment elsewhere, and I further **FIND** her testimony credible that the then assistant superintendent represented that her prior service in the district would count toward tenure accrual upon her return to a position with the Pemberton Board of Education. This determination is made after a careful consideration of the whole record and after having heard and observed the witnesses as they testified. I further **FIND** nothing in the record that would indicate the then assistant superintendent was ignorant of the basic principles of school law involved in this matter. He knew, or should have known, that a resignation, under ordinary circumstances, would cut off any accrual of time toward the acquisition of tenure. However, he chose to advise the petitioner of an opposite condition. He knew, or should have known, that the Board had the power to release the petitioner before January 31 without requiring a resignation. N.J.S.A. 18A:28-8.

I **CONCLUDE**, therefore, that if the petitioner's appeal is timely, she must on the basis of this record be awarded tenure in the Pemberton School District retroactive to April 8, 1985, with all benefits and emoluments accordingly. I **CONCLUDE** that she served "the equivalent of more than three academic years within a period of any four consecutive academic years" as required by N.J.A.C. 18A:28-5(c).

The petitioner stated in her testimony that she learned through Board minutes in or about April 1985, that she would gain tenure in September 1986. She met with the former assistant superintendent, now superintendent, and asked him when tenure would attach. It appears from the record the superintendent promised to look into the matter and reply to the petitioner. He did not do so promptly and the petitioner again asked to meet with him. At this meeting, the first reference was made to a resignation in her file. The petitioner also testified she sought a legal opinion following this meeting. She met with the superintendent a third time and again discussed her tenure status. The superintendent then sent her a letter saying he would not recommend her acquisition of tenure before September 1986. This was the petitioner's first official notice that her prior service in the district would not count. The letter, however, is not of record. Even if it were, I would be compelled to **FIND** that the petitioner had knowledge in or about April 1985, that she was not to receive credit toward tenure for her service in the Pemberton District prior to her resignation. The petition of appeal in this matter was filed with the Commissioner of Education on November 18, 1985. I **FIND** and

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In 1968, Lachman had no recourse but to resign if she wished to care for her newly adopted child. There was no statutory right to such leave nor was there a contract provision in the district that provided for it. Thus, I **FIND** that this case, also, is inapposite to the present matter.

This leaves two issues for resolution: Do the circumstances of this case rise to a level sufficient to invoke the equitable principles expressed in Evaul and was the matter timely pursued. As the Commissioner stated in Kozak, above, at 638:

> Regarding resignations, 78 C.J.S. 1101, 1102 reads in part as follows:
>
> > 'A teacher's contract of employment may be terminated by his resignation, but the resignation, in order to be effective, must be offered by the teacher with intent to terminate his employment, to the Board or officer having the power to remove or dismiss, and it must be accepted strictly in accordance with the terms of the offer by the Board having the power to accept, acting as a Board. . . . The resignation may be accepted to take effect at a future date. . . .
> >
> > The resignation may be withdrawn at any time before it is accepted but after the resignation has been accepted it is effective as a subsequent attempt to withdraw or offer to serve, even though the teacher attempts to withdraw before the effective date of his resignation.'

The record in this matter does not disclose any conduct by the school officials that amounts to duress. As in Evaul, I believe the peculiar circumstances of this case require the reinstatement of the petitioner on equitable principles. Unlike the petitioner in Lachman, the petitioner here did not resign for personal reasons. She did not wish a maternity leave, she did not wish to embark on a business venture, she did not want to test the waters in another district, and there is nothing in the record to suggest that she had any desire to leave the employ of the Pemberton Board.

When and only when advised of a RIF, and further advised that "early release" could be arranged, did the petitioner seek employment elsewhere. As it happened, employment on a part-time basis was available in the Mansfield Township District. The administration there wanted the petitioner to begin before February 1, the date upon which the petitioner would have been available had the RIF run its normal course.

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occurred voluntarily on the part of the teacher. . . . A voluntary termination on the part of petitioner did not occur here." That determination, however, went to the slightly different calendar followed by Title I teachers, and not to a resignation, purported or actual.

If the petitioner is to be successful here, it appears it must be on a theory similar to that in Evaul. The Evaul case, with its "extraordinary concatenation of events," stands clearly at the far end of the spectrum of resignation cases. Evaul was determined on equitable grounds. Lachman appears to be the most nearly similar recent case. The Commissioner, upon his own examination of the record, determined that Lachman did not meet the requisites of N.J.S.A. 18A:28-5 until September 1979. Lachman expressed the belief that years of prior service would count for seniority purposes because of information received from the administrative assistant for personnel who had advised her on two occasions that if she resigned and returned to the district, all prior service would count for salary placement and seniority credit.

In the Commissioner's own language:

> There is no dispute that petitioner was credited with all prior service for salary purposes. A board of education is free to take such action because by statute it is authorized to do so. (N.J.S.A. 18A:16-1) However, seniority credit may only be accorded pursuant to statute and code. Thus, even if a board were willing or "guaranteed" to recognize all prior service in the district for seniority purposes, the granting of credit for any service not leading to tenure would be prohibited by law. (Slip opinion at 17.)

The Commissioner further determined that when Lachman followed the advice of the administrative assistant for personnel regarding resignation, she acted at her own peril. While acknowledging that Lachman was misinformed, the Commissioner did not believe that the circumstances rose to a level that would require "that the mandates for seniority be set aside." (Slip opinion at 18.) The Commissioner's review of the record did not provide "a scintilla of evidence" that petitioner was coerced into resignation. "Nor is there any evidence that the Board or any of its adminstrators acted in bad faith in this matter. The information provided to her regarding seniority was erroneous, but there is unrefuted testimony that the administrator believed his information to be true upon consultation with the Board's attorney until informed to the contrary by the County Superintendent." (Ibid.)

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in jeopardy until just before she filed her first petition. In the present case, by the petitioner's own factual statement that she had knowledge in April 1985 that she was not to receive credit toward tenure or seniority for her service prior to January 15, 1983, and the fact that she did not file her petition until November 12, 1985, nearly eight months subsequent to her actual notice, she has established that she is time-barred.

DISCUSSION AND DETERMINATION

Tomlin, above, must be distinguished immediately from the present matter. In Tomlin, the petitioner resigned so that she might enter a business venture. None of the circumstances attendant to the resignation in this case were present. I **FIND** Tomlin inapposite to the present matter. I do not read Spiewak as broadly as does the petitioner. Its application to this case has been clearly addressed in stipulation number 18:

> At all times while employed in the service of Respondent, Petitioner has performed the duties of a teaching staff member as defined in N.J.S.A. 18A:1-1 in a position requiring the holding of a valid and appropriate teaching certificate issued by the State Board of Examiners. At all times material herein, Petitioner has in fact possessed a valid and effective teaching certificate, appropriate to the position held by her in Respondent's school district.

Solomon and Commins are similarly distinguishable. Solomon's resignation occurred after she had achieved a tenured status. There is nothing in the official report of that case to indicate circumstances even remotely resembling those in the present case. Commins was an unfortunate case in which mental illness played a part. The Commissioner found no element of improper duress, however. Commins at 13.

Kimless, above, would be decided differently today under the holding in Spiewak. More importantly, there was no resignation in Kimless. I **FIND** the matter to be inapposite.

Anderson v. Summit Bd. of Ed., 1980 S.L.D. 383, is closer to the point. Anderson was employed as a part-time teaching staff member in the Summit schools in the Title I kindergarten program from February 9, 1976. She was employed in the Summit schools until the end of the 1978-79 school year. The administrative law judge found, and the Commissioner affirmed, that there was no break in the chain of her service that disrupted her tenure accrual. "A break in the chain is applicable where the 'break'

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any element of bad faith in the treatment of the petitioner. As in the Lachman case, service prior to a resignation cannot be considered for seniority purposes.

In Tomlin v. Downe Tp. Bd. of Ed., OAL DKT. EDU 1994-84 (Aug. 30, 1984), adopted Comm'r of Ed. (Oct. 11, 1984), the petitioner urged that equitable principles should apply inasmuch as there had been a break in her service of only two days. Tomlin had tenure and lost it for two days, neither of which were school days. She had been employed for 10 years prior to that. Tomlin's resignation, effective January 1, 1984, was submitted so that she might enter a business venture with her husband. She was notified of the acceptance of her resignation by letter from the Board secretary, dated November 22, 1983. In early December, her husband left with no indication that he would return. This change in her personal situation made it impossible for her to go into the business venture. On December 6, she informed the superintendent that she wished to have her old job back. The Commissioner affirmed the administrative law judge's decision that the resignation was valid and reemphasized the importance attached to a resignation.

N.J.S.A. 18A:28-8, which specifically covers "a release on shorter notice," was known to the assistant superintendent in this case because he was familiar with that wording from his knowledge of school law. When the petitioner wanted to terminate her contract with the Board early so that she could accept her job in Mansfield Township, her resignation was, in effect, a request for an early release from her contract which is synonymous with a resignation. Although N.J.S.A. 18A:28-8 does mention the word "resign" in the title, nowhere in the body of the statute is the word "resign" used. When the assistant superintendent suggested an early release and indicated that the way to accomplish it was by filing a resignation, he was simply following the dictates of N.J.S.A. 18A:28-8.

The Board also asserts the petitioner is time-barred in her appeal pursuant to N.J.A.C. 6:24-1.2. That section of the Administrative Code provides that in order to initiate a proceeding for the Commissioner, a petition must be filed "within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested." In the present case, the petitioner acknowledges she first discovered and had knowledge of the fact that her prior service would not be counted toward tenure when she read the minutes of the Board of Education meeting in April. (Petitioner's brief, page 10.) In Lachman, the administrative law judge specifically noted that the petitioner was not time-barred because she had no inkling that her seniority was

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In Ahrensfield v. State Board of Education, et al., 126 N.J.L. 543 (E. & A., 1941), the petitioner had been employed since 1931. In 1934 she was on the verge of acquiring tenure under the then existing Tenure of Office Act. At that time, the Board adopted a resolution opposing giving tenure to married female teachers. Ahrensfield was then advised by her supervising principal that he did not recommend her for reemployment because of the Board's resolution. She then, in accordance with a suggestion of her supervising principal, submitted her resignation. Her resignation was duly accepted and thereafter the Board authorized her reemployment in the district. This continued each year thereafter and Ahrensfield was effectively denied the protection of the tenure statute for obviously improper reasons. Under present law, given these facts, it is easy to envision a four-line decision reinstating Ahrensfield. Almost unbelievably, the Supreme Court, in this case, held that her resignation was effective and her writ was dismissed. Although the Board does not suggest that a similar result would be reached today, the case nevertheless indicates the importance historically attached to the submission of a resignation.

The more recent case of Lachman, above, is extremely close to the present matter. In Lachman, a teacher was employed by the Cherry Hill Township Board of Education and sought to receive credit for time with the district prior to her two resignations; first in 1968 and then again in 1973. She came back in 1976 and was employed as a teacher in various capacities until a RIF in 1984. Lachman then filed her petition. Undisputed facts showed that she had been advised by a personnel officer for the Board to resign first in 1968 and then again in 1973, but he had assured her she would lose no seniority for the time prior to her resignations. This was a representation made by a representative of the board of education which was admittedly relied upon by the petitioner in submitting her resignations. The facts of that case clearly demonstrate that Lachman relied entirely upon the representation of an agent of the Board. She completely trusted his advice and only acted in accordance with his advice. The Commissioner concluded that Lachman was credited with all prior service for salary purposes, but that even if the Board were willing to recognize prior service toward tenure accrual, the granting of such credit for service prior to a resignation would be prohibited by law. The Commissioner held that when Lachman followed the advice of the personnel officer, "she acted at her own peril." It was noted that Lachman was not coerced, as in the present case, nor was there any indication that the Board or any of its administrators acted in bad faith. In the present case, there is certainly no suggestion or allegation that there was

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The petitioner's resignation was voluntary and should be accorded full force and effect. Her letter of resignation was unequivocal. This cannot be negated because she did not understand the import and ramifications of the action on her part. It is not suggested that the resignation was somehow coerced or that she was pressured to resign. The facts indicate the petitioner prepared the letter of resignation in the privacy of her own classroom without any undue influence or duress being exerted by any administrator.

There have been a few cases in which it has been held that the resignation was involuntary or made under duress or coercion of will and that under the particular circumstances in those cases, the teachers were allowed to credit prior time toward tenure and to continue employment. The argument is probably most compelling in those cases where the teacher was under tenure, submitted a resignation which was in some respect irregular, and therefore granted the opportunity to return to tenured employment as if there had been no break.

In Evaul, the Court was confronted with a rather unique set of facts involving a tenured teacher. Evaul had been a teacher in the Camden school system for many years. She apparently had enjoyed a good relationship with her superiors. No charges of any nature ever had been preferred against her nor was she ever suspended. In 1959, there developed a misunderstanding with some of her superiors leading to a confrontation in the principal's office, where she was charged by the principal or the president of the Board or the superintendent with being "argumentative, uncooperative, etc." Obviously distraught, Evaul submitted her resignation the very afternoon that coincided with a Board meeting and the resignation was accepted by the Board a few hours later. The following day she read in a local newspaper that her resignation had been accepted at the special meeting, and on the next day, a Sunday, she visited the home of the superintendent to discuss rescinding her resignation which, in effect, abruptly terminated 25 years of creditable service in the district. The Board took no further action on her request for reinstatement and she then sought a judicial determination. The judicial decision noted a "peculiar set of circumstances" in the case and concluded that they were such that reinstatement should be ordered.

There is no question that Evaul was a unique case. The facts in Evaul, however, are obviously different from the facts in the present case.

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hiatus including the Christmas holidays and that, therefore, equitable principles would suggest that he be viewed as having maintained his tenure status. The administrative law judge relied on Solomon and Commins. The Commissioner affirmed the initial decision dismissing the petition.

The Board cannot agree with the petitioner's suggestion that the body of law holding that a resignation negates and cuts off any prior service as counting toward tenure acquisition has been changed by Spiewak. In Spiewak, the Supreme Court laid to rest the question of whether or not public school teachers who provide remedial and supplemental instruction could acquire tenure. Prior to that case there was considerable confusion in the area and some conflicting holdings in lower courts. The Board suggests the precedent set in Spiewak was that if the remedial and supplemental instructors meet the qualifications of the tenure statute, then they acquire tenure. The differences of opinions of the many lower court judges considering the matter centered around the question of whether or not "Title I" teachers could acquire tenure in a normal sense because of the tenuous nature of their federally funded employment. The high court simply found that the petitioners in Spiewak did not fall within any of the statutory exceptions and held that a local board of education cannot, by particular wording in their contracts, create a class of teachers who do not acquire tenure although they fit all the other definitions necessary for a teaching staff member to acquire tenure. The ruling was, in fact, a narrow one.

In the present case, the Pemberton Township Board of Education did not insert or impose upon the petitioner any unusual or strange contract provisions. In fact, the contract used was the normal one employed by districts in the state and was in a form prescribed by the Commissioner of Education. The facts do not in any way suggest that the Board is attempting to deprive the petitioner of credit for her prior service because of some contract provision. Rather, because the petitioner submitted her resignation, which was duly accepted by the Board, the petitioner herself instituted the action to terminate the contract. The subsequent acceptance by the Board of the resignation is simply the second step in a resignation as established by the case law. It is the Board's position that the Spiewak case does not alter or change the long line of decisions holding that the resignation of a teaching staff member cuts off credit for any prior time in the district from being counted for tenure purposes. See, e.g., Kimless v. Woodbridge Tp. Bd. of Ed., 1978 S.L.D. 651; Misek, Commins, Solomon, above.

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to subsection (c) of N.J.S.A. 18A:28-5 is a substantial statutory right that arguably could not be waived at all, by resignation or otherwise. Waiver of such a statutory right can be founded upon evidence of an intentional and voluntary relinquishment of a known right. Carney at 1118. There is simply no such evidence in this case. The evidence adduced was to the effect that the petitioner's first notice the Board would treat her early release as extinguishing her prior time for tenure purposes was over two years later, in April 1985. Considerations of equity and public policy mandate granting the petitioner credit for her service to January 15, 1983, notwithstanding her alleged resignation.

Even in the absence of sufficient legal grounds to render a resignation invalid, equity may compel invalidating or restricting the effect of a resignation to avoid unjustice or unfair results. Evaul v. Camden Bd. of Ed., 35 N.J. 244, 249-50 (1961). Of the seven teachers shown in the record to have been subject to the RIF in the 1982-83 school year, and to have returned to the district by the beginning of the 1983-84 school year, only the petitioner has been denied credit for her service prior to termination. The petitioner will be entitled to tenure in the Pemberton District upon reemployment in September 1986. All evidence adduced at hearing suggests that this indeed will occur. Her seniority, however, should justly accrue in accordance with her rightful tenure date of April 8, 1985. In light of the clear likelihood of her reemployment in September 1986, and due to the absence of any detriment to the Board by compelling recognition of her prior service toward tenure and seniority, there is no basis in law or equity not to grant the declaratory relief sought by the petitioner.

BOARD'S ARGUMENTS

The Board asserts the petitioner's letter of resignation was duly submitted and the Board, at its regular meeting of January 11, 1983, took official action to accept it. The petitioner's resignation negates previous time served from being credited toward tenure or seniority. The entire body of school law establishes that a resignation, duly accepted by the board of education, terminates any credit for tenure purposes of prior employment time. There is no question in this matter but that the petitioner offered her resignation and the Board accepted it. In Misek v. Willingboro Tp. Bd. of Ed., 1980 S.L.D. 98, the petitioner resigned from the Board's employ on November 15, 1975, and returned to employment on January 13, 1976, creating a very short break in his service. The resignation in that case caused a hiatus of less than two months, including a Christmas recess. It was argued there that equitable principles be considered because of the brief

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As the Commissioner said with respect to the effect of a resignation in F. Rupert Belles v. Board of Education of the Township of Wayne, Passaic County, 1938 S.L.D. 556 (1933):

> '* * * Acceptance is to offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone. * * *' (at 557)

The petitioner argues that her letter of resignation was in reality no more than an acceptance of the Board's offer of an early relief should she find alternative employment. She was facing certain unemployment during the period January 31 - June 30, 1983. Her purpose in searching for and accepting alternative employment in Mansfield was clearly to avoid unemployment and not due to any desire on her part to leave Pemberton. The Board's offer of an early release was for the same purpose. Under these circumstances, the petitioner was under a legal duty to accept reasonable alternative employment. This tribunal must look beyond the mere form of petitioner's alleged resignation and determine the substance or totality of circumstances that led to her separation. Her separation was involuntary due to a RIF. As such, her prior service should count toward her accrual of tenure and seniority in the Pemberton District. Carney v. Summit Bd. of Ed., 1980 S.L.D. 1110.

The effect to be given a resignation is a matter of the parties' intention. In Kozak v. Waterford Tp. Bd. of Ed., 1976 S.L.D. 633, it was stated:

> Regarding resignations, 78 C.J.S. 1101, 1102 reads in part as follows:
>
> > 'A teacher's contract of employment may be terminated by his resignation, but the resignation, in order to be effective must be offered by the teacher with intent to terminate his employment. . . .' [Id. at 638.]

In this case it is clear that the petitioner's purpose in submitting her resignation was strictly limited to effectuating her early release and not terminating her contract or abandoning her teaching position in the Pemberton District. She had no idea that by accepting the Board's offer of an early release and submitting her resignation, she was waiving her right to have her prior service count toward tenure accrual. The break in petitioner's service was involuntary.

The petitioner's right to have her service prior to a reduction in force or similarly involuntary interruption of service count toward her accrual of tenure pursuant

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The petitioner urges that under the school law decisions predating Spiewak, the standard applied to determine whether a break in the chain of employment would negate the application of the statute, was whether the break in the chain occurred voluntarily on the part of the teacher or involuntarily due to circumstances beyond the teacher's control.

In the present case it is clear the break in the petitioner's service was involuntary and due to circumstances beyond her control. As demonstrated by the stipulation of facts and the testimony, the real cause of the petitioner's leaving the district in January 1983 was the Board's formal and final resolution terminating her teaching contract due to her reduction in force. But for these circumstances, the petitioner never would have sought alternative employment and would not have submitted her letter of resignation.

Commissioner of Education decisions concerning the effect of a volunary resignation on a teacher's accrual of tenure are distinguished in this regard from the present case. See, e.g., Lachman v. Cherry Hill Bd. of Ed., OAL DKT. EDU 5938-84 and EDU 3504-85 (Oct. 28, 1985), aff'd in part, rev'd in part, Comm'r of Ed. (Dec. 11, 1985); Reimann v. Edison Tp. Bd. of Ed., 1980 S.L.D. 636. Each of these cases shows that the teacher's resignation rose to the level of a voluntary abandonment of position or of an existing teacher contract. Neither factor is present in this case. The petitioner's teaching position and contract were terminated by the Board prior to her submission of her resignation. Both Lachman and Reimann were deemed to have voluntarily resigned to raise their children. Solomon v. Princeton Reg'l Bd. of Ed., 1977 S.L.D. 650, compares the teacher's volunary resignation and subsequent 12-month separation from the district to a previous decision involving actual abandonment of the teaching position, Commins v. Woodbridge Tp. Bd. of Ed., 1967 S.L.D. 11. In Solomon, the Commissioner states at 655-656:

> It is clear that petitioner offered her resignation from her position of employment as a teaching staff member and that such resignation was accepted by the Board effective October 6, 1971. In the Commissioner's judgment, petitioner's resignation effectively terminated her previous tenured employment with the Board on that date and barred all service prior to such date from subsequently accruing to a new tenure entitlement. Such holding is consistent with a previous ruling of the Commissioner wherein the petitioner voluntarily resigned his teaching position which constituted abandonment of any rights he may have had to a tenure claim. [Commins.]

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The only possible bar would be if her purported resignation were given full force and effect in the consideration of this tribunal. Since resignations are no more than contractual modifications of the employment relationship (see, e.g., Kass v. Brown Boveri Corp., 199 N.J. Super. 42 (App. Div. 1985); Kozak v. Waterford Tp. Bd. of Ed., 1976 S.L.D. 633, 638), then the mere fact of a resignation would be irrelevant to the petitioner's statutory right to have her prior service count towards tenure. To the extent that her alleged resignation was followed by employment in another district, the statute itself defines what type of interruption in service negates its application solely in terms of service rendered and time; that is, whether the petitioner accrued the equivalent of more than three years of actual service in a given district within any four consecutive academic years. The petitioner's actual service in the Pemberton District satisified all the express requirements of N.J.S.A. 18A:28-5(c) and is not covered by any statutory exception. Under the literal terms of the statute and the holding in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), she acquired tenure in the Pemberton District as of April 8, 1985.

The petitioner's separation from employment in Pemberton during the 1982-83 school year was involuntary. This entitles her to have prior service in the district credited towards tenure acquisition. The petitioner asserts that the Board's reliance on the mere fact of her submission of a two-line letter proporting to be official notification of her resignation is overreaching. Furthermore, it is contrary to the purpose and spirit of subsection (c) of the tenure statute and is inconsistent with the established law regarding the application of that statute.

The purpose of the passage of N.J.S.A. 18A:28-5(c) was to provide tenure protection to teachers who either are hired in the middle of an academic year or experience an irregular interruption in their service in the district. Solomon v. Princeton Reg'l School Dist. Bd. of Ed., 1977 S.L.D. 650, 656-657. It has been held by the Commissioner that N.J.S.A. 18A:28-5(c) does not require a teacher's service to be continuous in order to count towards tenure acquisition. Carney v. Summit Bd. of Ed., 1980 S.L.D. 1110. An irregularity or "break" of the chain of employment does not negate the application of the statute to service rendered within four consecutive academic years as long as the "break" does not occur voluntarily on the part of the teacher. Anderson v. Summit Bd. of Ed., 1980 S.L.D. 383, 400, rev'd St. Bd. 1980 S.L.D. 404, rev'd in Spiewak, above, at 84.

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could start by January 17. She referred to his offer in their meeting of November 15 as to early release and asked him about the procedure for early release. The petitioner testified that the assistant superintendent responded by instructing her to "put down a couple of lines saying you resign," and stating the date by which she had to be gone. The petitioner drafted a letter stating, "Please accept this as official notification of my resignation, effective January 15, 1983" (J-1f). She presented the letter to the then assistant superintendent on the same day and asked if anything else were needed. He responded, "That will do just fine," or words to that effect.

The petitioner urges that the first time the idea of a resignation was mentioned was in the meeting with the assistant superintendent on January 6. The sole purpose of her inquiry was to find out the procedure to effectuate the assistant superintendent's offer of an early release. Prior to the meeting of January 6, she had no idea what the procedure or mechanism would be. Her understanding of the purpose of submitting the resignation (J-1f) was that this was the means by which she would provide the Board with "something in writing" to approve her early release. She stated she believed this was necessary to make the early release legal and to assure she was not violating her contract by leaving before her termination date of January 31, 1983. The assistant superintendent did not inform her of any other means of effectuating her early release nor did he inform her of any other consequences of submitting the resignation beyond effectuating an early release from her contract.

The petitioner's service in the Pemberton District between October 26, 1981 and April 8, 1985, satisfied the express statutory requirement for tenure pursuant to N.J.S.A. 18A:28-5(c) and does not fall within any statutory exception. In this matter, the petitioner's service in the district between October 26, 1981 and April 8, 1985, did satisfy the precise statutory qualifications for tenure, including rendering the equivalent of more than three years of actual service within four consecutive academic years as required by subsection (c) of the above-cited statute. (See stipulation paragraphs 18 and 19.) The Board has identified no statutory exception applicable to the petitioner's case. The Board points only to an alleged letter of resignation and the fact that petitioner was not employed in its district for a period of approximately five and one-half months between January 15 and June 30, 1983. Notwithstanding this period of absence, the petitioner's actual service between October 26, 1981 and April 8, 1985, still meets the express criteria set forth in subsection (c) of the statute.

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The superintendent recalls another resignation. He recalls no early release from employment. He believes a resignation constitutes an abandonment of employment rights. The petitioner, in the absence of an early release, would have been employed through January 31.

The superintendent did state to the petitioner that he needed a letter of resignation. There was no other procedure for early release. He believes a person "would have to be resigned to be released from their contract. Yes."

This witness recalled no discussion of the position the petitioner was taking in Mansfield Township. When the petitioner contacted him in April 1983 and said she was looking for a position, he asked her to write to the district. At their August meeting in his office, at which a contract was signed, the witness recalls no specific statements by him or the petitioner concerning tenure.

PETITIONER'S ARGUMENTS

The petitioner was diligent and honest in the cover letters and resumes sent to some 20 or 30 school districts in Burlington and Camden Counties. The impending termination of her teaching position was clearly the reason for her job search and she relied on the representation of the then assistant superintendent that an early release was possible. But for the reduction in force and termination, she would not have sought another job. But for the assistant superintendent's offer of an early release, she would have limited her job search to employment commencing after her termination date of January 31, 1983.

The only positive response to the petitioner's many inquiries was from the Mansfield Township School District. She was told on or about January 4 by her principal that a Mr. Hydock from the Mansfield District had called him about interviewing the petitioner for a position in that district.

The petitioner was, in fact, interviewed by Mr. Hydock and accepted a part-time position teaching basic skills three days per week. Upon returning to Pemberton, she informed her building principal of the offer of employment in Mansfield and asked him what she should do. He told her to see the then assistant superintendent and later that day she did so. She told the assistant superintendent she had a job at Mansfield if she

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does not recall saying her prior service in the district would count toward tenure. He did say the time would count as experience for salary guide purposes.

After the petitioner saw her name in the April 1985 minutes, she again met with the superintendent. She specifically discussed her tenure date. The minutes did say that she would gain tenure on September 1, 1986. The superintendent said he would look into the question and get back to the respondent. He says he did so "right away." The petitioner came back to his office one or two more times. He finally sent a letter to her stating that her date of tenure acquisition would be September 1, 1986, and that he would not recommend a change.

The superintendent testified that the district lost 1.2 million dollars in federal aid in 1982. The district conducted its first ever mid-year RIF. It was also the first time the district had suffered an aid reduction of this magnitude. The reduction was unexpected and the Board had to act quickly. Teachers were notified on November 15, 1982, of the RIF to become effective January 31, 1983. Some teachers were recalled as vacancies occurred. A list of all RIFed teachers was kept. The list was used to recall teachers to vacancies. Every effort was made to match RIFed teachers to vacancies on the basis of prior experience.

The petitioner was on the original RIF list but not on the recall list because she had other employment. All employees affected by the RIF received letters in November 1982. He urged them to find other employment. Administrators, not the Board, advised teachers they could secure an early release.

The witness identified exhibit J-1e as a copy of the form letter used to notify personnel of the RIF. The superintendent could not recall using the word resignation at his first meeting with the petitioner. He used some term such as "early release."

When the petitioner came to him and asked for an early release, he stated, "I'll need something in writing - a resignation." The superintendent believed the Board would have to act to effect an early release and he further believed that the affected staff member would have to resign as "that was the procedure."

When the petitioner resigned, she knew she was to be terminated. When she resigned, she "moved up" her termination date.

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After her second meeting with the superintendent in the spring of 1986, the petitioner sought a legal opinion. She met again with the superintendent and again discussed tenure with him. He sent her a letter saying he would not recommend tenure at that time. This was her first official notice that her "old time" would not count toward tenure acquisition. The petitioner did receive all sick leave accrued upon her return to the Pemberton District. This tribunal notes that the Board has express authority under N.J.S.A. 18A:30-3.2 to grant any person who has unused accumulated sick leave days from another school district part or full credit therefor.

The present superintendent, formerly assistant superintendent, testified. He held a meeting with the petitioner in November 1982 at Harker-Wylie School. He informed petitioner of a RIF because of financial exigency. He recalls that the then superintendent spoke to some of the potentially RIFed teachers and he spoke to others. He recalls that when he spoke to the petitioner, he gave her a letter. He specifically recalls giving no guarantees about recall to the Pemberton District. He did say he would make efforts to release teachers early if they found employment and requested early release. This would require a letter from the staff member - actually a resignation. He could not grant early releases, only the Board could do so. He does not recall any teachers being given early releases.

This witness also met with the petitioner at his office after she received a promise of employment in Mansfield Township. He told her at that time she would have to resign in order to be released before the effective date of the RIF. He stated that "just a couple of lines" would be sufficient.

They met again shortly after and the petitioner gave him a letter of resignation. He read the letter and forwarded it to the Board. He recalls no particular discussion with the petitioner at that time.

After the Board approved the petitioner's resignation, the two met again. This witness told the petitioner that the Board had approved her letter of resignation.

The petitioner kept in contact with the witness concerning employment in the district. They had what he described as an interview-type meeting in August 1983. On or about August 26, the petitioner signed a contract and other papers. The superintendent

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caught in a RIF." The assistant superintendent assured her that her previous time in the district would count toward tenure. During the conversation, no reference was made to the petitioner's resignation. She signed a contract for the 1983-84 school year on August 30 (J-1i).

The petitioner began service in September 1983 as a Basic Skills teacher at the Newcomb School. In November she was transferred to the Haines School as an eighth grade teacher, in which position she served until June 1984. The petitioner received a contract for 1984-85 and spent that year teaching an eighth grade at Haines School. In 1985-86, she taught seventh grade at the Newcomb School. She received a form letter stating that she will be recommended for employment for the 1986-87 school year.

In her own words, the dispute is, "When I left Pemberton Township, I left leaving them the letter I was asked for. The letter was only to bring about my early release. I did what the administrators asked me to do."

The petitioner believes she attained a tenure status on or about April 8, 1985. She also believes the Board says her time began to accrue in September 1983 and tenure will not attach until September 1986. In effect, her "old time" has been wiped out.

The petitioner learned through Board minutes in or about April 1985 that she would gain tenure in September 1986. She again asked to see the former assistant superintendent, who was now superintendent. At their meeting, the petitioner mentioned the April minutes and asked when her service for tenure began. The superintendent assured her that he would look into the matter. The petitioner did not hear from him and asked to see him again. At the second meeting, reference was made to the resignation in her file. This was the first reference to resignation that she recalls.

The petitioner iterates that she relied on the then assistant superintendent's respresentation that she could get an early release and she put this fact in cover letters to prospective employers. Otherwise, she would have said in her cover letters that she was not available until after January 31. She had no intent to do anything but leave Pemberton early and properly. She took it from her conversations with the then assistant superintendent that the letter of resignation is what the district required of her.

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suggested it on January 6. While speaking to her on the subject, the assistant superintendent stated there was no other way to gain early release and there would be no other consequences of a resignation.

The petitioner received a letter concerning the Board meeting of January 11, 1983 (J-1h), and indicating that the Board had accepted her resignation effective January 15. January 15 was the petitioner's last day in Pemberton. She began employment in Mansfield on January 17.

On January 17, she signed a contract to serve in the Mansfield District from January 17 - June 30 (P-2). The position was a part-time position and her salary was prorated accordingly. The petitioner had no expectation of continued employment in Mansfield Township. On or about April 21, 1983, the petitioner's employment in Mansfield Township was nonrenewed (P-3).

In late April she contacted the Pemberton administration and spoke to the assistant superintendent concerning a return to the Pemberton District. She was advised that there were no openings at that time. At some point between April 21 and April 25, the petitioner and the assistant superintendent met and discussed possible September openings. The petitioner wrote to the assistant superintendent (P-4), thanking him for the meeting and making a formal request that she be considered for employment.

The petitioner stayed in contact with the assistant superintendent until August. Upon calling the assistant superintendent's office in August, she was informed by his secretary that a Basic Skills position would be open at the Newcomb School. It involved teaching reading and mathematics basics to seventh and eighth grade pupils. The secretary advised the petitioner to contact administrators upon her return from vacation. There was no discussion at that time of the petitioner's previous employment.

Upon return from her vacation, approximately August 26, the petitioner again called the assistant superintendent. At this time she was asked to come in to district offices, to fill out forms and to sign a contract. While there, she asked to see the assistant superintendent. She asked him if she were starting afresh or if her prior time in the district would count. The assistant superintendent told her that her prior time would count. The petitioner specifically referred to tenure and asked when her time began to accrue. When asked why she was concerned, the petitioner replied, "I don't want to get

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On November 23, 1982, the Board passed a resolution approving a RIF of 17 certificated teaching staff members, including the petitioner (J-1d). The Board Secretary sent the petitioner another letter, dated November 24, 1982, officially informing her of this action (J-1e).

The respondent began sending out resumes in November. She received only one answer in response to approximately 25 resumes. The Mansfield Township Board of Education indicated it had a part-time position open. Exhibit P-8 is an example of the cover letters under which she sent her resumes to various school districts in the area. The cover letter mentions that early release could be arranged.

The petitioner stated her building principal was contacted by a Mansfield Township administrator and he told the petitioner of the contact. The petitioner then set up an interview with the Mansfield Township administrator. The Mansfield District offered her three days employment per week in the basic skills area. She accepted a lower salary than she had made at Pemberton. The petitioner understood that she was filling in for a teacher on leave from January 17 - June 30, 1983. She was offered the job if she could begin on January 17.

On the day following the interview, the petitioner went immediately to her principal and received permission to see the assistant superintendent. Upon seeing the assistant superintendent, she informed him of her interview in Mansfield. She asked him what she had to do to be able to take the job in Mansfield on January 17. The assistant superintendent told her that all she had to do was to write a few lines saying that she resigned her position in Pemberton, effective January 15. The assistant superintendent also advised her to get her letter in quickly because the Board would meet in two or three days.

The petitioner returned to her school, jotted down a few lines, showed them to another teacher, and had the letter typed (J-1f). She received permission to take the letter to the assistant superintendent and did so. The assistant superintendent indicated that the letter was adequate and took it from her.

The petitioner states she believed, in order to leave before January 31, that she had to write a letter of this sort "to be legal - not violate the contract." The witness also stated she had not considered resignation before the assistant superintendent

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After notice, a prehearing conference was held on February 11, 1986, at the Office of Administrative Law, Quakerbridge Plaza, Trenton. Among other things, it was agreed that counsel would submit a joint stipulation of facts prior to hearing. The joint stipulation was submitted on April 2, 1986, and the matter was heard on April 15, 1986.

I.

RELEVANT EVIDENCE

The parties filed a stipulation of facts, with exhibits, which is attached to this Initial Decision and incorporated herein.

Maureen Delk testified that she began employment in the Pemberton District in October 1981, and served until June 30, 1982. She received a contract for the 1982-83 school year. The contract contained a 30-day notice clause.

At the beginning of the 1982-83 school year, there was much talk within the district concerning money problems and layoffs. On November 15, 1982, she met with the principal of the Harker-Wylie School and the then assistant superintendent. The administrators informed the petitioner that the district had to reduce staff. The petitioner was given a letter (J-1b) informing her of her reduction in force (RIF) effective January 31, 1983, and stating that she would be advised at a later date concerning hospitalization insurance and unemployment benefits.

During the course of this meeting, the petitioner asked the assistant superintendent about recalls for that school year. The assistant superintendent indicated that he saw no chance of recalls in that year. He expressed no objection to the petitioner pursuing other jobs. He also said that if the petitioner were successful in securing another job, "we'll let you go early," that is, before January 31, 1983.

The petitioner later received a letter dated November 16, 1982, from the Board Secretary (J-1c), explaining hospitalization insurance and unemployment benefits and discussing union dues deductions.

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8067-85
AGENCY DKT. NO. 390-11/85

MAUREEN DELK,
Petitioner,
v.
PEMBERTON BOARD OF EDUCATION,
Respondent.

Robert B. Eyre, Esq., for petitioner (Selikoff & Cohen, attorneys)

Ernest N. Sever, Esq., for respondent (Sever & Hardt, attorneys)

Record Closed: May 27, 1986 Decided: July 8, 1986

BEFORE **BRUCE R. CAMPBELL,** ALJ:

Maureen Delk, petitioner, claims she has attained a tenured status in the employ of the Pemberton Board of Education, respondent. She seeks a determination and declaration of the Commissioner of Education that she achieved tenure on or about April 8, 1985. The issue to be tried is whether the petitioner attained a tenured status and, if so, when.

The matter was opened before the Commissioner of Education by the filing a verified petition of appeal on November 18, 1985. The Board filed its answer before the Commissioner on December 9, 1985, and the Department of Education transmitted the matter to the Office of Administrative Law on December 18, 1985, for disposition as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

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superintendents, which hires coaches. See Robert Livingston v. Board of Education of the Township of Wall, 1980 S.L.D. 1321.

Notwithstanding the above, the Commissioner finds that the Board in the instant matter erred in its procedure in appointing the Edison High School boys' Varsity basketball team coach for the 1985-86 school year. Initially, the Commissioner notes that there is no right to employment as a coach. See Livingston, supra; see also Barry Hamlin v. Board of Education of the Borough of Dunellen, 1981 S.L.D. 719, aff'd State Board 721. Further, reappointment as a coach is not required, but the board's reasons for not reappointing cannot be arbitrary. See Jan Dutt and George Chilmonik v. Board of Education of the Town of Phillipsburg, Warren County, decided by the Commissioner September 25, 1981.

That the screening committee and the administration in the instant matter exercised their judgment relative to petitioner's suitability as a candidate for the coaching position in question was an entirely reasonable action and certainly within their function. That the administration approached the local athletic director and invited him to apply for the position in light of the absence of acceptable candidates was similarly within its role. However, that the local athletic director was appointed by the Board without having so much as filled out an application for the position created a taint in the process the Board established for the hiring of said coach. The local athletic director should have been required to proceed through exactly the same administrative procedure as all other candidates, even if it meant reposting the position as being vacant upon the screening committee's realization that there were no acceptable, eligible candidates available from among those who had applied at the time of the original posting in May 1985. That the man who would later be appointed to the position was a member of the two-man screening committee that interviewed petitioner for the position represents an even more egregious example of the capriciousness of the hiring process to which petitioner was subjected. The Commissioner finds such taint to be so serious in nature as to render the Board's determination improper and to require that petitioner be reimbursed in the amount of the stipend for the position for the 1985-86 school year.

In so deciding, the Commissioner's determination is not based upon any finding that petitioner was entitled to said position nor that the Board did not have valid reasons for rejecting his candidacy. Rather, the finding that petitioner is entitled to the relief he sought is based solely on the flawed process used by the Board in making its decision to hire the local athletic director.

Accordingly, the initial decision is rejected. The Board is directed to reimburse petitioner in the amount of the stipend for the position during the 1985-86 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 20, 1986
Pending State Board

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JOSEPH KOSLICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner contends that, in rejecting his application for the position of head coach of the Edison High School boys' varsity basketball team and in injecting the school athletic director into the situation as a candidate, "Edison's administrative staff created its own applicant and denied the Board the opportunity to consider and accept or reject [petitioner]." (Petitioner's Exceptions, at p. 1) Petitioner agrees with the ALJ's statement that "[a] board of education may adopt rules and regulations for the conduct of its schools provided the rules are not inconsistent with N.J.S.A. 18A:1-1 et seq. or the rules and regulations of the State Board of Education, N.J.A.C. 6:1-1.1 et seq." (Id., at p. 2, quoting Initial Decision, ante) Petitioner contends, as follows, that the Board by its posting did violate the above:

> "[Petitioner] complied with the Board's rules, but the administrative staff with neither the knowledge nor consent of the Board, changed the rules to fit their own perceptions. This they cannot do. It was the Board who should have considered [petitioner]. By its actions, the administrative staff prevented it from selecting and appointing or rejecting [petitioner]. Such action cannot be permitted." (Id., at p. 2)

Upon review of the record herein, the Commissioner finds unpersuasive petitioner's argument that the Edison administrative staff "denied the Board the opportunity to consider and accept or reject [petitioner]." (Id., at p. 1) Absent board policy to the contrary, which it is noted does not appear in the record herein, it is generally the practice that the superintendent present to the board the candidate who, in the considered opinion of his administrators and screening committee, is best suited for the position available. This function does not detract from a board's right, however, to make the final choice as to whether to appoint that candidate, so long as the criteria by which it makes such determination are not arbitrary, capricious or unreasonable. Ultimately, then, it is the board, not the administrators or

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WITNESSES

Joseph E. Koslick
Edward G. Adams
Robert H. Coward
Leo F. Scanlon
Dr. Joseph A. Kreskey
Charles A. Boyle

EXHIBITS

J-1	Letter, Koslick to Coward, 4/26/81
J-2	Letter, Koslick to Coward, 5/28/81
J-3	Letter, Bradshaw to Koslick, 6/3/81
J-4	Resume, S. Buszka, Jr.
J-5	Resume, R.J. Leary
J-6	Resume, E.C. Nieberlein, Jr.
J-7	Letter, Koslick to Adams, 6/20/85
J-8	Letter, Adams to Koslick, 7/2/85
J-9	Coaching summary, 1959-60 through 1985-86
J-10	Excerpt, Board minutes of 4/13/81
J-11	Letter, Koslick to Coward, 10/19/81
J-12	Posting, head boys' basketball coach at Edison High School, 6/12/85

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The petitioner not having shown by a preponderance of the credible evidence in the record that denial of appointment to the controverted position was in any way improper, I **ORDER** that the petition be **DISMISSED WITH PREJUDICE.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

10 JULY 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

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DEPARTMENT OF EDUCATION

Mailed To Parties:

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Ronald J. Parker /ks
OFFICE OF ADMINISTRATIVE LAW

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was considered a good candidate, removed himself from contention before being interviewed. The options were then reduced to two: the petitioner and the school athletic director. The administration recommended the school athletic director and the Board appointed him to the position.

Having reviewed the parol and documentary evidence in this matter, I further **FIND:**

1. The petitioner applied for the position of head boys' varsity basketball coach in the spring of 1985.

2. The petitioner was interviewed in connection with the position by the school athletic director and the district athletic director.

3. Both directors informed the petitioner they would have difficulty recommending that he be appointed to the position.

4. The school athletic director told the petitioner and district administrators that he (the director) was considering a return to coaching, albeit he had some reservations about being a full-time director and a coach.

5. In answers to interrogatories, the Board did state that the school athletic director was asked by administrators to take the job "in view of only one applicant"; that is, the petitioner.

6. The administration considered the past performance of both candidates and recommended the appointment of the school athletic director.

7. Nothing in the record shows or even supports an inference of any impropriety in the selection and appointment process.

In consideration of the foregoing, I **CONCLUDE** that the petitioner has not made a case. I further **CONCLUDE** that the selection and appointment process took place well within the borders of administrative and board discretion. Quinlan v. N. Bergen Tp. Bd. of Ed., 75 N.J. Super. 40 (App. Div. 1962).

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The superintendent testified he knew of the varsity basketball coaching vacancy after the reduction in force and posting of the position. The superintendent also knew the petitioner was the only in-district applicant. The two athletic directors, the principal, the deputy superintendent and he could not recommend the petitioner. They briefly considered outside applicants, but there were not teaching positions into which they could be hired. He agreed with the recommendation that the school athletic director be appointed, made the recommendation to the Board and the Board accepted it.

Applications normally are in writing, but in cocurricular areas administrators often have to seek persons and often do not require written applications, particularly if time is a factor. The superintendent stated he had no request from the petitioner for an interview and no knowledge of a request by the petitioner that he be interviewed by a Board committee.

III.

A board of education may adopt rules and regulations for the conduct of its schools provided the rules are not inconsistent with N.J.S.A. 18A:1-1 et seq. or the rules and regulations of the State Board of Education, N.J.A.C. 6:1-1.1 et seq. There is no right to employment as a coach, Hamlin v. Dunellen Bd. of Ed., 1982 S.L.D. 687, and tenure does not attach to coaching positions. Ibid. Furlong v. Kearny Bd. of Ed., 1980 S.L.D. 1420. It is well established that cocurricular activities, including interscholastic athletics, are an integral part of the through and efficient program of education guaranteed by the New Jersey Constitution and statutes.

In the present case, the petitioner had been head boys' varsity basketball coach from 1975-76 through 1980-81. He was then removed from the position. Credible testimony established that his removal, less than five years before the present matter developed, was predicated on concerns about the petitioner's ability to develop and motivate his players and not merely his won-lost record. Other credible testimony showed administrators at all levels believed that the Board, many of whose members know the petitioner, would not accept a recommendation to appoint the petitioner to the position again.

Two of the three persons from outside the district who submitted resumes were adjudged inappropriate on the basis of experience and other factors. The third, who

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The witness told the district athletic director, when the position opened, that he wanted a quick posting so that he could see what his options were. He also said he was one of the options. The high school principal knew of the situation and knew of the school athletic director's interest. In June, the school athletic director spoke to the deputy superintendent. He told the deputy superintendent he wanted to be one of the options.

The school athletic director stated he was not sure, in June 1985, that he could coach and be school athletic director. He discussed the pluses and minuses of his own coaching with the deputy superintendent. He denied he said he should be made coach because the petitioner was the only other candidate. He had indicated his interest during the posting period, all administrators knew of his prior stint as coach and all administrators knew of his close working relationship with the principal and the district director.

The high school principal testified. He recalled the release of the petitioner as a coach in 1981. He spoke to the school athletic director about the vacancy and said he wanted a coach who would also be hired to a teaching position. Both he and the director knew this was unlikely at a time of reductions in force. The school athletic director stated he might take the job if the district had no viable candidates. The director expressed some concern about being full-time athletic director and a coach.

The principal stated he believed the administration and Board remembered the petitioner's former service as coach and "would not go for him."

The deputy superintendent testified that he learned of the vacancy in May 1985. He was not involved in the interview process, but was kept abreast of developments. He knew the situation in the district and could not recommend the petitioner. He also knew the school athletic director's background and believed him best qualified for the position. The deputy superintendent also stated that the district has been hard pressed to find coaches at times and has not always required written applications. In any event, a written application would not be required of the school athletic director because he was a known quantity.

The deputy superintendent has known the petitioner since 1967 and believes they have a good professional relationship. He also knows the petitioner's record while an assistant coach at a parochial high school. After the school athletic director's appointment, he and the petitioner discussed the matter briefly in the Edison High School corridor.

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The district athletic director testified that the head basketball coach vacancy arose because the former coach was a victim of a reduction in force and was not rehired. This witness conducted no interviews for the position in May, June, July or August 1985. He did receive resumes (J-4, J-5, J-6). He considered two candidates inappropriate. He called the third candidate and invited him to an interview. The candidate withdrew from consideration before the interview. The petitioner was the only Edison staff member interviewed. The interview occurred on September 9, 1985.

The petitioner spoke about the past and how he could help the program by coming back. After the interview, this witness believed he could not recommend the petitioner because the district had terminated him in 1981, and because the athletic director believed the petitioner had not utilized players properly during his former service as coach. The petitioner's won-lost record, while certainly considered, was not an important criterion in his decision. He was more concerned about motivation and "kids getting a fair shot at developing their skills."

This witness spoke to the athletic director at Edison High School about seeking a coach other than the petitioner. They developed the job posting (J-12). After this witness considered the three persons who submitted resumes, he spoke to the school athletic director about taking the job. This was in late May or early June. The district athletic director believed the school athletic director could do the job.

In September 1985, he spoke to the deputy superintendent and the Edison High School principal. He stated the applicants for the position, including the petitioner, were not satisfactory and mentioned the school athletic director. The deputy and the principal agreed appointing the school athletic director would be the best course for the basketball program and jointly recommended him to the superintendent.

The district director acknowledged that the school athletic director never made written application for the position. The petitioner did not ask the district director for further interviews. This witness does not believe the Board reposted the position.

The school athletic director testified similarly. He interviewed the petitioner and told the petitioner he was interested in the job himself. The petitioner said, "If you want it, you've got it." This witness also told the petitioner he could not recommend him because the witness knew the feelings of the administration and they would not accept a recommendation that the petitioner be appointed.

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the head coach position there effective 1985-86, and he refused that offer because he had applied for the head coach position at Edison High School.

The petitioner was terminated as head basketball coach at Edison High School following the 1980-81 season (J-10). He believes his won-lost record was the reason for his termination. Over a period of some three years in the late 1970's and early 1980's, his principal, the superintendent of schools, the deputy superintendent and the district athletic director spoke to him and expressed concern only over his won-lost record.

In late April 1981, the petitioner wrote to his school athletic director and asked to be considered for the head coach position (J-1) notwithstanding his termination. On May 28, 1981, he wrote again, asking when he would be interviewed (J-2). An assistant superintendent informed him on June 3, 1981 that the vacancy existed only because he had been terminated and that if the Board had had any intention of continuing him in the position, it would not have terminated him on April 13 (J-3).

Later in the same year, he applied for the head girls' basketball coach position (J-11). He recalls no response to his application. He was not appointed to the post.

In 1985, the petitioner responded to a posting of the vacant head boys' basketball coach position (J-12). He was interviewed by the district athletic director for some 30 or 40 minutes in September. The director expressed surprise that the petitioner was applying for the position but agreed to a further interview by the director of athletics for the high school in question.

Both athletic directors told the petitioner they would find it difficult to recommend the petitioner and the Board was unlikely to appoint him. The petitioner stressed the benefits to the program he perceived if he were appointed and emphatically requested interviews with the assistant superintendent, superintendent and any appropriate Board members. The school athletic director said he was considering returning to coaching himself. Later in the month, the petitioner told the school athletic director he wanted "proper treatment, more interviews," especially if the school athletic director were both interviewing and applying. The witness also testified, however, that he was not apprised the school athletic director was an applicant until the director was appointed to the coaching position.

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Municipal Court. No posthearing submissions were filed although a schedule of posthearing submissions was established. Hearing no request from either party for instructions or enlargement of the time for submissions, I closed the record on May 29, 1986.

I.

The parties stipulate the following:

1. The petitioner is a tenured teaching staff member in the Board's employ.

2. On or about June 19, 1985, the petitioner applied for the head boys' basketball coach position which had been posted as vacant.

3. On or about September 9, 1985, the petitioner was interviewed in connection with the position by one of the Board's two athletic directors.

4. On or about September 12, 1985, the petitioner was interviewed by the second athletic director, Robert Coward.

5. On or about October 14, 1985, the Board appointed Coward to the position .

6. On or about October 15, 1985, Coward orally informed the petitioner of the Board's action.

7. Coward at no time submitted a written application for the position.

I adopt the foregoing as findings of **FACT** in this matter.

II.

The petitioner testified that he has been an English teacher in the district for 22 years; he coached boys' junior varsity basketball for 10 years; he was head varsity coach for six years, up to and including the 1980-81 season; he was assistant varsity coach at a parochial school from the 1981-82 season through the 1984-85 season; he was offered

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 797-86
AGENCY DKT. NO. 1-1/86

JOSEPH KOSLICK,
Petitioner,
v.
EDISON TOWNSHIP BOARD OF EDUCATION,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner & Hunter, attorneys)

R. Joseph Ferenczi, Esq., for respondent

Record Closed: May 29, 1986 Decided: July 10, 1986

BEFORE **BRUCE R. CAMPBELL, ALJ:**

Joseph Koslick (petitioner) alleges and the Edison Township Board of Education (Board) denies that he was improperly denied appointment as head basketball coach at one of the Board's high schools for the 1985-86 season. He seeks an order declaring void the assignment of the person appointed and directing he be reimbursed in the amount of the stipend for the position. At issue is whether the petitioner was improperly denied the appointment and, if so, to what relief he is entitled.

The matter was opened and joined before the Commissioner of Education. The Department of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. on February 4, 1986. A prehearing conference was held on April 1, 1986, and the matter was set down for hearing on May 7, 1986, at which time it was heard in the Edison Township

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MANALAPAN-ENGLISHTOWN EDUCATION ASSOCIATION,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

It is observed that no exceptions to the initial decision were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

In the Commissioner's judgment, the record supports the ALJ's findings and conclusions which establish the following:

> ***[T]hat N.J.A.C. 6:3-1.21(c) requires only that the district's chief school administrator act in consultation with tenured teaching-staff members by affording them or their representatives a reasonable opportunity under the circumstances to participate in the process of developing evaluation policies and procedures.*** (emphasis supplied) (Initial Decision, ante)

However, the Commissioner finds that the ALJ has misconstrued the provisions of N.J.A.C. 6:3-1.21(d). Unlike N.J.A.C. 6:3-1.21(c), the provisions of 6:3-1.21(d) are not part of the developmental process but rather this section merely sets forth the mandated requirements for the distribution to all tenured staff of the Board's policies and procedures affecting the evaluation process after consultation has occurred with respect to said policies and procedures. The Commissioner further clarifies that, under State Board regulation 6:3-1.21(d), any amendments to said policies subsequent to adoption shall be distributed within 10 working days.

Accordingly, except as modified herein, the Commissioner affirms the initial decision and hereby orders that the instant Petition of Appeal be dismissed.

COMMISSIONER OF EDUCATION

August 18, 1986

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WITNESSES

For petitioner:

Joseph D. Murphy, president, Manalapan-Englishtown Education Association

For respondent:

Joseph P. Scozzari, superintendent of schools

LIST OF EXHIBITS

R-1	Memo from the superintendent to staff, dated September 30, 1985
J-1	Letter, dated July 24, 1985, from superintendent to president
J-2	Application form for use of school facilities, dated July 31, 1985
J-3	Letter, dated August 5, 1985, from president to superintendent
J-4	Memo from superintendent to president, dated September 10, 1985
J-5	Letter from president to superintendent, dated September 10, 1985
J-6	Memo from superintendent to senior building representatives, dated September 13, 1985
J-7	Minutes of the Board of Education on September 10, 1985
J-8	Minutes of the Board of Education on September 26, 1985
J-9	Letter from superintendent to president, dated September 30, 1985
J-10	Teacher evaluation forms
J-11	Teacher Observation Report

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

July 8, 1986
DATE

RICHARD J. MURPHY, ALJ

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Under the totality of the circumstances above, I **CONCLUDE** that a reasonable opportunity was afforded to the teaching-staff members through their representatives to engage in consultation with the superintendent concerning the development of the evaluation forms in question and that they failed to take advantage of that opportunity. The fact that the I.C. had been previously used to discuss such issues and was suggested as a forum in this instance does not compel a different result because it was not required by the regulation nor, moreover, was the opportunity to present the matter to the I.C. denied to the teachers or their representatives, who had over a month to do so after they returned to school.

DISPOSITION

On the basis of the above findings of fact and conclusions of law, it is recommended that the action of the respondent Board in adopting evaluation forms be affirmed and the petition of appeal dismissed.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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and amendment process which was to be completed 10 working days after October 1, and the superintendent made clear that he was seeking input from the staff for further deliberations in August. That communication also indicated that the I.C. had been advised in June that an evaluation form was being developed. The superintendent acceded to the request of the president of the Association that consideration of the form be delayed until the full staff returned to school from summer vacation. On August 25, a month after the forms were sent to the union president, there was a general membership meeting to discuss contract negotiations. The proposed evaluation forms were not discussed at that meeting, or even distributed to the assembled teachers, who were understandably concerned with their contract and the possibility of some job action. Petitioner's president chose not to take advantage of that opportunity.

Indeed, it was not until September 10 that the president requested additional forms to be distributed, which were provided, and suggested a process for consideration whereby they would be submitted to the I.C. at its first meeting. On September 10, the president was plainly advised that the forms were to be considered by the Board on September 26, and that he was to respond at his earliest convenience "as not to lose the opportunity of a teacher input." (J-4). Although the superintendent acquiesced to the president's request for additional forms, he did not specifically agree to withhold consideration of this matter by the Board pending presentation to the I.C.

This, as well as the general issue of the form of the teacher input, was justifiably left to the president of the petitioner Association. The Board tabled the matter of the forms at its September 10 meeting in light of President Murphy's request. Over two weeks later, without any further input from President Murphy or the teaching-staff members, the matter was again placed on the agenda of the Board's September 26 meeting, several days before the October 1 deadline established by the regulation. Although the forms were adopted at that meeting, without teacher input, there remained some 10 working days after October 1 in which amendments could have been made. The record does not reflect any effort by the teachers' representatives to take advantage of this opportunity to provide input on the forms. Notwithstanding the fact that a job action of five days duration occurred at the beginning of school, the facts indicate that the teaching-staff members and their representatives had over a month after returning to school to provide input and they chose not to do so.

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administrator, that there be "cooperation" with teaching-staff members as set forth in N.J.A.C. 6:3-1.18. All that is required is consultation and the precise means by which this is to take place is not specified. In the absence of any definition of the term consultation, the plain and ordinary meaning of the term should be given effect. Consultation is defined in Webster's Third New International Unabridged Dictionary (1976) as being:

> 1: a council or conference (as between two or more persons) usu. to consider a special matter (holding frequent ~s with his lawyer to discuss the case); specif: a formal deliberation between two or more physicians on the diagnosis of a disease or its treatment in a patient.
>
> 2: the act of consulting or conferring: deliberation of two or more persons on some matter (the two firms were in ~over the construction of the new airplane).

The plain and ordinary meaning of the term "consultation" in the regulation is clearly meant to encompass the more general act of consulting or conferring by the way of the deliberation of two or more persons on some matter, and is not specifically limited to a given council or conference. The regulation refers to the ongoing process of being involved "in consultation" on a particular subject. It does not require any specific act of consultation, such as a council or conference or any form of meeting but establishes the general requirement that policies and procedures be developed in consultation with tenured teaching-staff members.

On that basis, I **CONCLUDE** that N.J.A.C. 6:3-1.21(c) requires only that the district's chief school administrator act in consultation with tenured teaching-staff members by affording them or their representatives a reasonable opportunity under the circumstances to participate in the process of developing evaluation policies and procedures. I further **CONCLUDE** that the only specific form of consultation required by the regulation is that the evaluation policies are to be distributed to each tenured teaching-staff member no later than October 1, with a period of 10 working days for amendments.

The specific question, then, is whether the actions of the superintendent afforded such a reasonable opportunity to develop evaluation forms in consultation with the teaching staff. A review of the facts indicates that such a reasonable opportunity was afforded and I so **CONCLUDE** the evaluation forms were made available to the president of the petitioner Association on July 24, 1985, some 11 weeks before the final adoption

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reasonably adequate opportunity is provided for tenured teaching-staff members to give input. Respondent argues that such a reasonable opportunity was afforded in this instance and cites the fact that the proposed evaluation forms were sent to the union president on July 24, 1985 and consideration of the form was delayed from August until the end of September to allow teachers' input. The respondent further argues that there was no requirement that the I.C. be used. In addition to the fact that consideration of the forms was postponed from August to September 10, and then again to September 26, to allow for teacher input, the Board notes that the superintendent cooperated in all respects with the Association, including providing sufficient forms for representative members on September 13. Under these circumstances, respondent argues, a reasonable opportunity was afforded to consult and the Association failed to take advantage of it in a timely way.[2] Given the time constraints of the October 1 deadline, respondent claims that any expectation that the I.C. would be utilized was not reasonable or realistic.

DISCUSSION AND CONCLUSIONS OF LAW

The issue is whether the teacher evaluation form in question was developed in consultation with tenured teaching-staff members within the meaning of N.J.A.C. 6:3-1.21 as set forth above. For the reasons set forth below, I **CONCLUDE** that a reasonable opportunity for consultation was afforded to the petitioner Association in this instance.

The threshold question involves the meaning of the term "consultation" which is not defined in the regulation. N.J.A.C. 6:3-1.21(d) does make it clear that part of the process of consultation shall involve the distribution of annual evaluation policies to tenured teaching-staff members no later than October 1, with a period of 10 working days after adoption to be allowed for amendments. The regulation further provides for meetings between supervisors and teachers in the form of annual summary conferences. With respect to the requirement of consultation in the development of the forms, however, there is no requirement expressly stated that the chief school administrator meet and confer with tenured teaching-staff members to develop evaluation forms, nor is there any requirement, as is the case with the functions of the school business

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[2] It is emphasized that the regulation provides that amendments made be made within 10 days after adoption, which is required by October 1 (N.J.A.C. 6:3-1.21).

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> (a) Every district board of education shall adopt policies and procedures requiring the annual evaluation of all tenured teaching staff members by appropriately certified personnel. . . .
>
> (c) The policies and procedures shall be developed under the direction of the district's chief school administrator in consultation with tenured teaching staff members. . .
>
> (d) These policies shall be distributed to reach tenured teaching staff member [sic] no later than October 1. Amendments to the policy shall be distributed within 10 working days after adoption. [Emphasis added].

Petitioner specifically argues that the I.C. has been used in the past as a means for the superintendent to meet with the Association to develop policies and forms for annual review and observation. As such, there was a reasonable expectation on the part of the president of the union that this practice would be utilized in the development of new forms, the need for which was known well before the close of school year 1985. Citing the fact that the forms were developed by the end of the school year but not submitted to the Association until the end of July, petitioner argues that the superintendent unnecessarily rushed to judgment and failed to utilize the I.C. as the standard means for consulting with the teaching staff members.[1] Petitioner also notes the intense state of contract negotiations occurring over the summer and contends that this climate made the accepted use of the I.C. in consultation all the more appropriate and desirable.

The respondent Board argues that no specific form of consultation is required by the regulation, which does not set any procedure by which the superintendent is to consult. Nor does it define the word "consultation," which absent a restrictive definition such as "meet and confer" may take various oral or written forms, provided that a

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[1] The petitioner seeks by way of relief a declaration that the adoption of the forms for evaluation was not in accord with N.J.A.C. 6:3-1.2, as well as a direction that the respondent Board enter into consultation with the tenured teachers for the development of such forms. There is no allegation that the form currently in effect is substantively incorrect or inadequate. The Association is thus not seeking to challenge by this petition any evaluations performed pursuant to the new forms, but is merely seeking to ensure that the required consultation take place.

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The minutes of the meeting of September 26 reflect that the evaluation forms were considered and also contain a note that "The teaching staff was consulted on these forms and was given the opportunity for input. This approval is necessary prior to October 1 as required in N.J. [sic] 6:3-1.21." Although President Murphy was present at the meeting, the minutes do not reflect any participation by him on the issue of the forms. Murphy was formally advised of the adoption of the forms by the superintendent on September 30.

The facts further reflect that the matter was never submitted to the I.C. and that no input was provided by the teaching staff through the petitioner Association prior to the adoption of the forms on September 26. President Murphy testified that it was his understanding, based upon correspondence and conversations with the superintendent, that the matter would be submitted to the I.C. and that the required consultation would take place in that context. His basis for this claim is that the superintendent acquiesced in delaying consideration of the matter until the return of the full staff in September, as well as the fact that additional forms were provided by the superintendent after Murphy suggested use of the I.C. on September 10. The I.C. had in past years been used to assist in the development of policies and forms for annual evaluations. Murphy concedes that the superintendent did not expressly agree either orally or in writing that the matter would be submitted to the I.C., which had been made aware that new forms were being developed before the end of the school year in June. Murphy further stated that contract negotiations between the respondent and the Board were intense in the summer of 1985 and directly involved the superintendent. There is no disagreement that there was general unhappiness with the evaluation forms previously in use. President Murphy further testified that the new forms were not submitted for consideration at the general meeting of the petitioner Association in August because the organization was preoccupied with more pressing matters of contract negotiations.

There is no dispute as to the above facts and I so **FIND**.

ARGUMENTS OF THE PARTIES

Petitioners contend that the evaluation forms in question were not developed by the superintendent in consultation with teachers as required by N.J.A.C. 6:3-1.21 which provides, in pertinent part that:

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On September 10, 1985, Superintendent Scozzari forwarded the following memo to President Murphy:

> In August I sent you copies of the newly proposed teacher observation form and annual performance review for input. At that time you indicated you would get back to me to set up a meeting for teacher input prior to Board adoption on September 26 for implementation this year. Time is getting very short for this meeting and I suggest you get back to me at your earliest convenience so as not to lose the opportunity for teacher input. [Emphasis added] (J-4).

That same day President Murphy wrote to the superintendent requesting additional copies of the proposed evaluation form and suggesting that the teaching staff be allowed to provide input with a method which would use the following steps:

A. Review document

B. Give imput [sic] to senior Reps.

C. Senior Reps forward "B" to Miss Fanelli.

D. Miss Fanelli presents "B" to I.C. [insturctional council] at its first meeting.

Please advise us on these suggestions and requests.

In response, the superintendent forwarded evaluation forms on September 13 to senior building representatives, indicating that he was doing so at the request of President Murphy and that he was seeking teacher input through the Association.

On the evening of September 10, 1985, the respondent Board met and considered the evaluation forms. The minutes reflect that:

> The Manalapan-Englishtown Education Association (MEEA) was asked for input on the teacher evaluation and performance review instruments in August. Did not receive response and sent another memorandum. They have asked for further information. Mr. Scozzari intends to send it to the Board for inclusion on the September 26, 1985 agenda whether or not input is received. [Emphasis added] (J-7).

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PROCEDURAL HISTORY

A verified petition was filed on December 23, 1985, with the Department of Education and an answer received on January 27, 1986. The matter was certified as a contested case and transmitted to the Office of Administrative Law for hearing on January 29, 1986. A prehearing conference was conducted on March 18, 1986, and a hearing conducted in Marlboro on May 1, 1986, at which time the record was closed.

FINDINGS OF FACT

The material facts are not in dispute. At its regular meeting on September 26, 1985, the respondent Board adopted a teacher-observation form and annual-performance review as required by N.J.A.C. 6:3-1.21, which was to be distributed to tenured teaching-staff members no later than October 1, 1985. Some three months earlier, on July 24, the district superintendent, Mr. Joseph Scozzari, had informed the union president, Mr. Joseph Murphy (no relation) that the district was considering a teacher-observation and annual-performance review form for implementation by September 30, 1985. Superintendent Scozzari also enclosed copies of the proposed changes and requested teacher input. He further indicated that the fact that the administrative staff was working on evaluation forms was made known in June 1985 to the Instructional Council (I.C.), a policy advisory group consisting of three administrators, three teachers and the superintendent as a nonvoting chair. The purpose or the I.C., which was created by contract, is to give advice to the Board on various educational issues. It had been utilized in past years to enable the superintendents to consult with teachers on evaluation forms. Superintendent Scozzari specifically requested that input be given from the teaching staff to be included in board deliberations in August (J-1).

President Murphy responded on August 5, and, noting that it was difficult for the Association to give input on the forms in August, requested a delay in the decision on the new form until the full staff returned to school. On August 25, the petitioner held a general membership meeting concerning contract negotiations with the respondent Board at which time the subject of the teacher-evaluation forms was not discussed nor placed on the agenda. Contract negotiations with the Board were unsuccessful and a five-day strike resulted, delaying the start of school in September.

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INITIAL DECISION
OAL DKT. NO. EDU 630-86
AGENCY DKT. NO. 428-12/85

MANALAPAN-ENGLISHTOWN EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

Arnold M. Mellk, Esq., for petitioner (Katzenbach, Gildea & Rudner, attorneys)

Eric Martin Bernstein, Esq., for respondent (Gerald L. Dorf, attorney)

Record Closed: May 1, 1986 Decided: July 8, 1986

BEFORE **RICHARD J. MURPHY,** ALJ:

STATEMENT OF THE CASE

Petitioner, Manalapan-Englishtown Education Association (Association), challenges the action of the respondent Board of Education of the Manalapan-Englishtown School District (Board) in adopting forms for the annual evaluation of tenured teaching-staff members. The issue is whether the policies and procedures were developed in consultation with tenured teaching-staff members as required by N.J.A.C. 6:3-1.21(c). This opinion concludes that the respondent Board afforded the petitioner a reasonable opportunity for consultation in the adoption of the teacher-evaluation forms in question.

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MATAWAN REGIONAL TEACHERS ASSOCIATION, BOROUGH OF MATAWAN, AND IRIS ALBIN, ET AL.,	:	
PETITIONERS-APPELLANTS.	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 18, 1986

For the Petitioner-Appellant Borough of Matawan, James J. Cleary, Esq.

For the Petitioners-Appellants Matawan Regional Teachers Association and Individual Petitioners, Oxfeld, Cohen and Blunda (Mark J. Blunda, Esq., of Counsel)

For the Respondent-Respondent, DeMaio and DeMaio (Vincent C. DeMaio, Esq., of Counsel)

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

Pending N.J.Superior Court

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Consequently, except as modified herein, the Commissioner adopts the findings and determinations of the ALJ as to Counts 1, 2, 8, 11, 12 and 13 of the partial initial decision dated July 7, 1986 and of the Order dated May 22, 1986. The dismissal with prejudice of Counts 1, 2, 8, 11, 12 and 13 leaves remaining for determination by the ALJ eight counts of the Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 18, 1986

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Commissioner's review of the record indicates not one scintilla of evidence directly or indirectly linking Marilyn Brenner's employment with NJASA with her affirmative vote on the reorganization plan. Moreover, the Association and Albin et al. have attempted to present, by way of exception, an entirely new and broader claim, i.e., a conflict of interest for a specific board vote compared to a conflict of interest for board membership. The Commissioner must emphasize that one may not raise claims by way of exception that were not considered during the course of the hearing.

The Commissioner also finds merit in the reply exception raised by the Board that since the Association and Albin et al. are for the first time arguing that employment of a Board member by NJASA is a per se disqualification from Board membersip, that Board member must have been made a respondent. Without so doing, the Commissioner agrees with the Board that said Board member would have been deprived of due process.

COUNT 13

Concerning Count 13, which avers that Board Member Theodore Endresen and Alphonse DeRosa are in conflicts of interest because of the employment by the Board of their spouses, the Commissioner notes no exceptions filed by the Association and Albin et al. concerning Count 13. Further, the Commissioner's review of the record reveals no basis for disputing the findings and determination of the ALJ in the partial initial decision, ante, which state, inter alia:

1. The mere fact of employment by a board of a sitting board member's spouse does not, standing by itself, create an intolerable conflict of interest.

   See State Board decision In the Matter of the Election of Dorothy Bayless to the Board of Education of the Lawrence Township School District, 1974 S.L.D. 603.

2. Merely because Endresen and DeRosa support Plan C and Plan C is the superintendent's recommendation, and the superintendent recommended to the full Board the employment of Endresen's and DeRosa's spouses, does not lead to a direct demonstrable conflict of interest on the part of Endresen and DeRosa.

   See Warren Larsen v. Board of Education of the Twp. of Woodbridge, decided by the Commissioner March 28, 1985.

Accordingly, Count 13 is dismissed with prejudice.

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other basis for waiving the 90-day rule is where there would otherwise be a manifest injustice. See N.J.A.C. 6:24-1.17. The Commissioner sees no basis for relaxing the 90-day rule under this exception because the circumstances going rise to the instant matter have existed since 1984.

Thus, the Commissioner does not agree with the ALJ that N.J.A.C. 6:24-1.2 is inapplicable in the instant matter because "[a]n illegal conflict due to relationships may not be valid through the mere passage of time." (Partial Initial Decision, ante) He therefore finds that Counts 12 and 13 are barred by application of N.J.A.C. 6:24-1.2. Similarly, the Commissioner rejects the conclusion of the ALJ on page 11 of the Order dated May 22, 1986 which states:

> "That the facts and circumstances giving rise to Counts 12 and 13 may have been known to petitioners at or about the same time the original Petition of Appeal was filed does not now bar the filing of Counts 12 and 13 because the initial subject matter, Plan C, remains the same and the amendments clearly relate back to the filing of the initial Petition of Appeal. Consequently, I CONCLUDE that N.J.A.C. 6:24-1.2 does not apply to the filing of Counts 12 and 13 of the Amended Petition of Appeal filed on April 7, 1986."
>
> (Order, dated May 22, 1986, at p. 11)

The Commissioner finds that the 90-day rule does apply to Counts 12 and 13 and, thus, they are dismissed with prejudice.

COUNT 12

Notwithstanding his ruling concerning N.J.A.C. 6:24-1.2, the Commissioner, in reaching the merits of Count 12, adopts as his own the judgment of the ALJ concerning the alleged conflict of interest between Marilyn Brenner, Board Member, and the Board of Education as a result of her employment by the New Jersey Association of School Administrators (NJASA). The Commissioner finds this Count as well as Count 13 to be entirely without merit. As noted by the ALJ, "a conflict of interest must be immediate, definite and capable of demonstration. A conflict of interest may not be shown if the asserted conflict is remote, uncertain, contingent or speculative such that persons of ordinary capacity and intelligence would not be influenced by it. See Warren Larsen v. Bd. of Ed. of Twp. of Woodbridge, [decided by the Commissioner Mar. 28, 1985]." (Partial Initial Decision, ante) The Commissioner agrees with the ALJ that "petitioners have failed to demonstrate by a preponderance of credible evidence that the relationships between and among Board members (sic) Marilyn Brenner, Superintendent of Schools Kenneth Hall, the Executive Director of the New Jersey Association of School Administrators, James Moran, and Margaret Moran Hom are such so as to invalidate the affirmative vote case for Plan C by Marilyn Brenner." (Partial Initial Decision, ante) The

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principle was "applied by Schwartz in a manner inconsistent with the definition of the principle by the American Institute of Real Estate Appraisers." (Partial Initial Decision, ante) Consequently, the Commissioner agrees with the conclusion of the ALJ regarding Count 11 that

> In consideration of the foregoing general background facts, the undisputed background facts giving rise to Count 11, and the existing law, I CONCLUDE that the Matawan-Aberdeen Regional School District Board of Education gave due consideration to Schwartz's appraisal of the market value of the controverted properties and, upon such due consideration, I CONCLUDE that the Board acted reasonably in setting a minimum price for both properties of $800,000, and I further CONCLUDE that the Board acted reasonably, lawfully and within its discretion when it accepted the bid of $826,000 for the sale of both subject properties. Consequently, I CONCLUDE that petitioners have failed in their burden of proof to establish the Board's acceptance of $826,000 for both subject properties is so far below the appraised market value of the properties so as to constitute a gift of public funds or property, fraud, or favoritism. Accordingly, this Count is DISMISSED.
>
> (Partial Initial Decision, ante)

The Commissioner does not agree with the finding of the ALJ in the partial initial decision at page 19, however, concerning the application of the 90-day rule to Counts 12 and 13. The Lavin Doctrine, which, when applicable, negates application of N.J.A.C. 6:24-1.2 and permits a new cause of action for each year the alleged violation continues, arises only when a statutory right is involved, and only when there is no "relationship to the services to be rendered [by petitioner] as an employee" and the statutory entitlement. See Lavin v. Hackensack Bd. of Ed., 90 N.J. 145, 150 (1982). See also Joyce Weir v. Board of Education of the Northern Valley Regional High School District, Bergen County, decided by the Commissioner July 20, 1984, aff'd State Board March 6, 1985, aff'd Superior Court, Appellate Division, April 9, 1986; Charles R. Stockton v. Board of Education of the City of Trenton, Mercer County, decided by the Commissioner November 19, 1984, rev'd State Board April 3, 1985, rev'd 210 N.J. Super. 146 (App. Div. 1986); James J. Bree v. Board of Education of the Township of Boonton, Morris County, decided by the Commissioner August 6, 1984, aff'd/rev'd State Board February 6, 1985, aff'd/rev'd Superior Court, Appellate Division, January 7, 1986; Edward Brown v. Board of Education of the Sussex County Vocational-Technical School District, Sussex County, decided by the Commissioner August 11, 1983, rev'd State Board May 2, 1984, rev'd/rem'd Superior Court, Appellate Division, April 4, 1985, decided by the Commissioner on remand July 11, 1986. However, the circumstances under which such an exception applies are not present in the instant matter. The only

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***

A. I didn't make an appraisal of this property. Based on Mr. Schwartz's report, I'd have to say there's no value to the property.

Q. No value?

A. Zero. Because Mr. Schwartz is reciting a value of $131,000 to the land manner (sic) in it is in a discounted cash flow on it based on the sale of 40 lots, there's no consideration for the buildings which would probably cost #330 (sic) to remove them at which case the value is zero which is ludicrous. I told you if there is anything I don't agree with with this report [P-2] is page 46. (Tr. V-59-60)

Exhibit P-2 at page 46 addresses land value estimates. Mr. Maffeo's earlier testimony regarding page 46 indicates that:

A. Yes. He's going through a subdivision analysis. He's using a discounted cash flow analysis which is an acceptable method of doing land surveys, but there is no mention here of the improvements on the property. So I don't know where he's coming from on this page, page 46. The property.

Q. Did I understand -- I'm sorry.

A. The properties improved were 12 school buildings and if he says if they were vacant he did not have a chance to talk about this, but are you asking me there's anything I am in disagreement with, it's this page here, his methodology of planning the building merge is an acceptable way of doing a market data approach. (Tr. V-37)

The Commissioner finds this testimony, in addition to the testimony of Mr. Maffeo concerning the "highest and best use real estate principle" (Tr. V-51-52), persuasive regarding the reply exception raised by respondent that "Petitioner's own expert conceded on cross-examination that the Schwartz appraisal and his own approval of it was not consistent with law in that the appraisal was not based upon the existing zoning." (Reply Exceptions, at p. 3) The current zoning is residential, not commercial. The Commissioner agrees with the ALJ in light of this testimony that "Schwartz's appraisal was based on the assumption a variance would be granted***." (Partial Initial Decision, ante) The Commissioner's review of the testimony comports with the ALJ's finding that the highest and best use real estate appraisal

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COUNT 8

The Commissioner adopts as his own the findings and determination rendered by the ALJ on page 5 of the partial initial decision as to Count 8, which "essentially alleges that Plan C will promote and exacerbate pupil imbalance along racial lines which exists in the school district as a whole because the Board's Cliffwood School, assertedly the oldest and most substandard building in the district, will remain open." (Partial Initial Decision, ante) The Association and Albin et al. provide nothing by way of arguments in their exceptions, nor is there anything contained in the partial transcript provided to convince the Commissioner to reverse the findings of the ALJ. Therefore, the Commissioner adopts the conclusion of the ALJ that petitioners have failed "to make out a prima facie case that Plan C will promote and exacerbate pupil imbalance along racial lines or that Plan C is in violation of the Order issued by the Commissioner during 1980 or, in any way, is in violation of New Jersey laws against discrimination." (Partial Initial Decision, ante) Count 8 of the instant Petition of Appeal is accordingly dismissed with prejudice.

COUNT 11

The Commissioner adopts as his own the findings and determination of the ALJ rendered in the partial initial decision, ante, as to Count 11, which alleges that the Board, despite having received a written professional appraisal in December 1984, assessing the Broad Street properties in excess of $1.5 million, accepted a bid and entered a contract for the sale of the properties in the amount of $826,000, a sum so low, it is averred, as to constitute "an illegal gift." (Partial Initial Decision, ante)

The Association and Albin et al. rely on the Schwartz appraisal for their proposition that the two properties in question were undersold. In concurring with the ALJ's conclusion that the accepted bid of $826,000 was a reasonable selling price considering the zoning of the properties, the Commissioner finds particularly enlightening the testimony of A. Fred Maffeo, rebuttal witness for the Association and Albin et al. Mr. Maffeo himself agreed that the full value of the Schwartz appraisal would be valid only if a zoning change were accomplished. In response to the Board counsel's inquiry on cross-examination:

> Q. You're saying that if the zoning were changed, that you would accept the figures which you already testified to as being the agreement with Mr. Schwartz?
>
> A. Yes, sir.
>
> Q. Now, my next question is what value do you place on this site if there is no change in the zoning?

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As to Exception II, ante, the Board replies that this exception "completely misconceives the issue since Petitioner's own expert [Maffeo] conceded on cross-examination that the Schwartz appraisal and his [Maffeo's] own approval of it was not consistent with law in that the appraisal was not based upon the existing zoning." (emphasis in text) (Reply Exceptions, at p. 3) The Board cites its post-hearing brief for its assertion that an appraiser's opinion is not binding on a jury or his client and must stand on its own merits. The Board avers the partial initial decision properly concludes that it gave to the appraisal all of the weight to which it was entitled.

Point III of the Board's reply exceptions addresses the application for a stay by the Association and Albin et al. Such reply exceptions will not be addressed since the Application for Injunction and Stay of Initial Decision was not properly before the Commissioner.

The Board prays that the partial initial decision be affirmed.

Having reviewed the record in this matter so far as it has been developed, the Commissioner will address the issues raised in the partial initial decision in the same order as they appear therein. First, however, he will address Counts 1 and 2, which were decided by the ALJ in his Order dated May 22, 1986.

COUNTS 1 AND 2

Count 1 of the Petition of Appeal avers, inter alia, that the 5 to 4 vote of the Board to adopt and implement a new school organization policy violates Bylaw No. 030 of the Matawan-Aberdeen Regional School District Board of Education in that it was not passed by a 2/3 vote of the full Board and, thus, is illegal, ultra vires and of no force and effect. (Petition of Appeal, at pp. 18-19) Count 2 of the Petition of Appeal avers, inter alia, that the October 28, 1985 vote of the Board, adopting a new policy on school organization, violates official ByLaw No. 030 in that it was not presented at the mandatory two public meetings and, thus, is illegal, ultra vires and of no force and effect. (Petition of Appeal, at pp. 21-22)

The Commissioner notes for the record that no exceptions were filed to the Order dated May 22, 1986, nor was a motion for interlocutory review filed with the Commissioner following the issuance of said Order. Therein, the ALJ granted summary decision in favor of the Board on Counts 1 and 2 of the Petition of Appeal filed against it in regard to the controverted Plan C. The Commissioner concurs for the reasons stated therein. Consequently, Counts 1 and 2 of the Petition of Appeal are dismissed with prejudice "as being allegations not arising to the level of a justiciable controversy or dispute under school law for which relief could be granted." (Order, dated May 22, 1986, at p. 9)

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the findings of the Board's expert. To accept the ALJ's determination, they argue, would be to allow the Board "to disregard the legal advice of their board solicitor and will bear no liability for their violation of the stated law." (Exceptions, at p. 8) They respectfully submit that the Commissioner must reject the initial decision of the ALJ and must void the sale of the Broad Street properties.

Petitioner Borough of Matawan takes no exception to the recitation of facts and introductory comments contained on pages 12 through 18 of the initial decision. However, it does except to the ALJ's discussion at pages 19-20 wherein, inter alia, it is stated that "I am aware of no authority which would prohibit a board member from being an employee of an association in which a board employee is the chief officer." (Initial Decision, ante) Petitioner Borough of Matawan avers that the method of analysis contained in certain selected statements of the ALJ on pages 19 and 20 is inappropriate to the facts in this case. Petitioner Borough of Matawan further asserts that ample authority exists upon which to base a finding of a conflict of interest and to invalidate the affirmative vote of Marilyn Brenner on Plan C. Relying on Aldom, supra, Matawan argues that "[t]he facts outlined by Judge McKeown leave no doubt of the financial interdependence of Brenner, Hall, Moran and Hom. The circumstances cast grave doubt upon the ability of Brenner to exercise her best judgment on behalf of the public." (Matawan's Exceptions, at p. 3) Matawan suggests that the public is entitled to have effective representation free from conflict of interest, actual or apparent. It requests that the partial initial decision rendered in this case not be adopted as the final decision by the Department of Education.

The Board did not file exceptions to the partial initial decision. With respect to the exceptions filed by Matawan, the Board relies on its original brief which is a part of the record and which is incorporated herein by reference.

The Board's reply exceptions initially note that the exceptions of the Association and Albin et al. were not timely filed. At Point II of its reply exceptions, the Board posits that those exceptions are without merit. As to Exception I, ante, the Board replies that the pleadings and pre-trial order raised the issue of whether a conflict of interest invalidated the vote of Board Member Brenner on Plan C and that its post-hearing brief, which is incorporated herein by reference, argues that there is no connection between Brenner's employment by NJASA and Plan C, direct or indirect. The Board suggests in reply exceptions that they now seem to be arguing for the first time that employment of a school board member by the NJASA is a per se disqualification from board membership, an argument not made heretofore. The Board avers that on any such issue the board member must have been made a respondent, which was not done here, and would have been entitled to personal counsel, which she did not have here. The Board argues that the ALJ "properly decided this issue and Petitioner should not, at this late date be permitted to change the issue and deprive the Board Member of due process." (Reply Exceptions, at p. 2)

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> 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.

To the same effect see Griggs v. Princeton Borough, 33 N.J. 207 (1960).

The Courts have further declared it to be essential not only that the judgment of the public body be a righteous one, but also that it be rendered "in such a manner as will beget no suspension of the pureness and integrity" of the action. Aldom v. Borough of Roseland, supra; Hochberg v. Borough of Freehold, 40 N.J. Super. 276, 284 (App. Div. 1956). (Exceptions, at p. 5)

The Association and Albin et al. query, "Would not her employment by James Moran and Kenneth Hall tend to influence her judgment concerning employment of Mr. Moran; employment of Mr. Moran's daughter; salary and evaluation of Kenneth Hall and voting on matters of grave concern to the Superintendent of Schools, who has such a large role in her gainful employment?" (Exceptions, at p. 6) They submit that a reasonable member of the public would think so and submit that the recommendations of the ALJ in this regard are "absolutely repugnant to our legal and moral standards. They must be rejected by the Commissioner of Education." (Exceptions, at p. 6)

II. IT WAS UNREASONABLE FOR THE BOARD AND ALJ TO SUBSTITUTE THEIR LAY OPINIONS FOR THE EXPERT OPINIONS OF TWO REAL ESTATE APPRAISERS AND TO AUTHORIZE SALE OF PUBLIC PROPERTY FOR ONE-HALF OF THE APPRAISED VALUE.

The Association and Albin et al. submit the adoption of the recommendation of the ALJ will establish a disastrous standard of law in this State if allowed to stand. They suggest it is arbitrary, capricious and unreasonable that the Board might, without rational foundation, reject expert opinion and sell public property at 50% of fair market value. They contend it is undisputed that the appraisal took into consideration that the property would require a variance and it specifically evaluated the facts to be considered and the likelihood of obtaining such a variance. They aver they presented testimony from another real estate expert, who confirmed

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B. Margaret (Moran) Hom's contract as Supervisor of Purchasing for the Matawan-Aberdeen Board of Education. Marilyn Brenner recommended and voted for the hire of the daughter of her employer. She did not disclose the relationship to the Board prior to its vote.

C. Kenneth Hall's contract as Superintendent of Schools for Matawan-Aberdeen. Marilyn Brenner recommended and voted for a salary increase for the Superintendent of the Matawan schools at the same time that he was President of the organization that employed her. At the same time, she failed to carry out her duty as Personnel Chairperson by neglecting to evaluate the job performance of the Superintendent, despite public demand by the Board of Education. (emphasis in original) (Exceptions, at p. 4)

The Association and Albin et al. argue that "[t]here can be no question but that Marilyn Brenner was caught in an intolerable conflict of interest between her duty as a member of the Matawan-Aberdeen Board of Education and her obligations as an employee of the New Jersey Association of School Administrators." (Exceptions, at p. 6) They contend that the standard of law in reviewing when public figures are involved with a conflict of interest is best enunciated in the State Board's decision in Woodstown-Pilesgrove Regional Board of Education v. John J. Ketas, 1980 S.L.D. 1563, which states:

> This section [N.J.S.A. 18A:12-2] and related statutes incorporate the fundamental common law rule that:
>
> > Public servants shall not be interested, directly or indirectly, in any contract made with public agencies of which they are members. Public service demands an exclusive fidelity. The law tolerates no mingling of self-interest. Ames v. Board of Education of Montclair, 97 N.J. Eq. 60, 64 (Ch. 1925).
>
> The rule applies not only to a pecuniary interest, but to a psychological or personal interest as well. As the Court said in Aldom v. Borough of Roseland, 42 N.J. Super. 495, 502 (App. Div. 1956):
>
> > 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

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MATAWAN REGIONAL TEACHERS ASSOCIATION, BOROUGH OF MATAWAN, AND IRIS ALBIN ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record, partial initial decision dated July 7, 1986, Interim Order dated May 22, 1986, and Application for Injunction and Stay of Initial Decision submitted to the Commissioner on July 23, 1986 have been reviewed. Exceptions to the Partial Initial Decision filed by Petitioners Matawan Regional Teachers Association and individual petitioners (hereinafter "Association and Albin et al.") technically were submitted beyond the timeline established by N.J.A.C. 1:1-16.4a, b and c. However, the Commissioner granted an extension for the filing of same. Petitioner Borough of Matawan's exceptions were timely received, as were the Board's reply exceptions.

The Association and Albin et al.'s Application for Injunction and Stay of Initial Decision, however, is procedurally defective insofar as it is a request for a stay of a recommended decision by an ALJ, which has no force in law. The Commissioner therefore will not consider such application in rendering his decision.

The Association and Albin et al.'s exceptions posit two points.

> I. THE ADMINISTRATIVE LAW JUDGE INCORRECTLY CONCLUDED THAT BOARD MEMBER BRENNER DID NOT HAVE AN INDIRECT INTEREST IN A CONTRACT WITH THE RESPONDENT BOARD OF EDUCATION.

Citing N.J.S.A. 18A:12-2, their post-hearing brief, which is incorporated herein by reference, and the ALJ's findings of fact, they aver that Marilyn Brenner had a blatant and direct interest in each of the following contracts:

> A. James Moran's contract as a paid negotiator for the Matawan-Aberdeen Board of Education. James Moran, while under contract to the Board of Education, effectively hired its member and Personnel Chairperson, Marilyn Brenner, and approved a 44% salary increase for her.

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For the foregoing reasons, the Board's motion to dismiss Counts 12 and 13 of the Amended Petition of Appeal is **DENIED.** The matter shall proceed to plenary hearing as scheduled to commence June 2, 1986.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** either upon interlocutory review pursuant to N.J.A.C. 1:1-9.7 or at the end of the contested case, pursuant to N.J.A.C. 1:1-16.5.

May 22, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

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votes by the fact their respective spouses are employed by the Board. The employment of Board member Endresen's spouse is not specified, while it is alleged that Board member DeRosa's spouse is employed in a "teaching position within the district." Petitioners allege that both Board members were influenced to cast affirmative votes for Plan C by virtue of "* * * his spouse's employment relationship with the Board and his pecuniary connection with Superintendent of Schools Hall." No specifications are alleged regarding the 'pecuniary connection' with the superintendent other than the mere fact of employment by the Board.

The Board seeks dismissal of Counts 12 and 13 through the application of N.J.A.C. 6:24-1.2 which requires a petition to be filed within 90 days of the complained of action and because the facts as alleged do not constitute a conflict of interest as a matter of law.

I disagree with the arguments advanced by the Board. First, N.J.A.C. 6:24-1.2 applies to new and separate causes of action. The amended petition of a appeal filed in this case does not change the initial cause of action pleaded in the original Petition of Appeal, namely the adoption of Plan C. Rather, Counts 12 and 13 simply raise additional allegations to support the original requested prayer for relief which is, essentially, to set aside Plan C. That the facts and circumstances giving rise to Counts 12 and 13 may have been known to petitioners at or about the same time the original Petition of Appeal was filed does not now bar the filing of Counts 12 and 13 because the initial subject matter, Plan C, remains the same and the amendments clearly relate back to the filing of the initial Petition of Appeal. Consequently, I **CONCLUDE** that N.J.A.C. 6:24-1.2 does not apply to the filing of Counts 12 and 13 of the Amended Petition of Appeal filed on April 7, 1986.

I do not agree with the Board that the allegations raised in Counts 12 and 13 do not as a matter of law rise to the level of a conflict of interest for the three Board members involved. Depending upon the facts to be established at hearing by a preponderance of credible evidence advanced by petitioners, it will then be determined whether in law and in fact any or all named Board members were in conflict at the time Plan C was adopted on October 28, 1985. Petitioners must have the opportunity to present their evidence at hearing to support the allegations made.

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BOARD'S MOTION TO DISMISS

The Board moves to dismiss Counts 12 and 13 as pleaded in petitioners' Amended Petition of Appeal. As noted earlier, the Petition of Appeal was filed January 10, 1986, and the amended Petition of Appeal was filed April 7, 1986. Count 12 makes the following allegations. Board member Marilyn Brenner is chairperson of the Board's personnel committee, which committee evaluates the performance of the superintendent of schools, Kenneth Hall. The evaluation makes recommendations to the Board regarding Hall's employment, salary and benefits. Hall, in addition to being the superintendent, is also the president of the New Jersey Association of School Administrators (Association) whose Executive Director is James Moran. Hall recommended and the Board approved the retention of Moran as its labor consultant to negotiate agreements with various units for the period 1983 through 1986. During the time Moran was so retained by the Board, the Association employed Board member Brenner. During the same period Moran was retained by the Board as its labor consultant, Hall recommended and the Board approved the appointment of Moran's daughter to a newly created administrative position. Board member Brenner voted in the affirmative for Plan C on October 28, 1985. Board member Brenner voted in the negative shortly after October 28, 1985 to rescind Plan C. Petitioners allege in paragraphs 17 and 18 of Count 12 as follows:

> 17. At all times relevant to this petition, and continuing to date, there has existed an intolerable conflict of interest among Board member Marilyn Brenner, Superintendent of Schools Kenneth Hall, Executive Director of the N.J.A.S.A. James Moran, Board employee Margaret Hom [Moran's daughter] and N.J.A.S.A. employee Marilyn Brenner.
>
> 18. The appearance of impropriety and the actual conflict of interest is so substantial and so pervasive as to invalidate board member Marilyn Brenner's votes on the organizational policy of the school district.

Petitioners seek to have Board member Brenner's affirmative vote for Plan C be declared null and void and other relief.[1]

Count 13 alleges that Board member Endresen and Board member DeRosa, both of whom voted in the affirmative for Plan C, were influenced to cast affirmative

[1]A motion to intervene filed on behalf of the Association, James Moran, and his daughter was denied by way of letter ruling May 21, 1986.

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Nonetheless, if a reorganization of a school district's educational program or organizational structure necessitates the transfer of teaching staff members or the adopting of text books or some other action which requires a certain number of affirmative votes, then such actions may only be approved by the board under the provisions of law before the actual transfer or text adoption occurs. In this case, there is no requirement in law for the Board to approve Plan C by a 2/3 vote of its full membership and there is no authority in law for the Board to circumscribe its statutorily conferred powers in matters which do not create, nullify, or affect a party's otherwise legally enforceable right. Here, petitioners have no legally enforceable right which was created, nullified, or affected by the Board's adoption of Plan C. As noted by the Board, the Commissioner in Polonsky v. Red Bank Bd. of Ed., 1967 S.L.D. 93, 95 held that "A board of education is not bound by its own procedural rules when no vested rights are involved."

Motions for summary decision in the administrative arena are similar if not identical to motions for summary judgment in the judiciary. In Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980), it was noted that

> A motion for summary judgment is a means for the efficient disposition of a cause of action where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Of course, courts should exercise appropriate caution in deciding issues involving policy considerations. However, excessive caution would undercut the purpose of a motion for summary judgment, which provides a means for piercing the allegations of the pleadings to determine whether there are issues requiring disposition at trial. If, after drawing all inferences of doubt against the movant, a court finds that there is no genuine issue of material fact, it should enter summary judgment. [citations omitted]

On these cross motions for summary decision, the facts are agreed upon and no issue of material fact remains. The Board is not obligated to follow its own by-laws as a matter of law. Consequently, summary decision must be granted the Board on Counts 1 and 2 of the Petition of Appeal filed against it in regard to the controverted Plan C. Accordingly, summary decision is granted the Board on Counts 1 and 2 and both counts are hereby **DISMISSED** as being allegations not arising to the level of a justiciable controversy or dispute under school law for which relief could be granted.

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The ultimate issue here is whether Plan C is null and void having been adopted by the Board in violation of its own by-laws. Boards of education have only those powers specifically enumerated in the statutes or necessarily implied. Certain powers granted by the Legislature may only be exercised by a 3/4 vote of the full membership of the board, as an example calling an emergency board meeting without providing adequate prior notice, N.J.S.A. 10:4-9. Other powers granted a board may be exercised only by a 2/3 vote of its full membership, as an example, the awarding of a contract without bidding after having twice advertised but receiving no bids or unreasonably high bids which the board rejected based on prior cost estimates, N.J.S.A. 18A:18A-5. Still other powers may only be exercised by a recorded roll call vote of the full membership of the board, as examples, selecting text books, N.J.S.A. 18A:34-1, transferring a teaching staff member, N.J.S.A. 18A:25-1, or withholding an employment increment, N.J.S.A. 18A:29-14. Finally, other powers specifically enumerated or necessarily implied may be exercised by a simple majority of those voting so long as a quorum of the board is present to legally conduct a meeting. The reorganization of a school district's educational program and organizational structure does not require for approval under Education Law, N.J.S.A. 18A:1-1 et seq., a 2/3 vote of a board's full membership nor a recorded roll call majority vote of its full membership. Such action may be taken by a board under its broad discretionary authority at N.J.S.A. 18A:11-1 which gives to boards the power to:

* * *

c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and the management of the public schools and public school property of the district * * * 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.

It has long been recognized that boards of education have discretionary authority to determine into which of its schools pupils shall be enrolled so long as such determinations are not incompatible with the laws of the United States or of this state and not in conflict with the general regulations of the state board of education, Pierce v. Union District School Trustees, 46 N.J.L. 76, 77-78 (Sup. Ct. 1884). Such discretionary authority has not been changed nor modified to the present day.

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" 'on the complaint of any person' " was obligated to take action to remove all property of the company from the city streets. The ordinance was, of course, set aside for having been adopted the same evening it was substantially amended in violation of rules governing adoption of ordinances as set forth in Woodbury's charter. The Erie Railroad Company case involved an ordinance adopted by the Paterson governing body after having received a first reading on a day not otherwise scheduled to be a regular meeting day. Local rules required all ordinances to be read three times at regular meetings. The ordinance provided that a city street was to be opened across the Company's railroad tracks which the court found "* * * impose[d] an additional servitude on the [Company's] land * * *" 79 N.J.L. 514. Having found that the Company was entitled to a hearing before the governing body prior to the imposition of such a burden, the court set aside the ordinance for having been adopted in violation of its own local rules.

The foregoing cases are distinguishable from this case. Here, petitioners present no claim of an enforceable vested interest which has been affected by the controverted action on October 28, 1985 when the Board adopted Plan C. While it is recognized that New Jersey public school pupils by constitutional mandate are to be afforded a thorough and efficient program of education, N.J. Const., (1947), Art. VIII, Siv, para. 1 and N.J.S.A. 7A:1-1 et seq., there is no corresponding right, constitutional, statutory or otherwise, for any pupil or any parent on behalf of their child who is or may be a pupil, to receive a thorough and efficient program of education in a certain school house in the district or to progress through the school district grade level structure under a certain grade organization.

N.J.S.A. 18A:33-1 requires that

> Each school district shall provide, for all children who reside in the district and are required to attend the public schools therein * * * suitable educational facilities including proper school buildings and furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and 20 years * * * in schools within the district convenient of access to the pupils * * *

While this statute requires 'convenience of access' to suitable educational facilities as described therein, it does not require the most convenient of access to such facilities.

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In addition, petitioners contend that Plan C is null and void because the October 28 vote of the Board was the first public vote taken on Plan C and its by-laws require public votes at two separate meetings. In addition to the foregoing authorities relied upon by petitioners, petitioners also rely in this regard upon Erie R. Co. v. Mayor and Alderman of the City of Paterson, 79 N.J.L. 512 (E. & A. 1910) and cases cited therein.

The Board, in urging summary decision in its favor on Counts 1 and 2, notes petitioners used the very same legal argument as here in its unsuccessful motion for interim relief that it violated its own by-laws. In addition to authorities cited in its brief earlier filed in opposition to petitioners' motion for interim relief, the Board in support of its motion for summary decision also cites Martello v. Willingboro Tp. Bd. of Ed., 1985 S.L.D. - (May 17, 1985) for the proposition that a board is not legally required to follow its own self-imposed policy, or a policy which is not statutorily mandated nor imposed upon it by the State Board of Education.

DISCUSSION

On this cross-motion for summary decision petitioners and the Board agree on all relevant and material facts. This is not a case by which the Board moves for summary decision on Counts 1 and 2 and is opposed by petitioners on the grounds that material facts are in dispute. Rather, the parties agree that the relevant material facts are as stated above.

Each of the cases cited by petitioners in support of the principle that the Board as a public body is legally bound to conduct its business according to its by-laws and that any action taken in violation of such by-laws is null and void involves a municipal governing body or a creation thereof under statutory authority. Four of the cases cited involve a challenge to an action taken by such body which created or attempted to create, or resulted in an affect upon some enforceable right by way of contract (Hicks, Taylor, Eggers), or by way of appointment to employment on an indefinite term or automatic tenure (DeVita). One case, South Jersey Telegraph Co. v. Woodbury, involved an ordinance initially introduced at an earlier meeting but adopted by Woodbury at the same meeting the ordinance as earlier introduced was significantly amended. The ordinance provided by its amendment that the telephone company authorized Woodbury to regulate its affairs and that if the company refused to acknowledge such authorization the mayor

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this application. Discretionary authority granted boards of education are grounded in Education Law, N.J.S.A. 18A:1-1. Discretionary actions may be taken by a board of education according to the requirements imposed upon it by the specific statute. The force and effect of discretionary actions taken by a board are dependent solely upon the requirements imposed upon that board by the specific statute involved. A 2/3 vote of the full membership of the board is not required in law for a board to reorganize its schools. A recorded roll call majority vote of the full membership of the board is required for the board to exercise its discretionary authority to dispose of school buildings. It is recognized that a local board may adopt rules at N.J.S.A. 18A:11-1 for its governance but such rules may not be inconsistent with school laws, Wassmer et al. v. Wharton Bd. of Ed., 1967 S.L.D. 125, 127 and rules adopted by a board of education which are inconsistent with state law are invalid. Ross v. Rahway Bd. of Ed., 1968 S.L.D. 26, 29. There is simply no requirement in the statutes for a board to circumscribe discretionary authority given it by the legislature. Accordingly, injunctive relief may not be granted upon the basis the Board may have violated its by-laws on October 28, 1985 by adopting Plan C through [a] 5/4 vote and at the first, not the second, meeting the Plan was publicly presented.

The foregoing constitutes all relevant and material facts as stated by petitioners and adreed to by the Board for purposes of the cross-motions for summary decision.

Petitioners contend again on their cross-motion for summary decision that Plan C was not lawfully adopted by the Board on October 28, 1985 because Plan C is in fact the Board's policy on school organization and as such Plan C may not be approved by the Board absent a 2/3 vote as is required by the Board's own by-laws. The argument made by petitioners is that once a public body establishes by-laws for the conduct of its business, it is legally bound to follow such by-laws until such time the by-laws are lawfully amended, modified or repealed. Petitioners contend because the Board admits it took no affirmation action by a 2/3 vote to amend or repeal its own by-laws, a 5-4 vote is insufficient as a matter of law to adopt Plan C. In support of their position that the Board as a public body is bound by its own by-laws, petitioners cite Hicks v. Long Branch Commission, 69 N.J.L. 300 (E. & A. 1903), which case was relied upon in DeVita v. Housing Authority of the City of Paterson, 31 N.J. Super. 394 (App. Div. 1954), Taylor v. City of Lambertville, 43 N.J. Eq. 107 (Chan. Div. 1887), South Jersey Telegraph Co. v. City of Woodbury, 73 N.J.L. 276 (1906) and Eggers v. Mayor and City of Newark, 77 N.J.L. 198 (1908).

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1986 and added three counts, the Board moved to dismiss two of the three amended counts and the parties then cross-moved for summary decision on Counts 1 and 2 with supporting briefs and exhibits.

This order addresses the parties' cross-motions for summary decision on Counts 1 and 2 and the Board's motion to dismiss Counts 12 and 13 of the amended Petition of Appeal.

BACKGROUND FACTS

The Matawan-Aberdeen Regional School District, an all-purpose regional school district organized under N.J.S.A. 18A:13-2, consists of Matawan Borough and Aberdeen Township. The regional board of education consists of nine members. Prior to October 28, 1985 the Board's schools were organized on a grade K-5, 6-7, 8-9, and 10-12 basis. Plan C will result in the schools being organized on a K-6, 7-8, and 9-12 basis.

Since at least January 1983, the Board imposed upon itself certain by-laws which provide in part that "No policy shall be adopted by the Board until it has received a 2/3 vote of the full Board at two public meetings." The same by-laws provide that policy adoptions, amendments, or repealers shall be accomplished through a 2/3 vote of the full Board. The 5-4 vote on October 28, 1985 was the first public vote taken by the Board on Plan C. It is not disputed that no emergency was declared by the Board nor did it take action by a 2/3 vote to suspend its self-imposed by-laws as set forth above. The Board is presently taking steps to divest itself of title to the elementary school, the administrative facility, and to do all things necessary to implement the provisions of Plan C.

Petitioners, as already noted, unsuccessfully sought to restrain the Board from divesting itself of title, possession and use of the elementary school through public sale because, as petitioners argue, the public sale results from the Plan C reorganization of the school district's educational program and grade levels which was adopted by the Board in violation of its by-laws for failure of the Plan to have received a 2/3 vote of the full membership and for failure of the Board to vote on the Plan at two public meetings. Petitioners' motion for interim relief was denied for the following essential reasons:

> Petitioners' assertion that the Board adopted Plan C on October 28, 1985 in violation of its own by-laws, even if such assertion is true, is an insufficient basis to grant the extraordinary relief sought on

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BEFORE DANIEL B. MC KEOWN, ALJ:

INTRODUCTION

The Matawan-Aberdeen Regional School District Board of Education (Board), determined by a 5-4 vote at a special meeting conducted October 28, 1985 to reorganize its educational program and organizational structure as of July 1, 1986 according to an administrative plan known as "Plan C". Plan C requires among other things changes in pupil attendance boundaries, relocation of some special education programs, and the closing of one elementary school and one building used for administrative purposes both of which facilities are to be sold by way of public auction. On January 10, 1986 petitioners filed a ten count Petition of Appeal before the Commissioner of Education alleging that Plan C was adopted in violation of the Board's own by-laws, that Plan C will result in educational facilities not suitable for the district's pupils and in a program of education not thorough and efficient, that certain unnamed Board members were fradulently induced to cast affirmative votes for Plan C, that unnamed Board members and agents and representatives of the Board fraudulently obtained approval of Plan C from the Department of Education, that pupil enrollment is reasonably expected to increase contrary to a basic premise of Plan C, that Plan C will result in racial imbalance and in violations of special education laws, and that the action taken on October 28, 1985 and Plan C are actions otherwise arbitrary, capricious, unreasonable or unlawful.

Petitioners also moved for interim relief in the form of an order by which the Board would be prohibited from doing any act which would interfere with its ownership, rights of possession, and use in the elementary school pending a determination on the merits of the matter. The Commissioner of Education transferred the matter to the Office of Administrative Law, including the motion for interim relief, on January 31, 1986, as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. Oral argument on petitioners' motion for interim relief was heard February 3, 1986 and denied by written ruling on February 4, 1986. A copy of the ruling is attached hereto and incorporated herein as if set forth in full.

Thereafter a prehearing conference was conducted on March 27, 1986 during which the issues to be tried at hearing scheduled to commence June 2, 1986 were decided and leave was granted petitioners to amend their Petition of Appeal. In addition, leave was granted the parties to cross-move for summary decision on Counts 1 and 2 of the Petition of Appeal. After petitioners filed an amended Petition of Appeal on April 7,

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LASLO, DONNA ALVIA LOCKHART, JACKIE LOUGHRAN, JAMES LOUGHRAN, GAIL A. LUPO, CHARLES T. LUPO, PATRICIA A. LYNCH, PATRICIA MARSH, GEORGE MARSH, SHARON A. MAUND, PATRICK J. MAUND, EUGENE J. MC DONALD, PATRICIA A. MC GUINN, MARIA E. MURRAY, PETER F. MURRAY, EDELE L. NISKY, KATHLEEN A. ODELL, LAWRENCE D. ODELL, STEPHANIE PAGANO, THOMAS PAGANO, LAURA PARNESS, WILLIAM PARNESS, REGINA A. REGLER, WAYNE REGLER, ELIZABETH E. RIKE, MARSHA ROSENSTEIN, LEON ROSENSTEIN, HALICE RUBIN, JEFF RUBIN, PATRICIA SHERMAN, HAROLD SHERMAN, KATHLEEN SIEGEL, MARLA SIEMAN, JOHN SIEMAN, DENISE SILVERSTEIN, LAURENCE SILVERSTEIN, JOAN SMITH, ZULLY SMITH, BONNIE SNOW, NORMAN SNOW, HOLLY VOLK, WILLIAM VOLK, ELAINE VRABEL, individually and as representatives of a class,

Petitioners,

v.

MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

Mark J. Blunda, Esq., for petitioners Matawan Regional Teachers Association and individual petitioners (Oxfeld, Cohen & Blunda, attorneys)

James J. Cleary, Esq., for petitioner Borough of Matawan

Vincent C. DeMaio, Esq., for respondent (DeMaio & DeMaio, attorneys)

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 706-86

AGENCY DKT. NO. 5-1/86

MATAWAN REGIONAL TEACHERS ASSOCIATION, BOROUGH OF MATAWAN, a Municipal Corporation of the State of New Jersey, IRIS ALBIN, STUART ALBIN, LORRAINE AYANIAN, AIDA BEAUDRY, THOMAS BEAUDRY, JILL BINDER, RANDY BINDER, GERTRUDE BLUMENTHAL, BONITA BOYLE, JAMES C. BOYLE, WENDY BRODSKY, IRA BRODSKY, SHERYL BROUGHTON, JAMES BROUGHTON, GERALDINE BRUNGARD, MRS., FRANCIS BURNS, FRANCIS BURNS, ALFRED J. CASAGRANDE, JOANNE CASTRO, MARIANNE CORCORAN, GEORGE D. CORCORAN, LINDA DE MAIN, EDWARD DE MAIN, VICKI L. DE VICO, LOUIS J. DE VICO, MARY ELLEN DOLINICK, KENNETH DOLINICK, GERALDINE L. DUCKWORTH, RAYMOND T. DUCKWORTH, ROSLYN EICHENBAUM, FRED EICHENBAUM, SUSAN FELDMAN, ROBERT FELDMAN, GEORGETTE FRANK, ROY FRANK, ROBERT FRANZBLAU, JOANNE GARGAN, JOHN GARGAN, JOYCE GARIPPA, LINDA GLOGOWER, WARREN GLOGOWER, LENA FONG HOR, PATRICIA KELLER, EDMOND P. KELLER, LINDA D. KLIEMISCH, DONNA LASLO, FRANCIS

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

July 7, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

JUL - 7 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JUL 8 1986
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

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DeRosa's spouses, does not lead to a direct demonstrable conflict of interest on the part of Endresen and DeRosa. Any conflict, if any exists, is too remote and speculative to declare Endresen's and DeRosa's affirmative votes for Plan C null and void. Accordingly, I **CONCLUDE** petitioners have failed to demonstrate by a preponderance of credible evidence that Board member Endresen's and DeRosa's affirmative votes for Plan C should or could be declared null and void. Accordingly, Counts 12 and 13 of the amended Petition of Appeal are **DISMISSED.**

While this case is being forwarded to the Commissioner of Education for an expedited final decision, a plenary hearing on the remaining eight counts of the Petition of Appeal shall be scheduled as soon as possible.

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CONCLUSION

In consideration of the foregoing facts and the law, I **CONCLUDE** that petitioners have failed to demonstrate by a preponderance of credible evidence that the relationships between and among Board members Marilyn Brenner, Superintendent of Schools Kenneth Hall, the Executive Director of the New Jersey Association of School Administrators, James Moran, and Margaret Moran Hom are such so as to invalidate the affirmative vote cast for Plan C by Marilyn Brenner. Petitioners have failed to demonstrate that Marilyn Brenner has a direct or indirect interest in Plan C as a whole or in any of its subparts. It is not a conflict of interest for a board member to be persuaded by a superintendent of schools that a particular path towards reorganization is best for the school district. There is no showing in this case that superintendent Hall curried the favor of Marilyn Brenner by securing her employment with the Association which, in turn, would guarantee the superintendent an affirmative vote on any reorganization plan regardless of the merits of such plan. This, petitioners have failed to show.

I **CONCLUDE**, therefore, that petitioners have failed to demonstrate a basis upon which Marilyn Brenner's vote for Plan C could or should be declared null and void. Count 12 of the amended Petition of Appeal is, accordingly **DISMISSED.**

Petitioners' case regarding their plea to have Board member Endresen and DeRosa's affirmative votes for Plan C be declared null and void is without merit. The mere fact of employment by a board of a sitting board member's spouse does not, standing by itself, create an intolerable conflict of interest. In In the Matter of the Election of Dorothy Bayless to the Board of Education of the Lawrence Township School District, 1974 S.L.D. 603, the State Board of Education held that a board member whose spouse is employed by the board is not automatically disqualified from sitting as a board member so long as the member abstains from voting on a matter that directly affects the spouse. In this case, there is no evidence to show that Endresen or DeRosa ever voted on a matter directly involving their spouses. Furthermore, a conflict of interest must be immediate, definite and capable of demonstration. A conflict of interest may not be shown if the asserted conflict is remote, uncertain, contingent or speculative such that persons of ordinary capacity and intelligence would not be influenced by it. See, Warren Larsen v. Bd. of Ed. of Twp. of Woodbridge, 1985 S.L.D. -- (Mar. 28, 1985). Merely because Endresen and DeRosa support Plan C and Plan C is the superintendent's recommendation, and the superintendent recommended to the full Board the employment of Endresen's and

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employment with the Association. While it is true the superintendent, Brenner, and the entire Board of Education could have been more circumspect in the creation of a new position which was subsequently filled by Ms. Hom within days of Brenner's employment with the Association, circumspection is not the standard upon which a conflict of interest or an inconsistent interest may be found.

Moreover, petitioners seek only to have Brenner's affirmative vote on Plan C declared null and void. The evidence fails to establish any interest whatsoever Brenner may have, direct or indirect, regarding Plan C other than in her judgment Plan C is an appropriate measure for the Matawan school district. While it may be that Brenner was influenced by the superintendent to vote for Plan C, that is precisely the task of an effective superintendent of schools. As the chief executive officer of the board of education, the superintendent is to act as the educational leader for the board of education and point the way. There is no evidence Hall influenced Brenner in an unlawful or improper manner regarding Plan C. Hall, as president of the Association, did not employ Brenner. True, Moran employed Brenner and Moran is a close friend of Hall and Hall recommended Brenner to Moran. Nonetheless, in the final analysis it is Moran's decision to employ or not to employ Brenner. Neither Hall, nor Brenner acting unilaterally, may have employed Ms. Hom. It is the board of education which employs its personnel. In this case, the Matawan-Aberdeen Regional School District Board of Education did in fact employ Margaret Hom as its supervisor of purchasing. Even if the Board members individually did not know that Ms. Hom was Moran's daughter, that relationship standing by itself may not prohibit the daughter from seeking employment with this Board. There is no prohibition to my knowledge against the employment by a board of education of the daughter of a man it had engaged as a consultant.

That the Association's magazine "On Target" announced Ms. Hom's promotion when in fact such a promotion did not occur is unfortunate. It is more unfortunate that neither the Association's executive director, the associate executive director, nor the editor of the Association's magazine could explain rationally how such an error was created. Nonetheless, that published error can in no way invalidate the vote of Brenner for Plan C.

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LAW

N.J.S.A. 18A:12-2 provides in full as follows:

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

It has long been the rule in this state that public servants shall not be interested, directly or indirectly, in any contract made with the public agencies of which they are members. Ames v. Montclair, 97 N.J. Eq. 60, 65 (1925). The public is entitled to have its representatives perform their duties free from any interest, personal or pecuniary, which has the capacity of affecting their judgment. Kremer v. City of Plainfield, 101 N.J. Super. 346 (App. Div. 1968). In Vanitallie v. Franklin Lakes, 28 N.J. 258, 268 (1958) it was held that

> The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case * * * No definitive test can be devised. The question will always be 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.

The Board claims that the conflicts allegations must be dismissed upon N.J.A.C. 6:24-1.2, the 90 day rule, and/or the equitable doctrine of laches because the facts surrounding the allegations have been known to petitioners since September 1984. I disagree that the 90 day rule or laches apply. If a board member is in a conflict because of relationships so as to void board membership, the conflict continues. An illegal conflict due to relationships may not be valid through the mere passage of time.

There is no evidence in this case to demonstrate that either Brenner, Endresen or DeRosa, individually or jointly, have any interest directly or indirectly in any contract with or claim against the Board. While one may have a personal opinion that the interrelationships between and among Hall, Brenner, Moran and Ms. Hom should not exist, I am aware of no authority which would prohibit a board member from being an employee of an association in which a board employee is the chief officer. Moran was not an employee of the Board; rather, he was a contractor who was engaged by the Board to be its consultant for labor negotiations. Ms. Hom, who is in all respects qualified for the position she holds with this Board, cannot be faulted for accepting gainful employment. There is no evidence that Ms. Hom's employment was a quid pro quo for Brenner's

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Petitioners contend that the financial relationships between Brenner and Hall in their titles and capacities could so influence Brenner's votes on Board matters so as to render null and void her vote in support of the Plan C reorganization.

B. Members Endresen and DeRosa

1. Theodore Endresen was elected to the Board in April 1983.

2. Board member Endresen's wife was employed by the Board as a preschool teacher for the period January 17 through June 30, 1984.

3. During April 1984, Endresen's wife was reemployed for the following academic year by the Board as a full time teacher. Endresen's wife was employed as a full time teacher despite the fact other teachers with greater experience, though not tenured, lost their employment due to a reduction in force.

4. Endresen supports the Plan C reorganization.

5. Alphonse DeRosa was appointed to the Board in September 1981. Board member DeRosa's wife was employed as a teacher by the Board on December 14, 1981, retroactive to September 14, 1981 the date her husband was appointed a Board member.

6. DeRosa supports Plan C.

7. Panos, who attends most Board meetings, testified that Endresen and DeRosa both abstained from voting when any matter came before the Board directly involving their spouses.

Petitioners contend that on these facts the affirmative votes of Endresen and DeRosa for Plan C must be declared null and void because Plan C was recommended by the superintendent and it is the superintendent who recommended to the full Board that their spouses be employed as teaching staff members.

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that time Plan C was being considered and with the relationships between and among Ms. Hom, Moran, Brenner and himself having been raised regarding Hom's employment, Hall felt he would rather have the matter put on hold then to have it considered by the full Board and not passing.

16. Despite the Matawan Board never formally nor informally promoting Hom to the position assistant board secretary, the magazine for the Association of which her father is the executive director and Hall is the president reported in its January 1986 edition of "On Target" that Hom had been promoted by the Matawan Board to the position assistant board secretary/business administrator/superintendent of purchasing. (P-10) Niether Moran, Wisenfeld, the assistant executive director of the Association, nor Jay Donnigan, the Association's editor of the magazine "On Target" could or would explain the source of the incorrect information published in their newsletter.

17. During the conduct of this hearing, Quinn has been promoted to the position of Board secretary and assistant to the superintendent for supportive services. His former position, school business administrator, is now vacant. Ms. Hom, who has completed a master's program and has been certified as a school business administrator, is eligible for appointment to that vacancy.

This concludes a recitation of the background facts surrounding the allegations of Brenner's asserted conflict of interest. Petitioners point out that Marilyn Brenner, a Board member and otherwise employee of the Association of which Hall is president, voted in favor of Plan C which was recommended to the full Board by the superintendent. Petitioners contend that Brenner's vote must be declared null and void because of the remarkable web of conflicts created by the fact Moran is effectively the employer of Brenner who, as a Board member, is chairperson of the Board's personnel committee. Simultaneously, Moran was an "employee" of the Board while simultaneously holding employment with the Association whose president is Hall, superintendent of Matawan. Hom, being the daughter of Moran, furthers the asserted web of conflicts because the administration intentionally withheld from the Board and from the public the true relationship of Ms. Hom to Moran prior to the Board's vote on her employment.

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This posting was not in the same format as normal postings as evidenced by P-44.

11. Quinn says he interviewed Hom on August 9, 1984 and concluded the interviewing process on that date because no one else applied for the position. Hom testified she was interviewed by Quinn for the position during July 1984. Neither Quinn nor the assistant superintendent Klavon, both of whom were in charge of interviewing the candidates for this position, could name any other applicant or person they interviewed for the vacancy other than Ms. Hom.

12. No one disclosed to the Board's personnel committee prior to the meeting of August 13, 1984 the relationship between Ms. Hom and James Moran despite the fact that Hall, Brenner, Quinn, and Klavon all had such knowledge.

13. Immediately prior to the meeting of August 13, 1984, the Board members received a revised agenda for that meeting which then included the name of Margaret Hom as the person recommended to be selected for the position supervisor of purchasing. When Brenner recommended to the full Board the employment of Ms. Hom Panos, who knew Moran and that Margaret Hom was his daughter, asked the Board the maiden name of Ms. Hom. The Board president refused to answer the question and refused to entertain any more questions on the subject.

14. On September 4, 1984, the Board held a meeting at which it allowed discussion on its policy governing conflicts of interest. Panos questioned the Board concerning its conflict policy to the interrelationships of Ms. Hom, Moran, Marilyn Brenner's employment by the Association, and Hall's presidency of the Association. The Board president at this meeting suggested Ms. Panos was engaging in defamation and urged her to cease.

15. During October 1985, Hall, Quinn, and Brenner discussed with Hom the distinct possibility of promoting Hom to the position of assistant board secretary. Hall recommended to the Board's personnel committee that Hom be promoted. Later, Hall withdrew the recommendation because by

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6. The position for which Brenner was engaged by the Association in July 1984 was neither posted nor advertised. According to Harriet Wisenfeld, assistant executive director of the Association, there is no record of applications for the position, no resume or other application from Brenner, nor any other written indication that she applied at all for the position. According to Wisenfeld, the position vacancy was announced by "word of mouth" to the Association's executive committee.

7. Brenner, as chairperson of the personnel committee for the Board, recommended to the full Board at an executive meeting August 6, 1984, that it create a new administrative position, supervisor of purchasing, without a proposed salary or proposed candidate for the position. No discussion of this proposal occurred on August 6. The business administrator, Bruce Quinn, and Superintendent Hall say the new position was necessary because of the workload in Quinn's office.

8. Between August 6, 1984 and a public meeting conducted August 13, 1984, Board members received a revised agenda at home for the August 13 meeting. This agenda did not contain a proposed salary nor proposed employee for the position supervisor of purchasing.

9. The proposed position supervisor of purchasing was not posted throughout the district as in the ordinary course of business, nor was the Matawan Regional Teachers Association advised of the position's creation.

10. When the absence of the position's posting was brought to the attention of Quinn by Marie Panos, President of the Matawan Regional Teachers Association, Quinn caused a reposting for the newly created position to occur August 8, 1984. On this posting, Quinn noted the following:

> Inadvertently copies were apparently not posted on school bulletin boards. Qualified candidates have applied and some were interviewed. However, consideration will be given to other applicants. Candidates should be prepared to be interviewed on Monday afternoon, August 13. (P-43)

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A. Marilyn Brenner

1. Marilyn Brenner has continuously been a member of the Matawan-Aberdeen Board of Education since 1977. Hall was first employed as superintendent in Matawan during December 1977. In 1978, Brenner voted in the affirmative for Hall to receive a seven percent salary increase, an increase in his transportational allowance, and a merit bonus of $2,000. In 1980, Brenner voted in the affirmative to grant Hall an early extension of his employment contract. In 1981, Brenner voted in the affirmative to grant Hall a nine percent salary increase as opposed to the six percent increase required by the terms of his contract. In 1984, Brenner voted in the affirmative to grant Hall a salary increase.

2. During 1984 and 1985, Brenner was chairperson of the Board's personnel committee. The personnel committee confers with the superintendent on personnel changes including hiring, firing, job descriptions, filling of vacancies, creation of positions, resignations, promotions and raises. The chairperson, in turn, makes recommendations to the full Board for its determination.

3. In addition to the above described duties, the personnel committee is responsible for the performance evaluation of the Board's superintendent and, according to Board policy (P-8), such evaluation is to be performed on an annual basis. Brenner, during the time she has been chairperson of the personnel committee, has not caused an evaluation of Hall's performance.

4. During July 1984, Brenner was employed by the Association and to date continues that employment.

5. Moran, as executive director of the Association, gave final approval for the employment of Brenner. From the date of her employment with the Association to the present, Brenner's salary increased 44 percent.

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an organization of which the superintendent is president. Accordingly, petitioners seek to have declared null and void the affirmative vote of Marilyn Brenner for the approval of Plan C and for the sale of the controverted properties. Count 13 alleges Board member Theodore Endresen and Alphonse DeRosa are in conflicts of interest because of the employment by the Board of their spouses. Accordingly, petitioners seek to have declared null and void the affirmative votes of Board members Endresen and DeRosa for Plan C and for the sale of the controverted properties to be declared null and void.

The essential allegations surrounding Marilyn Brenner's asserted conflict is that she is employed by the New Jersey Association of School Administrators (Association). Kenneth Hall, the Matawan Superintendent of Schools, is the president of the Association and as such is the presiding officer of the Association's executive committee. Michael Klavon, the Matawan Assistant Superintendent of Schools, is also a member of the Associations' executive committee. The Association's executive committee directly employs an executive director for the Association. The executive director is and has been for the last 12 years James Moran. Moran and Superintendent Hall have known each other for at least 12 years. In fact, when Hall was considering leaving the superintendency of the North Hunterdon Regional School District for the Matawan position, Moran assisted Hall in drawing up the terms of the contract Hall sought and received from the Matawan Board.

During July 1984 Moran, who had been retained the prior year by the Board to be its negotiator with the Matawan Regional Teachers Association, was still performing work related to the negotiating process. Moran knew at the time of Brenner's employment that she was a member of the Matawan Board independent of the fact Hall recommended her employment to Moran.

During August 1984, less than a month after Brenner was employed by the Association, the Board employed Margaret Horn for its newly created administrative position of supervisor of purchasing which is assigned to its business administrator's office. Ms. Horn is James Moran's daughter.

The background facts giving rise to Counts 12 and 13 and not otherwise in dispute by the parties are these.

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Schwartz's appraised market value is not binding on the Board so long as the Board acts reasonably in setting a lower sale price. Schwartz provided no guarantee that the Board would find a willing buyer at full market value, or 75 percent of full market value, or even 50 percent of market value. In this case the Board, recognizing that Schwartz's appraisal was based on the assumption a variance would be granted but being exposed to public utterances to the contrary, determined that it would offer for sale the properties consistent with the existing zoning ordinance. Accordingly, the Board adopted member Brown's recommended minimum price of $800,000 which represented $20,000 for each of 40 buildable lots encompassed within the property. This is the market value Schwartz assessed on the properties for 40 buildable lots. While this is not a condemnation proceeding as in Gorga, the former Chief Justice Weintraub's 'caveat' is as applicable here given the circumstances.

Despite the inferences which can be drawn from petitioners' arguments, these two properties are not highly sought by potential buyers as evidenced by the submission of only two bids from a pool of 20 persons who picked up bid forms and toured the properties.

CONCLUSION

In consideration of the foregoing general background facts, the undisputed background facts giving rise to Count 11, and the existing law, I **CONCLUDE** that the Matawan-Aberdeen Regional School District Board of Education gave due consideration to Schwartz's appraisal of the market value of the controverted properties and, upon such due consideration, I **CONCLUDE** that the Board acted reasonably in setting a minimum price for both properties of $800,000, and I further **CONCLUDE** that the Board acted reasonably, lawfully and within its discretion when it accepted the bid of $826,000 for the sale of both subject properties. Consequently, I **CONCLUDE** that petitioners have failed in their burden of proof to establish the Board's acceptance of $826,000 for both subject properties is so far below the appraised market value of the properties so as to constitute a gift of public funds or property, fraud, or favoritism. Accordingly, this Count is **DISMISSED.**

COUNTS 12 and 13

Count 12 of the amended Petition of Appeal alleges Marilyn Brenner, a Board member who voted for Plan C and for the sale of the controverted properties, is in conflict of interest with her obligations as a Board member in light of her employment by

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The question then to be addressed in this matter is whether the Board received a fair price for the properties it has already contracted to sell. The fairness of the price received must, of necessity, be gauged in light of Schwartz's appraisal, the potential buyers' market as reflected in interest shown in the properties, and the reasonableness of the steps taken by the Board in establishing the fixed minimum price of $800,000.

First, it is uncontroverted that the market value assigned both properties in Schwartz's appraisal, $1,557,700, was arrived at by application of the highest and best use real estate appraisal principle. This principle, however, was applied by Schwartz in a manner inconsistent with the definition of the principle by the American Institute of Real Estate Appraisers. Schwartz reported his knowledge that the properties are located in areas zoned residential; yet, he arrived at market values upon the assumption that the Matawan Borough Board of Adjustment would automatically grant a variance for multiple office use. Consequently, Schwartz appraised the value of the properties with the variance at $1,557,700. Without the variance, Schwartz appraised the land, as vacant, at a value of $331,000. In regard to the former market value and upon the assumption a variance would be granted, Schwartz recommended the Board set a minimum bid of 75 percent for both properties while recognizing that school buildings, in many cases, sold for less than the appraised value and having recognized the need to develop a market of potential purchasers.

Former Chief Justice Weintraub, in State v. Gorga, 26 N.J. 113 (1958), in addressing the question of whether fair market value in a condemnation proceeding may be affected by the prospect of an amendment of the zoning ordinance noted:

> The important caveat is that the true issue is not the value of the property for the use which would be permitted if the amendment were adopted. Zoning amendments are not routinely made or granted. A purchaser in a voluntary transaction would rarely pay the price the property would be worth if the amendment were an accomplished fact. No matter how probable an amendment may seem, an element of uncertainty remains and has its impact upon the selling price. At most a buyer would pay a premium for that probability in addition to what the property is worth under the restrictions of the existing ordinance. In permitting proof of a probable amendment, the law merely seeks to recognize a face, if it does exist. In short if the parties to a voluntary transaction would as of the date of taking give recognition to the probability of a zoning amendment in agreeing upon the value, the law will recognize the truth. Id. at 117.

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> suitable or convenient for the use for which they were acquired or which are no longer needed for school purposes * * * and the purchaser thereof shall acquire title thereto free from any use or purpose for which it may have been acquired by the board.

In this case, the Board determined that the Broad Street Elementary School is no longer suitable or convenient for pupil use in its district and it determined that the Broad Street administration property was no longer suitable or convenient for school purposes in its district.

In regard to the method of disposal of such lands, N.J.S.A. 18A:20-6 and 7 are instructive. N.J.S.A. 18A:20-6 provides in part as follows:

> Any lands or rights or interests therein sold by any board of education shall be sold at public sale, to the highest bidder, after advertisement of the sale in a newspaper published in the district * * *

N.J.S.A. 18A:20-7, as amended by L. 1983, c. 555, para. 1, effective January 17, 1984, provides in part as follows:

> a. In the case of public sales the board may by resolution fix the minimum price with or without the reservation of the right, upon the completion of said public sale, to accept or reject the highest bid made thereat * * * but the acceptance or rejection thereof shall be made not later than the second regular meeting of the board following the sale * * *

While boards of education have statutory discretion to set a minimum price to dispose of property no longer necessary for school purposes, the minimum sale price must be a fair consideration in the light of the value of the property. Borough of Rockaway v. Rockden American Legion, 39 N.J. 504, 506 (1963). Clearly, a fixed minimum price for the disposition of property in which a board of education has title may not be so low as compared to its values so as to constitute a gift, fraud, or favoritism. See, Spoerel v. Pennsauken Twp., 14 N.J. 186 (1954); Juice Bar Corp. v. Twp. Comm., Twp. of Neptune, 36 N.J. Super. 164 (App. Div. 1955). In Hudak v. Bd. of Ed. of Twp. of East Brunswick, 1971 S.L.D. 493, the Commissioner noted that because the board conveyed property it owned without first determining the property was no longer necessary for school purposes and that it did not receive in exchange land at least equal to the value of the land it conveyed the board failed to guard the public purse.

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16. Approximately 20 persons showed interest in the Broad Street properties by picking up bid forms and taking a tour of the facilities.

17. Despite the initial interest shown by 20 persons, the Board received two bids on January 31, 1986 one of which was for the minimum price $800,000, while the other bid was for $826,000.

18. The Board determined on February 10, 1986, to award the sale of the Broad Street properties to the bidder who submitted the price $826,000. The Board thereafter entered into a contract of sale with the successful bidders. The closing is to occur on July 31, 1986.

19. Maffeo contends Schwartz's appraisal affords no reasonable basis upon which the Board could justify the sale of the properties for $800,000, despite the public utterances of two Matawan Borough governing body members that a variance would not be granted nor the zoning changed. Maffeo believes the Board failed to take adequate steps to determine the likelihood of a variance. Maffeo says a board of adjustment is hard pressed to deny a variance if the case is "properly presented."

20. Maffeo is of the view the Board took reasonable efforts to market the property, although he says it could have done more.

This concludes a recitation of the background facts not in dispute among the parties. These facts constitute the relevant and material facts of the Board's sale of its Broad Street properties.

LAW

N.J.S.A. 18A:20-2 authorizes boards of education to sell real estate and personal property in a manner provided by law. N.J.S.A. 18A:20-5 provides in part as follows:

> The board of education of any district by recorded roll call majority vote of its full membership may dispose, by sale or otherwise, in the manner prescribed in this chapter, of any lands or any rights or interests therein, owned by it, which ceased to be