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NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1978 to December 31, 1978

vol. 2

New Jersey
State Department of Education
225 West State Street
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FRED G. BURKE
COMMISSIONER OF EDUCATION

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Board of Chosen Freeholders of the County of Passaic; Board of School Estimate, Passaic County Technical and Vocational High School; Board of Trustees, Passaic County Technical and Vocational High School,

Petitioners,

v.

Vincent B. Calabrese, Assistant Commissioner, Division of Administration and Finance, Department of Education, State of New Jersey,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, James V. Convery, Esq.

For the Respondent, William F. Hyland, Attorney General of New Jersey (Mark Schorr, Deputy Attorney General)

Petitioners appealed to the Commissioner of Education for a declaratory judgment on the question of whether tuition moneys which the Passaic County Technical and Vocational High School, hereinafter "Vocational School," collects for pupils residing within the county are legally deductible, pursuant to the provisions of *N.J.S.A.* 18A:7A-3, when respondent computes its net current expense budget and State equalization aid pursuant to *N.J.S.A.* 18A:7A-24.

A brief hearing to establish a contextual setting for what is essentially a legal issue was conducted by a hearing examiner appointed by the Commissioner at the New Jersey State Library on December 19, 1977. There being no relevant fact in dispute, the matter comes directly before the Commissioner for determination. The facts are these:

The Vocational School has an enrollment of 2356 pupils of whom 1769 are regular vocational day school pupils residing in the several local public school districts within Passaic County. The approximate annual cost of educating each of those pupils is $2,210. The Vocational School receives in State equalization aid $400 per pupil for the 1977-78 school year. Of the remaining $1,810, the Passaic County Freeholders fund $905 from county tax sources. The remaining $905 is paid as tuition by the local school district in which each pupil resides. (Tr. 10-24) Out-of-county pupils' tuition is billed in full to the school districts in which they reside.

The Vocational School receives equalization aid on a per pupil basis pro-

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portionate to its 50 percent share of the tuition which is funded by the Freeholders through a county tax levy. Each local school district receives a like amount of equalization aid per pupil based on its contribution of 50 percent of the tuition charge.

Petitioners contend that all of these tuition funds, whether raised by a municipal tax levy or a county tax levy are, in fact, raised by a levy on local property owners. They assert that this precludes their deduction when computing the net current expense budget pursuant to *N.J.S.A.* 18A:7A-3 which states:

> "***'Net current expense budget' means the balance after deducting (1) State support for categorical programs pursuant to section 20 of this act, (2) the transportation amount in the current expense budget and (3) *all other revenue in the current expense budget except the amount to be raised by local taxation,* equalization State support, and State support for approved transportation.***" *(Emphasis supplied.)*

Thus, it is argued that respondent was in error when he deducted the amount of tuition received from local districts when computing the Vocational School's net current expense budget which, in turn, became the basis for the computation of county vocational school aid pursuant to *N.J.S.A.* 18A:7A-24, which provides, *inter alia,* that:

> "State support for county vocational school districts shall be paid in accordance with the following calculations:
>
> a. Divide the county equalized valuations per pupil by the guaranteed valuation per pupil and subtract the quotient from 1.0000 to obtain the county vocational school's State support ratio.
>
> b. Multiply the State support ratio by the smaller of (1) *the net current expense budget for the prebudget year* or (2) the product of the resident enrollment multiplied by 175% of the Statewide sixty-fifth percentile net current budget per pupil for the prebudget year when all district figures are ranked from low to high. The amount obtained is the current expense equalization support.***" *(Emphasis supplied.)*

Petitioners contend that the effect of respondent's deduction of tuition received when calculating the vocational school's State equalization aid is, in the face of inflationary pressures, both contrary to statutory provision and violative of the mandate of the Public School Education Act of 1975, *N.J.S.A.* 18A:7A-1 *et seq.*, that a thorough and efficient education be provided. Petitioners further allege that it is contrary to *Robinson v. Cahill,* 69 *N.J.* (1976) and results in lack of uniformity of distribution of State aid. (Brief of Petitioners, at pp. 8-15)

Petitioners further allege that the same undesirable results spring from the fact the same deductions are used in computation of the net operating budget

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which, in turn, affects the maximum annual budget as permitted under the "cap" provisions of existing law. (Tr. 34-39)

Respondent's position was succinctly summarized in his letter statement to petitioners on July 7, 1977, as follows:

> "In administering Chapter 212 the Department defines tuition as a payment by a school district to another school district for services performed in educating the sending school district's children. There is no provision in law, that I know of, that would permit us to interpret a payment by a school district for educational services performed by another school district to be used as tax revenues by the receiving district."
>
> (Appendix of Petitioners' Brief, P-4)

Respondent contends that those tuition payments to a county vocational school are indistinguishable from payments which a local district makes for any other educational services and that the local tax levy that raises those moneys may not also represent county tax levies. (Respondent's Brief, at pp. 5-6) Respondent avers that these funds are in all points comparable to those wherein a local district pays tuition to another district which receives and educates high school pupils or provides special classes or services for the handicapped, in which instance the local taxes raised to pay such tuition are not construed to be local tax levies in the receiving district.

Respondent characterizes as irrational the contention that a receiving district, including a county vocational school, should receive State aid for tuition paid by any sending district for any type of training. (*Id.*, at pp. 6-7)

The Commissioner, having carefully considered and balanced the legal arguments advanced by respective counsel, finds for respondent whose cogent legal interpretation must prevail. The equitable distribution of State aid must not be disparate as between districts. *N.J.S.A.* 18A:7A-3 plainly states that computation of the net current expense budget requires, *inter alia*, that there be deducted "***all other revenue in the current expense budget except the amount to be raised by local taxation***." Petitioners are familiar with the interpretation set forth as follows by the Department of Education in its publication, "Financial Accounting for New Jersey School Districts":

> "***11. LOCAL SCHOOL TAXES
>
> Money from local levies on the real and personal property in the school district.***" (R-1, at p. 1)

The local district for a county vocational school is the county itself. An equitable levy is made on all property owners within the county. In the instant matter petitioners have chosen to limit that levy to approximately half of the expenses of the vocational school. It is on the basis of that levy that petitioners are accorded State equalization aid which alleviates the burden on property taxpayers throughout the county. Similarly, the local school districts and the

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taxpayers they represent are aided by the State in direct proportion to their payments of tuition to the County Vocational School. This procedure is not only equitable, but is wholly consistent with an interpretation of the statutory plan in that it gives the words of the statutes their ordinary meaning, in keeping with familiar canons of statutory interpretation. To depart therefrom would result in disparate treatment, as plainly shown by respondent. The Commissioner so holds.

Nor are petitioners without recourse to equitable adjustment with respect to the application of the maximum budget permitted by law. The Commissioner agrees that the effect of the existing law on maximum permitted budget increases is severely limiting on those receiving districts wherein a large proportion of enrolled pupils come from sending districts. This is so because those revenues must be deducted prior to applying the permitted percentage to a board's net operating budget when computing the amount which that board's budget may increase in the succeeding year. It must be recognized, however, that the Legislature in its wisdom judiciously provided that a board may appeal its budget cap by applying through its county superintendent of schools to the Commissioner for relief from that budget limitation.

This equitable form of relief as provided by the Legislature is similarly available to the Board of Education herein.

It is similarly recognized that, should petitioners desire to escape the effects of both the cap computation stemming from the high portion of tuition pupils or the distribution of State equalization aid to sending districts, they may adopt a practice of raising all money from taxes by a county tax levy and abandon the practice of collecting 50 percent of the tuition costs from individual school districts.

Thus, it is seen that, in both counts of petitioners' complaints, they have at their own option equitable solutions to the problems about which they express concern. For the reasons heretofore stated the Commissioner declares that petitioners are not entitled to the relief which they seek.

COMMISSIONER OF EDUCATION

June 2, 1978

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Ramsey Teachers Association and Cecelia O'Toole,

Petitioners,

v.

Board of Education of the Borough of Ramsey, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Greenberg & Covitz (Morton R. Covitz, Esq., of Counsel)

For the Respondent, Sullivan & Sullivan (John J. Sullivan, Esq., of Counsel)

For the Respondent, Sidney Dincin, Esq. (Substitute Counsel)

Petitioners seek an order from the Commissioner of Education directing the Board of Education of the Borough of Ramsey, hereinafter "Board," to abide by its adopted sick leave policy as contained in its negotiated agreement with the Ramsey Teachers Association, hereinafter "Association."

The Board asserts that its sick leave policy is *ultra vires* and void in that it provides benefits not permitted by the pertinent statutes, and that the Board cannot abdicate, delegate, renounce, or surrender its authority pursuant to any statute. The Board, therefore, seeks an order from the Commissioner declaring its sick leave policy null and void.

Oral argument was presented on December 30, 1974 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. Affidavits, Briefs, and exhibits have been filed. The report of the hearing examiner follows:

There are no disputed issues of material fact. Cecelia O'Toole, the individual teacher petitioner in this matter, is a member of the Association and has more than ten years' experience as a teacher in the Ramsey School District. She enjoys a tenured status. (Petitioners' Brief, at pp. 4-6) During the 1971-72 academic year she became ill, missed nineteen days, and was granted sick leave by the Board. Her illness continued so that she missed one hundred twenty-nine days during the 1972-73 academic year, one hundred six days during 1973-74, and sixty-two days during the 1974-75 academic year up to and including the date of December 5, 1974. She has no accumulated sick leave. (Board's Brief, at pp. 1-2)

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In March 1974, the Board terminated Cecelia O'Toole's sick leave benefits and she appealed to the Superior Court of New Jersey, Chancery Division (Hon. Martin J. Kole, J.S.C.), who remanded this matter to the Commissioner for a substantive decision. The Court ordered that, pending the decision of the Commissioner, Cecelia O'Toole be paid her sick leave benefits in accordance with Article VIII, Section A, of the negotiated policy which is the subject matter of the instant dispute. (Schedule D—Petitioners' Brief, at p. 1) The parties stipulate that petitioner is, in fact, sick and has a *bona fide* illness which prevents her from attending to her regular duties. (Petitioners' Brief, at p. 6)

The argument presented to the Commissioner is, therefore, whether or not the Board is bound by the provisions of its adopted policy, or whether the terms of *N.J.S.A.* 18A:30-6 and 7 are controlling as interpreted by the Board.

At the conference of counsel, the hearing examiner denied petitioners' offer of proof of provisions contained in excess of thirty negotiated agreements in Bergen County school districts granting blanket sick leave benefits, in excess of the statutory minimum, without the necessity of individual consideration by the local board, in support of their practical construction argument.

The sick leave policy in question reads in pertinent part as follows:

ARTICLE VIII
LEAVE

"A. *Sick leave* in addition to the requirements of Chapter 18A, Laws of 1954, the Ramsey Board of Education further agrees that:

"1. If the absence of any teacher on account of personal illness, exceeds ten (10) days in one school year except as allowed under accumulated period provided in New Jersey Statutes 18A, such teacher shall forfeit the actual substitute's salary pay in accordance with Article VI Section G1 for each day's absence, from the eleventh or the first day following expiration of accumulated leave to the 100th day of absence inclusive in the same school year.

"2. Any teacher who shall have had less than ten years' experience in teaching shall forfeit per diem pay for each day's absence in excess of one hundred (100) days, occurring in the same school year.

"3. Any teacher who shall have had at least ten (10) years' experience in teaching may be permitted to be absent, on account of personal illness for more than one hundred (100) days in a school year, with the loss of half pay for the time of absence in excess of one hundred (100) days, if leave of absence is granted to such teacher by resolution of the Board, but no leave of absence so granted shall be extended beyond the end of the school year in which the absence mentioned occurs." (Schedule A)

The Commissioner has addressed the question of sick leave in several

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decisions. *Mabel Marriott v. Board of Education of the Township of Hamilton, Mercer County,* 1949-50 *S.L.D.* 57, aff'd State Board of Education, 1950-51 *S.L.D. 69; Marjorie B. Hutchenson v. Board of Education of Totowa,* 1971 *S.L.D.* 512, aff'd State Board of Education, 1972 *S.L.D.* 672; *Anne Ida King v. Board of Education of the Borough of Woodcliff Lake,* 1972 *S.L.D.* 449; *Woodbridge Township Federation of Teachers Local No. 822, AFL-CIO v. Board of Education of the Township of Woodbridge; Woodbridge Township School Administrators' Association v. Board of Education of the Township of Woodbridge,* 1974 *S.L.D.* 1201

Chapter 30, Leaves of Absence, in *N.J.S.A.* 18A Education, sets forth the statutes which specifically define, mandate, and authorize sick leave for all school employees. The statutes relevant in the instant dispute are reproduced here in part as follows:

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

"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 who are protected by tenure in their office, position, or employment under the provisions of this or any other law *** shall be allowed sick leave with full pay for a minimum of 10 school days in any school year."

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

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

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

"When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education *in each individual case.****" *(Emphasis supplied.)*

The aforementioned statute, *N.J.S.A.* 18A:30-6, permits a local board of education to grant additional sick leave, less substitute's pay, when an employee has used all accumulated sick leave and annual sick leave as the result of illness in any one school year. *Hutchenson, supra*

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

"Nothing in this chapter shall affect the right of the board of education to

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fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year.''

In *Marriott, supra,* the Commissioner dealt with a set of facts which are similar to those argued herein, and he held that the statute then in force, *R.S.* 18:13-23, basically unchanged to the present day but now *N.J.S.A.* 18A:30-6, precluded an automatic, blanket coverage and required an individual consideration of each request for extended sick leave. Specifically, the Commissioner stated:

> ''***It will be noted that the board must consider *each individual case.* Therefore, a blanket rule of a board of education to pay for a certain number of days the difference between a teacher's salary and her substitute's without considering the individual cases in inconsistent with law. Accordingly, such a *blanket rule* must be considered only as a general statement of policy, not binding upon the board or any of its members in an individual case. *The board members are free, and, indeed, it is their duty, to decide each individual case on its merits.****'' *(Emphasis supplied.)* (at 60)

The Commissioner repeated this language in *Hutchenson, supra,* and he found that the board's policy gave away its freedom ''to decide each individual case.'' He stated, therefore, that the contested provision in its policy was inconsistent with *N.J.S.A.* 18A:11-1, which prohibits such inconsistency and which reads in part as follows:

> ''The Board *shall* *** make, amend, and repeal *rules, not inconsistent* with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools *** and for the *employment,* regulation of conduct and discharge of its employees***.'' *(Emphasis supplied.)*

The Commissioner then decided *King, supra,* which held that the board's policy in the matter which granted, *inter alia,* sixty days non-accumulative sick leave in addition to fifteen days of accumulative sick leave was an ''***improvident action which [constituted] an abuse of discretion.***'' He declared that policy *ultra vires* and set it aside.

In *Woodbridge, supra,* the Commissioner quoted *Marriott, Hutchenson, King,* and commented further as follows:

> ''***The Commissioner pointed out in *King, supra,* that uniformly acquired, accumulative sick leave must be utilized first, before any additional annual sick leave days above the total of fifteen are used. This determination is based upon the principle that a statute may not be construed to permit its purpose to be defeated by evasion. *Grogan v. DeSapio,* 11 *N.J.* 308,

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322 (1953) If local boards of education were to grant, for example, thirty days of sick leave annually, and employees used fifteen which may not be accumulated, then the remaining fifteen could be accumulated. By such arrangements the intendment of both *N.J.S.A.* 18A:30-6, 7 would be evaded by a board policy. The purpose of the statute, *N.J.S.A.* 18A:30-7, is to prevent an improvident policy from being adopted while still protecting the personal interest of the employee who assiduously accumulates the maximum possible sick leave days from year to year. The policy held to be *ultra vires* in *King* made both statutes, *N.J.S.A.* 18A:30-6, 7 meaningless, by permitting a total of seventy-five sick days per year.***'' (at 1208)

And,

''***In the instant matter, the Board's second sick leave policy *** was based upon the erroneous assumption that only fifteen days of sick leave could be granted for a school year. The Commissioner does not agree for the reasons hereinbefore stated. A local board of education may grant sick leave in excess of fifteen days on a uniform basis to all employees; however, in the Commissioner's judgment, the accumulated days, including the annual number permitted to accumulate between eleven and fifteen, must be used before the excess number, which cannot accumulate, may be used. Thus, an additional benefit would be available for prolonged illness, without violating the spirit and intent of the statutes. A benefit in this form also obviates the creation of the undesirable situation whereby employees would each year be granted sick leave which could not accumulate, but which could be used without diminishing the maximum of fifteen which may accumulate.***'' (at 1208-1209)

In the judgment of the hearing examiner, that language in *Woodbridge, supra,* which states that a board ''***may grant sick leave in excess of fifteen days on a uniform basis to all employees***'' is in conflict with the decisions in *Marriott* and *Hutchenson, supra,* both of which were affirmed by the State Board of Education. Those decisions held that extended sick leave beyond the accumulated sick leave benefits may be provided when the board decides in ''each individual case.''

The hearing examiner recommends, therefore, that the Commissioner modify that portion of his decision in *Woodbridge* which would allow for extended sick leave blanket coverage by board of education policy rather than by consideration of each individual case. The hearing examiner further recommends that no maximum limit be placed on any individual employee's request for extended sick leave.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions, objections and replies thereto filed by the parties. Petitioners

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aver that the report of the hearing examiner relied too heavily on the decisions of the Commissioner in *Mabel Marriott, supra,* and *Marjorie B. Hutchenson, supra,* and failed to adequately consider the legislative history of the sick leave statutes. In petitioners' view this history clearly points ''***to an intention by the Legislature to expand rather than restrict sick leave benefits payable by Boards of Education.***'' (Petitioners' Exceptions, at p. 1) It follows, petitioners aver, that *N.J.S.A.* 18A:30-7 is an alternative and a more liberal statute than *N.J.S.A.* 18A:30-6, which restricts sick leave benefits beyond fifteen days to those grounded only in judgments by local boards based on studies of ''***each individual case.***'' *N.J.S.A.* 18A:30-6 Petitioners aver that the Commissioner correctly analyzed the applicable statutes in *Woodbridge, supra,* and urge the Commissioner to reject the recommendation of the hearing examiner that the determinations in *Woodbridge* be reversed. The Board's Reply takes exception only to that part of the hearing examiner's report wherein it is stated that the parties stipulated that petitioner had a bona fide illness which prevented her from attending to her regular duties. The Board avers that it did not affirm or deny petitioner's illness but that a medical certificate prepared by Petitioner O'Toole's physician had been filed with the Board.

Thus, the determination required herein is one concerned primarily with the interpretation of two statutes: the one, *N.J.S.A.* 18A:30-6, which provides for an extension of sick leave benefits after an individual case scrutiny; the other, *N.J.S.A.* 18A:30-7, which also provides, seemingly in contradiction, that there may be a blanket extension of such benefits by ''rule.'' Certain prior decisions of the Commissioner are directly involved in the controversy.

The Commissioner determines that a review of the legislative history of the statutes here in question is again in order as a reference point of consideration. This history was set forth in *Woodbridge, supra,* as follows:

> ''***The original enactment of *P.L.* 1942, *c.* 142 granted certain provisions of sick leave to '***teachers, principals and supervising principals***.' The title of this act was changed by *P.L.* 1952, *c.* 237 to provide sick leave benefits for '***teachers, principals, assistant superintendents and superintendents***.' A general revision of this law was accomplished by the enactment of *P.L.* 1954, *c.* 188, which extended the scope of these sick leave benefits to '***certain persons in the public schools of this State.' The statement attached to this legislation enunciated two purposes of this bill, the second being '***to extend the coverage of the law to include all persons steadily employed by boards of education.' The language of the specific 1954 statute, *N.J.S.A.* 18:13-23.8 (now 18A:30-2) clearly provides that the act applies to '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***.
>
> ''Further amendments and additions were made to this basic act by *P.L.* 1956, *c.* 58, permitting the granting of sick leave above the minimum of

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ten days; *P.L.* 1958, *c.* 150, allowing additional sick leave days above the minimum of ten to accumulate, but limiting the annual accumulation of such unused days to fifteen; *P.L.* 1959, *c.* 175, providing for leave with pay for injury arising out, and in the course, of the performance of duties, for up to one calendar year; *P.L.* 1960, *c.* 53, protecting the accumulated sick leave of employees who continue employment after a regional school district is created; *P.L.* 1960, *c.* 54, providing similar protection for employees of public schools which consolidate; *P.L.* 1961, *c.* 34, permitting local school boards to hire teachers with accumulated sick leave from other school districts within the same county and transfer such leave; and *P.L.* 1967, *c.* 177, broadening the transfer of accumulated sick days for new employees from any other school district within the State.

"The Commissioner's conclusion was stated in *King, supra,* as follows:

"***Thus the thirty-year history of this legislation discloses a consistent legislative purpose to broaden the scope of beneficiaries, and no instance of restrictive language to permit any limitation of the designated beneficiaries at the discretion of local boards of education. Therefore, the Commissioner finds no authority in the controlling statutes of *N.J.S.A.* 18A:30-1 *et seq.* to permit such a limitation. Sick leave provisions adopted by a local board of education pursuant to the statutes, *ante,* must apply to all persons as defined by *N.J.S.A.* 18A:30-2***.' (1972 *S.L.D.* at 455)***" (1974 *S.L.D.* at 1205-1206)

The Commissioner further determined in *Woodbridge, supra,* as recited by the hearing examiner, that that board's policy was "***based on the erroneous assumption***" that only fifteen sick leave days could be granted in a school year as a blanket provision applicable to all employees. The Commissioner determined that sick leave days in excess of fifteen could be granted "***on a uniform basis to all employees." Such a grant was specifically barred by the decisions of *Hutchenson* and *Marriott, supra,* and it is this apparent conflict which is directly at issue herein.

The Commissioner observes that the decision in *Woodbridge, supra,* postdated the decision in *Hutchenson, supra,* by more than three years and that in *Marriott, supra,* by more than fourteen years. It is further observed that the decision in *Hutchenson* was predicated in large part on *Marriott* although this earlier decision was handed down many years prior to the passage of *L.* 1956, *c.* 58 which, as set forth *ante,* was a liberalization of the sick leave entitlements. It provided an opportunity for local boards to provide by rule or by individual consideration for a grant of sick leave days over and above the minimum number. *L.* 1954, *c.* 188 had provided that local boards could pay the salary for employees in certain cases of absence "***not constituting sick leave." Thus, in these two enactments there was a clear liberalization of law which the Commissioner determined, in effect, in *Woodbridge* had not been adequately considered in *Hutchenson,* but had been given weight in *King.* Therefore, he relied on *King* in his determination in *Woodbridge* and it is the principles set forth in these two decisions which must serve as the guide herein. The Commissioner so holds.

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Such holding is, in its essential form, that local boards of education must grant at least ten days of sick leave per year to all employees as a minimum entitlement but *may* grant as many additional days to all employees as it deems appropriate in a blanket rule applicable to all. The sole restriction is that no more than fifteen days of sick leave may be accumulative. *N.J.S.A.* 18A:30-7 Sick leave beyond that provided in a blanket rule may be granted as the result of individual consideration pursuant to *N.J.S.A.* 18A:30-6 and *Hutchenson, supra.* Thus, the statute *N.J.S.A.* 18A:30-6 does not act as a restriction against the provisions of 18A:30-7 but as an extension. When the benefits of a blanket rule applicable to all employees have been exhausted in any instance, a local board of education may still, as the result of individual consideration, grant the payment of a day's salary less the pay of a substitute teacher as circumstances may be deemed to warrant such action. *N.J.S.A.* 18A:30-6 Such interpretation of the statutory plan was inferred in *King, supra,* wherein the Commissioner said:

> "***It is also logical to assume that, given additional sick leave days as described above, if any employee used all of the annual sick leave days and, additionally, all accumulated sick leave days as the result of illness in any one school year, the board could invoke its authority under *N.J.S.A.* 18A:30-6, *supra,* to grant *additional sick leave less substitute's pay. Hutchenson v. Board of Education of Totowa, Passaic County,* [1971 *S.L.D.* 512]***" *(Emphasis supplied.)* (1972 *S.L.D.* at 454)

In the context of these determinations the instant policy may be examined. The Commissioner determines in this respect that the Board's policy (Schedule A, *ante*) is appropriate in part in that Section A-1 makes uniform provisions for the sick leave entitlement of all employees, but faulty in part in that benefits set forth for sick leave beyond one hundred days (A-3) are not made uniformly available. Such provisions are required to be made uniformly available to all for reasons set forth in *King, supra,* unless there is consideration of individual cases pursuant to *N.J.S.A.* 18A:30-6. The years of service criterion in Section A-3 is inappropriate. The Commissioner so holds.

Accordingly, the Commissioner determines in the instant matter that the sick leave entitlement for Petitioner O'Toole for the 1974-75 academic year is that which is specifically set forth as applicable to all employees in Section A-1 of the Board's sick leave policy (Schedule A, *ante*) but that there is no entitlement pursuant to Section A-3 of such policy. The Board is directed to compensate her substantially commensurate with this determination.

COMMISSIONER OF EDUCATION

June 5, 1978
Pending State Board of Education

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In the Matter of the Tenure Hearing of

Arlene Dusel,

School District of the Borough of Sayreville, Middlesex County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant, Casper P. Boehm, Jr., Esq.

For the Respondent, Rothbard, Harris & Oxfeld (Sanford R. Oxfeld, Esq., of Counsel)

The Board of Education of the Borough of Sayreville, hereinafter "Board," has proffered a series of three charges against respondent, a tenured teaching staff member in its employ, to the Commissioner of Education for determination pursuant to the procedure set forth in the Tenure Employees Hearing Law. *N.J.S.A.* 18A:6-10 *et seq.* Such charges were certified in a resolution of the Board adopted on October 13, 1976, subsequent to receipt of a letter of September 29, 1976 from the Superintendent of Schools, wherein it was alleged that respondent had been arrested by the New Brunswick Police Department for allegedly growing twenty-two marijuana plants, possessing narcotics paraphernalia, including two pipes and three packs of marijuana cigarettes and for possession of more than 25 grams of marijuana. The Superintendent alleged that such charges, if proven true in fact, constitute evidence of conduct unbecoming a teacher. Respondent admits to some of the allegations against her but avers she "***does not now, or has she ever, admitted any guilt in relation to these charges.***" (Respondent's Answer, at p. 1) She further avers that she would voluntarily agree to receive first offender treatment pursuant to *N.J.S.A.* 24:21-27 and that after the appropriate time there would be no criminal record whatsoever. She requests dismissal of the charges.

Subsequent to receipt of respondent's Answer, an Order to suppress evidence advanced against respondent in a parallel Court proceeding was granted by the Honorable Charles H. Morris, Jr., on December 17, 1976 and on March 7, 1977 all complaints against respondent were dismissed in Superior Court. Respondent moved at that juncture for dismissal of the charges before the Commissioner but the Board objected to such dismissal. The Board maintained that it was not bound by rules of criminal evidence, which were at issue, with respect to the Court proceeding and maintained further that it was entitled to enter its proofs with respect to the allegation of unbecoming conduct. On June 17, 1977 the hearing examiner appointed by the Commissioner set forth the view in a letter to the parties that the Commissioner's jurisdiction to hear the matter was not impinged by the determination in the criminal proceeding but offered to

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refer the question of jurisdiction directly to the Commissioner upon request. No such request was received and a hearing was then set down and conducted on July 18, 1977 at the office of the Middlesex County Superintendent of Schools, New Brunswick. Memoranda of Law have been filed. The report of the hearing examiner is as follows:

Testimony at the hearing with respect to the charges that respondent had grown marijuana and had been in possession of narcotics paraphernalia and marijuana cigarettes was elicited from a New Brunswick police officer. He testified that on or about August 1, 1976 he had observed respondent on a patio outside a second floor apartment and also saw what he thought "***was a marijuana plant in what I believed was a closet.***" (Tr. 15) He testified he saw the same plant on two subsequent occasions and on one of those occasions, in the early morning, it was illuminated by a fluorescent "bright light." (Tr. 15) He testified he obtained a search warrant and at approximately 7 p.m. on September 21, 1976 he and two other police officers presented themselves at respondent's apartment door. (Tr. 15, 17) He testified he knocked on the door and rang the doorbell but that there was no answer and that he then gained entry with a passkey from the apartment building superintendent. (Tr. 17) He testified that respondent was alone in the apartment. (Tr. 21) He testified that he had shown her the search warrant and she had read it and that he and the other officers had then searched the apartment. He testified that as a result of the search he had found fourteen large potted plants, tentatively identified as marijuana, on shelves in the closet and another eight such plants in smaller pots on the patio in a "fish tank." (Tr. 21) He testified that he also found two pipes, three packages of cigarette paper and approximately 16 grams of what he believed to be refined "loose marijuana" that had been processed. (Tr. 22) He testified that all of the twenty-two plants, tentatively intially identified as marijuana, had thereafter been determined to be marijuana by the State police and that the "loose" material had also been so identified. (Tr. 24) He testified he had then charged respondent with possession and growing of marijuana and with possession of narcotics paraphernalia. (Tr. 25, 34) He testified that he had not observed that respondent was under the influence of a narcotic and that one of the pipes which was found "***could have been***" taken from a closet which contained only men's clothing. (Tr. 32)

Respondent testified that she had been in California during the period August 1 to September 1, 1976 when she had allegedly been seen on her patio but that she had arrived back in New Brunswick on September 1, 1976. She testified that there was "another name on the lease" of the apartment she occupied and she later identified such "name" as a male entomologist employed by Rutgers University. (Tr. 56, 65) She testified that the marijuana plants belonged to him but that she "***really wasn't sure***" that the plants were marijuana. (Tr. 57) She testified that the plants were "very small" at the time she left for California but that she had watered them along with other plants which belonged to her. (Tr. 58) She testified that she assumed, and was told, that the plants later identified as marijuana "***were something he was doing for one of his experiments***" and that the fluorescent lights were required to assist with the propagation of "***mites and things like that***" in the work

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of an entomologist. (Tr. 62-63) She testified she never volunteered information to the police that the plants were not hers and in fact believes she was not questioned in this regard. (Tr. 67) She further testified that the man she alleges owned the plants never volunteered the information to police either and that she alone was charged with an indictable offense. She testified that this man has since moved and she does not know his whereabouts. (Tr. 65)

Respondent avers that the evidence against her is not sufficient as one isolated incident involving other than school related activity, even if found to be true in fact, to warrrant her dismissal from her tenured position. She further avers, with respect to the facts, that "***all that was shown was that twenty-two marijuana plants, two pipes, cigarette paper and some loose marijuana was found in an apartment which respondent possessed jointly with another individual on the night of September 21, 1976***" even if the Board's case is viewed in its "***best possible light***." (Respondent's Memorandum, at p. 2) She maintains that there is no proof that the plants belonged to her and cites her sworn denial in this regard. Respondent avers moreover that the Commissioner has never taken a position with respect to possession of marijuana by teaching staff members and it would be unduly harsh, without case precedent, to impose a punishment of any kind upon her for actions classifiable only as those of a disorderly person. She distinguishes the decision of the Commissioner *In the Matter of the Tenure Hearing of David Earl Humphreys, School District of Pennsville, Salem County,* decision on Motion July 11, 1977, on the basis of the serious impact of the charges in Humphreys. Respondent further argues that on the record of the decision *In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville,* 1973 *S.L.D.* 157, a finding with respect to one single and isolated incident poses no reason for dismissal from her tenured position. The dismissal of the matter by the Court is held by respondent to be further reason, on constitutional grounds, for a similar dismissal by the Commissioner.

The Board avers that respondent has not cited cases "***which would prohibit the use and introduction of the evidence obtained by the police***" in an administrative matter before the Commissioner and further avers that the Commissioner should not be bound by rules of evidence applicable to criminal matters. (Board's Brief, at p. 6) In the Board's view, respondent's testimony about a co-tenant in her apartment and his propagation of marijuana plants is "incredulous" and her other testimony wherein she indicated a lack of knowledge that the plants were marijuana is not believable. The Board also questions why respondent failed to tell the police of her alleged cotenant and his involvement with marijuana at the time of her original arraignment if, in fact, the responsibility for the marijuana and the paraphernalia was his. In support of its view that respondent should be dismissed as a result of the factual record of this hearing, the Board cited *Humphreys, supra; "A.D." v. Board of Education of the East Windsor Regional School District,* 1974 *S.L.D.* 447; *"W.G." v. Board of Education of the Township of Ocean,* 1974 *S.L.D.* 780; and *"E.E." v. Board of Education of the Township of Ocean,* 1971 *S.L.D.* 97, 101.

The hearing examiner has considered such arguments in the context of the

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total factual record of this matter and finds that the Commissioner does have jurisdiction. Such finding is premised on a series of decisions of the Commissioner and the courts wherein it has been held that determinations in an administrative matter may be made independently from those made by the courts in a criminal proceeding. *Schwarzrock v. Board of Education of Bayonne,* 90 *N.J.L.* 370 (*Sup. Ct.* 1917); *Borough of Park Ridge v. Salimone,* 36 *N.J. Super.* 485 (*App. Div.* 1955), aff'd 21 *N.J.* 28 (1956); *Victor W. De Bellis v. Board of Education of the City of Orange,* 1960-61 *S.L.D.* 148 The quantum of proof required in an administrative hearing is that there shall be a preponderance of believable evidence as a criterion for a determination and not, as in a criminal procedure, proof beyond a reasonable doubt. A finding of guilt in an administrative matter, albeit it may result in serious consequences, is not of an import comparable to a criminal determination of guilt.

The hearing examiner further finds that on September 21, 1976 respondent was found in what she characterized at one point in the hearing as "my apartment" (Tr. 52) to be in possession of a total of twenty-two potted marijuana plants, a quantity of loose marijuana, two pipes and cigarette papers. Indeed, such facts are undisputed by respondent although the impact of such finding is a subject of dispute. The principal issue for determination is whether respondent's explanation of such facts is believable; that the marijuana and paraphernalia did not belong to her, that she "wasn't sure" that the plants were marijuana and that the man that she alleges owned the materials has since left the apartment for an unknown destination.

The hearing examiner concludes that such an explanation is not credible. Fourteen of the marijuana plants, here in question, were large plants prominently displayed and lighted artificially to stimulate growth. Any finding that would set forth a conclusion that respondent had never questioned the propagation of such plants, inquired about the kind or family of plant or questioned the use to which they would be put would be one which would require a corollary finding that respondent was indeed naive in the extreme. The hearing examiner cannot so find since respondent's testimony at the hearing gave no substantiation to support it. She is a mature, well educated, tenured teaching staff member. Her educational background makes it highly improbable to conclude that she lived with and cared for these plants in ignorance of what they were. (Tr. 58)

To the contrary, the finding must be, and is, that on September 21, 1977 respondent was found in possession in her apartment of a quantity of refined marijuana and in possession of plants which she knew to be marijuana plants which she helped to tend to propagate. The question for ultimate determination is whether such finding, in the absence of any prior incidents of record and absent any evidence that respondent's work in the public schools was affected by such private behavior, constitutes sufficient reason for respondent's dismissal by the Commissioner from her tenured employment with the Board.

The hearing examiner concludes that the Commissioner's prior decision involving drug possession and use do indicate that dismissal is warranted. The Commissioner said in *Humphreys, supra:*

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> "***The problem of the possession of drugs and the possible attendant use of such drugs is one of the great problems facing today's society. Parents must be assured that all professional school employees to whom they entrust the care and education of their children shall rise above the possible taint of drug possession or usage.***" (at)

There can be no such assurance in the context of the facts and findings as set forth, *ante*.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions, objections and replies thereto filed by respondent, *pro se*, by her counsel, and by the Board. The exceptions of counsel for respondent dispute the finding that respondent knew or should have known the facts with respect to the marijuana plants found growing in her apartment, and dispute the admission of the police officer's testimony with respect to the search. Further, the exceptions aver that a charge such as that herein involving a single incident without evidence of an impact on the pupil-teacher relationship and involving a relatively small amount of marijuana cannot be used as the basis "***to punish respondent whatsoever." (Respondent's Exceptions, at p. 8) Respondent finds support for this position *In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville*, 1973 *S.L.D.* 157. She distinguishes the determination in *Humphreys, supra*, by the fact that the allegations therein involved "***a much more serious matter, and the courts and the legislature recognize this distinction.***" (Respondent's Exceptions, at p. 9)

Respondent, in her exceptions, *pro se*, avers that the hearing examiner's report states that there were three packs of marijuana cigarettes found in her apartment when in fact there were three packs of cigarette "paper." She further avers that she has never admitted the truth of some of the allegations against her but only to the fact that she was arrested on such charges. Respondent urges the Commissioner to decide herein "***in light of current developments nationally and locally in regard to marijuana.***" (Respondent's Exceptions, *Pro Se*, at p. 3) She cites in this respect a number of instances wherein an effort has been made to remove the penalties now existing in law for the private possession and use of marijuana and avers that "***even if respondent was an acknowledged drug user, rehabilitation, not dismissal, would be mandated***" in the context of her otherwise exemplary work as a teacher. (Respondent's Exceptions, *Pro Se*, at p. 3)

The Commissioner determines that respondent's avowal, that the testimony of the police officer should have been barred by the hearing examiner because a technical flaw in the search procedure he initiated caused the results of the search to be barred as evidential by the Court, cannot be accepted as valid. As Justice Powell of the Supreme Court of the United States said in a recent decision,

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Carey v. Piphus, 46 *U.S.L.W.* 4224, written for the Court and concerned with another constitutional right, that of due process;

> "***rights, Constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.***" (at)

The "interests" to be protected herein are not those associated with a possible indictment or conviction in a criminal matter but those concerned with fitness to hold a position as an instructor of school pupils. The right of these pupils to be taught by teachers who are free from the taint of patently illegal or flagrantly unbecoming acts is also at issue. In such a balancing of rights and circumstance the Commissioner holds the Board was not barred, but required, in the matter, *sub judice,* to make inquiry with respect to respondent's alleged activities at the time they were brought to public attention and that such requirement included at least the securement of the details of the allegations as presented by the police and an opportunity for respondent to respond thereto.

This holding is not unlike that of the Court in *Estelle Laba et al. v. Board of Education of Newark,* 23 *N.J.* 364 (1957) (1956-57 *S.L.D.* 87) wherein the Supreme Court of New Jersey was required to consider whether teaching staff members who had invoked the Fifth Amendment of the United States Constitution and refused to testify before a congressional committee could, because of such refusal, be subject to an inquiry by the local board of education. The Court affirmed the Commissioner's prior decision that such inquiry was appropriate and quoted with favor a document prepared by the Association of American Law Schools Committee on Academic Freedom in 1953 as follows:

> "***'Whether a faculty member who has refused to answer a legislative question may be found unfit for his post can be determined only by an investigation of all the relevant circumstances, including the individual's entire record as a teacher and scholar and the reasons which prompted his refusal to testify. If the reasons involve a desire to conceal continuing illegal or immoral conspiratorial activity of the faculty member or of others, an adverse judgment may of course be reached. If the reasons lay in confusion or fear produced by the investigation, they may have little bearing upon the faculty member's fitness; if they involve sincere ethical or political principles, their bearing will hardly be adverse. If the witness's refusal to testify resulted from a decision to withhold evidence of his past or present illegal conduct, the question of his fitness turns upon the justifiability of his decision, upon whether the conduct continues, and upon the relevance of that conduct to his academic duties. A good-faith reliance upon the constitutional privilege to remain silent is not misconduct, but contumaciousness toward a legislative committee is and may be weighed in the balance.' Association of American Law Schools, Proceedings 111 (1953).***" (at 375-376)

The Court in *Laba, supra,* further cited a decision of the Pennsylvania

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Supreme Court in *Board of Public Education School District of Philadelphia v. Beilan*, 386 *Pa.* 82, 125 *A.2d* 327, 330 (1956) in support of the view that a teacher is required to "fully and frankly" cooperate with school authorities when there is a need to evaluate fitness to teach. The citation recited in part was:

> "***'Certainly a teacher who refuses to respond to a pertinent inquiry relative to his fitness to teach is not competent within the broad reach of that term, whether the inquiry concerns loyalty or any other proper subject of inquiry. Frankness and cooperation with an administrative superior bear directly upon a teacher's competency. They are as essential in one occupying a post of public trust and civic responsibility as academic qualifications. *** The Superintendent has the power and the duty, whenever the facts indicate the need, to inquire into and reevaluate the fitness of a teacher. *** Unquestionably there is a reciprocal duty on the part of the teacher to fully and frankly cooperate. He may not block such proper inquiry by secretiveness or concealment.' [125 *A.2d* at 330-331]***" (at 386-387)

In its conclusion in *Laba* the Court said:

> "***In recent days many thoughtful and highly respected educators have taken the position that, while the assertion by a faculty member of his constitutional privilege before a Congressional Committee does not constitute an admission of guilt or justify automatic dismissal, it does call for a full and conscientious inquiry as to whether he is qualified to continue in the discharge of his teaching responsibilities at a place dedicated to the advancement of democratic ideals.***" (*Id.* at 393-394)

While the Court proceeding in the instant matter, which preceded the hearing before the hearing examiner, was not marked by a refusal of respondent to testify, the decision of the Court to grant a Motion to Dismiss on a technical flaw precluded any testimony on the merits of the charges but left a doubt with respect to respondent's fitness to teach. It is the Commissioner's determination that the circumstances then required the same "full and conscientious inquiry" by the Board that the Court deemed advisable in the interests of pupils in *Laba, supra*. The ultimate purpose of the inquiry by the Board and the procedure before the hearing examiner, in the context of the Court's dismissal of criminal charges against respondent, was only to determine whether respondent was qualified "***to continue in the discharge of [her] teaching responsibilities***." (*Laba* at 394) In such circumstance there was an obligation for respondent to cooperate with the hearing procedure, to refrain from concealment and to testify concerning the allegations against her. She did, in fact, so testify and the allegations may now be judged on their merits.

Respondent's testimony at the hearing was that she shared an apartment with a man not her husband but that his name was affixed along with hers to the rental lease. She confirmed by her testimony that plants later identified by police as marijuana were indeed growing in the apartment and that a miscellany of refined marijuana, pipes and cigarette paper was also found. She avers,

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however, that such facts do not involve her and that the responsibility for the apartment she and her co-tenant otherwise shared do not include the illegal propagation or possession of an illegal substance.

The Commissioner cannot agree to such an avowal and conclusion. He holds instead that respondent had in fact compromised her own position in this factual situation by her own actions in the initiation of, or consent to, a liaison wherein there was a unity of interest and where there must be adjudged to be at least a measure of liability in the sharing arrangement.

The Commissioner is constrained, however, to give equal weight to the facts in the record which are favorable to respondent and which must be considered in the assessment of a penalty. There was no evidence produced at the hearing that respondent was herself a user of marijuana. The Superintendent testified that respondent had served creditably as an employee of the Board and that the incidents considered in the instant matter stand alone as a flaw.

Accordingly, the Commissioner determines that the allegations, *sub judice*, with respect to the private possession of marijuana, even in the limited determination that such allegations were true in fact as set forth, *ante*, are not "sufficiently flagrant" in the criterion of the Court in *Redcay v. State Board of Education*, 130 *N.J.L.* 369, (1943), aff'd 131 *N.J.L.* 326 (*E.&A.* 1944) to justify respondent's dismissal from her tenured position. As the Court said in *Redcay:*

> "***Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is *best evidenced by a series of incidents*. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.***" *(Emphasis supplied.)* (at 371)

It may be further observed that the allegations of the instant matter have not been associated in any way with respondent's performance of duties as a teacher.

The Commissioner has weighed these facts and determines that the findings in this matter justify a lesser penalty than dismissal. He directs therefore that respondent be restored forthwith to her position but that there shall be a forfeiture of her salary and other emoluments retroactive to the day of her suspension without pay by the Board.

COMMISSIONER OF EDUCATION

June 5, 1978

Pending before State Board of Education

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Doris Berkhout,

Petitioner,

v.

Board of Education of the Borough of Roseland, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Peter N. Perretti, Jr., Esq.

Petitioner, a teaching staff member in the employ of the Board of Education of the Borough of Roseland, hereinafter "Board," alleges that the Board has improperly and illegally reduced her hours of employment and has refused to acknowledge her seniority entitlement to a full-time position. She requests that the Commissioner of Education restore her to such a position in the employ of the Board. The Board denies that it has acted improperly or illegally and avers that its controverted action to reduce its professional staff was within the parameters of its authority. It requests dismissal of the Petition of Appeal.

The matter is submitted on the pleadings and an agreed stipulation of facts. The facts which gave rise to the dispute may be succinctly recited.

Petitioner applied for a position as a learning disabilities teacher in the employ of the Board in January 1970 and was first employed by the Board to serve in such a position in April 1970. At all times forward from that date through June 1976 her employment by the Board was that of a full-time learning disabilities teacher-consultant at a salary commensurate with her years of experience and academic preparation. Her service in this position was within the authority of a certificate issued by the State Board of Examiners in March 1971 and containing the express designation of her qualifications as a "Learning Disabilities Teacher-Consultant." (PR-2) Prior to petitioner's acquisition of this certificate she had been issued certificates to serve as a "Teacher of the mentally retarded" (June 9, 1966) and as "Elementary School Teacher" (November 1967). She has not, however, performed duties pursuant to these latter certifications as an employee of the Board.

On April 25, 1976 the Board resolved, because of a reduction in the number of enrolled pupils, to abolish some positions of employment and to establish similar positions with a shorter work week. (PR-22) Thus, a school principal

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was reduced from a twelve month to a ten month year, and a vocal music teacher and petitioner were reduced from full-time employment to a four day week. The Superintendent then addressed the following letter to petitioner on April 26, 1976:

> "At its public meeting, conducted last evening, the Roseland Board of Education voted unanimously to abolish your position of full-time learning disabilities teacher-consultant. The Board had the authority to make this decision under powers mandated in N.J.S.A. 18A:28-9. However, it is also authorized by N.J.S.A. 18A:16-1 to create the new position of learning disabilities teacher-consultant -4 days/week. Due to your satisfactory performance in the past, the board is offering you this position with salary and fringe benefits to be determined at the completion of negotiations with total staff.
>
> "It is incumbent on you to inform the Superintendent of Schools, Mr. Nicholas F. Corbo, of your decision. He and I will be happy to discuss any questions or concerns you may have regarding this status change.
>
> "Please inform us of your decision no later than Friday, May 14, 1976." (PR-23)

Subsequently, petitioner informed the Board that she would accept the position of reduced employment at a salary level established at four fifths that of a full-time teaching staff member, although she has maintained she is entitled to a full-time position as an elementary teacher pursuant to law. (PR-11) She cites *N.J.S.A.* 18A:28-11, 12 and *N.J.A.C.* 6:3-1.10 in support of this position.

The statute *N.J.S.A.* 18A:28-9 provides in pertinent part that local boards of education may effect reductions in force because of a decision that "***it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils***." The statutes that follow establish the parameters of law with respect to seniority in the event of a reduction in force. *N.J.S.A.* 18A:28-10 mandates that "***the commissioner with the approval of the state board***" shall establish "standards" of seniority applicable in the event of such reduction. *N.J.S.A.* 18A:28-11 provides that:

> "In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status***."

N.J.S.A. 18A:28-12 provides in pertinent part that:

> "If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemploy-

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ment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940, shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service.''

The rules or ''standards'' of the State Board of Education provide that seniority shall be determined ''***according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, *in the school district in specific categories* as hereinafter provided.***'' *N.J.A.C.* 6:3-1.10(b) *(Emphasis supplied.)*

Petitioner avers that since she is ''***certificated, qualified and has taught in the Elementary School***'' the Board had an obligation to transfer her to ''***another position for which she was qualified***'' when the full-time position in which she had served throughout her period of employment by the Board was abolished. (Petition of Appeal, at p. 3)

The Commissioner does not agree. It is clear from the record that petitioner served during all of the years of her employment by the Board in only the one ''category'' of learning disabilities teacher-consultant. This category is a specific one as expressly set forth in the rules of the State Board of Education at *N.J.A.C.* 6:3-1.10(k)(30). It provides that there shall be:

''Additional categories of *specific certificates* issued by the State Board of Examiners and listed in the State Board rules dealing with Teacher Certification.''

Petitioner's ''specific certificate'' of learning disabilities teacher-consultant was the only one that authorized her to serve in her position with the Board, and in the absence of other service ''***in the school district***'' (*N.J.A.C.* 6:3-1.10(b)) pursuant to the authorization of her other certificates there is no other seniority entitlement. The Commissioner so holds.

Accordingly, it follows that there was no need for the Board to equate petitioner's seniority with that of other full-time teaching staff members serving as elementary teachers at the time her position was abolished and a new one established in its place. The validity of the reasons for the Board's reduction-in-force is not an issue, *sub judice,* in the context of the narrow thrust of the pleadings. There is no other cause of action before the Commissioner.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

June 6, 1978

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Hightstown Education Association and John Schnedeker,

Petitioners,

v.

Board of Education of East Windsor Regional School District, John Hunt, Superintendent, and Dempsey Dixon, Mercer County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondents, Turp, Coates, Essl and Driggers (Henry G. P. Coates, Esq., of Counsel)

This matter having been opened before the Commissioner of Education (Daniel B. McKeown, Assistant Director, Division of Controversies and Disputes) through the filing of a formal Petition of Appeal by which the Hightstown Education Association, and its President, hereinafter "petitioners," (Ruhlman and Butrym, Paul T. Koenig, Jr., Esq., appearing) allege that the Board of Education of East Windsor Regional School District, hereinafter "Board," (Turp, Coates, Essl and Driggers, Henry G.P. Coates, Esq., appearing) has violated the provisions of *N.J.A.C.* 6:29-6.3 in its employment of a person to coach the indoor track team and the girls' track team who is not otherwise employed by it as a teaching staff member and who is not certified to be a teaching staff member; and

It appearing that petitioners seek an Order from the Commissioner which would restrain the Board from continuing that person's employment as an alleged coach of the indoor and girls' track teams; and

Oral argument of the parties having been heard on petitioners' Motion for Restraint on April 7, 1978 at the State Department of Education, Trenton, and the matter having been referred directly to the Commissioner for adjudication, the facts of the matter are these:

Petitioners' Motion for Restraint is based on the fact that the Board has employed and assigned a person to coach indoor track and the girls' track team who is not otherwise employed by it as a teaching staff member nor is he certified to be a teaching staff member in the employ of any board. The Board admits it employs the person and has employed him in such a manner since 1974. The

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Board also states that he is not otherwise employed by it as a teaching staff member and that he does not possess any certification to be a teacher. The Board asserts, however, that he is not employed as a coach. Rather, the Board contends that the person is employed as an aide to assist the athletic director in the specific areas of indoor track and the girls' track team.

The Commissioner observes that the rules and regulations of the State Board of Education with respect to the employment of athletic personnel are clear and emphatic. *N.J.A.C.* 6:29-6.3(a) specifically provides that:

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

Furthermore, *N.J.A.C.* 6:29-6.3(b) requires:

> "Every person appointed subsequent to June 1, 1960, to coach, teach or train individual pupils or school teams for interschool athletic competition shall be a certified member of a school faculty in that same school district and shall be employed full time during the regular school day when classes are in session.***"

In instances where a board of education is not successful in acquiring the services of one of its teaching staff members to coach a particular sport, *N.J.A.C.* 6:29-6.3(c) does allow a board, with the proper approval of the county superintendent of schools on an annual basis, to employ certified, full-time employees of constituent or sending districts, or of a vocational school within the same county. Provision is also made at *N.J.A.C.* 6:29-6.3(d) which, under certain circumstances, allows a board, with the prior approval of the county superintendent on an annual basis, to employ certified and qualified full-time teaching staff members of other New Jersey school districts to coach. Finally, *N.J.A.C.* 6:29-6.3(e) allows boards of education, under certain circumstances, and with the prior approval of the county superintendent on an annual basis, to employ as a coach a person who possesses teacher certification but is not presently employed by a board.

Thus, the whole of *N.J.A.C.* 6:29-6.3(a) through (e) limits the employment of persons to coach an athletic activity to those who are certified to be a teacher. No authority exists for the employment of a person by a board of education to coach who, in the first instance, is not certified to be a teacher.

The Board asserts that the person assigned to the position controverted herein is not a coach, but a teacher's aide who assists the athletic director with indoor track and the girls' track team. The athletic director attests in his affidavit that

> "***I, as athletic director, supervise all coaches. I have, however, super-

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vised [the person] to a greater degree because of his absence from school during the day. We confer almost daily about the Girls' Track Team and on some days we discuss aspects of the Girls' Track Team program before and after practice. I have provided texts and other track materials to [him] in addition to personal supervision.***'' (R-1)

The Commissioner observes that the Board's roster for the 1977-78 school year of all coaches assigned to the various athletic teams names only the person designated as an aide for indoor track and the girls' track team. No one is assigned to these two athletic activities as a coach or assistant coach as is the case for other specified teams. (R-8)

The Commissioner has reviewed the affidavits executed by the secretarial assistant (R-4), the former Board Secretary (R-2), and the present Board Secretary (R-3), each of whom attests that he/she was never informed by the County Superintendent of Schools that the Board's use of the person as an aide to the athletic director was or is improper or illegal.

The Commissioner observes in this regard that subsequent to the oral argument of the parties herein the Mercer County Superintendent of Schools did produce from his official records a copy of a letter dated June 6, 1977 which he sent to the President of the Hightstown Education Association. (C-1) That letter is reproduced here in full:

''Your undated letter, regarding the coaching situation of the Girls' Spring Track Program at Hightstown High School, has been received and is hereby acknowledged.

''Thank you for supplying me with a copy of Dr. Hunt's letter to you dated April 28, 1977, in which he explains how the district has advertised for the position of girls' track (head) on two different occasions.

''Obviously, there has been a positive attempt to obtain the services of a certified person to fill the position in this instant matter. Since the search conducted has proven to be fruitless, the administration feels that the Athletic Director and his coaching aide are responsible and in charge of the program of Girls' Track. Thus, certified persons are in charge.

''Please find enclosed correspondence from Dr. Fred A. Price, to me regarding Guidelines for Hiring Athletic Coaches From Outside a Local School District, dated May 19, 1977. Perhaps this new procedure will allow your administration to recruit and obtain the services of a properly certified person.

''As your letter indicates, this is the first year that your girls are involved in a full complement of meets, and I am hopeful that the coaching matter will be corrected as promptly as possible.

''Thank you for your letter and know that I appreciate your concern. I have

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discussed this instant matter with Dr. John Hunt and Mr. George Hepbron, and I am confident that the situation will be rectified as promptly as possible.'' (C-1)

Firstly, the Commissioner knows of no authority for a person who, at the very least, is not certificated as a teacher to be appointed by a board of education to the position of coach or assistant coach. Secondly, this Board or any board of education may only create the positions of school aides and/or classroom aides to assist in the supervision of pupil activities under the direction of a principal, teacher or *other designated certified professional personnel* pursuant to *N.J.A.C.* 6:11-4.9. The requirements provide, *inter alia,* that school districts which desire to employ aides must develop job descriptions for each type of aide to be employed and standards for appointment. The job descriptions and standards adopted by the board of education must first be approved by the county superintendent of schools.

Here, there is no evidence that the Board ever adopted a job description or standards for appointment to the position of a coaching aide. Absent such evidence, the Mercer County Superintendent of Schools' stated conclusion in his letter dated June 6, 1977 that ''***certified persons are in charge [of the girls' track team]***'' is incorrect.

The Commissioner, having considered the arguments of the parties and particularly the affidavit of the athletic director (R-1), finds and determines that the Board has violated the provisions of *N.J.A.C.* 6:29-6.3 by assigning a person, not certificated, to be a coach of its indoor track team and its girls' track team. The Board's argument that the person is an aide to the athletic director is wholly without merit. The athletic director's attestation establishes that the person is assigned the duties of a coach with minimal supervision before and after practice.

The Commissioner has considered the Board's argument that *N.J.S.A.* 18A:7A-5(g) demands the participation of persons, not otherwise certified, in a thorough and efficient program of education. The referenced statute provides for the participation of ''Qualified instructional and other personnel.'' The Board's argument that ''other personnel'' allows for the use of noncertificated persons in coaching assignments contrary to *N.J.A.C.* 6:29-6.3 is misplaced. The statute does require the use of other qualified administrative and/or support personnel. The Commissioner so holds.

The Commissioner hereby directs the Board of Education of East Windsor Regional School District to immediately refrain from assigning any person to the position of coach who does not meet the requirements of *N.J.A.C.* 6:29-6.3 and to immediately terminate the assignment of Dempsey Dixon in its athletic program.

It is so ordered on this 6th day of June 1978.

COMMISSIONER OF EDUCATION

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Klaus G. Rucker, Marion J. and James W. Andriola,

Petitioners,

v.

Board of Education of the Borough of Kinnelon, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioners, American Civil Liberties Union of New Jersey (Anne Nelson, Attorney at Law)

For the Respondent, Rowe, McMahon, McKeon & Curtin (Thomas R. Curtin, Esq., of Counsel)

This matter having been opened before the Commissioner of Education (August E. Thomas, Deputy Assistant Commissioner, Division of Controversies and Disputes) by Anne Nelson, counsel for petitioners, by separate Petitions of Appeal dated April 26 and May 11, 1978 requesting a recomputation of the class ranking of all pupils and a stay of the graduation exercises scheduled by the Board of Education of the Borough of Kinnelon, hereinafter "Board," to be held on June 16, 1978; Thomas R. Curtin, Esq., counsel for the School District of the Borough of Kinnelon; and

The arguments of counsel having been heard regarding petitioners' contentions that the unwritten class rank policy utilized by the Board is discriminatory and is causing immediate and irreparable harm to petitioners now and in the future; and

It appearing that Klaus G. Rucker is a pupil completing his third year in high school; and

It appearing that petitioners' daughter Carol is a senior currently ranked third in her class; and

It appearing that the Board utilizes an unwritten class rank policy which urges all pupils to take as many courses as possible during their high school careers to better their education and that the grades earned from courses taken at private summer school are added to those earned at the high school, thus raising the class rank of those who attended summer school over those who did not or could not attend; and

It appearing that Carol Andriola would have been ranked number two in

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her class and named salutatorian if the ranking had been computed "***excluding advanced and/or new summer course work from consideration***" (Exhibit B); and

It appearing that the unwritten class rank policy has been utilized since either 1962 or 1964; and

It appearing that any delay in the graduation exercises would be unfair to the other seniors and may cause irreparable harm since many of them have undoubtedly made plans for this coming summer; and

It appearing that whatever the merits and demerits of the Board's unwritten class rank policy may have been, that the policy was not practiced so as to evidence bad faith or willful discrimination by the Board; and

It appearing that the Board reconsidered its unwritten policy and has changed it prospectively beginning with the next school year; and

It appearing that the final class ranking has not yet been established although the valedictorian and salutatorian have already been selected; nevertheless, the policy as it has existed for the past fourteen or sixteen years has been unfair to pupils as evidenced by the Board's willingness to change it and Carol Andriola has suffered because of the policy; however

It further appearing that it would be unfair to pupils already selected as valedictorian and salutatorian to now be stripped of those honors; now therefore

IT IS ORDERED that any and all awards for which the salutatorian may be a recipient, shall be matched and the duplicate awarded to Carol Andriola, or in the alternative, the awards shall be halved and presented to each pupil. Further, a letter shall be prepared for Carol Andriola containing the explanation of her class rank as set forth in some detail in Exhibit B, attached to the Petition of Appeal, so that she may use it for college application or other purposes favorable to her.

Further, the Board is directed to re-rank the entire senior class immediately and have the task completed before, or as soon after graduation as possible, so as to aid pupils in their applications for college entrance.

The Petition of Appeal filed by Klaus G. Rucker must now be either amended or withdrawn, considering the fact that the Board's contested policy is now changed.

Therefore, with the exceptions as hereinbefore noted, both Petitions of Appeal are dismissed.

Entered this 9th day of June 1978.

COMMISSIONER OF EDUCATION

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In the Matter of the Annual School Election Held in the School District of the Borough of Maywood, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

Pursuant to a letter complaint filed by defeated candidate Beverly Guglielmo, alleging certain irregularities in the conduct of the annual school election held February 14, 1978 in the School District of Maywood, an inquiry was conducted by a representative of the Commissioner of Education on March 3, 1978 in the office of the Bergen County Superintendent of Schools, Wood-Ridge. The announced results of the balloting for the election of school board members was not challenged; however, allegations of improper conduct of the election were made by complainant. Specifically, Candidate Guglielmo alleges that the name of the write-in candidate was "displayed in sight of every voter to see."

The report of the Commissioner's representative follows:

Complainant testified that something was wrong with the voting machine at Memorial School, District 2, when she attempted to cast her ballot. She testified that, although she reported the difficulty to an election worker, nothing was done to correct the malfunction. (Tr. 5-6)

Robert L. Magnabousco, a registered voter and resident of Maywood for thirty-three years, testified that when he stepped up to vote the woman on duty indicated to him the name of the write-in candidate on a handwritten slip of paper taped to the desk. He testified that he protested the presence of the slip of paper to the Judge of Elections and that he was told there was nothing wrong with it. (Tr. 9) He stated he did not see the write-in candidate's name displayed at two other tables but that it was removed from the fourth table as he approached. (Tr. 9-10) He testified that he felt his vote had been solicited by the Board worker because she called to his attention the slip bearing the write-in candidate's name. He testified that the election worker at no time specifically asked him to vote for the write-in candidate. (Tr. 12-13)

The Superintendent of Schools/Board Secretary-Business Administrator testified that he had neither given prior approval for the placement of the slip of paper bearing the write-in candidate's name, nor seen the slip of paper displayed. (Tr. 16-17)

The Judge of Elections testified that he saw no objection to the presence of the slip of paper on the table. (Tr. 6) He also stated that he advised people who asked for help in voting but that he did not tell them for whom to vote. (Tr. 28) The Judge of Elections stated that the paper bearing the name of the write-in candidate was on the table for about one hour. (Tr. 29)

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An affidavit from the Bergen County Superintendent of Elections stated that the voting machines used in the Maywood Board of Elections annual school election were in proper working order when delivered and that no call was received concerning any malfunction of voting machines on election day. An affidavit filed by the election workers of District 2, where complainant voted, stated that she had made no complaint to them regarding inoperative or defective voting machines.

The hearing examiner has examined the record carefully including the testimony of witnesses and documents as submitted. He recommends that the Commissioner determine that the display of the name of a write-in candidate at the voting booths was improper and injudicious although the hearing examiner finds no evidence of overt action by the Board workers to influence voters' decisions. Rather, he finds an overzealousness and excessive eagerness on the part of election workers to be of assistance to voters.

Although *N.J.S.A.* 18A:14-73 specifically prescribes that no one shall loiter, electioneer, or solicit votes there has been no showing that any of these offenses occurred. Accordingly, the hearing examiner recommends that the Commissioner affirm the election results as announced.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the controverted matter. The gravamen of the findings, which the Commissioner herewith adopts as his own, is that for a limited period of time there was displayed at the polls in full view of voters, the name of a write-in candidate. It was removed after a short period of time. The display of that name, albeit through nescience, was improper. Appropriate steps must be taken by the Board Secretary to guarantee that this does not recur.

There is, however, insufficient showing that this irregularity or deviation from statutory procedure was sufficient to warrant that the expressed will of the voters should be set aside or that a second election must be held pursuant to *N.J.S.A.* 18A:12-15 as authorized by Chapter 324, Laws of 1977. As the Commissioner said *In the Matter of the Annual School Election Held in the School District of Manasquan,* 1968 *S.L.D.* 104:

> "***[I]t is well established that an election will be given effect and will not be set aside unless it is shown that the will of the people was thwarted, was not fairly expressed, or could not properly be determined. *Love v. Board of Chosen Freeholders,* 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Petition of Clee,* 119 *N.J.L.* 310 (*Sup. Ct.* 1938); *Application of Wene,* 26 *N.J. Super.* 363 (*Law Div.* 1953), affirmed 13 *N.J.* 185 (1953) There has been no such showing herein.***" (at 107)

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Absent a showing that the expressed will of the voters was thwarted, the results of the election are affirmed as previously announced.

COMMISSIONER OF EDUCATION

June 16, 1978

Helen Peggy Cappeto,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Mandel, Wysoker, Sherman, Glassner & Weingartner (Jack Wysoker, Esq., of Counsel)

For the Respondent, Jacob Green, Esq. (Allan Dzwilewski, Esq., of Counsel)

Petitioner, a nontenure teaching staff member in the employ of the Board of Education of the Borough of South Plainfield, hereinafter "Board," in the period 1974-77 alleges that the Board has failed to afford her adequate specific reasons for its decision not to renew her contract of employment. She requests the Commissioner of Education to reinstate her in her position and to direct the Board to afford her retroactive salary compensation and attendant emoluments. The Board avers it has afforded petitioner reasons which are sufficient in law for her non-reemployment and requests dismissal of the Petition of Appeal.

The matter is before the Commissioner at this juncture on the basis of petitioner's advancement of a Motion for Summary Judgment. An oral argument on the Motion was conducted on December 16, 1977 by a representative of the Commissioner at the State Department of Education, Trenton. Briefs have been filed.

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The facts pertinent to the adjudication are contained in the documents of record and may be recited succinctly.

Petitioner was first employed by the Board in September 1974 as a teacher of home economics and her contract of employment was renewed for each of the years 1975-76 and 1976-77. On April 19, 1977 the Board decided, however, that petitioner's contract for the 1977-78 academic year would not be renewed and notified petitioner of this decision by letter of April 25, 1977.

Thereafter on April 26, 1977 petitioner requested a written statement of reasons for the Board's action and the Superintendent of Schools replied to her request by letter of May 11, 1977. This letter is recited in its entirety as follows:

> "I am in receipt of your letter of April 26, 1977 requesting a written statement of reasons for your non-reemployment by the Board of Education for the 1977/78 school year.
>
> "Please be advised that the basis of the Board's decision is as contained in your evaluations and observations performed by the supervisory staff during the 1976/77 school year. You have been given copies of these evaluations and observations and they have been discussed with you at length. In sum, it is my recommendation and the Board's determination that your overall teaching performance does not justify your continued employment in the District.
>
> "If you have any further questions in this regard, please contact me at your convenience." (Petition of Appeal, Exhibit C)

Subsequently on May 16, 1977 petitioner addressed a second letter to the Superintendent and requested "***specific reasons for the non-renewal of my contract." (Petition of Appeal, Exhibit D) She also indicated in the letter that she believed that the Superintendent's letter of May 11, 1977 had not afforded her the specific reasons to which she alleged she was entitled pursuant to the decision of the Court in *Donaldson v. Board of Education of North Wildwood*, 65 *N.J.* 236 (1974) and rules of the State Board of Education. *N.J.A.C.* 6:3-1.20 The Superintendent, in reply to this letter and another of June 7, 1977 from petitioner, reiterated the statements of his May 11, 1977 letter and petitioner subsequently appealed to the Commissioner. There is no record that she ever requested an appearance before the Board although in her letter of June 7, 1977 to the Superintendent she said she was not "***abrogating my right to a Board hearing." (Petition of Appeal, Exhibit E)

The principal issue for determination by the Commissioner is whether the reasons afforded petitioner by the Superintendent for her non-reemployment were adequate in the context of applicable law. A subsidiary issue is whether, having failed to request an appearance or hearing before the Board within the time parameters of *N.J.A.C.* 6:3-1.20, petitioner is estopped at this juncture from the otherwise clear entitlement.

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Petitioner avers that reasons afforded teaching staff members for non-renewal of contract must be "***clear, simple and understandable***" and that the reasons afforded petitioner by the Superintendent in his letter of May 11, 1977 may not be so categorized. (Petitioner's Brief, at p. 5) She characterizes the statements contained in the letter as "***vague and general***" (at p. 7) and avers that the "***failure to provide her with a clear-cut and simple listing of those reasons frustrates the rationale for the entire procedure as set forth in *Donaldson, supra****" (at p. 7) and *Barbara Hicks v. Board of Education of the Township of Pemberton*, 1975 *S.L.D.* 332. Petitioner also cites *Kathleen Mullelly v. Board of Education of Township of Maple Shade*, 1976 *S.L.D.* 388 and *Richard A. Gearing v. Board of Education of the Borough of Manasquan, Monmouth County*, 1977 *S.L.D.* 751, aff'd State Board of Education 760. She argues, therefore, that she should be reinstated in her position and made whole for the income she has lost.

The Board avers that the reasons afforded petitioner for her non-reemployment do conform to all requirements of law as set forth in the statutes, rules of the State Board and in *Donaldson, supra*, and *Hicks, supra*. It avers that the evaluations and administrators' reports of petitioner's work "***are sufficiently detailed and understandable***" to meet the requirements of those two decisions. (Respondent's Brief, at p. 6) The Board further avers that petitioner waived her right to an appearance before the Board when she failed to make application for such appearance within ten calendar days.

The evaluations of petitioner's work by administrators and supervisors are part of the record in the instant matter and the most important of these is an evaluation by the department chairman made on or about March 1, 1977. This report, which was accompanied by a recommendation that petitioner not be reemployed, was one of summary evaluation and is recited in its entirety as follows:

> "I have observed [petitioner] formally three times during the past evaluation period. It is clearly evident to this observer that her level of professional performance has declined substantially from the December 1st evaluation, and she has regressed to the point where she is again performing with the same inconsistency and less than acceptable standards that have plagued her growth as a professional in the past. My observations of her dramatically indicate that her teaching level has not shown consistent improvement over the two and one-half years during which she has been a staff member in the Home Economics program.
>
> "Her observation ratings continue to range from 'Needs Improvement' to 'Fair' to 'Good.' It must be expected that she would have clearly and positively demonstrated a steadily inclining and progressing level of achievement. This has not been the case.
>
> "Her judgment in the selection of classroom work and her preparation for her daily lessons indicate a lack of proper and necessary investigation into

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the educational value of the material she intends to present. Her objectives are, at times, vague and the materials, equipment, methods and student activities she plans and utilizes are inappropriate and inconsistent with student needs.

"Her presentation of instructional materials does not exhibit the necessary flexibility in instruction which is needed in a classroom situation in which constantly changing educational circumstances, which vary on a daily basis, cannot function in a rigid atmosphere. Her directions are often not clear and can be misunderstood and misinterpreted.

"She keeps her classroom in a neat, clean and orderly fashion. As I have stated to her on numerous occasions, her classroom organization with respect to establishing a definite opening classroom routine in which all students are expected to be in their assigned places at the late bell for the purpose of providing an orderly atmosphere during which attendance is taken and instructions for the day are given is an absolute necessity. This has not been accomplished with the degree of success I had anticipated and requested. Students still arrive to class tardy without the teacher's awareness, due to poor positioning and the failure to efficiently organize a classroom routine. This also leads to the necessity of her shouting out instructions and directions while her class is still moving about the lab in an unorganized and haphazard fashion. In virtually every class, I have observed student tardiness to class, which leads me to believe that this is a regular rather than an occasional occurrence.

"She has demonstrated her acceptance of responsibility for keeping records up-to-date and accurate (plan book, grade book, etc.). She is reasonably punctual in submitting requested materials and information to this office.

"She has constructively contributed to committees, either voluntarily or by assignment. Her attendance is regular and prompt.

"In my conferences with her, I feel that she fails to accept the observation and evaluation process as a constructive means for the improvement of instruction. She becomes overly defensive and, as a result, cannot or will not intelligently consider and accept suggestions, ideas or constructive criticisms offered by superiors with a professionally adult attitude.

"Her failure to develop and to grow as a professional and as an effective classroom teacher leads me to no other conclusion but to evaluate her overall performance as 'Needs Improvement' with the accompanying recommendation that [petitioner] not be reemployed for the 1977/78 school year."

The other "observation ratings" of reference are also a part of the record and the Commissioner determines that they do corroborate the assertion that prior evaluations of petitioner had been distributed over a range of "needs improvement" to "fair" to "good" over a number of categories on the Board's

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evaluation forms. Thus, a report of November 27, 1974 contained seven "fair" ratings and comments that indicated that "minor adjustments" in petitioner's teaching technique were required. A report of October 15, 1976 contained an overall evaluation of "fair" and five "fair" ratings and two ratings of "needs improvement." A report of December 1, 1976 contained an overall evaluation of "good" but still had one "fair" rating in the itemized list of specific attainments.

The Commissioner has considered all such facts and arguments and determines that the total record in this matter stands as proof that the Board and school administrators had conscientiously observed and evaluated petitioner's services as a teacher over a period of three years. He further determines that reports of these observations are sufficiently detailed so that reference to them by the Superintendent in his letter of May 11, 1977 to petitioner does in fact constitute compliance with the law that, upon request, nontenure teachers shall be afforded reasons when their contracts of employment are not renewed. The criticisms and comments of the reports are clear. There was no need in May or June 1977 to repeat the summary of March 1, 1977 which petitioner had so recently received. The Commissioner so holds. This holding is grounded in the precepts set forth by the Court in *Donaldson, supra*, and by the Commissioner in *Hicks, supra*.

It must be recognized, in the Commissioner's view, that at the time of the Court's decision in *Donaldson, supra*, there were no requirements that nontenured teachers were required to be evaluated on a regular basis. Neither was there a requirement that reports of such evaluations were to be furnished to the teacher. Accordingly, in the absence of such requirements, the Court held that at the time of decision not to reemploy a nontenured teacher some form of due process was required to be afforded. The Court held that as a minimum the teacher should be afforded "reasons" for the non-reemployment and an opportunity for an appearance before the Board "upon request." Since that decision, the Commissioner, the State Board and the Legislature have all acted to insure that the evaluative process is a deliberate, methodical one designed to aid the teacher, to insure appropriate due process, and also to maintain the discretion of the Board in the important hiring process. When, as here, a local board of education has complied with the requirements of the Legislature (*N.J.S.A.* 18A:27-3.1, 2) and the State Board (*N.J.A.C.* 6:3-1) the Commissioner will not, and may not, interpose his discretion for that of the board. As the Commissioner said in *John J. Kane v. Board of Education of the City of Hoboken*, 1975 *S.L.D.* 12:

> "***[T]he Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious, or unreasonable. See *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County*, 1973 *S.L.D.* 167***." (at 16)

There is no affirmative showing in the instant matter that the Board has been

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arbitrary, capricious or unreasonable and in fact the evidence is to the contrary. The Commissioner so holds.

There remains the matter of whether or not petitioner has retained any entitlement to an appearance before the Board. The Commissioner said in this respect in *Hicks, supra*, that such appearance should be afforded if there was

> "***a timely request for an appearance before a local board of education. The Commissioner interprets the term 'timely' under these circumstances, to mean that the request must be made within ten calendar days and the appearance scheduled within thirty calendar days from the receipt of the requested statement of reasons. This will permit ample time for the teaching staff member to prepare his/her presentation which will be made to the local board.***" (1975 *S.L.D.* at 334)

This basic outline of the scheduling requirement for requests for appearances was subsequently incorporated in modified form as a part of the State Board rules. *N.J.A.C.* 6:3-1.20 It is designed to insure an expeditious consideration or reconsideration by the Board while at the same time affording the limited due process right the Court determined in *Donaldson, supra*, was required to be insured. When, as here, there was no request forwarded in timely sequence, the right is forfeit. The Commissioner so holds.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

June 27, 1978

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In the Matter of the Tenure Hearing of

Lucille Pedecine,

School District of the Township of Millburn, Essex County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant, McCarter and English (Steven B. Hoskins, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld (Sanford R. Oxfeld, Esq., of Counsel)

The Board of Education of the Township of Millburn, hereinafter "Board," avers that respondent, a tenured secretary in its employ, has insubordinately refused to return to work and that such refusal constitutes an abandonment of her position. It requests judgment of the Commissioner of Education to this effect. Respondent admits that she did not report to work at any time during the period July 1, 1976 through August 27, 1976 but maintains that the work station assigned her jeopardized her health and that her actions do not constitute abandonment of either her position or her tenured entitlement.

A hearing was conducted on May 17, 1977 by a hearing examiner appointed by the Commissioner at the office of the Essex County Superintendent of Schools, East Orange. Memoranda of Law have been filed. The report of the hearing examiner is as follows:

Respondent was first employed by the Board in 1957 to perform secretarial duties and continued in such employment to the date of July 1, 1975. (Tr. 88) She was assigned during the two years 1972-74 to the central office where she performed duties concerned with the calling of substitutes and other routine clerical tasks. (Tr. 89) In such assignment she had limited or no contact with school pupils. (Tr. 89) In the spring of 1974 she was called to a meeting with school officials, told there was to be a diminution of central office clerical personnel and that she would be assigned to duties in the High School. She began such duties on July 1, 1974 and continued to July 1, 1975. On that latter date, pursuant to her request, she was granted a one year leave of absence by the Board but never did return to her employment in the High School. She alleges the assignment given her was harmful to her health, that the Board's promise to her of a new work station could not be relied upon, and that she could not and would not return. (Tr. 103, 112, 121)

The evidence with respect to the Board's charges is found in a series of

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letters and memoranda and in the testimony of school officials. The issues which will serve as a reference point for a review of the evidence were agreed at the conference of counsel to be as follows:

(1) Did Respondent refuse to return to work as alleged?

(2) If there was such refusal, was it founded on reasons of health?

(3) How valid were such reasons if indeed they were present?

(4) Even if present, could a refusal for reasons of health justify a refusal to return to work?

(5) Was the position respondent held abandoned by her in fact?

(6) Was there insubordination in her actions?

(7) Does a health condition mandate that an employee be transferred to another assignment? If it does, and if there is no alternative placement, must a new position be created as a result of the physical infirmity?

Additionally, at the hearing, there was raised an issue concerned with the entitlement to salary pursuant to *N.J.S.A.* 18A:27-10. The Board argues that if there is a finding that respondent abandoned her position there is no such entitlement. Respondent argues conversely.

The documentary and other evidence will now be examined.

Respondent's "health or hardship" leave was requested by her on June 24, 1975 (P-1) and was accompanied by a physician's certification that such a leave was desirable because of "allergic sensitivities." (P-2) The request was subsequently approved by the Superintendent and the Board. (P-3, 4) In early March 1976 respondent addressed a letter to the Board's business administrator which stated, *inter alia*, that she intended "***to terminate my leave June 30, 1976." (P-5) Subsequently, on March 25, 1976, respondent's physician addressed the following letter to school officials:

> "Miss Lucille Pedecine has informed me that her leave will be terminated in June 1976. I attest to the fact that she is in good health and can return to work. However, it is imperative that you honor her request for change from her previous work assignment so that the medical problem does not recur. A change from the work assignment that she found intolerable will result in a productive work year." (P-6)

A similar letter was received from another physician. This letter stated that respondent's "***state of health last year was a result of intolerable working conditions***" and "strongly" recommended "***a major change in her working environment so that the medical problem does not recur.***" (P-7)

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The Board's business administrator addressed successive letters to respondent on April 21, 1976 and May 6, 1976 which were, in effect, a reply to respondent's physician's recommendation for a change of assignment. The letters (P-8, 9) offered a position for the 1976-77 year to respondent which was essentially the same as the one she had held prior to her leave but in a different office location. The proffered office was one which was said to provide "***walls and a door to assure privacy and insulation from the major office activity as well as having an air conditioner for environmental control.***" (P-8) The second of the letters also said that the business administrator had "***investigated the options and found no alternatives other than those included in the statement of duties above.***" Such duties were itemized to include "***substitute service, high school bookkeeping and related office work.***" (P-9; See also P-12.)

Respondent did not reply in writing to these letters and on May 28, 1976 the business administrator addressed the following letter to her:

> "On May 6, 1976, we wrote you concerning your assignment for the 1976-77 school year. We asked for your response on or before May 19, 1976. As of this date, we have not officially heard from you.
>
> "Because we have not received your response, we must assume you did not intend to return. If this assumption is incorrect, please notify me, in writing, immediately.
>
> "If we do not hear from you by June 4, 1976, we will have no alternative but to take steps to terminate your employment and fill the position with someone else." (P-10)

Respondent did not reply in writing to this letter of the business administrator and did not report to work on July 1, 1976 in the essentially similar assignment which had been offered her. The instant charges followed and on September 10, 1976, respondent addressed a letter to the Board Secretary which was a response thereto. (R-5) Contained therein was a review of her seventeen years of service as an employee of the Board and the statement "***I am ready and willing to work at any assigned job except that which brought on my illness, on my doctors' advice.***" (R-5) Subsequently, respondent asserted, "****This is a health problem, not insubordination.****" (*Emphasis in text.*) (R-5) Thereafter, respondent's physicians again sent memoranda which indicated that respondent suffered from "allergic sensitivities" complicated by emotional stress. (R-6, 7)

The Board's business administrator testified that school officials had in fact offered respondent two positions for the 1976-77 year, her former position in another office and a ten month position in the Junior High School. (Tr. 18) He testified that respondent had called his office subsequent to his letter of April 21, 1977 (P-8) and, while refusing to speak with him, had told office personnel that she did not wish to return to the high school and would not. (Tr. 24) He

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further testified that he and other administrators had explored the possibility of alternative placements but had found none "***without creating a completely new position which would be a make work kind of position; and we could not relocate the work that was in the high school because of its proximity to the Principal and the approvals that are necessary from him in her work.***" (Tr. 28) The business administrator testified that respondent had wanted to return to the education center (Tr. 29) despite the fact that there was smoking there (Tr. 34), because she found the High School "chaotic" as a place to work. (Tr. 48) He also said:

> "***She indicated that she had an aversion to the building and that the relationships with the other members of the office staff were not the greatest.***" (Tr. 58)

The principal testified that smoking in the main High School office is only an occasional thing and that persons who smoke there "***are consistently asked to put them out." (Tr. 79) He testified that respondent's duties in the High School required her actual presence there. (Tr. 82)

Respondent testified that she had very limited contact with pupils in the period 1972-74 and, although she had allergy problems, she was able to keep herself "calmer" in the position of the central office. (Tr. 90) She testified that at the time of transfer to the High School she did not want to go "***because I couldn't tolerate the confusion, the constant activity of the high school. It made me extremely nervous.***" (Tr. 91-92) Respondent testified that such alleged confusion and activity exacerbated her allergy problems caused by dust, dirt, leaves, grass and tobacco smoke and that as a result her body swelled and she developed severe rash and skin eruptions. (Tr. 90-108) She further testified that as a result she could not and would not go to work at the High School during the 1976-77 year in the position offered her by the Board. (Tr. 103, 112, 118, 121)

The Board's certification of charges herein is an avowal that respondent's refusal to accept the proffered High School position and to perform the duties pertinent to it during the 1976-77 year constitutes an abandonment of the position and insubordination. The Board avers it had no obligation herein to honor respondent's request for a transfer and that respondent, as an employee, was required to honor a transfer directed to be made by the Board. The Board also avers that a personal health condition does not mandate that a transfer to another existing position be made or that a new position be created as an accommodation. The Board maintains that its efforts with respect to respondent were "reasonable and responsible" and that respondent's failure to respond to letters and telephone calls concerned with her employment constitutes insubordination. (Board's Memorandum, at p. 9)

Respondent avers that she was never "***guilty of any conduct which could be construed as an abandonment of her position.***" (Respondent's Memorandum, at p. 1) She maintains that she never voluntarily absented herself from employment by the Board but that "***for totally involuntary and med-

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ically certifiable reasons, Ms. Pedecine could not perform as a secretary in the Senior High School.***'' (Respondent's Memorandum, at p. 5) Respondent further maintains that the validity of the medical reasons asserted by her to support her avowal that she could not and would not return to the High School may not be challenged by the Board at this juncture since the Board never ordered her to submit to a physical examination by its own physician. Respondent also avers that since the Board, in her opinion, acted improperly in offering her a position she could not accept, it ''***should now be ordered to reinstate [her] as of the 1977-78 school year to a position in which she may faithfully work***'' and to otherwise make her whole for the interim period here in question. (Respondent's Memorandum, at p. 9)

The hearing examiner has considered all such arguments and the total record of the instant matter and sets forth his findings as follows in the context of the issues and questions recited, *ante*:

1. Respondent was transferred from her position in the central office area of the Board to the High School in the 1975-76 school year and served in that new assignment for the whole of the year. Such service, however, proved to be deleterious to her health and resulted in severe physical reactions; body swelling, rash and emotional trauma. The physicians' letters attest to the accuracy of this finding. The hearing examiner also observed the scars still evident as a result of the rash respondent incurred.

2. This physical trauma was the principal reason for respondent's request, granted by the Board, for a leave of absence for the 1976-77 academic year. This same trauma was the principal reason for respondent's assertion that she could not and would not return to the High School assignment for the succeeding year.

3. The emotional trauma referred to was not, however, primarily attributable to an allergy to cigarette smoke as alleged, (such smoke was present in the central office assignment) or to other substances or physical conditions, but to the personal interaction, the constant activity, the demands of a new position which respondent found difficult and extraordinarily demanding. (Tr. 91)

4. The Board did attempt to explore alternatives and to ameliorate conditions but found no other twelve month position available to offer respondent and respondent evidenced no interest in the ten month position of reference. There is no evidence herein that the Board's reorganization of secretarial assignments in 1975 was taken in other than good faith or that there was another twelve month position available to respondent in 1976 which the Board refused to offer her.

5. The Board's offer of a position to respondent in 1976 was proffered in good faith and was refused by respondent although she always maintained she was available and ready to work in a position she deemed suitable.

6. Such refusal constitutes abandonment, however, it may be held to be

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justified as necessary or required by respondent's physical problems. Respondent repeatedly said in meetings, telephone calls and in a letter to the Board (R-5) that she would not and could not accept the High School assignment. She did not report for work on July 1, 1976 or thereafter to her work station.

The hearing examiner concludes that respondent's refusal to accept the assignment was explained and justified by her real emotional trauma but that such trauma imposes no liability on the Board. Schools are often noisy. There can be found in all school offices on many occasions a frenetic activity which may be both tiring and confusing. Such condition, however, which may be classified as the rule and not the exception, imposes no moral or legal responsibility on local boards to assign employees to more tranquil locations in order that they may be insulated from the normal school environment.

Accordingly, the hearing examiner finds that respondent has, in fact, abandoned her position and that there is no relief which may or should be offered her by the Commissioner.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed and considered the report of the hearing examiner and the exceptions pertinent thereto filed by respondent. Such exceptions are limited in scope to avowals that the Board had not acted in good faith to explore alternative placements for respondent in the 1976-77 year and that her actions refusing to accept the proffered placements do not constitute abandonment of her tenured position.

The Commissioner finds such exceptions to be without merit and concurs in all respects with the findings of the hearing examiner. The Board's reorganization of central secretarial staff positions is not at issue herein and subsequent to such reorganization respondent was properly transferred to another position she was qualified to fill. Her difficulty in this assignment resulted in substantive efforts at amelioration of the problems she had experienced by an offer of alternatives made by the Board which she refused to accept. (See P-8, 9; Tr. 18.) Such refusal, similar to that considered by the Commissioner in *Anne U. Clark v. H. Francis Rosen, Superintendent of Schools, and Board of Education of the City of Margate*, 1974 *S.L.D.* 678, aff'd State Board of Education 1975 *S.L.D.* 1082, aff'd Docket No. A-2196-74 New Jersey Superior Court, Appellate Division, January 8, 1976 (1976 *S.L.D.* 1134), *cert.* granted 70 *N.J.* 152 (1976), *cert.* denied Docket No. A-107, New Jersey Supreme Court, May 13, 1977, constitutes abandonment of respondent's position. The Commissioner so holds.

In *Clark, supra*, as herein, there was a reduction of a position by the local board of education and an offer of two assignments to petitioner which were refused. The Commissioner determined that such refusal constituted abandonment and said:

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"***This determination is grounded on the long-held principle that tenured teachers have no entitlement to a specific position of employment, but may be transferred by formal action of the local board of education to another position within the privileges of their teaching certificates. As the Commissioner said in *Josephine DeSimone v. Board of Education of the Borough of Fairview, Bergen County*, 1966 *S.L.D.* 43:

> "***The protection afforded petitioner by the tenure laws is in her position as teacher. As a teacher she has no claim to a particular class or grade or school but may be assigned by her employer to teach within the scope of her certificate. *Greenway v. Camden Board of Education*, 1939-49 *S.L.D.* 151, affirmed State Board of Education 155, affirmed New Jersey Supreme Court 129 *N.J.L.* 46 (1942) As a teacher under tenure she could not be dismissed or suffer a reduction in salary without cause, but she could be transferred to other teaching positions for which she was qualified. A transfer is not a demotion or a dismissal. *Cheeseman v. Gloucester City Board of Education*, 1 *N.J. Misc.* 318 (*Sup. Ct.* 1923); *Downs v. Hoboken Board of Education*, 12 *N.J. Misc.* 345 (*Sup. Ct.* 1934), affirmed 113 *N.J.L.* 401 (*E.&A.* 1934) (at p. 47)

See also *Abigail J. Williams v. Board of Education of the Borough of Madison*, 1938 *S.L.D.* 552 (1933); *Lelia Carpenter v. Board of Education of the City of Hackensack*, 1938 *S.L.D.* 593 (1933), affd. State Board of Education, 1938 *S.L.D.* 595 (1934).***" (at 690)

While respondent in the instant matter was a secretarial employee of the Board and not a teacher, as in *Clark, supra*, the Commissioner holds that the principles of *Clark* are equally applicable. A refusal of a secretarial or clerical employee to accept a position of employment similar to that in which tenure has been earned constitutes abandonment of the tenure entitlement.

Accordingly, the Commissioner determines that respondent's actions warrant a judgment against her. It is so ordered.

COMMISSIONER OF EDUCATION

June 27, 1978

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Frances Dullea,

Petitioner,

v.

Board of Education of the Borough of Northvale, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Irving C. Evers, Esq.

Petitioner, who was employed by the Northvale Board of Education, hereinafter "Board," as a tenured special education teacher, alleges that the Board, in violation of her statutory and due process rights and the provisions of the negotiated agreement then in effect, improperly withheld her salary increment for the 1974-75 school year. The Board, conversely, denies that its withholding of the 1974-75 increment was other than a reasoned and legal exercise of its discretionary authority.

Long delay, occasioned, *inter alia*, by adjournments and briefing of motions and cross-motions, culminated in an interlocutory order of the Commissioner of Education, incorporated herein by reference, dated January 11, 1977, denying application to sequester witnesses at depositions and directing that they be conducted at the Board's offices within sixty days. Briefing of the issues was completed on February 10, 1978. The matter is now ripe for determination on the basis of the pleadings, Briefs on Cross-Motions for Summary Judgment and exhibits appended thereto. The factual context is as follows:

Petitioner, while teaching her special education class of trainable pupils, was twice observed and evaluated by her principal in February and April 1974. Written evaluations and conferences on the subject matter contained therein were afforded petitioner. The written evaluations in February directed petitioner to adopt twelve recommendations which would assist her in correcting alleged shortcomings by involving all of her pupils in instructional and follow-up group activities, eliminating confusing instructions, identifying achievable goals of skills development, substituting a positive approach for loud, rigid and negativistic remarks, and improving pupil's language skills development and social adjustment. The evaluation concluded as follows:

> "***This evaluation will indicate to you that my overall impression of your teaching on February 28, 1974 was considered unsatisfactory.

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"The recommendations that I have stated are expected to be corrected by my next evaluation." (Exhibit C)

The April evaluation criticized petitioner for failure to use suggestions in her teacher's manual. The principal characterized that lesson as being poorly prepared, unimaginative, unstimulating, in many ways counterproductive, and not consistent with the daily lesson plan. He further criticized petitioner for failure to follow certain of his recommendations of February 28, 1974 and concluded by stating that her lesson of April 5, 1974 was also unsatisfactory. (Exhibit D)

On April 25, 1974 the Superintendent notified petitioner in writing that he proposed that her salary increment for the ensuing school year be withheld for the following reasons:

"1. Two successive unsatisfactory evaluations were made by Mr. Mendillo. After each evaluation he conferred with you, listing the deficiencies in your classroom procedures that were to be corrected. These recommendations were not followed nor corrected, in fact others were noted as areas of concern by the evaluator.

"2. Recommendations by members of the staff, Mrs. DeLuca, LDT-C and Mr. Whitmire, School Psychologist, which have advised you of their concerns regarding your program.

"3. The recommendations and observations of Mr. Carl Salierno, Region III Coordinator, and Mr. John Mangan, County Child Study Supervisor***.

"4. Your inability to perceive the needed changes in program for individual students and to develop your program accordingly. Over the past two years, either the School Nurse, the LDT-C, the Aide, the Principal, the School Psychologist, outside specialists, staff members and myself have been the personnel responsible for the development of the various aspects of the Trainable program.

"5. Recommendations that I have made to you concerning visitation of other Trainable programs have not been followed." (Exhibit E)

Petitioner requested and was granted an appearance on June 5, 1974 before the Board at which time she unsuccessfully sought to dissuade the Board from withholding her increment, pursuant to the provisions of Article XIII of the negotiated agreement, which also states in pertinent part:

"***The Superintendent shall have the power to recommend to the Board of Education the withholding of any salary increment and/or adjustment for inefficiency as determined by at least two successive evaluations indicating unsatisfactory performance or effectiveness or other good cause which may have an adverse affect on the performance or effectiveness of the teacher.

"Whenever the withholding of an increment is proposed by the Board, the

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individual concerned shall be given a written statement of reasons setting forth the particulars constituting the basis of said withholding. *No such recommendation which is based on classroom performance shall be made by the Superintendent that is based on observation not conducted openly and with full knowledge of the teacher; neither shall any such recommendation, whether related to classroom performance or for other just cause, be made without notification to the teacher that a deficiency exists which may call for a recommendation for the withholding of an increment unless said deficiency is corrected forthwith.****''

(Emphasis supplied.) (Exhibit H)

Petitioner contends that the principal's two written evaluations, *ante*, did not comply with Article XIII in that they did not forthrightly state that ''***a deficiency exists which may call for a recommendation for the withholding of an increment unless said deficiency is corrected forthwith.***'' Petitioner avers that any notice subsequent to the actual written evaluation may not be considered to have corrected the lack of notice required therein by the terms of Article XIII, *ante*.

The Commissioner, although in agreement that the evaluation reports do not state, *per se*, that the observed shortcomings, if not corrected, would result in recommendation that an increment be withheld, nevertheless finds petitioner's interpretation unduly restrictive. The two evaluation reports consisting of seven single-spaced typewritten pages are minutely explicit and can only be interpreted as giving notice that petitioner's observed performance of her teaching duties was considered grossly unsatisfactory. Their unambiguous recommendations for improvement also set forth in detail the procedures whereby deficiencies might be corrected. Such forthright and candid professional evaluations are precisely the type which has been consistently recommended by the Commissioner as contributory to the constitutional mandate of a thorough and efficient system of education. *Sallie Gorny v. Board of Education of the City of Northfield et al.*, 1975 *S.L.D.* 669 Accordingly, the Commissioner rejects petitioner's argument that the omission of cautionary words, advising that failure to correct the observed deficiencies would result in recommendation to withhold an increment, estops the Board from considering those evaluations as a basis for such withholding. To hold otherwise, within the above factual context, would, in reality, divest the Board of its statutory authority to withhold an increment. That the terms of a negotiated agreement may not supersede statutory authority was emphatically stated by the New Jersey Supreme Court in *Lullo v. International Association of Fire Fighters*, 55 *N.J.* 409 (1970) as follows:

''***It is crystal clear that in using the term 'collective negotiations' the Legislature intended to recognize inherent limitations on the bargaining power of public employer and employee. *** [P]ublic agencies, departments, etc., cannot abdicate or bargain away their continuing legislative or executive obligations or discretion.***'' (at 440)

The applicable statutory authority for a local board to withhold an increment was affirmed by the courts in *Westwood Education Association v. Board of*

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Education of the Westwood Regional School District, Docket No. C-3373-72 New Jersey Superior Court, Chancery Division, August 22, 1973, aff'd Docket No. A-261-73, Appellate Division, June 21, 1974 (1974 *S.L.D.* 1436), *cert.* den. 66 *N.J.* 313 (1974) as follows:

> "***[A] local board of education, pursuant to *N.J.S.A.* 18A:29-14, has sole discretion to withhold a member's salary increment for inefficiency or other good cause and *** this right is not negotiable under the provision of *N.J.S.A.* 34:13A-5.3. See *Assoc. of New Jersey State Col. Fac. v. Dungan*, 64 *N.J.* 338 (1974).
>
> "Appellant, relying upon previous decisions of the Commissioner of Education, contends that *N.J.S.A.* 18A:29-14 has no application to salary schedules in excess of statutory minima, unless the local board first adopts a salary policy pertaining to such increments. We find no basis, statutory or otherwise, for the Commissioner's limiting construction and hold this contention to be without merit. cf. *Kopera v. Board of Education of West Orange*, 60 *N.J. Super.* 288 (*App. Div.* 1960).***" (1974 *S.L.D.* 1436)

Similarly pertinent is that stated by the Commissioner in *Nancy Weller v. Board of Education of the Borough of Verona*, 1973 *S.L.D.* 513, as follows:

> "***Suffice it to say here that, in the Commissioner's judgment, boards of education must, of course, negotiate with their employees all of those salary and other benefits of direct or indirect compensation in return for their services or employment. However, such negotiations, which are required, cannot be held to abrogate those rights and duties given to local boards by the Education statutes. (Title 18A) The rights of employer and employee are mutually exclusive, and to view them accordingly is to view the body of statutory law contained in the Education statutes and in the New Jersey Employer-Employee Relations Act as a 'unitary and harmonious whole.'***" (at 524)

Petitioner further attacks the validity of the controverted evaluations by alleging that the principal was disqualified from making them because of insufficient training or certification in the field of special education. (Petitioner's Brief, at pp. 4-5)

The Commissioner accords no credence to this contention. The principal is certified to supervise. The evaluations, moreover, reveal the insights of a trained and experienced supervisor. Those insights are not narrowly limited to one's field of academic specialty. To adopt petitioner's line of reasoning would preclude a principal or a supervisor from supervising in any but his or her own special field of subject matter expertise. Not only would this be patently unworkable and inefficient, but it would negate the validity of the establishment of graduate programs which train supervisors and administrators in programs approved by the State Board of Examiners in this State and throughout the graduate programs of colleges and universities of our nation. The Commissioner so holds.

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Similarly, the Commissioner finds no merit in petitioner's allegations that the Superintendent improperly relied on recommendations and observations of the school psychologist, the learning disabilities teacher/consultant, the Region III child study team coordinator and the Bergen County Child Study Supervisor. The preponderance of evidence makes it clear that these highly qualified persons, all of whom had both the authorization and the responsibility to observe and make recommendations concerning petitioner's program of instruction, reported to the principal and the Superintendent their findings of program deficiencies that should be corrected. (Exhibit C, at p. 3; Exhibit E; Exhibit G, at pp. 15, 22; Exhibit I) The consideration of their reports by the Superintendent and the Board was in keeping with their ordinary functions and expertise and was in no way improper. Rather, any failure on their part to do so would have been contrary to their responsibility to assist the Board in developing and presenting a thorough and efficient program of education. *N.J.S.A.* 18A:7A-1 *et seq.* The record is also clear that it was not for teacher evaluation purposes but in the area of assessment of program that petitioner's superiors relied on others with special expertise for guidance. The ultimate evaluation by the Superintendent of petitioner's competency was one of total impression in which the deficiencies in her program of instruction were, of necessity, an important and proper factor. (Exhibit E)

The weight of credible evidence within the record leads to the conclusion that petitioner was both candidly and forthrightly apprised of deficiencies and also afforded sufficient opportunity to correct those deficiencies. Because she failed to prove her capacity to discharge her responsibilities as a teacher in fully acceptable fashion, the Board on recommendation of its Superintendent, pursuant to *N.J.S.A.* 18A:29-14, determined to withhold her 1974-75 increment. While the Commissioner does not condone the failure of the principal to notify her that her shortcomings could result in a recommendation to withhold her increment, in accord with the stated terms of the negotiated agreement, the Commissioner finds this lack of adherence to the Board's salary policy, within the factual context here presented, insufficient reason to void the Board's final determination to withhold her employment increment. *Gorny, supra* Rather, it is determined that the record herein supports a judgment that the Board's exercise of discretion was not, as petitioner charges, arbitrary, capricious, illegal, taken in bad faith or otherwise an abuse of the Board's discretion or violative of her due process rights. The Commissioner perceives no reason or authority within the factual context of this dispute to interpose his discretion for that of the Board. Accordingly, the respondent Board's Cross-Motion for Summary Judgment is granted. The Petition of Appeal is dismissed. *Francis Filardo v. Board of Education of the Township of Mahwah*, 1975 *S.L.D.* 830

COMMISSIONER OF EDUCATION

June 27, 1978

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STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 27, 1978

For the Petitioner-Appellant, Goldberg & Simon (Gerald M. Goldberg, Esq., of Counsel)

For the Respondent, Irving C. Evers, Esq.

The State Board affirms the Commissioner on both counts of his decision for the reasons expressed therein.

November 8, 1978

Pending New Jersey Superior Court

Donald R. Tagliareni,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Morgan and Falvo (Peter S. Falvo, Jr., Esq., of Counsel)

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

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Township of Hazlet, hereinafter "Board," alleges that the Board granted him a four month leave of absence in 1969 to enter a program of basic combat training with the United States Army Reserve but has failed to pay him the compensation due him pursuant to law while engaged in such service. He requests the Commissioner of Education to direct the Board to pay him the salary he would have received as a teacher for all of the period of leave.

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The Board admits that petitioner was not paid his regular salary during the period of his military leave but avers he is barred by the equitable doctrine of laches from a claim at this juncture and that in any event his claim lacks merit in the context of applicable law. The facts are not in dispute and the matter is submitted directly to the Commissioner for Summary Judgment on the pleadings and Briefs of counsel.

Petitioner had already achieved a tenure status as an employee of the Board when on November 13, 1969 he was "***ordered to ACTIVE DUTY FOR TRAINING***, with his consent***" in the United States Army Reserve and directed to begin his service therein on November 28, 1969. (PR-3) The military orders which established such reporting date also stipulated that petitioner was assigned for basic combat training at Fort Dix, New Jersey, effective December 8, 1969 and that on February 15, 1970, he would be transferred to an "advanced individual training" program at Fort Devens, Massachusetts. (PR-3) Petitioner notified the Superintendent of Schools by letter of November 24, 1969 of this call to active duty and on November 26, 1969 the Superintendent addressed the following letter to petitioner.

> "This is to acknowledge receipt of your orders to report for Army Reserve duties commencing November 28, 1969 and ending approximately April 20, 1970.
>
> "This actually represents a military leave of absence which means that your position will be held open for you and all benefits normally given to you will continue during your leave of absence.
>
> "If, for any reason, you find it impossible to return at the end of your leave, I would appreciate being informed of this factor at least a month in advance.***" (PR-5)

It is observed that the letter contains handwritten notations at the bottom by the Superintendent which indicate that petitioner was to be continued as an employee of the Board in all insurance and pension reports but that he was to be taken off the payroll as of December 1, 1969. Thus, the phrase "all benefits normally given" was interpreted by the Superintendent to mean certain fringe benefits but not the benefit of continued salary payment. In any event, petitioner was not paid for the four month period of leave and made no protest concerned with this fact until January 27, 1975 when he directed a letter to the Board. The instant Petition was filed on August 12, 1976, subsequent to a Board determination that the service rendered by petitioner during the period of leave did not entitle him to compensation both as a teacher and as a military serviceman.

The Board avers that laches bars the claim at this juncture but argues further that if laches is set aside the claim is barred on its merits by the determination of the Court in *Lynch v. Borough of Edgewater*, 8 *N.J.* 279, 85 *A.2d* 191 (1951) and the decision of the Commissioner, grounded in the tenets of *Lynch*, in *Walter E. Reutter v. Board of Education of the Borough of Roselle*, 1975 *S.L.D.* 532. The Board avers that the applicable statute, as in *Lynch*, is *N.J.S.A.* 38:23-1.

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Petitioner avers that the facts of his service are such as to qualify him within the parameters of *N.J.S.A.* 38:23-1 as interpreted by the Court in *Lynch, supra*, but that additionally the statute *N.J.S.A.* 38A:4-4 with its application to the "organized militia" is also applicable herein. He cites *Parks v. Union County Park Commission*, 7 *N.J. Super.* 5 (*App. Div.* 1950) in further support of the argument that "***those involved with the militia should not lose compensation from their regular employment just because they are also compensated by the United States Government.***" (Petitioner's Brief, at p. 8)

The Commissioner has reviewed all such arguments in the context of the undisputed facts herein and determines that while the equitable doctrine of laches might well bar consideration of this Petition on its merits, a decision on the merits of the claim is required for the benefit of many who, like petitioner, have voluntarily enlisted and served in the armed forces of the United States. Accordingly, the merits of the Petition will be considered.

The Commissioner further determines that the only applicable statute herein is the one of specific reference to those who serve in federal reserve units, as differentiated from the State militia or National Guard. This statute is *N.J.S.A.* 38:23-1, which, recited in its entirety, provides:

> "An officer or employee of the State or a county, school district or municipality, who is a member of the organized reserve of the Army of the United States, United States Naval Reserve, United States Air Force Reserve or United States Marine Corps Reserve, or other organization affiliated therewith, shall be entitled to leave of absence from his respective duty without loss of pay or time on all days on which he shall be engaged in *field training*. Such leave of absence shall be in addition to the regular vacation allowed such employee." (*Emphasis supplied.*)

The question for determination in the context of the statute is whether petitioner's service of four months in basic combat training and in "advanced individual training" may be characterized as "field training" according to the statutory prescription and pursuant to the Court's definition of the phrase "field training" as contained in *Lynch, supra*. The Commissioner determines that petitioner's service may not be so characterized and, in fact, is specifically barred by *Lynch* from the benefits which the statute otherwise confers on those army reservists who engage in "field training." Petitioner was not engaged during the four month period with other men "***training for battle***" as a unit, a principal criterion established by *Lynch* as a prerequisite for the statutory benefits. (at 290) *Lynch* specifically recognized that many types of military service were barred from statutory benefits by the limiting statutory language. The Court said, in this regard:

> "***references to state and federal legislation are not exhaustive. They serve, however, to illustrate the clear distinction, made in both realms of legislative effort between 'field' training or instruction and *other types of military or naval duty, service or instruction*. There is no doubt that the

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Legislature of this State had this distinction in mind when *L.*1931, *c.*347, *secs.* 1, 2, now *R.S.* 38:23-1, was enacted and while we may not be certain as to the motivation of the Legislature in applying that distinction, it is probable that at least one consideration was that the organized units of the *** reserve forces are those primarily to be considered as necessary to the defense of the State, ready to fight on very short notice and *required* (*emphasis in text*) by law to undergo field training, *i.e.*, training for battle as a unit, *without the consent* of the individual serviceman to support or prepare for that defensive effort.***'' (*Emphasis supplied.*) (at 290)

It may be further observed that petitioner's period of basic training and individual preparation is specifically detailed in his military orders as being ''***with his consent***.'' (PR-3) Such training and preparation may not, in any event, be characterized as ''field training'' in the context of *Lynch, supra*, but as one of the ''***other types of military or naval duty***.'' (at 290) The Commissioner so holds.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

June 28, 1978

Board of Education of the Borough of Manville,

Petitioner,

v.

Mayor and Council of the Borough of Manville, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Raymond R. & Ann W. Trombadore (Raymond R. Trombadore, Esq., of Counsel)

For the Respondent, Stanley J. Purzycki, Esq.

This matter having been opened on April 12, 1978 by the filing of a Petition of Appeal by the Board of Education of the Borough of Manville, hereinafter ''Board,'' wherein the Board appealed a reduction of its current expense budget

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by the Mayor and Council of the Borough of Manville, hereinafter "respondent;" and

The Board having submitted on February 14, 1978 to the voters a proposal to raise by local taxation $2,915,206 for current expenses of the Board in the 1978-79 school year; and

The voters having rejected that proposal whereupon the matter of the defeated budget was considered by respondent pursuant to applicable law; and

Respondent having reduced the Board's current expense budget by $65,000.00; and

The Board having adopted a resolution on April 3, 1978 which deemed "***that a $65,000.00 reduction in the 1978-79 budget would have a negative impact on the entire educational process, including implementation and continuance of a Thorough and Efficient Education for the pupils of Manville***" and authorized the Board Secretary to give notice of intent to appeal to the Commissioner of Education; and

The Board and respondent, after further consideration of the controverted matter, having arrived at an amicable settlement of the dispute; and

The terms of that amicable settlement having been agreed to in a joint stipulation of settlement entered into the record; and

The parties having agreed that the sum of $20,000 shall be restored to the amount to be raised by taxation for current expenses; and

The Commissioner, after a thorough review of the entire record of the controverted matter, having concluded that the amicable settlement is appropriate, in the best interests of the parties and their constituents, and in keeping with the constitutional and statutory mandate that a thorough and efficient education be provided by the public schools; now, therefore

The Commissioner agrees with the stipulation of settlement submitted jointly by both parties and hereby approves the additional $20,000 to be certified to the Somerset County Board of Taxation by the Council of the Borough of Manville for current expense for the 1978-79 school year, thereby increasing the total current expense tax levy to $2,870,206.

Entered this 28th day of June 1978.

COMMISSIONER OF EDUCATION

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Board of Education of the Township of Parsippany-Troy Hills,

Petitioner,

v.

Parsippany-Troy Hills Education Association, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioner, Murray, Meagher & Granello (Malachi J. Kenney, Esq., of Counsel)

For the Respondent, Ruhlman and Butrym (Cassel R. Ruhlman, Jr., Esq., of Counsel)

This matter having been opened before the Commissioner of Education (August E. Thomas, Deputy Assistant Commissioner, Division of Controversies and Disputes) by Cassel R. Ruhlman, Jr., Esq., counsel for the respondent on May 12, 1978 by formal Notice of Motion to Dismiss Petition of Appeal filed on March 3, 1978, requesting a Declaratory Judgment from the Commissioner asserting that a Board policy regarding the instructional process utilized by its teaching staff is an appropriate and reasonable policy developed pursuant to the powers vested in the Board; and

It appearing that this Petition of Appeal was filed on March 3, 1978; and

It appearing that said policy is not yet developed by the Board; and

It appearing that the Board is asking the Commissioner to approve a policy that has not yet been developed; and

It appearing that the Board, recognizing that the Commissioner cannot approve a policy that does not exist, asked that the Petition of Appeal be held in abeyance until such time as the proposed policy is developed; and

It appearing that respondent opposed holding the matter in abeyance and moved for dismissal; and

It appearing that no issue has been set forth for consideration by the Commissioner; and

The Commissioner, having weighed the arguments of counsel respecting the Motion to Dismiss the Petition of Appeal and it further appearing that it

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would be singularly inappropriate for the Commissioner to declare appropriate and reasonable a policy that has not been formally adopted by the Board; therefore

IT IS ORDERED that respondent's Motion to Dismiss is granted.

ENTERED this 28th day of June 1978.

COMMISSIONER OF EDUCATION

In the Matter of the Special School Election Held in the School District of the City of Asbury Park, Monmouth County.

COMMISSIONER OF EDUCATION

DECISION

The Asbury Park Board of Education, hereinafter "Board," held a special election on May 9, 1978 to elicit voter approval of the following proposals:

"*Proposal #1*

"Resolved: That the Board of Education of the City of Asbury Park is authorized to raise by direct taxation for current expenses the sum of $135,065.00 for the 1977-78 school budget and expend the proceeds therefor.

"*Proposal #2*

"Resolved: That the Board of Education of the City of Asbury Park in the County of Monmouth, is authorized to renovate and rehabilitate the Bangs Avenue Elementary School situated on Bangs Avenue in the city of Asbury Park, in accordance with the recommendations of The Vaughn Partnership, Architects, Trenton, New Jersey, and to expend therefor a sum not exceeding $1,400,000.00 and to issue bonds of the School District for said purpose in the principal sum of $1,400,000.00."

Four polling places located within the school district were designated by the Board and the voting was conducted through the use of voting machines.

At the conclusion of the special school election the announced results were as follows:

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	AT POLLS	
Proposal #1	*Yes*	*No*
Totals	120	243
Proposal #2	*Yes*	*No*
Totals	134	223

There were no absentee ballots.

Thereafter, on May 10, 1978 a letter was directed to the Commissioner of Education by the Board Secretary requesting that a recount of the ballots cast at Polling Place #2 (Middle School) be conducted to ascertain the accuracy of the votes tabulated and to determine whether the two voting machines, #20305 and #20176, were functioning properly.

The initial tabulation of the ballots cast at Polling Place #2 regarding the Board's proposals were as follows:

	AT POLLS	
Proposal #1	*Yes*	*No*
Totals	58	27

	AT POLLS	
Proposal #2	*Yes*	*No*
Totals	69	18

A representative appointed by the Commissioner conducted a recount of the ballots cast at Polling Place #2 on May 31, 1978 at the voting machine warehouse in Freehold, Monmouth County, in the presence of the Board Secretary. As part of the recount of these two voting machines the Board Secretary was permitted to operate each of the machines after the results had been rechecked by the Commissioner's representative. It was determined at that time that both voting machines were, in fact, functioning properly.

At the conclusion of the recheck of the results of the balloting on these two voting machines, all interested parties were invited to attend the review of the poll lists and the voting authority slips conducted by the Commissioner's representative at the office of the Monmouth County Superintendent of Schools.

As a result of the recount of the ballots cast on the voting machines in Polling Place #2, the Commissioner's representative found that the school election officials had inadvertently omitted tabulating the ballots cast on voting machine #20176. These results were as follows:

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Voting Machine #20176—Polling Place #2 (Middle School)

	AT POLLS	
Proposal #1	*Yes*	*No*
Totals	68	22

	AT POLLS	
Proposal #2	*Yes*	*No*
Totals	88	14

The recount on the second voting machine (#20305) at the polling place was confirmed as originally announced at the conclusion of the special election.

Accordingly, the Commissioner's representative finds that the results of the ballots cast on voting machine #20176 located at Polling Place #2 must now be added to the combined results of the balloting reported from all four polling places at the special school election. These ballots, when added to the results previously reported, change the total tally of votes on both proposals to read as follows:

	AT POLLS	
Proposal #1	*For*	*Against*
Totals	188	265
Proposal #2	*For*	*Against*
Totals	222	237

The Commissioner's representative finds that while the final tally of the ballots cast at the special school election on the Board's proposals #1 and #2 are altered, the outcome remains unchanged. It is found that the voters of the school district have, in fact, rejected both proposals as originally announced.

This concludes the report of the Commissioner's representative which is referred directly to the Commissioner for determination.

* * * *

The Commissioner has reviewed the findings of his representative with respect to the recount of the ballots cast on the two voting machines in Polling Place #2 at the special school election held in the School District of the City of Asbury Park on May 9, 1978 and concurs with the findings herein.

Accordingly, the Commissioner finds and determines that while the failure of the school election officials to tabulate the results of the ballots cast on voting

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machine #20176 in Polling Place #2 was a serious error, the outcome of the special election with respect to proposals #1 and #2 remains unchanged. The effect is that the proposals were defeated by the electorate.

COMMISSIONER OF EDUCATION

July 5, 1978

In the Matter of the Annual School Election Held in the School District of the Borough of South Plainfield, Middlesex County.

COMMISSIONER OF EDUCATION

ORDER

This matter having been opened on February 18, 1978 before the Commissioner of Education by the filing of a letter of complaint of alleged election irregularities by four candidates for the South Plainfield Board of Education who were unsuccessful in their candidacy at the annual school election held February 14, 1978; and

The Commissioner having directed his representative to conduct an inquiry pursuant to the provisions of *N.J.S.A.* 18A:14-63.12, which inquiry was conducted at New Brunswick on March 2 and 8, 1978; and

The Commissioner having considered in the light of applicable statutory and decisional law governing school elections complainants' allegations that the election was so tainted by fraud, deceptions, illegalities, improprieties, actions contrary to school policy, and laxity of compliance with election laws that the voters were deprived of a fair opportunity to express their will as contemplated by the Constitution and legislative provisions of this State; and

The Commissioner having reviewed the documents marked into evidence and the testimony of all witnesses who were called or volunteered to testify at the inquiry of matters relevant to the complaints; and

The Commissioner having determined that such irregularities or deviations from statutory procedure as were proven to have occurred prior to the election, at the polls, or in the compiling of the results of the voting are insufficient to warrant a determination that the expressed will of the voters should be set aside or that a second election must be held pursuant to the provisions of *N.J.S.A.* 18A:12-15 as amended by Chapter 324, Laws of 1977 (*In re Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1953), 13 *N.J.* 185 (1953)); now therefore

IT IS ORDERED that the announced results that Candidates Bronstein,

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Byrne and Salerno were elected to three year terms on the South Plainfield Board of Education are confirmed; and

IT IS ALSO ORDERED that this ORDER, which in the interest of timeliness is issued prior to, but not in lieu of, the detailed written opinion which will follow, be forwarded forthwith to the complainants, the Board and counsel of record.

Entered this 13th day of March 1978.

COMMISSIONER OF EDUCATION

COMMISSIONER OF EDUCATION

DECISION

A letter of complaint detailing alleged election irregularities was filed on February 18, 1978 with the Commissioner of Education by five individuals who were unsuccessful at the annual school election held February 14, 1978 in their candidacy for seats on the Board of Education of South Plainfield, hereinafter "Board." They allege that the election was so tainted by fraud, deceptions, illegalities, improprieties, violation of Board policy and laxity of compliance with the election laws that the voters were deprived of a fair opportunity to express their will as contemplated by the Constitution and legislative guarantees of this State.

An inquiry was conducted on March 2 and 8, 1978 at New Brunswick by a hearing examiner appointed by the Commissioner. The complainants represented themselves *pro se*. The South Plainfield Education Association, hereinafter "SPEA," was represented by counsel (Richard H. Greenstein, Esq.).

An Order of the Commissioner dated March 13, 1978, incorporated herein by reference, was issued prior to but not in lieu of a detailed written report of the Commissioner's representative and a determination by the Commissioner. The report of the Commissioner's representative is as follows:

The announced results of the balloting for three members for full terms of three years each on February 14, 1978 were as follows:

Joseph T. Salerno	847
Carol M. Byrne	645
Marvin S. Bronstein	633
*Morton Lehr	369
*Frances M. Licato	337

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*Charles Strassle	297
*Russell J. Gratta	198
M. Michael Whalen	129
*Robert W. Niper	129

*Complainants in the instant matter

The testimony of witnesses at the hearing and the findings of the hearing examiner based thereon are succinctly set forth as follows:

ALLEGATIONS OF ILLEGALITY AT THE POLLS

Patricia Bowdish testified that, when at the polling place in the Roosevelt School a friend asked her for whom she was voting, Mildred Lucanegro, a challenger, not only stated, "***I can tell you who to vote for***" but also displayed a card on which appeared the names of Carol Byrne, Marvin Bronstein and one other candidate. (Tr. I-41) Mrs. Bowdish testified that she reponded to her:

> "***I am not going to vote for who (sic) you want me to***."(Tr. I-41)

She further stated that she reported the matter to Candidate Russell Gratta. That she did so was corroborated by his testimony. (Tr. I-49)

Another voter who entered the polling place with Patricia Bowdish testified that she had heard Mrs. Lucanegro say to her, "***I'll tell you who (sic) to vote for.***" (Tr. I-121)

Similar testimony was elicited from Carol Crisafulli, another voter, who stated that when she entered the polling place Mrs. Lucanegro said to her, "***I hope that you are going to vote for Carol Byrne.***" (Tr. I-110) She testified further that Rella Risoli, another challenger, made further suggestions that she vote for Candidates Bronstein, Byrne and Salerno whose names were printed on a card which she then displayed before her. (Tr. I-115) She stated that she then reported the incident to Candidate Gratta and Candidate Licato, the then Board President. Both candidates testified that they reported the matter to the police, the County Board of Elections and the office of the Board Secretary. (Tr. I-49-50; II-6, 103-105)

Challengers Lucanegro and Risoli both denied, under oath, that they had either made such statements or displayed any campaign literature to voters. They testified that their activities as challengers were limited to acting as challengers and writing a list of names of those who voted. (Tr. I-22, 26, 34-36) They testified that during the afternoon the judge of elections at the Roosevelt School asked them to leave at the suggestion of a policeman because of complaints that had been made against them by a voter. (Tr. I-28) It is uncontroverted that, at the direction of the judge of elections, they left the polling area at approximately 2:30 p.m., one-half hour after the polls opened, and did not resume their functions as challengers thereafter.

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The hearing examiner, having carefully reviewed the directly conflicting testimony as well as the demeanor and forthrightness of witnesses, finds that the preponderance of credible evidence establishes the fact that Challengers Lucanegro and Risoli displayed printed campaign material and orally suggested to voters at the Roosevelt School polling place that they support certain candidates, in violation of *N.J.S.A.* 18A:14-81 which states that:

> "If a person shall distribute or display any *** printed matter or offer any suggestion or solicit any support for any candidate *** within the polling place *** he shall be a disorderly person."

There is no evidence, however, that electioneering at the polls continued at the Roosevelt School polling place when these challengers left the polling place approximately one-half hour after the polls opened. There is within the record insufficient evidence on which to base a conclusion that other comparable abuses occurred at the Roosevelt School polls after 2:30 p.m. or at any other of the established polling places at any time during the election.

The statement of results of the election filed by the election officials at the Roosevelt School reveals that a total of 160 ballots were cast at that polling site. (C-1-6) It is concluded that, even were every vote cast at the Roosevelt School for candidates other than petitioners to be voided by reason of taint from the above-stated violations, the result, standing alone, would be insufficient to alter the announced results of the election. This conclusion is grounded on the fact that the highest number of affirmative votes cast for any one of the complainants was 369 whereas the lowest number of yes votes tallied for the three successful candidates was 633. (C-1)

It is found that laxness occurred in the failure of election officials on at least two occasions when they failed to compare written signatures on the poll lists with those in the signature register as required by *N.J.S.A.* 18A:14-51. (Tr. II-10, 172) Similar laxness occurred in that certain envelopes containing poll returns were not sealed when returned to the Board Secretary. (Tr. II-117)

ALLEGATIONS OF ILLEGAL CAMPAIGN PRACTICES

Much testimony was elicited from both successful and unsuccessful candidates for seats on the Board regarding interviews conducted by a Residents' Committee which was composed principally of resident and non-resident teachers and other school employees. This committee and its smaller screening committee, prior to endorsing a slate of candidates, invited certain candidates to express their views on topics including, *inter alia*, the forthcoming election, Board policies, the Superintendent, the Board's attorney and his fees, teacher morale, discipline and vandalism at the schools, assignment of teachers to extracurricular duties, and litigation in which both the Board and the South Plainfield Education Association were involved. (P-2; Tr. I-55, 82-85, 142, 147, 181-185; II-116, 148-151)

Testimony of witnesses and documentary evidence also reveal that, although the SPEA openly endorsed no candidates, numerous of its members zealously

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engaged in efforts of the Residents' Committee to promote the election of its endorsed slate of candidates. To this end they produced and distributed literature through inter-school mail to SPEA members soliciting funds in support of the Residents' Committee slate of candidates. (Tr. I-69-73, 102, 108, 127, 132-135; II-61; P-3, 5, 9-10a) One teacher testified that he had typed and duplicated materials (P-5) soliciting such funds in the science department office using school materials and thereafter distributed them through inter-school mail. (Tr. I-164, 172-175)

Candidate Gratta stated that, in his opinion, teachers "***shouldn't have so much freedom in selecting their bosses.***" (Tr. I-186) Candidate Lehr, summarizing for complainants, stated, *inter alia*, the following:

> "***The South Plainfield Education Association, in the guise of the [R]esidents' Committee contrived to rig the election for candidates sympathetic to their cause.***" (Tr. II-179)

And

> "***[T]eachers in our district violated board policy by using their position as staff members, by using school supplies and materials and time for raising funds and disseminating campaign literature through school mail.***" (Tr. II-181-182)

And

> "***Treacherous road conditions the day of the election, the violations prior to election day, the violations of election day, the obvious curtailment of transmission of proper information, the serious and complicated involvement of the South Plainfield Education Association and the New Jersey Education Association in the political process, all indicate that the recent Board of Education election held in South Plainfield could, in no way, be interpreted as fair to all candidates. *** We urge *** a new election for the school district of South Plainfield.***" (Tr. II-185-186)

Candidate Stressle alleged that, in regard to Candidate Licato's effectiveness as President of the Board, he had been "brainwashed" by false information he had read and by unfair attacks upon her at meetings he had attended. (Tr. II-118-119)

Candidate Licato testified that when, late in the campaign, she learned of unfounded charges and misrepresentations of Board actions by the SPEA and PTA, she had personally attempted, albeit unsuccessfully, to inform members of the electorate of the true facts pertaining to those Board actions. (Tr. II-96-97, 102-106)

The hearing examiner, having carefully reviewed the documentary evidence and transcripts of testimony of witnesses, sets forth the following findings of fact concerning allegations of illegal campaign practices:

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1. Campaign literature distributed by members of the SPEA and by the Residents' Committee did not bear on the face thereof a statement of who printed or copied the material or provided payment therefor as required by *N.J.S.A.* 18A:14-97. (P-2, 5, 10-10a)

2. P-5, a solicitation of campaign funds by members of the Residents' Committee, was duplicated on school property prior to the opening of school on a school owned duplicator and on supplies paid for by the Board in violation of the Board's policy adopted on April 19, 1977 which states, *inter alia*, that:

> "***[S]chool property and school time, paid for by all the people, may not be used for political purposes.***" (P-6)

The distribution of P-5 was through inter-school mail which procedure is also prohibited by the Board's adopted policy. (P-6)

* * * *

The Commissioner, having carefully reviewed the entire record of documentary evidence and testimony of witnesses pertaining to the allegations of impropriety and illegality, finds abhorrent the violations of Board policy. That policy wisely restricts teaching staff members from expending public funds, using inter-school mail and otherwise engaging in activities soliciting funds for an announced slate of candidates. That other members of the teaching staff recognized and felt bound by these reasonable restrictions is evidenced by their testimony. (Tr. I-135) Those who violated the Board's policy which emanated from its discretionary authority pursuant to *N.J.S.A.* 18A:11-1(c) are herewith reprimanded. *In the Matter of the Annual School Election Held in the School District of the Township of East Hanover, Morris County*, 1978 *S.L.D.* (decided April 20, 1978)

Similarly abhorrent is the disregard by two challengers at the Roosevelt School of statutory restriction placed upon individuals at the polling place. While their effect upon the outcome of the election appears to have been negligible, or perhaps nonexistent, such action is rendered no less reprehensible thereby. A careful review of the record prompts the Commissioner to direct the Board Secretary to instruct his election officials not only of the parameters within which challengers may legally perform their functions at school elections but to compel them to function within those parameters. Similar instruction is also to be provided regarding comparison of signatures of voters to those in the signature register.

The Commissioner, observing that the election was intensely contested, has no reason to doubt complainants' allegations that there was dissemination to the voters of information which may have been misleading or even untrue. Such is our election process, however, that the burden of rebutting such misinformation rests upon other candidates and citizens who have equal access to the public news media and the right to mount a campaign involving personal contacts, mailings and organizational forums. Once such campaigns conclude,

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it is the public which must determine who will represent them on a local school board.

As was stated by the Commissioner *In the Matter of the Annual School Election Held in the Greater Egg Harbor Regional School District, Constituent District of the Township of Hamilton, Atlantic County*, 1978 *S.L.D.* (decided January 10, 1978):

> "***It is well established that gross irregularities, when not amounting to fraud, do not vitiate an election. *Stone et al. v. Wyckoff et al.*, 102 *N.J. Super.* 26 (*App. Div.* 1968) It is only when the deviations from statutory procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted, so as to make impossible a determination of the will of the people, that an election will be set aside. *In re Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1953) sets forth the rule as follows:
>
> > 'The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will.***' (at 383)***" (at)

The Commissioner perceives insufficient irregularity in the instant matter to adjudge the election invalid. Accordingly, the Commissioner declares that the previously announced results of the election shall stand.

The Commissioner is constrained, however, to commend complainants for the public service which they have rendered by bringing to light the aforementioned irregularities. The Board, the teachers and the election authorities, being so informed, are hereby directed to take proper precaution to prevent recurrence of such violations.

COMMISSIONER OF EDUCATION

July 5, 1978

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STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 13, 1978 and July 5, 1978

The State Board affirms the decision of the Commissioner and directs that the entire case file be transmitted to the Middlesex County Prosecutor's office for whatever action he/she deems appropriate.

November 8, 1978

In the Matter of the Annual School Election Held in the School District of Warren County Vocational School, Warren County.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioners, Stover and Stover (Thomas E. Stover, Esq., of Counsel)

For the Respondent, Albert B. Thorp, Esq.

Pursuant to charges of election irregularities brought by letter dated February 21, 1978, before the Commissioner of Education by Thomas E. Stover, Esq., attorney for Candidates Nicholas Fornarotto and Robert Whitesell, Albert B. Thorp, Esq., appearing for the Board of Education of the Warren County Vocational School, hereinafter "Board," an inquiry was conducted by a representative of the Commissioner on March 2, 1978, at the office of the Warren County Superintendent of Schools, Belvidere, in conformance with *N.J.S.A.* 18A:14-63.12.

It appearing from the testimony heard and the documentary evidence received that the election held on February 14, 1978, was not conducted in the manner prescribed for school elections pursuant to Chapter 14 of Title 18A of the New Jersey Statutes, in that the registered voters in the Township of Pahaquarry were not provided with voting ballots nor polling places, and were unable to participate in the election of February 14, 1978; and that the registered voters of the Township of Pahaquarry were denied the exercise of a fundamental right of citizenship, which the Commissioner deplores and cannot condone; and

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It appearing that the Commissioner has previously enumerated those principles enunciated by the courts (*Application of Wene*, 13 *N.J.* 185 (1953)) by which matters of this kind must be guided (*In the Matter of the School Election of the Hopatcong School District*, 1973 *S.L.D.* 115, 118-121); and

It appearing that school elections must be given effect whenever possible, despite irregularities, if the will of the people may be clearly seen, and the Commissioner having found there are 29 registered voters in the Township of Pahaquarry (R-1) and that the outcome of the election will not be affected by the addition of 29 votes to those election totals previously announced; and

The Commissioner having found the election irregularities to have been the result of inadvertent human error, not involving malconduct or fraud;

It is ORDERED on this 13th day of March 1978, that the election results as to the winning candidates and budget questions presented shall be given full force and effect; and

It is further ORDERED that, since the stringent time provisions of *N.J.S.A.* 18A:12-15, as amended by *L.* 1977, *c.* 324, approved January 10, 1978, necessitates the use of this interim order, there being insufficient time for the completion of a formal written decision prior hereto, a written decision setting forth more completely those findings upon which the determination in this matter has been reached shall follow.

COMMISSIONER OF EDUCATION

COMMISSIONER OF EDUCATION

DECISION

Chapter 30, Public Law of 1977 was enacted into law and made effective on March 2, 1977 and provided that boards of education of county vocational schools in all counties of the third class in New Jersey with a population greater than 70,000 but less than 120,000 were in the future to consist of nine members to be elected at large by the legal voters of the respective counties. The first such election pursuant to this enactment was conducted in Warren County on February 14, 1978 and voters were required to elect nine members to serve on the Warren County Vocational Board of Education, hereinafter "Board," for either three, two or one year terms. The electorate was also required to vote on appropriations for current expense and capital outlay costs of the school district.

The announced results of the balloting for seats on the Board were as follows:

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	At Polls	Absentee	Total
For Three Seats:			
For Three Year Terms			
Henry C. Kogler	1136	27	1163
John LaPorta	1061	27	1088
Charles Kwartler	1050	28	1078
Philip I. Evertz	964	31	995
Nicholas C. Fornoratto	930	17	947
For Three Seats:			
For Two Year Terms			
Walter Gross	1225	39	1264
Philip J. DeRea	1135	21	1156
Frank A. DeBennardis	933	21	954
George B. Babula	890	18	908
Cosmo Lubertazzo	688	16	704
For Three Seats:			
For One Year Terms			
Joseph L. McDonald	838	19	857
Carolyn Scurato	818	17	835
Nancy J. Gianni Schmidt	726	20	746
Wallace C. Whitford	637	21	658
Michael Olsyn, Jr.	632	18	650
Robert A. Whitesell	482	13	495
Lewis T. Parrish	425	10	435
Joseph F. Calamoneri	377	8	385

It is observed that the difference in vote totals between the third and fourth named candidates for each of the terms exceeded 29 votes.

Additionally there were candidates for each of the terms who received one vote.

The announced tally of the vote on appropriations for current expense and capital outlay costs was as follows:

	At Polls		Absentee		Total	
	For	Against	For	Against	For	Against
Current Expense	1125	851	19	21	1114	872
Capital Outlay	1096	870	22	27	1118	897

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Subsequent to the election, Candidates Fornoratto and Whitesell requested by letter that the Commissioner of Education review the conduct of the election and declare it invalid. Specifically they alleged:

***

"1. Said election being a County-wide election for said Board was, in fact, not a County-wide election in that the qualified voters and residents of the Township of Pahaquarry were not provided with ballots for voting for the membership of the Warren County Board or the budget, and that polling places were not even provided for them.

"2. That in addition in polling districts throughout the County, the election officials did not advise voters as to the fact of their being a separate ballot for the Vocational Board, and, in certain instances, unless the voter who appeared specifically requested same, he was tendered only the ballot for the local board elections.***"

Subsequent to receipt of the letter, the Commissioner appointed a representative to conduct an inquiry with respect to the allegations. The inquiry was conducted on March 2, 1978 at the office of the Warren County Superintendent of Schools, Belvidere. Thereafter, the Commissioner's representative conferred with the Commissioner, and because of the stringent time provisions of *N.J.S.A.* 18A:12-15 as amended by *L.*1977, *c.*324, wherein a second annual election was rendered a possibility, the Commissioner issued an interim order on the merits of the instant complaint on March 13, 1978. This order stated that the election results in question were to be given full force and effect. The findings of the Commissioner's representative on which the interim order was based are as follows:

The first annual election of members to serve on the Warren County Vocational Board of Education was planned well in advance of the scheduled date by the Secretary of the Board. The planning process included meetings of the Secretary with the County Superintendent of Schools in December 1977 and January 1978 and additionally with all other secretaries of local boards in Warren County. (Tr. 49-50) The Board Secretary testified that as a result of such meetings it was decided to use white paper for all ballots for the elections of the local school districts and yellow ballots for the vocational school election. (Tr. 49) He and the County Superintendent testified that there had been a suggestion by the County Superintendent that the election of February 14, 1978 be conducted, in effect, as two separate elections (Tr. 25, 49) and this suggestion was followed in almost all districts. (See Tr. 49.) Thus, when voters presented themselves at the polls they signed a poll list for the local election, were given a ballot and voted. They then were required to sign a second poll list for the vocational school election and voted for a second time, casting ballots in a separate ballot box. (Tr. 25) A total of sixteen secretaries of local boards of education in Warren County all testified or stated by affidavit that the procedures which had been discussed and agreed upon had been implemented and that there were no expressions of voter complaint at the election. (Tr. 32-33, 35-41, 43-44, 47; R-2-4)

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Subsequently two voters submitted affidavits with complaints. One complaint was that at one polling place a newspaper article had been handed out which contained pictures and qualifications of the candidates. (P-1) The second complaint was that the method used in distributing ballots wherein the vocational school ballot distribution followed that of the local district "***gave me the impression that somehow the vocational ballot was 'inferior' to the other ballot or had less worth." (P-2) Candidate Fornoratto testified that he knew of no one who had been denied the right to vote although he also questioned the procedure. (Tr. 17) The County Superintendent testified he had had one call from a candidate for the Vocational Board who stated that her husband, although apparently offered a ballot for the local election, had had to request a ballot for the vocational school election. (Tr. 19-20)

The hearing examiner finds from the testimony and the total record that there is no evidence except with respect to Pahaquarry Township as noted, *post*, that any voter was denied a ballot to vote in the vocational school election and in fact the tally in most districts for the vocational school election closely approximated that of the tally for the district election. (See Tr. 33, 35-38, 40.) While there was testimony as noted, *ante*, that "in certain instances" a voter had been offered only a ballot pertinent to the local district, such practice was apparently the exception and not the rule and the hearing examiner finds no cause for censure. Indeed the testimony and record as a whole attest to the truth of a conclusion that this first election of the Board was well prepared, efficiently conducted and almost without incident, except for the facts pertinent to Pahaquarry Township.

The County Superintendent testified that there are no pupils of school age living in Pahaquarry Township, that all land in the Township is now owned by the State or federal governments and that no polling places for the election were established there. (Tr. 21) He testified there has been no board of education in the Township in several years. (Tr. 22) The Board Secretary testified that he had not deemed it necessary to establish a polling place for Pahaquarry Township since it is not listed as an operating school district and there was no discussion of the entitlement of Pahaquarry voters to participate in this county school election. (Tr. 50-51) An affidavit from the Chief Clerk of the County Election Board states that there are 29 registered voters in Pahaquarry Township. (R-1) The failure to include these voters in plans for the election here in question was characterized at the hearing by respective counsel as either an "innocent mistake" or an "honest mistake" although counsel for the candidates who requested the inquiry avers that such failure should be reason to vitiate the election.

The hearing examiner finds a similarity in the instant matter to the facts *In the Matter of the Inquiry of the School District of the Township of Sandyston-Walpack*, 1975 *S.L.D.* 78 although therein the entitlement of pupils living on public land to attend public school was the issue for consideration. The Commissioner held that:

> "***The right to a free public education is guaranteed to all pupils in the State by the New Jersey Constitution and the school law (*Title 18A, Ed-*

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ucation) and may not be bargained away or set aside.***" (at 82)

The finding herein is similar, namely, that the constitutional rights of Pahaquarry voters to vote in all county school elections must not be permitted to be set aside in such future elections. Accordingly, the hearing examiner recommends that the County Superintendent be directed to establish procedures in future elections which are appropriate to the locale. Such procedures may well be envisioned to include a mobile polling place or an alternative to the kind of facility usually deemed to be necessary.

The hearing examiner finds no reason, however, to set aside the election here in question because of the oversight which occurred. There is no evidence of fraud and in the absence of such evidence the courts and the Commissioner have consistently held that the expressed will of the voters must be given effect. *Application of Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1953), aff'd 13 *N.J.* 185 (1953); *In the Matter of the School Election of the Hopatcong School District*, 1973 *S.L.D.* 115, 118-121 The expression of voter intent in the instant matter has not been impinged by the fact that 29 ballots of the voters of Pahaquarry Township were not cast. The announced tally at the close of the election was such that the three candidates with the greatest number of votes for each of the seats, as reported *ante*, were separated by more than 29 votes from the fourth highest candidatc.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the written report of the hearing examiner and reiterates the determination of his Order of March 13, 1978 that the irregularities of the election in Warren County for a seat on the Board of the Vocational School were the result of inadvertent human error, not involving malconduct or fraud. He further determines for the reasons set forth *In re Hopatcong*, *supra*, that absent such evidence of deliberate malconduct or fraud the election must be given effect. The will of the people freely expressed may be clearly seen although the irregularities with respect to Pahaquarry Township are deplored and not condoned by the Commissioner. In order to insure that such irregularities do not occur in the future, the Commissioner directs the County Superintendent to develop in conjunction with the Board Secretary a plan whereby in future elections the voting franchise of all Warren County voters is insured.

The Commissioner finds and determines that the announced results of the election for seats on the Board and for the expenditure of funds for current expense and capital outlay costs must stand as announced at the conclusion of the tally.

COMMISSIONER OF EDUCATION

July 5, 1978

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Tri-R Bus Service, Inc.,

Petitioner,

v.

Board of Education of the City of Plainfield, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Golden, Shore & Paley (Phillip L. Paley, Esq., of Counsel)

For the Respondent, King and King (Victor E. D. King, Esq., of Counsel)

Petitioner, a private bus contractor to the Board of Education of the City of Plainfield, hereinafter "Board," alleges that the Board illegally refused to award him contracts for three bus routes in August 1977, although his bid price on each of the three routes was the lowest one submitted. He demands judgment to this effect and a retroactive award. The Board does not deny that petitioner submitted the low bids as alleged but avers that it properly decided within the parameters of its own discretionary authority to reject all bids and operate its own vehicles over the routes in question. It requests dismissal of the Petition of Appeal.

An oral argument on a Motion for relief, *pendente lite*, and a hearing on the merits of the Petition was conducted on August 23, 1977 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. Subsequently, the Commissioner denied the motion by letter of August 30, 1977 but held in abeyance a decision on certain of the merits of the Petition. Briefs have been filed by the parties. The report of the hearing examiner is a follows:

The Petition in its presently viable form before the Commissioner is a more limited one than that at the time of hearing, since one of the bus routes then in question, designated as route number 19, has been awarded by the Board in a contract for the performance of services to petitioner. There remain in question only three routes on which petitioner originally submitted bids. Petitioner alleges that the Board's administrative officers represented to him that these routes, on which he had been operating vehicles for four years, would be renewed for the 1977-78 academic year. He avers that he relied on such representation and incurred resultant expense. If it is found that such representation was made by or on behalf of the Board, there is a legal issue concerned with whether such

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representation is binding on the Board. A second issue arises from the argument by petitioner that a local board of education which has advertised for bids on local bus routes for the transportation of school pupils may not, subsequent to receipt of bids, decide by a unilateral decision to operate its own vehicles on the vague undocumented premise that such operation may prove more economical.

Testimony at the hearing on the merits of the Petition was elicited from petitioner's chief operation officer and from the Board's transportation coordinator.

The operating officer testified that petitioner had entered into a three year contract with the Board to operate vehicles on the three routes here in question in 1973 and it was agreed in June 1976 that the contract would be renewed for a succeeding two years. It was also agreed as a part of such renewal that there would be no increase in cost the first year but that a five percent increase would be incorporated as a contractual term for the 1977-78, or second, year. (Tr. 21) A contract which embodied these terms was in fact executed by both petitioner and the Board and was submitted for approval pursuant to law to the County Superintendent of Schools. (P-2; Tr. 22) This contract was forwarded to the County Superintendent on or about October 13, 1976 and on December 1, 1976 the County Superintendent approved it but for only the one year "annual" extension which is authorized by law. *N.J.S.A.* 18A:39-3. The approved contract contained a deletion pertinent to the terms of the second year. (P-2)

The operating officer testified that he was not apprised of this deletion pertinent to the second year of the proposed contract until a later date but still believed the contract would be renewed for the second year as originally agreed. (Tr. 23, 35, 37) He testified that there was "***the understanding that we get the '77-'78 increment." (Tr. 26) The operating officer then testified that as a result of this understanding, and dependent on it, he had purchased new school buses. (Tr. 28) Subsequently, he testified, petitioner had addressed a letter to the Board on June 8, 1977 and requested therein "***that the maximum increases available on the Bus Transportation Contracts that we perform for your district be applied for the upcoming year.***" (P-1; Tr. 30) (It is noted here that the maximum accumulative increase possible in annual transportation contract renewals is twenty percent. *N.J.S.A.* 18A:39-3(c))

The Board's transportation coordinator testified that he had not, to the best of his knowledge, made a direct representation to petitioner or his agent that the contracts would be renewed for a second year at a five percent increase. (Tr. 45)

The hearing examiner cannot adduce from such testimony or the total record of this hearing that petitioner was ever directly or officially informed during the 1976-77 year that his three contracts here in question would be renewed for the 1977-78 year at an increase in the contractual price of five percent. In fact, it may be inferred from petitioner's letter to the Board of June 8, 1977 that he knew there was no firm commitment to a definite percentage increase since in that letter he requested "the maximum increases available." (P-1) It was the

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testimony of petitioner's operating officer that he thought the maximum increase was twenty percent. (Tr. 30) Accordingly, the hearing examiner finds no reason to discuss the ramifications of commitments by an agent or agents of the Board on behalf of the Board.

There remains the question concerned with the Board's decision to operate its own vehicles over three of its routes when such decision was made subsequent to the receipt of bids and without precise estimations or documentation to support an opinion that such operation by the Board would in fact be less expensive. The Board's advertisement for bids is pertinent to this argument. It provides *inter alia* that:

> "***The Board of Education reserves the right to accept any bid meeting specifications regardless of price. The Board also reserves the right to accept any portion of the bid, waive any irregularities in bidding, and to proceed in any manner considered in its best interest.***" (PR-1)

Such language contains no express provision providing for a rejection of all bids but such provision is certainly to be inferred from that phase wherein the Board stated it reserved the right to proceed in a manner it deemed advisable "***in its best interest." Such discretion with respect to the award of transportation contracts to private contractors has long been exercised by local boards of education and upheld by the Commissioner. *Gabriel Frank et al. v. Board of Education of the Borough of Englewood Cliffs*, 1963 *S.L.D.* 229 In this decision the local board's exercise of discretion was also at issue and the Commissioner said:

> "***The Commissioner has consistently held that he will not substitute his judgment for that of the local board of education in matters which lie purely within the discretionary authority of the board. *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, affirmed State Board of Education 15, 135 *N.J.L.* 329 (*Sup. Ct.*), 136 *N.J.L.* 521 (*E.&A.* 1948); *Mackler v. Board of Education of Camden*, 1953-54 *S.L.D.* 53, affirmed State Board of Education 66, 16 *N.J.* 362 (1954); *Noto v. Board of Education of Township of Lopatcong*, 1956-57 *S.L.D.* 71, affirmed State Board of Education 77; *Iden et al. v. Board of Education of West Orange*, 1959-60 *S.L.D.* 96; *Schrenk et al. v. Board of Education of Ridgewood*, [1960-61 *S.L.D.* 185]. It is the function of the local board to make rules and contracts for the transportation of children to school (*R.S.* 18:14-8, supra), consistent with rules and regulations of the State Board of Education applicable to pupil transportation (*R.S.* 18:14-12). Thus the selection of public transportation over private contract *or district-owned bus transportation lies within the discretionary authority of the local board, and will not be upset unless it is clearly arbitrary, capricious*, or *unreasonable*. The Commissioner does not find those *elements* here.***"
>
> (*Emphasis supplied.*) (at 231)

Neither can the hearing examiner find such elements in the instant matter. Further, it has been established in decisions which date back to the last century that an advertisement for bids by a local board of education carries with it no

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compulsion that there must be an award of contract. The Commissioner determined in *Camden Motor Truck Company v. Board of Education of the Township of Shamong, Burlington County and Joseph H. Haines and Sons*, 1938 *S.L.D.* 790 (1936) that the purpose of the bidding statutes was clearly to prevent dishonesty or fraud but not to prevent the exercise of an honest judgment subsequent to receipt of bids. In support of this determination the Commissioner cited a prior decision of the Court in *James Oakley and the Electric Light Co. of Atlantic City v. City of Atlantic City*, 34 *Vroom* 127 (*Sup. Ct.* 1899) as follows:

> "***I think it has been quite clearly established in this court that, under the statute of 1894, even where proposals more or less general in their character are advertised for and received, the municipality is not bound to award the contract to the lowest bidder or *even to award the contract upon such bids*.***" (*Emphasis supplied.*) (at 137)

The same principle is applicable to the action of the Board which is controverted in the instant matter. While the Board advertised for bids on its bus routes and while petitioner was the low bidder on five transportation routes, there was no obligation imposed on the Board by such facts to award any or all of these five contracts to petitioner as a low bidder or at all. To the contrary, the Board was free to make an honest judgment in the best interests of the school district to set aside the bids and develop alternative plans with its own transportation vehicles. Absent evidence that the determination was arbitrary, capricious or unreasonable, and there is no such finding herein, the action must stand. The hearing examiner so finds and recommends that the Petition be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner to which no exceptions or objections have been filed. The Commissioner concurs with the findings and recommendations of the report. It is determined that no legally binding contract existed between petitioner and the Board for the transportation of pupils on the three routes here in question for the 1977-78 school year since the County Superintendent had not, as required by law (*N.J.S.A.* 18A:39-3) approved contract terms for the year which had been proposed. It is further determined that subsequent to receipt of bids on the three routes in 1977 the Board lawfully exercised its discretionary authority to reject the bids and to operate its own vehicles. There is no evidence that the Board's action was arbitrary, capricious or unreasonable. It is required to be sustained. *Frank, supra* The Commissioner so holds.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

July 5, 1978

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Deal Education Association,

Petitioner,

v.

Board of Education of the Borough of Deal, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Morgan & Falvo (Peter S. Falvo, Jr., Esq., of Counsel)

For the Respondent, Mirne, Nowels, Tumen, Magee & Kirschner (Michael B. Kirschner, Esq., of Counsel)

Petitioner, the Deal Education Association, avers that the Board of Education of the Borough of Deal, hereinafter "Board," has improperly and illegally employed persons as members of its athletic coaching staff who were not qualified for the positions they held. It requests the Commissioner of Education to restrain the Board from such alleged employment practices in future years. The Board maintains that it has employed all coaches in conformity with its goal to achieve a quality athletic program and it avers the rules of the State Board of Education pertinent to the employment of athletic coaches have been unduly restrictive. The dispute is submitted to the Commissioner for Summary Judgment on the pleadings, Briefs and a Stipulation of Facts.

The facts upon which the Petition is grounded are not in dispute although the legal arguments pertinent thereto have been rendered moot in many pertinent respects by the passage by the State Board of Education of new rules with respect to the employment of athletic coaches. *N.J.A.C.* 6:29-6.3 Such rules were adopted on March 3, 1977 and constitute a liberalization of the rules regulating such employment. Prior to that date the State Board rules required that all physical education activities within or following the regular school day were to be supervised only by persons certified as teachers and employed "full time" in the local district. There was, however, one exception; namely, that in an "emergency" local school districts were permitted to "***employ certified, full-time employees of their constituent or sending districts, or of a vocational school within the same county***." *N.J.A.C.* 6:29-6.3(c)

The revised rule was adopted on March 3, 1977 and is recited in its entirety as follows:

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

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

"(c) School districts shall be permitted to employ certified, full-time employees of their constituent or sending districts, or of a vocational school within the same county as designated in N.J.S.A. 18A:54-11, to work on a part-time basis in the interscholastic program, providing the superintendent of schools of the receiving district certifies an emergency exists to the county superintendent, upon whose approval the individual may be employed for one year, except as expressly provided in (d) and (e) below.

"(d) School districts shall be permitted to employ certified and qualified, full-time teaching staff members of other New Jersey school districts to work on a part-time basis in the co-curricular interscholastic athletic program provided that:

1. The employing district can demonstrate annually to the county superintendent that an emergency situation exists;

2. The part-time position has been properly advertised within the district;

3. Both local boards of education are in agreement regarding such part-time employment;

4. Approval of the county superintendent shall be obtained prior to such employment by the local board of education.

"(e) In addition, school districts shall also be permitted to employ holders of New Jersey certification not presently employed in a school district provided that:

1. The employing district can demonstrate annually to the county superintendent that an emergency situation exists;

2. That the part-time position has been properly advertised within the district;

3. The district superintendent will provide a letter to the county superin-

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tendent attesting to the prospective employee's knowledge and experience in the sport which he/she will coach;

4. Approval of the county superintendent shall be obtained prior to such employment by the local board of education.''

The stipulated facts may be viewed in the context of these rules as they existed prior to the time the Petition was filed and subsequent to March 3, 1977. Such facts may be summarized as follows:

1. In the years 1974-76 the Board employed as soccer coaches men who were certificated teachers but were not employed full time by the Board.

2. No formal announcement with respect to the soccer coaching vacancies was made to the Deal teaching staff in 1974-75 and in 1976 there was only an oral announcement.

3. On November 20, 1975 the Board gave notice of a vacancy which had suddenly occurred in the position of basketball coach and asked a full-time teaching staff member employed by the Board if he would accept the position. He indicated he would.

4. The Board then employed, instead, on December 10, 1975, its school principal as ''***Supervisor of Student Activities, a position which included the duty of coaching basketball that season, among other duties, for the sum of $1000***.'' (Stipulation of Facts, at p. 2) The Board also appointed a basketball player at Monmouth College who was not a certified teacher or teaching staff member to assist as basketball coach at a salary of $500 for the season's work.

5. Concurrently the Board appointed the full-time staff member it had formerly asked to serve as basketball coach to a newly created position of junior varsity coach for the 1975-76 year.

6. In 1976 this full time staff member was employed as boys' varsity and junior varsity basketball coach at a salary of $600.

7. The Deal teaching staff numbered only twenty-three teachers during all of the period 1974-76.

It is clear from the record that petitioner's request to restrain the Board from hiring coaching personnel from among the certified teaching staff members of other New Jersey public school districts has been rendered moot by the State Board's adoption of new rules pertinent to the employment of coaches. *N.J.A.C.* 6:29-6.3, *ante* Such personnel may now be employed subject to the conditions as set forth in the rules.

There remains, however, the matter of the Board's employment of a college basketball player, uncertified as a teacher, as a salaried assistant basketball coach for the 1975-76 year. Such employment was clearly illegal in the context of *N.J.A.C.* 6:29-6.3 both prior to and subsequent to March 3, 1977 and while the

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Commissioner understands the emergency nature of the general athletics situation in Deal in December 1975 he cannot condone the employment. A similar employment was considered by the Commissioner in *Point Pleasant Beach Teachers' Association v. Board of Education of Point Pleasant Beach et al.*, 1974 *S.L.D.* 241 and the Commissioner said:

> "***[T]here is no expressed authority to be found anywhere that permits a board to employ any person other than a certificated teacher as a coach. In this respect the Board is directed to follow the provisions of *N.J.A.C.* 6:29-6.3 when making coaching appointments in the future.***" (at 244)

The Commissioner grounded this direction in a conclusion that:

> "***The intent of this rule is, in part, to avoid the evil of hiring professional athletes and other uniquely qualified persons as minimal part-time employees, as a guise for acquiring their coaching talents. A further intent of the rule is to insure that boys and girls will be coached by teachers who have been trained to develop the mind, body and character of their pupils.***" (at 245)

While the rule has been liberalized to a degree, there has been no alteration of its intent or purpose. This intent may not be freely subverted because a situation has been designated as an emergency except as expressly provided in the rule. The Commissioner so holds.

Accordingly, the Board is directed to employ all future coaches pursuant to the express provisions as set forth in the rules of the State Board of Education. *N.J.A.C.* 6:29-6.3

Finally, it is observed that the Petition requests the Commissioner to enter a judgment directing the Board to offer coaching positions to any "***of its teaching staff personnel at the same salary and upon the same terms and conditions paid and offered to outside non-teaching staff personnel***." (Petition of Appeal, at p. 5) Such an order is unnecessary, in the Commissioner's judgment, because the applicable, previously cited regulations do not permit a local board of education to employ certified teachers from outside the district as coaches, either from constituent districts, sending districts or a vocational school (*N.J.A.C.* 6:29-6.3(c)), other school districts (*N.J.A.C.* 6:29-6.3(d)) or unemployed certificated teachers (*N.J.A.C.* 6:29-6.3(e)), unless an emergency can be certified to the County Superintendent. An emergency could not be demonstrated where a board has teaching staff members who are qualified and available to perform such coaching duties. Also, local boards are required to advertise such assignments within the school district, particularly for the benefit of the regular teaching staff members. See *N.J.A.C.* 6:29-6.3(d)1 and (e)2.

Accordingly, except as set forth *ante*, the Petition is dismissed.

COMMISSIONER OF EDUCATION

July 7, 1978

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Ralph Marshall,

Petitioner,

v.

Board of Education of the Southern Regional High School District, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Starkey, White & Kelly (William V. Kelly, Esq., of Counsel)

For the Respondent, Berry, Summerill, Piscal, Kagan & Privetera (Franklin H. Berry, Jr., Esq., of Counsel)

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Southern Regional High School District, hereinafter "Board," avers that the Board has denied an adjustment increment longevity payment for the 1978-79 school year without just cause, and that its action was arbitrary, capricious, unreasonable and in violation of *N.J.S.A.* 18A:29-14. He requests that the Commissioner of Education order the Board to rescind its action and compensate him at the proper step pursuant to the adopted salary schedule and, further, to clear his permanent record of any such action by the Board. The Board, denying the allegations and asserting its action to withhold petitioner's adjustment increment longevity payment was a legal and proper exercise of its authority, seeks dismissal of the Petition of Appeal.

An oral argument on Cross-Motion for Summary Judgment was conducted on July 5, 1977 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The entire record in this matter, including the pleadings, the transcript of the oral argument, exhibits and Briefs in support of their respective positions is presently before the Commissioner for his determination.

All relevant facts are undisputed. Petitioner has been employed by the Board for sixteen years and has served as its Director of Guidance and Student Personnel Services for the past fifteen years. On April 6, 1977 the then Superintendent of Schools forwarded to petitioner a ten page evaluation of petitioner's performance for the 1976-77 school year. (C-1) Attached thereto were copies of twenty-six memoranda and other documents dated from February 3, 1972 through March 25, 1977. (C-2-27) On April 29, 1977, petitioner and his attorney appeared before the Board at a closed session. Subsequently, the Board recon-

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vened at an open public meeting with petitioner and his attorney in attendance, adopted the Superintendent's evaluation, and voted to pay petitioner the same salary which he received during the 1976-77 for the ensuing 1978-79 school year. No statement of the reasons to withhold his adjustment increment longevity payment was sent to petitioner by the Board subsequent to its action.

The Board's 1977-78 teachers' salary guide provides, *inter alia*, as follows:

> "***When salary guide is completed ½ increment will be added every second year until retirement. ***
>
> "The Board of Education may withhold the salary increment of any teacher upon the recommendation of the Superintendent in accordance with and governed by New Jersey Law (RS 18A:29-14)." (C-28)

Petitioner was at the top step for his degree level and years of experience and therefore eligible for the one-half increment for the 1978-79 school year.

The Board argues that its authority to withhold a salary increment is provided by *N.J.S.A.* 18A:29-14, which reads as follows:

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

The Board argues that such authority rests with it so long as it observes the basic elements of fair play and provides the affected employee with the elemental requirements of due process. The Board's reliance that it met the requisite of fair play and due process as provided in *J. Michael Fitzpatrick v. Board of Education of the Borough of Montvale*, 1969 *S.L.D.* 4, is misplaced. The Court's determination in *Westwood Education Association v. Board of Education of the Westwood Regional School District*, Docket No. A-261-73 New Jersey Superior Court, Appellate Division, June 21, 1974 (1974 *S.L.D.* 1436) supersedes *Fitzpatrick*. The Board argues that petitioner was provided a written evaluation which detailed the grounds of the Superintendent's dissatisfaction with his performance and a notification therein that a recommendation would be forwarded to the Board to withhold his salary increment for the 1978-79 school year. Subsequently, petitioner, with his attorney, presented his position to the Board in private session with regard to the Superintendent's evaluation

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and recommendation. Thereafter, at an open public meeting and in the presence of petitioner and his attorney, the Board adopted the recommendation of its Superintendent and voted to withhold his increment. The Board acknowledges that petitioner was entitled to additional written notice as provided by *N.J.S.A.* 18A:29-14. It argues, however, that such notice would have been superfluous and redundant. The Board argues that so long as the intent of the notice requirement of *N.J.S.A.* 18A:29-14 was met, its action to withhold petitioner's increment should be upheld. *George Hillman v. Board of Education of Caldwell-West Caldwell, Essex County*, 1977 *S.L.D.* 218

Petitioner argues that the Board's failure to notify petitioner in writing within ten days and state its reasons for withholding his increment is in violation of the statute. Petitioner argues that the language of *N.J.S.A.* 18A:29-14 is not permissive but, rather, mandatory wherein it states, *inter alia*:

> "***It *shall be the duty* of the board of education, *within 10 days*, to give *written notice* of such action, *together with the reasons* therefor, to the member concerned.***" (*Emphasis supplied.*)

Notwithstanding the Board's assertion that petitioner and his attorney attended the open public meeting at which the Board acted to withhold petitioner's increment, petitioner argues that the subsequent absence of such written notice within the prescribed time limit and a statement of the Board's reasons was a violation of the statute and, therefore, the Board's action should be declared null and void. *Hillman, supra; Anna Gill v. Board of Education of the City of Clifton Passaic County*, 1976 *S.L.D.* 661, aff'd State Board 666, aff'd Docket No. A-912-76 New Jersey Superior Court, Appellate Division, December 7, 1977

Petitioner further cites the case of *Charles Coniglio v. Board of Education of the Township of Teaneck*, 1973 *S.L.D.* 449, wherein the Commissioner held that there was no statutory authority for the withholding of one half of petitioner's salary increment even in the presence of Board policy. In the instant matter, petitioner was at the maximum salary step and pursuant to the Board's adopted salary guide he would be eligible to receive a one-half increment every second year until retirement. (C-28) Petitioner would be eligible for such a salary increment for the 1978-79 school year. Petitioner argues that pursuant to the decision in *Coniglio*, the Board may not withhold one half of a salary increment and, therefore, petitioner's increment should be restored.

The Commissioner agrees with petitioner that there is no basis in the statutes for a board of education to withhold one half of a salary increment even though a board of education adopted a policy to do so. In *Coniglio, supra*, the Commissioner held that:

> "***when a local board of education does adopt a policy for the withholding of salary increments, either by adopting the provisions of *N.J.S.A.* 18A:29-14 or a variation thereof, it cannot adopt a policy which is not within the bounds of *N.J.S.A.* 18A:29-14. This statute makes no provision for the

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withholding of a portion or a fraction of an increment. Accordingly, any policy adopted by virtue of the authority of this statute may not provide for the withholding of a portion or fraction of an increment.***''(at 459)

The Commissioner, however, cannot agree with petitioner's interpretation of his decision in *Coniglio, supra*, and the instant matter. The issue controverted herein is not the withholding of a ''portion or fraction'' of petitioner's salary increment but rather, the withholding of a full increment which, in this case, represents one half of a normal increment every two years subsequent to petitioner's attainment of the maximum step on the Board's adopted salary guide. Thus, the Board's authority to withhold such full increment is in accordance with *N.J.S.A.* 18A:29-14 and the decision in *Coniglio*. The Commissioner so holds.

The Commissioner observes that petitioner was in receipt of the Superintendent's evaluation and was well aware that the Superintendent had recommended that the Board withhold his increment. Indeed, subsequent to the Superintendent's recommendation and prior to the Board's action to withhold petitioner's increment, he was afforded the opportunity to meet and discuss the matter, in private session, with the Board. Petitioner was not successful in his arguments to dissuade the Board and, in fact, was in attendance at the Board's subsequent open public meeting when it acted to withhold his increment. To argue that the Board failed ''***to give written notice of such action, together with the reasons therefor***'' in the Commissioner's judgment places form over substance. Petitioner was aware ''***of such action, together with the reasons***.'' *N.J.S A.* 18A:29-14 As the Commissioner stated in the matter of *Hillman, supra*:

> ''***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)

Within one month of the Board's action on April 29, 1977, specifically May 25, 1977, petitioner filed a Petition of Appeal in the instant matter as provided by *N.J.S.A.* 18A:29-14. Thus, the intent of the notification requirement was met by the Board. *Hillman, supra*

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.

The Commissioner is constrained to issue a caveat to this Board and all other local boards of education that the withholding of any salary or adjustment

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increment is to be accomplished in accordance with the provisions of *N.J.S.A.* 18A:29-14. Such compliance, even if considered redundant by a local board, will prevent allegations of improper procedures and litigation. In the judgment of the Commissioner, the instant matter might not have arisen if the Board had simply followed the directive set forth in the statute rather than making its own determination that it had substantially complied with the intent of the statute, and that further action would be superfluous.

The Commissioner finds and determines that the action of the Board of Education of Southern Regional High School District on April 29, 1977 to withhold the adjustment increment of Ralph Marshall is proper and legal. The Board's Motion for Summary Judgment is hereby granted.

COMMISSIONER OF EDUCATION

July 10, 1978

Herbert Levitt and the Elizabeth Education Association,

Petitioners,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Goldberg, Simon and Selikoff (Gerald M. Goldberg, Esq., of Counsel)

For the Respondent, Murray, Granello & Kenney (Robert Emmet Murray, Esq., of Counsel)

Petitioners protest the action of the Board of Education of the City of Elizabeth, hereinafter "Board," in deducting one day's pay from the annual salaries of certain non-supervisory teaching staff members employed by the Board, for the date October 13, 1975, Columbus Day, a legal holiday in New Jersey. *N.J.S.A.* 36:1.1 Petitioners pray for relief in the form of an order of the Commissioner of Education directing the Board to reimburse them for the salary withheld on that date. The Board argues that its action was correct, moves for dismissal for failure of petitioners to state a cause of action upon which relief

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can be granted and questions the jurisdiction of the Commissioner in the instant matter.

Oral argument on the Board's Motion to Dismiss was held March 21, 1977 at the State Department of Education, Trenton, before a representative appointed by the Commissioner. Briefs were subsequently submitted on the Motion to Dismiss and Cross-Motion for Summary Judgment. The matter is presently before the Commissioner for adjudication based on the pleadings, appended exhibits, and arguments of law. The facts of the matter are these:

Petitioners were absent from their contracted and assigned posts on the Friday preceding and the Tuesday following Columbus Day which fell on Monday, October 13, 1975. A deduction from salary was made by the Board not only for Friday, October 10 and Tuesday, October 14 but also for Columbus Day, October 13 which was listed on the school calendar as a date on which school would not be in session. (Petitioners' Brief, Ex. A)

Petitioners agree that the Commissioner may make his determination as to the issue of Columbus Day salary based on the hypothetical assumption that a strike was in progress before and after Columbus Day. (Petitioners' Reply Brief, at p. 1)

The Commissioner has carefully considered the legal arguments set forth by the parties. The issue of jurisdiction in this matter is rendered *stare decisis* by *Carl Moldovan et al. v. Board of Education of the Township of Hamilton*, 1971 *S.L.D.* 246, a case in which the Commissioner exercised his jurisdictional authority by determining that deductions from teachers' salaries could not be made for absences during a specified legal holiday. Similarly the Commissioner has jurisdiction to review the dispute in the instant matter.

The narrow issue before the Commissioner is whether the Board could legally deduct 1/200th of the annual salary for Columbus Day, a day on which school was not scheduled, and which was spanned by two days on which school was scheduled to be in session but was closed because of a work stoppage.

N.J.S.A. 18A:25-3 provides that:

> "No teaching staff member shall be required to perform his duties on any day declared by law to be a public holiday and no deduction shall be made from such member's salary by reason of the fact that such a public holiday happens to be a school day***."

In *Moldovan, supra*, the Commissioner determined that the Hamilton Township Board could not legally make a deduction from teachers' salaries for not working on a recognized legal holiday, albeit a day on which school had been scheduled by the school calendar. Given such a decision there is even less rationale on which to base a holding herein that teachers should have deductions made from their salaries for a day on which school had not been scheduled by the Board when it exercised its authority to promulgate the yearly calendar.

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As was stated in *Moldovan, surpa*:

> "***The courts have also ruled on the importance of long usage and long standing in establishing the intent of legislative enactments. In *State of New Jersey, Department of Civil Service, et al. v. James P. Clark, et al.*, 15 *N.J.* 334 (1954), the Supreme Court stated the following at p. 341:
>
> > 'The principle is well established by a wealth of authority that resort may be had to long usage, contemporaneous construction and practical interpretation in construing statutes, to ascertain the meaning of technical terms, *to confirm a construction deduced from the language*, to explain a doubtful phrase or where the meaning is obscurely expressed. *Suburban Electric Co. v. Elizabeth*, 59 *N.J.L.* 134 (*Sup. Ct.* 1896).***' (*Emphasis supplied.*)
>
> 'Also, the Court stated at p. 340:
>
> > "***Such a contemporaneous construction over a period in excess of 40 years [here 65 years] is of substantial importance in weighing the issues where there is a debatable question. Under such circumstances the long-continued exposition exhibited in the usage and practice requires the construction put upon it to be accepted by the courts as a true one.***'
>
> "Having examined several pertinent decrees of the courts, the Commissioner finds that the statute, *N.J.S.A.* 18A:25-3, *supra*, is clear on its face, and that its long standing over a period in excess of sixty-five years removes any question here of the intent of the Legislature.***" (at 248)

And,

> "***The clear intent of this long standing statute, *N.J.S.A.* 18A:25-3, *supra*, is that teaching staff members shall not be required to perform duties on any public holiday, that no salary deduction shall be made for absence because a public holiday happens to be a school day, and that no contract term may violate this statute. It is evident that this statute does not prohibit school sessions on public holidays, but instead protects the right of teaching staff members to be absent on public holidays without suffering financial loss. In the instant matter, petitioners' absence from the school session held on October 12, 1970, was within the rights bestowed upon teaching staff members by *N.J.S.A.* 18A:25-3, *supra*; therefore, their salaries were not subject to a deduction because of such absence.***" (at 253)

Further credence was given to this long standing interpretation of *N.J.S.A.* 18A:25-3 in *Parents' Union of Burlington County v. Board of Education of the Township of Willingboro, Burlington County, and Willingboro Education Association*, decided by the Commissioner June 22, 1978. Therein the Commissioner in his factual recitation related, with favor, the following resolution of

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a salary dispute over a deduction concerning a legal holiday spanned by a teacher strike:

> "***When the Board and the Association failed to negotiate a successor agreement by November 4, 1977 a teacher strike ensued. With the exception of the Board's Kennedy High School and the Stuart Elementary School, Willingboro schools were closed for seventeen scheduled school days from November 4 through December 2, 1977. Teachers who did not teach during those days had deducted from their pay 1/200 for each of sixteen days during which they did not work. The seventeenth of those days originally scheduled as pupil days was Tuesday, November 8, 1977, Election Day, which is defined by *N.J.S.A.* 36:1-1 as a legal holiday. Pursuant to dicta set forth in *Carl Moldovan et al. v. Board of Education of the Township of Hamilton*, 1971 *S.L.D.* 246 and the directive of the Court which handled the contempt proceedings in the instant matter, the Board made no salary deductions for teachers who did not perform duties on that day.***"
>
> (at)

Given the above factual context, the legislative mandate of *N.J.S.A.* 18A:25-3, the directive of the Court as reported in *Willingboro, supra*, and dicta heretofore set forth from *Moldovan, supra*, the Commissioner determines the instant matter to be *stare decisis*. The Board was without legal authority to deduct 1/200th from the teachers' annual salaries for Columbus Day, October 13, 1975. Accordingly, the Board is directed to issue payment in the precise amount of 1/200th of their then annual salaries to each teaching staff member for whom such deduction was made.

COMMISSIONER OF EDUCATION

July 10, 1978
Pending State Board of Education

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Michael G. Popeluk,

Petitioner,

v.

Board of Education of the Borough of Merchantville, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Michael G. Popeluk, *Pro Se*

For Respondent, Brown, Connery, Kulp, Wille, Purnell & Greene (George Purnell, Esq., of Counsel)

Petitioner, a resident of Merchantville, alleges that the Board of Education of Merchantville, hereinafter "Board," acted illegally in its refusal to place a specific question on the ballot at the 1977 annual school election with respect to its determination to make major repairs on its schoolhouse. Petitioner demands that the Commissioner of Education enter an order by which the Board would be required to place the question before the electorate at a special election pursuant to *N.J.S.A.* 18A:14-3 on whether the major repairs should be made. The Board admits it refused to place such a referendum before the voters and asserts that it is under no statutory requirement to do so. The parties, each of whom stipulates the facts in the matter, seek Summary Judgment in their favor.

Oral argument of the parties was heard subsequent to the submission of Briefs in support of their respective positions on January 17, 1978 at the Camden County Office of the Department of Education by a representative of the Commissioner. The matter is referred directly to the Commissioner for his determination.

The facts of the matter are these. Several years ago the south wall of the Board's schoolhouse was detected to be leaning outward. Engineers engaged by the Board to study the seriousness of the situation recommended that six classrooms not be used to house pupils. In the meantime several temporary measures were employed such as the removal of an iron fire escape attached to the outside wall and use of cables and turnbuckles to prevent the collapse of the wall.

The Board thereafter proposed to the electorate the construction of a new schoolhouse. The proposal was defeated by the voters. The Board then determined to raise sufficient funds over a period of years through voter approval of capital outlay requests in order to make substantial repairs to the schoolhouse.

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This effort was successful to the extent that the Board did raise at least $200,000 for capital outlay purposes. It is observed by the Commissioner that the subject of the propriety and wisdom of the Board's action to renovate the south wing of its schoolhouse with the capital outlay funds it raised through voter approval was challenged in *Charles C. Colozzi, a Taxpayer, and President, Merchantville Taxpayers League v. Board of Education of the Borough of Merchantville, Camden County*, 1977 *S.L.D.* 288. The Commissioner found that petitioner failed to set forth points of law or allegations of impropriety sufficient to reverse the Board's action and the petition was dismissed.

The Board herein explains that, with funds available for the contemplated major repairs, there is a difference of opinion between the Board and some members of the community, one of whom is petitioner. The Board takes the position that it requires the use of the six classrooms heretofore found unfit for pupils, consequently, its intention is to repair the defective south wall and regain the use of the six classrooms.

The community opposition would have the Board tear down the south wall, eliminate the six classrooms and erect a new wall thereby reducing the size of the schoolhouse by six classrooms.

Petitioner, by letter dated February 14, 1977, submitted to the Board a list of fifty-seven signatures from persons who attest to be qualified voters of the school district. This letter requested that the Board place before the electorate at a special election, or at the regular 1977 annual school election, the following question:

> "Should the Merchantville Board of Education repair, rehabilitate and furnish the South Wing of the present facilities at a total cost of $75,000 or more to receive Special Education Students from other Districts."
>
> (Exhibit A)

It is observed that it is not established that the sole use of the refurbished facilities would be for special education.

The Board did not place the question on the ballot at the regular 1977 annual school election, nor did it call a special election for that purpose. Furthermore, the Board asserts that it is not required to call a special election on an issue that, statutorily, is within its authority to determine.

The Commissioner agrees with the Board. *N.J.S.A.* 18A:33-1 requires the Board to provide suitable facilities for its pupils which includes proper school buildings. This authority and responsibility is vested solely within the purview of the Board.

Petitioner improperly relies on *N.J.S.A.* 18A:14-3 for the relief he seeks. That statute provides, in pertinent part, that:

> "The board of education *** *may* call a special election *** whenever 50

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of such legal voters shall by petition so request***.'' (*Emphasis supplied.*)

N.J.S.A. 18A:14-3 constitutes permissive authority granted to boards of education; it is not mandatory.

The Commissioner finds no basis to intervene in the matter. Summary Judgment is hereby granted the Board.

The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

July 10, 1978

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 10, 1978

For the Petitioner-Appellant, Michael G. Popeluk, *Pro Se*

For the Respondent-Appellee, George Purnell, Esq.

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

December 6, 1978

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Louise Bechtel,

Petitioner,

v.

Board of Education of the Township of Moorestown, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Hartman, Schlesinger, Schlosser & Faxon (Kenneth S. Domzalski, Esq., of Counsel)

For the Respondent, Moss, Powell & Powers (Philip R. Lezenby, Jr., Esq., of Counsel)

Petitioner, a professionally certificated employee of the Board of Education of the Township of Moorestown, hereinafter "Board," held tenure as Assistant Superintendent for Personnel and Public Relations and prior to holding this position had achieved tenure in the Board's employ as a secondary English teacher. At a meeting June 21, 1976 the Board for reasons of economy and decreasing enrollment voted to abolish the position of Assistant Superintendent for Personnel and Public Relations. On July 2, 1976 the Board notified petitioner that her position had been abolished effective August 22, 1976 and also offered petitioner employment as a secondary English teacher effective September 1, 1976, which she accepted. On July 1, 1977 petitioner, pursuant to *N.J.A.C.* 6:24-1 *et seq.* appealed the Board's decision to the Commissioner of Education. The Board moved to dismiss the appeal and oral argument on the Motion was held at the State Department of Education, Trenton, on March 28, 1978 by a representative of the Commissioner. Briefs were filed and the matter is presently before the Commissioner for adjudication.

The Board argues that petitioner is barred from seeking relief in this matter by the defense of laches citing *Dorothy L. Elowitch v. Bayonne Board of Education*, 1967 *S.L.D.* 78, aff'd State Board of Education 86, aff'd New Jersey Superior Court, Appellate Division, October 14, 1968 (1968 *S.L.D.* 260); *Patricia Crawford v. Board of Education of the Township of Voorhees et al., Camden County*, 1977 *S.L.D.* 364 and *Park Ridge v. Salimone*, 36 *N.J. Super.* 485 (*App. Div.* 1955), aff'd 21 *N.J.* 28 (1956).

Petitioner argues against dismissal citing *West Jersey Title and Guaranty Co. v. Industrial Trust Co.*, 27 *N.J.* 144 (1958); *Notaro v. Notaro*, 38 *N.J. Super.* 311 (*Chan. Div.* 1955); and *Simon v. R.H.H. Steel Foundry, Inc.*, 25 *N.J. Super.* 50 (*Law Div.* 1953).

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Petitioner contends that she made numerous, successive contacts with her first attorney during the period from August 5, 1976 until June 6, 1977 when she first learned that he had not contacted the Board. Accordingly, she contends that she had diligently pursued the instant matter and therefore could not be held responsible for any delay in filing her Petition of Appeal with the Commissioner.

The Board argues that it had no knowledge of any difficulties petitioner may have had with her attorney. The Board argues further that petitioner's "***remedy lies against someone other than the board who should not be forced to suffer prejudice because of the inaction of persons over whom it had no control.***" (Board's Brief, at p. 6) The Board cites *Crawford, supra*, wherein the Commissioner said:

> "***Petitioner cannot use inaction of counsel as a viable excuse for lack of her action in initiating her pleadings with the Commissioner in a propitious manner.***" (1977 *S.L.D.* at 365)

The Commissioner stated further in *Crawford*:

> "***The applicability of the equitable doctrine of laches must be determined within the context of the relevant facts in each individual matter. *Bookman v. R. J. Reynolds Tobacco Company*, 138 *N.J. Eq.* 312, 406 (*Ch.* 1946) Therein, Bookman delayed filing her petition of appeal for a period of nearly ten months after her notification of non-reemployment. During only two of these months was Bookman active in protesting the matter before the board. Thereafter, for a period of eight months the board, absent further protests of litigation, had no reason to believe that petitioner would continue to assert an entitlement to employment.***"
>
> (*Id.* at 365-366)

In the instant matter the Board had no knowledge that petitioner would contest the abolishment of her position until a year after its notification to her. The Commissioner observes from his own records that an Advisory Opinion for the Board was rendered pursuant to *N.J.S.A.* 18A:28-11 on March 29, 1976 which in pertinent part stated:

> "Attention is called to N.J.A.C. 6:3-1.10, stating that the position of Assistant Superintendent is a separate position. (See (k)4.)
>
> "In regard to the three positions, namely, Assistant Superintendent, Personnel and Public Relations; Assistant Superintendent, Business and Negotiations; and Assistant Superintendent, Curriculum and Instruction, which are under consideration in this matter, each is a separate category under provisions of N.J.A.C. 6:3-1.10, (k)4.
>
> "Accordingly the Board must determine which category of Assistant Superintendent it chooses to abolish.***"

From the record it is clear that petitioner's duties encompassed those usually included within that category and it must be concluded that such duties being

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necessary to the operation of any school district must have been recognized within the remaining positions. Further the Commissioner observes that this restructure of administrative responsibilities existed for a year with no word of protest to the Board from petitioner. He does not deem it equitable or proper that such administrative restructuring be overturned now.

For the reasons set forth herein the Commissioner finds that petitioner is barred by laches from proceeding with this action and accordingly orders the Petition of Appeal dismissed. *Gloria Ulozas v. Board of Education of the Matawan Regional School District*, 1975 *S.L.D.* 598, aff'd State Board of Education 604, aff'd Docket No. A-1183-75, New Jersey Superior Court, Appellate Division, February 3, 1977, *cert.* den. 74 *N.J.* 279 (1977)

COMMISSIONER OF EDUCATION

July 10, 1978

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 10, 1978

For the Petitioner-Appellant, Hartman, Schlesinger, Schlosser & Faxon (Kenneth S. Domzalski, Esq., of Counsel)

For the Respondent-Appellee, Moss, Powell & Powers (Philip R. Lezenby, Jr., Esq., of Counsel)

The State Board reverses the decision of the Commissioner of Education and directs that the merits of the case be heard by the Commissioner.

Mrs. Wilson and Mrs. Dillman dissented in the matter.

November 8, 1978

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Samuel E. Appel and Jerrothia Riggs,

Petitioners,

v.

Board of Education of the City of Camden and Anthony Gonski, School Business Administrator, Camden County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Samuel E. Appel and Jerrothia Riggs, *Pro Se*

For the Respondents, Supnick, Mitnick & Vogelson (M. Allan Vogelson, Esq., of Counsel)

Petitioners, both of whom, on December 22, 1975, were members of the Camden Board of Education, hereinafter "Board," allege that the Board's employment on that date of a male purchasing agent rather than a female contender for that position was not only violative of *N.J.S.A.* 18A:36-20 and *N.J.A.C.* 6:4-1.1 *et seq.*, but also contrary to its own affirmative action resolution of July 28, 1975. They seek, *inter alia*, an order of the Commissioner of Education setting that action aside and directing that the female applicant be appointed as purchasing agent.

The Board, conversely, asserts both the recommendation of its School Business Administrator and its determination to follow that recommendation in hiring a purchasing agent were legally grounded, based on logical and businesslike considerations, and consistent with its own affirmative action policy.

A hearing was conducted on November 19, 1976, February 22 and April 22, 1977 at the office of the Camden County Superintendent of Schools, Pennsauken, by a hearing examiner appointed by the Commissioner. Post-hearing briefing was completed November 28, 1977.

The uncontroverted facts which reveal the contextual setting of the dispute are succinctly set forth in chronological order as follows:

On July 2, 1975 the Board posted a notice of vacancy and job description for the position of purchasing agent. That job description detailed that the purchasing agent, a subordinate of the School Business Administrator, would be responsible not only for the purchase and inventory of all supplies, textbooks, equipment and repair services but also for supervision of warehouse and office personnel. That posting also detailed the following:

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"***In general a period of five (5) years or more of experience in purchasing and educational field is desirable." (J-2)

On July 28, 1975 the Board adopted a policy entitled Personnel Goals and Objectives which stated, *inter alia*, the following:

"***It shall be the policy of the Board of Education to seek and to hold the highest qualified personnel for all professional, paraprofessional, and nonprofessional positions.***" (R-3)

On the same date the Board also adopted an Affirmative Action Resolution which, concerning employment practices, stated:

"***[T]he Board of Education does hereby reaffirm its policy to insure equal employment opportunity for all persons and to prohibit discrimination in employment because of sex, race, color, creed, religion, national origin and to have equal access to all categories of employment in the public education system of Camden City school district and that an intensive Affirmative Action program shall be an integral part of every aspect of employment***." (P-1B)

On July 29, 1975, the Board withdrew the July 2 posting of vacancy notice. (J-3) Thereafter, on September 18, 1975, the Board again posted a vacancy notice for the position of purchasing agent with a revised job description listing in altered format the aforementioned duties and specifying the following qualifications for applicants:

"1. Bachelor degree in Marketing Procurement and Business Administration or related field.

"2. Eligible to qualify for admission to a State Certification Program.

"3. Or six years experience in a responsible capacity involving purchasing for a large organization, preferably a school district, Municipal Government or large industry." (J-6)

On November 24, 1975 the Board adopted an Affirmative Action Addendum which stated, *inter alia*:

"***The Board officially adopts the Affirmative Action Employment policy as a means of underscoring its commitment to prevention of discriminatory employment policies and practices. Whatever barriers may exist for current or potential employees will be overcome so that employment decisions are based purely on individual qualifications as they relate to the requirements of the position being filled.***

"To assure that equal employment opportunity becomes a reality for minorities and women, the following actions will be taken:

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"Review all job categories to determine those in which men, women, and/or minorities or both sexes have not previously been employed in equitable numbers; analyze possible reasons; and [take] appropriate action, based upon the availability of persons with requisite job skills within the job categories to assure that such groups are employed in equitable numbers.***

"The Board pledges to actively support and comply with all applicable state and federal laws and regulations regarding equal employment opportunity***." (P-2, at pp. 2-3)

On December 9, 1975, the ultimately successful male candidate, holder of a liberal arts degree, submitted his application for the vacancy. Therein he gave details of his degree in liberal arts, experience in private business and eight years of experience as purchasing agent for the City of Camden. Among the detailed duties he listed for that position were budget control, the development and implementation of systems and techniques for purchasing, accounting, and assignment of employees, preparation of advertisements, specifications, and contracts. (P-5)

Also on December 9, 1975, the leading female contender for the purchasing agent position, with a B.S. degree in Education and fifty credit hours in business administration and accounting, submitted her application. This candidate listed her twenty-two years of experience with the Board consisting of eight years as an elementary school secretary, and fourteen years as a business education teacher and department chairman in which employment she participated in numerous study committees, workshops and seminars. (P-4)

Eighteen applications for the vacancy were reviewed by a screening committee which interviewed approximately ten persons before recommending to the School Business Administrator as minimally qualified three candidates, including the two whose experience has been previously summarized. (Tr. I-67) The Business Administrator interviewed those three candidates and recommended in writing that the Board, on the basis of his knowledge and work experience, employ the male candidate with eight years of experience as a purchasing agent in the City of Camden. (P-1D, E) On December 22, 1975, the Board, with petitioners casting negative votes, determined to employ that candidate as its purchasing agent.

Thereupon, petitioners, pursuant to the provisions of the Board's affirmative action policy, each wrote letters of protest to the Board's appointed affirmative action officer stating that underutilization of women in the school administration required that the Board appoint the female candidate who was minimally qualified. (P-1F, G) The affirmative action officer responded that he was unaware that the Board had ever employed a woman at the administrative level. He stated that, in consideration of the candidacy of a qualified female, he did "***not feel the recommendation or approval of a male to fill the position of purchasing agent [was] in accord with the provisions of the Affirmative Action Resolution." (P-1H) Thereupon, petitioners filed the matter as a controversy before the Com-

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missioner. A concise summary of testimony elicited at the hearing follows:

The Board's affirmative action officer testified that, when called upon to render an opinion, he had advised the Board that the female candidate should have been hired on the basis that:

> "***once the board committed itself to an affirmative action program the words most qualified and better qualified in an instance where there was demonstrated underutilization *** carried no significance, as long as the person was *** minimally qualified. I felt they should all be considered equal***." (Tr. I-25-26)

And,

> "***[T]he position of Purchasing Agent had never been filled by a female and the opportunity to hire a female in that position was there ***, and as I understand the purpose of Affirmative Action is to redress any inequities that have persisted *** I thought that was an opportunity to do it, and the person was qualified.***" (Tr. II-136-137)

He stated that it was his belief that, not only the Board's affirmative action policy submitted in compliance with the New Jersey State Board of Education's mandate but also the State and federal governmental prohibitions against discrimination required that in this instance the minimally qualified female candidate be employed.

The coordinator of affirmative action of the Office of Equal Educational Opportunity of the New Jersey State Department testified, *inter alia*, as follows:

> "***[I]f one looks at the statistics, *** it becomes very obvious that females and minorities are not represented on jobs in accordance with their presence in the surrounding work force. As a result, it has become necessary by law to implement some redress *** to correct this kind of discriminatory action that has gone on for many years***." (Tr. I-77)

He stated further that the Board's affirmative action policy statement required the Board to seek out groups that have been underutilized in its school system and appoint qualified applicants to remedy that situation. (Tr. I-81-82, 85) Stating that, in his opinion, the female candidate who was minimally qualified should have been appointed, he said:

> "***The question of most qualified versus qualified, but all qualified, does not enter into the concept of affirmative action. Once you reach the level of qualification *** then you must select according to affirmative action***.
>
> "***[I]f Boards were to continue hiring the most qualified individual, they would never break the pattern that now exists.***" (Tr. I-89-90)

The School Business Administrator who interviewed the candidates rec-

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ommended by the screening committee testified that, although he found that each of the three possessed the requisite job skills for a purchasing agent, he recommended the male candidate whose grasp of legal considerations and scope of operations stemmed from his eight years of experience as purchasing agent for the City of Camden. (Tr. II-17; P-1E)

The Assistant Superintendent in charge of Administrative Services testified that it is his interpretation of the Board's affirmative action policy that if candidates display equal qualifications the Board must hire the candidate from the underutilized group, but that, if qualifications of any one candidate are superior, the Board is free to hire that individual. (Tr. II-66) Similar testimony was elicited from another administrator who served on the screening committee. (Tr. II-82)

A member who had served on the Board for nineteen years testified that she considered the affirmative action policy but voted to hire a male applicant on the basis of what she considered, from a review of the resumes presented, to be superior qualifications and experience. (Tr. II-94-96, 99-106)

The then Board President testified that, in consideration of the affirmative action policy, he had abstained from voting because he felt he did not have available sufficiently delineated qualifications of the respective candidates. (Tr. II-120-122)

Three additional Board members testified that after reviewing the resumes of candidates they had voted for the successful male candidate because they believed he possessed superior qualifications and job experience of eight years as a city purchasing agent as contrasted to the female candidate's lack of job experience as a purchasing agent. (Tr. III-18-24, 31-43, 44-59) Each affirmed that he considered the importance of adherence to the affirmative action policy, but not to the exclusion of freedom to choose the most highly qualified candidate for a position. (Tr. III-28, 37, 45) This viewpoint is typified by the following statement:

> "***I see a need for affirmative action, definitely. However, that doesn't mean I should pick the less qualified person***.
>
> "Affirmative action means that everyone should get the equal right to compete for a job without having anything held against them because of their sex or race or color.***" (Tr. III-37)

Petitioner Riggs, also a member of the Board, testified that, on the basis of her evaluation of the candidates' resumes, she believed the female candidate possessed the superior qualifications. (Tr. III-65, 69) She stated that she voted against the motion to appoint the male candidate on the following basis:

> "***My interpretation of the three finalists is that they all met the requisite skills and that *** the consideration for the three finalists ultimately was

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balanced, on experience, *** rather than a total picture; and that the Board affirmative action had not been taken into consideration.***''

(Tr. III-74-75)

The hearing examiner, after careful review of the pleadings, documents in evidence, testimony of witnesses and Briefs, sets forth his findings of fact which, together with those uncontested facts heretofore set forth, provide the Commissioner with the contextual basis for a determination of the dispute:

1. For a period of at least twenty years the Board has not employed a female in any one of the five administrative positions of its business division.

2. Many members of the Board, prior to hiring the purchasing agent in December 1975, individually examined the resumes submitted by the three candidates recommended by the screening committee as finalists for the vacant position.

3. Board members who testified at the hearing, including both those who voted in the affirmative to employ the male purchasing agent and those two who voted against his employment, did seriously consider the Board's affirmative action policy as well as the Board's policy requiring the employment of the highest qualified applicants for vacant positions, *ante*.

4. Those Board members who testified, and had voted in the affirmative, believed that the successful male candidate had superior qualifications and experience. Petitioner Riggs, who voted against his employment, believed the female finalist, with her degree in business administration as contrasted to the successful male candidate's degree in liberal arts, was the superior candidate. All Board members believed that all three finalists were minimally qualified to be the Board's purchasing agent.

The hearing examiner finds no statute, rule of the State Board, or decision by the Commissioner or the Courts to be entirely on point or dispositive of the issue herein presented. That issue is whether, given the fact of underutilization of women in the administrative sector of its business division, the Board's action to employ a male purchasing agent whom the majority believed to possess superior qualifications and experience over the other two minimally qualified finalists, one of whom was a woman, was an abuse of its discretionary authority, contrary to its affirmative action policy, or applicable law. The hearing examiner commends to the Commissioner, in reaching his determination, the extensive arguments of law set forth by the parties.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the entire record of the controverted matter and notices that no exceptions were filed by the Board, pursuant to *N.J.A.C.* 6:24-1.17(b), to the report of the hearing examiner. Petitioners take

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exception to the hearing examiner's statement of the issue on the final page of the report. In this regard petitioners contend that, although the female candidate had no experience as a purchasing agent, her qualifications may not be termed inferior in view of her educational background with fifty credit hours in business administration and accounting, as contrasted to the successful male candidate's degree in liberal arts. Petitioners further contend that the record fails to reveal that the position of purchasing agent was such that lack of experience could not be overcome by on-the-job training. (Petitioners' Exceptions, at pp. 1-3) No exceptions, however, were taken to the findings of fact of the hearing examiner which the Commissioner, on the basis of his review of the record, holds for his own.

The Commissioner finds no imperfection in the statement of issue as framed by the hearing examiner, since that statement recognizes that *it was the majority of the Board* who believed that, of the three minimally qualified applicants, the successful male applicant possessed superior qualifications over the other two applicants, one of whom was a woman. Although the female candidate and the successful male candidate both possessed baccalaureate degrees, the female's more closely approximated the Board's first qualification of a bachelor's degree in marketing procurement and business administration or related field. (J-6) The second qualification of eligibility to qualify for admission to a State certification program is so obscure that it merits no further consideration. The Board's third qualification begins with the correlative conjunction "or," which, in common English usage, signifies that the Board did not require a candidate to possess each of the stated qualifications, the last of which was six years' experience as a responsible purchasing agent. Thus, it may be reasonably concluded that in the area of training the female candidate presented a somewhat superior qualification. By contrast, experientially, the male greatly excelled with eight years of on-the-job experience whereas the female candidate had no such experience.

It is also shown that the Board, on the very evening it adopted its affirmative action policy, also adopted a policy "***to seek and to hold the highest qualified personnel for all *** positions.***" (R-3) Thus, it must be concluded that the Board in its hiring practices intended to consider those policies *in pari materia*. The record is clear that it did so. After individual members had assessed the relative merits of the candidates and formed their judgment on the basis of that information, a majority concluded and voted in favor of the male candidate whom they believed to be the superior candidate.

Petitioners contend conversely that, since the three candidates considered by the Board were each minimally qualified, the Board fatally erred in failing to appoint the female candidate, who represented a group which had for a long period been underutilized at that level of the Board's administrative staff. This contention that the Board was estopped from hiring a candidate whom a majority of its members considered to be superior does not, however, withstand the scrutiny of federal or State law and of opinions rendered by the courts.

Title VII of the Civil Rights Act of 1964, designed to protect constitutional

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rights of employment in public facilities and public education, amended by P.L. 92-261 in March 1972 provides, *inter alia*, in Sec. 703 the following:

***

"(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire *** or otherwise to discriminate against an individual *** because of such individual's *** sex ***; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities *** because of such individual's *** sex ***.

***

"(j) *Nothing contained in this title shall be interpreted to require any employer *** to grant preferential treatment to any individual *** because of *** sex *** on account of any imbalance which may exist with respect to the total number or percentage of persons of any *** sex *** employed by any employer *** in comparison with the total number or percentage of persons of such *** sex *** in the available work force in any community***."* (*Emphasis supplied.*)

Similarly, New Jersey's Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, declares in pertinent part that it is an unlawful practice

"***for an employer, because of the *** sex of any individual *** to refuse to hire or employ *** such individual***." (*N.J.S.A.* 10:5-12(a))

The New Jersey State Board of Education in *N.J.A.C.* 6:4-1.6 stated the following:

"(a) All persons regardless of race, color, creed, religion, sex, or national origin shall have equal access to all categories of employment in the public educational system of New Jersey.

"(b) All New Jersey public school districts shall comply with all State and Federal laws related to equal employment***."

The United States Supreme Court opinion in *Griggs v. Duke Power Company*, 401 *U.S.* 424 (1971), rejecting the concept that federal law requires that a lesser qualified applicant from an underutilized group must be employed to the exclusion of a better qualified candidate, stated:

"***Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant.

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What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.***'' (at 436)

It must, of course, be recognized that petitioners in the instant matter are concerned with sex discrimination rather than racial disparity. Petitioners' contention that the Board was without discretion to employ a male whom it considered to be a better qualified candidate because of its historic underutilization of women is without basis in existing law. To carry that reasoning to its logical conclusion would require that a board which had underutilization of men in its lower elementary grades be forced to hire any male teaching candidate who was minimally qualified to the exclusion of better qualified female candidates. Such would be an anomalous and indefensible result not only contrary to the federal and State laws previously cited but to the goals embodied in *N.J.S.A.* 18A:7A-1 *et seq.*

The Commissioner is constrained to affirm his deep sense of commitment to the desirable goals of affirmative action in respect to the employment of individuals in the school districts of New Jersey. Those goals, however, may not be reached by yet further discrimination. Discrimination by sex, by failing to hire a male applicant adjudged by a majority of the Board to have superior qualifications in favor of hiring a woman whose qualifications were considered by them inferior, would be no less invidious than the initial underutilization of women in the Board's business office. Injustices of the past may not properly be corrected by creating yet further injustices of ''reverse discrimination.'' Each person, whether male or female, has the right in our democratic society to be adjudged on the basis of merits, abilities and experience. Failure to follow this principle in striving to achieve proper balance of utilization of identifiable groups could only add discrimination upon discrimination. Accordingly, it cannot be sanctioned.

Nevertheless, a board of education which has an underutilized group in its employment rosters should take appropriate steps to eliminate that underutilization. For example, a board may exert efforts to obtain qualified applicants from an underutilized group from colleges which train such persons or from employment agencies. It may conduct courses or on-the-job training for such persons and encourage them to submit applications for newly created positions or for positions in which vacancies exist. Such applicants, so trained, would find themselves in a better competitive position to procure employment. By these and other appropriate means a board may thus seek to insure that existing imbalances may be rectified in the future.

The Board, herein, after appropriate consideration of its needs in operating a large city district reasonably determined that both educational background and on-the-job experience of candidates should be considered. A review of the testimony of the Board's business administrator reveals that he was recuperating from a heart attack and unavailable to train an inexperienced purchasing agent. (Tr. II-6-7) The fact that the Board within this contextual setting was required to make its choice of a purchasing agent lends validity to its emphasis on the experience factor in making its choice. The record is clear that Board members

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properly considered both the newly passed affirmative action resolution and the reaffirmed policy of employing the best qualified candidate. It is also evident that individual Board members expended much effort to assess the qualifications of applicants. (Tr. II-18, 99, 102-106; Tr. III-18, 23-24, 40-43, 54-59, 80)

In the light of the above cited laws and the opinions of the courts, the Commissioner finds no irresolvable conflict between those two Board policy statements. Nor does the Commissioner perceive that the Board was in any way prevented from exercising its discretion by the fact that a woman, a member of an underutilized class, was minimally qualified for the position.

A majority of the Board, concluding on the basis of substantive data that the successful male candidate had superior qualifications, voted to employ him. That determination was not only in accord with its own stated policies but was consistent with State and federal laws and the above cited opinions of the highest courts in New Jersey and the United States. Absent a showing of bad faith, illegality, arbitrariness or capriciousness, the Commissioner under such circumstances will not interpose his judgment for that of the Board, which was statutorily empowered to exercise its discretion. *Schinck v. Board of Education of Westwood Consolidated School District,* 60 *N.J. Super.* 448 (*App. Div.* 1960)

Petitioners, in their prayer for relief, seek an order of the Commissioner "***requiring [the] respondent Board to hire the female finalist as the Purchasing Agent retroactive to January 15, 1976.***" (Petition of Appeal, at p. 5) Absent the inclusion of the female finalist as a party petitioner, this request for relief would, in any event, be inappropriate, since there is no assurance by reason of her own action to assume that such appointment is her present intent or that she would accept it if ordered. On that basis alone this prayer for relief is rejected. Petitioner's further application for an order directing the Board to vacate the position of purchasing agent, is, within the factual context and the legal precedents which prevail herein, inappropriate. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

July 12, 1978

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STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 12, 1978

For the Petitioners-Appellants, Samuel E. Appel and Jerrothia Riggs, *Pro Se*

For the Respondents-Appellees, Supnick, Mitnick & Vogelson (M. Allan Vogelson, Esq., of Counsel)

The State Board affirms the decision of the Commissioner without any implication that they sanction or support the choice of the term "reverse discrimination". The State Board further issues the following caveat: Where, as here, the local board of education has adopted an affirmative action plan, it should carefully frame the qualifications for employment and/or promotions to particular positions in such a manner as not to frustrate the objectives of affirmative action. The Board should not establish qualifications which are not essential for performing satisfactorily the duties of the position but which may result in failure of properly qualified candidates to obtain such employment or promotion.

October 4, 1978

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

COMMISSIONER OF EDUCATION

DECISION

The Board of Education of the Lenape Regional High School District, hereinafter "Board," conducted a special election on April 20, 1978 wherein the voters of the district were asked to consider a proposal to raise funds by the issuance of bonds in the sum of $1,100,000 for capital projects at two of its schools.

Pursuant to a letter request from C. Edman Budd, a member of the Board, a recount of the ballots was conducted by an authorized representative of the Commissioner of Education on May 16, 1978 in the office of the Burlington County Superintendent of Schools, Mount Holly.

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Complainant had legal assistance and the Board was represented by counsel. In addition to Board personnel, other interested persons attended. At the conclusion of the recount, with 42 ballots voided, the uncontested ballot count was as follows:

	YES	NO
At Polls	945	942
Absentee	9	4
Totals	954	946

Additionally, forty-five ballots were challenged by either the complainant or the Board and they have been submitted to the Commissioner for his determination. These forty-five ballots are identified by number as assigned at the recount and they will be discussed, *post*.

The Commissioner has examined the contested ballots identified by number, and divided them into eight exhibits for purposes of discussion and to determine whether or not they shall be counted.

Exhibit A—Ballots C-51, 68

These ballots were challenged by the Board because a cross (×) was made in green ink on the first and in blue ink on the latter.

As the Commissioner said *In the Matter of the Special School Election Held in West Morris Regional School District*, 1973 *S.L.D.* 600:

> "***Each one of the ballots in this exhibit is properly marked, except that all marks are notated in green ink. However, faced with a decision concerning such use of green ink *In the Matter of the Recount of Ballots Cast at the Special School Election in the Northern Valley Regional High School District, Bergen County*, 1959-60 *S.L.D.* 121, the Commissioner said:
>
> > '***The Commissioner has held consistently that ballots marked *** in the proper square should not be voided solely because of the use of blue or blue-black ink. See *In Re Recount of Ballots Cast at the Annual School Election in the Township of Ocean, Ocean County*, decided by the Commissioner on April 10, 1958. The marks on these ballots and on the two marked in *green ink did not appear to distinguish the ballots* or to make any particular ballot other than secret by reason of the color of the marks or otherwise.***' (*Emphasis supplied.*) (at p. 122) (See also *N.J.S.A.* 19:16-3g.)***" (at 605)

The Commissioner finds that both ballots are valid and they will be counted, one as a "yes" vote, the other "no." The Commissioner is convinced that no attempt was made to distinguish either ballot by the color of the ink used.

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Exhibit B—Ballots C-13, 24, 29, 31 and 33

These five ballots will be voided by the Commissioner. Ballots C-13 and 24 have the word "no" written in the square to the left of the printed word "no." Ballots C-29, 31 and 33 have no mark in either square to the left of the words. Rather a cross (×) is placed in the square containing the printed word "no" on each ballot.

The statute clearly states that each ballot must be marked with a cross (×), plus (+) or check (√) in the square to the left of the words "yes" or "no" if they are to be held valid. *N.J.S.A.* 18A:14-37; *N.J.S.A.* 19:16-3g; *In the Matter of the Annual School Election Held in the Constituent District of the Borough of Woodstown, Woodstown-Pilesgrove Regional School District*, 1975 *S.L.D.* 199, 201

Exhibit C—Ballots C-7, 8, 36, 38, 39, 41, 52, 62, 65, 67, 69, 78, 80, 81, 84

Nine of these ballots are marked "yes" while six are marked "no." They are challenged because the cross (×) placed in the proper square has two legs joined by a loop or a bar caused by the voter not lifting his pencil or pen when making his mark. Each mark is a substantial cross-mark and will be counted. The Commissioner determines that nine ballots are properly marked "yes" and six ballots are properly marked "no." *N.J.S.A.* 18A:14-37; *N.J.S.A.* 19:16-3g

Exhibit D—Ballots C-40, 46, 47, 63, 66, 79

Each of these ballots has a cross (×) placed substantially within the square to the left of the word "yes" printed on the ballot and therefore all will be counted. *N.J.S.A.* 18A:14-37; *N.J.S.A.* 19:16-3g

Exhibit E—Ballots C-12, 17, 18, 19, 34, 35

Each of these ballots has a proper mark in the square to the left of the word "no." Four also have a mark in the square with the word "no" or have a second mark superimposed over the word. Ballot C-17 has a check in the proper square and the word "*no*" is underlined. The mark in the proper square on ballot C-18 is a cross (×) which has two cross bars over one leg so as to resemble the letter H with an extended cross bar. Additionally a cross (×) has been placed in the square with the word "no."

The Commissioner determines that each of these ballots is valid. Proper marks are substantially within the square to the left of the word "no." The Commissioner does not find that the voters who cast these ballots intended to distinguish them, which practice is forbidden by statute. *N.J.S.A.* 18A:14-76 The Commissioner determines that these voters merely intended to emphasize their vote. *In re Recount of Ballots Cast at the Annual School Election in the Borough of Union Beach*, 1955-56 *S.L.D.* 108

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Exhibit F—Ballots C-61, 85

These ballots are properly marked with a cross (×) in the square to the left of the word "yes"; however, each has an additional mark, a circle around the printed word. The Commissioner finds that these voters did not intend to distinguish their ballots but rather to emphasize their votes. *In re Union Beach, supra*

Exhibit G—Ballots C-3, 11, 45, 48, 50, 77

These ballots have marks in the squares to the left of the printed words: three "yes" and three "no." Each of the marks is embellished with additional lines. Ballot C-3 has a cross superimposed over a check. Ballot C-48 has a plus superimposed over a check, and ballots C-11 and C-77 each have a cross superimposed over another cross. Ballot C-45 is a distorted, squiggly check, nevertheless it is a check. Finally, ballot C-50 is a cross formed by two checks. One check appears to be formed from the right side of the square and the other from the left. The result is a cross made by two checks forming each of the legs.

In the Commissioner's judgment each of these ballots is valid. Each has a proper mark which is substantially a cross, plus or check-mark. Three are marked "yes" and three "no." As the Commissioner said *In the Matter of the Annual School Election Held in the School District of the Borough of Bradley Beach*, 1969 *S.L.D.* 44 with respect to similar marks:

> "***It is the Commissioner's judgment that these votes must be counted. Although the marks are poorly and crudely made, they are substantially those required by *R.S.* 19:16-3g which provides in part as follows:
>
> > 'If the mark for any candidate or public question is substantially a cross ×, plus + or check √ and is substantially within the square, it shall be counted for the candidate or for or against the public question, as the case may be***.'
>
> "Such marks as these are not uncommon and are obviously the result of unskilled calligraphy, infirmity, poor vision or visibility, rough writing surface or some other cause rather than any attempt to distinguish the ballots.***" (at 45-46)

Also *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Sayreville*, 1951-52 *S.L.D.* 47 the Commissioner said:

> "***It is quite common to find in recounting ballots that the voters express certain idiosyncrasies. It is the opinion of the Commissioner that these marks were not intended to identify the ballots.***" (at 48)

Accordingly, these ballots will be counted.

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Exhibit H—Ballots C-14, 30, 56

Ballot C-14 has a cross (×) in the square to the left of the printed word "no." It appears that the voter initially placed a cross (×) in the square to the left of the word "yes," changed his mind, then filled in the square with black pencil so as to cover the (×), but leaving a proper mark opposite the word "no." The intent of this voter is clear and the Commissioner does not find that this ballot has been distinguished. *In the Matter of the Special School Election Held in the School District of Ocean Township*, 1974 *S.L.D.* 1342, 1345, aff'd State Board of Education 1975 *S.L.D.* 1116; *N.J.S.A.* 19:16-3g The ballot will be counted as a "no" vote.

Ballot C-30 has a cross in the square to the left of the printed word "no." Additionally the printed word "yes" has been marked out. Again the intent of the voter is clear and no determination is reached that the voter attempted to distinguish his ballot.

Ballot C-56 has a check-mark placed in the square to the left of the word "no." The check-mark is underlined and, in the Commissioner's judgment, this was done for emphasis and not to distinguish the ballot. *In re Union Beach, supra* Accordingly, these three ballots will be counted as "no" ballots.

Recapitulating, the challenged ballots are counted as follows:

YES	NO	VOID
C-36, 39, 40, 41, 46, 47, 48, 50, 51, 52, 61, 62, 63, 65, 66, 67, 69, 77, 79, 81, 85	C-3, 7, 8, 11, 12, 14, 17, 18, 19, 30, 34, 35, 38, 45, 56, 68, 78, 80, 84	C-13, 24, 29, 31, 34

Accordingly, the Commissioner determines that twenty-one ballots shall be counted as "yes" votes and nineteen as "no" votes and be added to the totals as determined at the recount. Five ballots have been voided.

Question	Recount	Decided by Commissioner	Absentee	Total
Yes	945	21	9	975
No	942	19	4	965
Void	42	5	0	50

Having carefully reviewed the disputed ballots, the Commissioner determines that the results clearly show that the referendum was approved by a majority of the legal voters who participated in the special election.

COMMISSIONER OF EDUCATION

July 18, 1978

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In the Matter of the Special School Election Held in the School District of the Borough of Milltown, Middlesex County.

COMMISSIONER OF EDUCATION

DECISION

A public question to raise $2,134,030 to renovate the Joyce Kilmer School was defeated by the voters in a special school election held March 18, 1978, in the school district of the Borough of Milltown.

Pursuant to a letter request from more than ten qualified voters in the school district, the Commissioner of Education directed an authorized representative to conduct an inquiry into the conduct of the election. *N.J.A.C.* 6:24-6.1(d) The totals of the counted ballots were not contested. The inquiry was conducted on April 28, 1978 in the County Administration Building, New Brunswick.

Petitioner Margaret E. Inglese, on behalf of the complainants, set forth six specific complaints which she believes are violations of the school election laws. They will be discussed individually, *post*.

1. "Members of the local police department were present inside the polling places even though their presence was not requested by the Milltown Board of Education."

This complaint was adequately supported by the testimony of election workers and the Board Secretary. One or two policemen were, in fact, present in each of two polling places during the day when ballots were being cast. The testimony indicated that voting was heavy at times and that the policemen assisted by keeping lines straight and maintaining order in the polling place. (Tr. 5-9, 12-13)

Regarding this complaint *N.J.S.A.* 18A:14-46 reads as follows:

"A member of the board of education, or in his absence the judge of the election, or in the absence of both, the secretary of the board shall declare the polls open at the time fixed for the opening thereof, and they shall remain open and the balloting shall continue without recess from the time of the opening until the close thereof, and the election officers shall have power to maintain order in the polling place, to require all persons other than challengers, candidates, and persons in the process of voting to leave the polling place, and to prohibit electioneering in the building in which the election is being conducted while the same is being conducted."

The Commissioner's representative recommends that the Commissioner determine that a policeman's presence in a polling place, even though not invited by the election workers, is not a violation of the school laws as contemplated in *N.J.S.A.* 18A:14-46. A police officer is a public official, and in the instant

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matter, obviously on assignment. This recommendation in no way minimizes the responsibility of election workers, as required by statute, and there is no authority for a policeman to do anything other than assist in maintaining order in the polling place.

2. "A policeman at one of the polls actually collected ballots from the voters for a period of time, contrary to state statutes."

Complainant Inglese testified that a policeman actually accepted her ballot after she had marked it. She testified that she saw him accept another ballot as well. An election officer also testified that the policeman apparently assisted in collecting the ballots which were then deposited in the ballot box. (Tr. 59, 12-13)

Other than the unrefuted complaint that a policeman accepted these ballots, Complainant Inglese made no further allegation in that regard. Therefore, it is accepted as fact that her ballot and any others collected by the policeman were placed in the proper ballot box.

Regarding this complaint, *N.J.S.A.* 18A:14-79 reads as follows:

"Every election officer, who, previous to putting the ballot of an elector in the ballot box, at any election, attempts to find out any name on such ballot, or who opens or suffers the folded ballot of any elector which has been handed in to be opened or examined previous to putting the same in the ballot box, or who makes or places any mark or device on any folded ballot with the view to ascertain the name of any person for whom the elector has voted, shall be guilty of a misdemeanor."

There is no way that this or any other statute can be interpreted to mean that policemen are election workers or election officers. They were not authorized to collect any ballots. The statute states that this duty is clearly the function of the election officers.

There is no allegation that the policemen, or anyone else, attempted to reach any ballots; however, the hearing examiner recommends that the Commissioner determine that no persons other than the appointed election officials are allowed to handle an elector's ballot.

3. "During the counting of the ballots at both polling places police officers stood over or sat with the judges and clerks giving opinions at to the validity of the votes cast on some ballots. At the same time they gave reports over walkie-talkies."

Complainant testified that she heard a policeman state that a particular ballot, the validity of which was questioned, should be counted as a "yes" or "no" ballot. An election worker testified that although policemen may have stated their opinions about some questioned ballots, she was not influenced and that as an authorized worker she made her own decision about each ballot. The

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inspector of elections at the Joyce Kilmer School testified that a policeman had told her that two ballots she was counting were "no" ballots. She testified, however, that it was her ruling and not the policeman's when she determined that the ballots were correctly marked "no." (Tr. 20-27, 30-33)

One election worker testified that the policemen were giving instant results of the counting of the ballots to sources outside the polling place by using their walkie-talkies. She complained that this added to the confusion and turmoil in the polling place at the close of the election. (Tr. 28, 37) In this regard *N.J.S.A.* 18A:14-57 reads as follows:

> "Immediately after the close of the polls, the election officers shall proceed to count the votes for each candidate and the votes for and against the adoption of each proposal, resolution or question submitted to the voters at the election. The counting shall be open and public but the number of persons permitted to be present shall not be such as to hinder, delay or inconvenience the election officers in counting and ascertaining the result. The election officers shall keep tally sheets of the votes as counted which shall be signed by the judge of the election and the secretaries of the election."

Clearly, no interference with the counting of the ballots or hindrance of the election workers in the performance of their duties can be countenanced.

In this regard, the Commissioner's representative recommends that the Commissioner take whatever action he deems appropriate to correct this violation in which policemen did, in fact, advise election workers on the validity of at least two ballots. (Tr. 30-31)

The testimony does not show that the policemen caused confusion and interfered with the counting of the ballots by using their walkie-talkies. The counting of the ballots is open to the public and the record does not show that the election workers were hindered, delayed or inconvenienced. *N.J.S.A.* 18A:14-57

The charges in complaints nos. 4 and 5 were withdrawn at the inquiry. (Tr. 38-39)

> 6. "Mayor Crabiel actively campaigned against the referendum for the renovation of Joyce Kilmer School by mail and in public, using the integrity of the office of Mayor, without having received the authority to do so from the Milltown Borough Council."

The Commissioner's representative finds from his review of the original complaint and its accompanying letter, an inference that the Mayor unduly influenced the electorate to defeat the proposal and that he or his representative chief of police, without request, assigned policemen to the polling places to monitor the election. (Tr. 49-50)

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Complainant avers that the Mayor had no right to use his title to influence the voters and that he misrepresented to the voters that the Borough Council was opposed to the proposal presented by the Board of Education. In this regard, complainant introduced three documents as evidence. Exhibits A and B appear to be photocopies of statements prepared by Mayor David B. Crabiel, and each bears at the bottom the inscription "Paid for personally by David B. Crabiel, 170 North Main Street, Milltown." Neither of these documents states or infers that the Mayor's position in opposing the proposal presented to the voters is also the position of the Borough Council. In fact, the statements clearly name those persons who supported the Mayor's position against the proposal.

Regarding this complaint, *N.J.S.A.* 18A:14-97 reads as follows:

> "No person shall print, copy, publish, exhibit, distribute or pay for printing, copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, any circular, handbill, card, pamphlet, statement, advertisement or other printed matter having reference to any election or to any candidate or to the adoption or rejection of any candidate or to the adoption or rejection of any public question at any annual or special school election *unless such* circular, *handbill*, card, pamphlet, statement, advertisement or other printed matter *shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied or published or of the name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copies or published.*"
> (*Emphasis supplied.*)

Exhibit C is a document which also opposed the Board's proposal. At the bottom of that document is the inscription "Paid for by CITIZENS COMMITTEE AGAINST 'TWO MILLION ONE,' Thomas Wright, Treasurer, 38 Harrison Avenue, Milltown."

Each of the exhibits is in violation of *N.J.S.A.* 18A:14-97 in that it does not contain "***the name and address of the person or persons by whom the same is *printed, copied or published.*" (*Emphasis supplied.*)

There was no evidence presented that Mayor Crabiel improperly influenced the electorate. The evidence clearly shows that his views were not the same as complainants; however, the Mayor, as a citizen, has as much right as complainant to make known his views. Undoubtedly his name, title and prestige assisted him in presenting his viewpoint, but that is not a violation of any statute known to the Commissioner's representative. Nothing in the record supports complainant's inference that the Mayor indicated his position was supported by Borough Council. The record shows, finally, that there were violations of *N.J.S.A.* 18A:14-97, which requires that printed matter used in elections must show the source of *payment and printer*.

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The courts of this State have spoken clearly regarding election law violations as follows:

> "***The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will.***" (In *re Wene*, 26 *N.J. Super.* 363, 383 (*Law Div.* 1953), aff'd 13 *N.J.* 185 (1953))

The Commissioner's representative finds that the election law violations as reported herein had no effect on the election and he recommends that the results stand as announced. He recommends, also, that the Commissioner address the violations as determined by his representative and direct that remedies be made as required.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his representative and examined the evidence presented at the hearing.

The Commissioner determines that policemen were, in fact, inside the two polling places without having been invited by the Board Secretary or any of the election officers and improperly assisted in the conduct of the election by taking ballots from voters and placing them in the ballot boxes. Further, policemen improperly voiced their opinions concerning the validity of ballots to the election officers designated to conduct the counting of the ballots. They also used their walkie-talkies to report results immediately to persons outside the polling places.

Regarding these facts the Commissioner determines that the responsibility for the proper conduct of any school election is that of the Board Secretary. The pertinent statute reads as follows:

N.J.S.A. 18A:14-63

> "It shall be the duty of the secretary of the board of education to perform any such duties, not in conflict with those imposed upon any other officer by this law, as may be necessary for the proper conduct of a school election."

The Commissioner does not conclude that the presence of policemen in the

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polling place, even though not authorized by any proper election official or the Board Secretary, is improper. However, when police are present their duties may not be extended to assist, interfere with, or offer advice to election workers. In this regard, the handling of ballots and their voiced opinions as to the validity of certain ballots were improper. Further, if their broadcasting of results interfered with, or caused confusion among, the election workers, that, too, is improper. *N.J.S.A.* 18A:14-6, 14-24, 14-64, 14-67

The Commissioner directs the Board to examine these determinations and instruct the Board Secretary to pursue these matters with the local chief of police so that an understanding is reached regarding the duties and the presence of police in the polling places in all future school elections. The Board Secretary should thereafter instruct the judges of elections so that improprieties in the polling places may be avoided.

The Commissioner concurs with the finding of his representative that the Mayor did not improperly influence the election. There was, however, a statutory violation as evidenced by Exhibits A, B and C that none of the handbills had printed thereon the *name and address* of the *printer* of those documents.

In consideration of the irregularity reported, *ante*, the Commissioner cannot conclude that such constitutes fraud or deliberate misconduct. The Commissioner has previously commented about procedural violations in school board elections. *In the Matter of the Annual School Election Held in the School District of the Borough of Lindenwold*, 1972 *S.L.D.* 241, the Commissioner commented as follows:

> ''***The Commissioner would vigorously condemn any procedural faults found in any school election; however, in the instant matter he finds that there is no showing of misconduct or collusion that would vitiate this election. Nor can the Commissioner find that the will of the people was thwarted and could not be fairly determined. The Commissioner stated in his decision, *In the Matter of the Annual School Election in the School District of Riverside Township, Burlington County*, 1968 *S.L.D.* 73, 77:
>
> > '***It is purely speculative to propose that if conditions had been different, the results would have been different. The Commissioner has consistently declined to set aside contested elections unless it can be shown that the irregularities clearly affected the result of the election.
> >
> > > '***[I]t has been held that gross irregularities when not amounting to fraud do not vitiate an election.' 15 *Cyc.* 372
>
> 'See also *Application of Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1953); *Sharrock v. Keansburg*, 15 *N.J. Super.* 11 (*App. Div.* 1951); *Love v. Freeholders*, 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *In the Matter of the Annual School Election in the Township of Jefferson, Morris County*, 1960-61 *S.L.D.* 181; *In the Matter of the Recount of Ballots Cast at*

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the Annual School Election in the Township of Lumberton, Burlington County, 1959-60 *S.L.D.* 130.***'***'' (at 246-247)

The Commissioner determines that none of the irregularities as found herein ''clearly affected the result of the election***'' or that ''the will of the people was thwarted or could not be fairly determined.***'' *Riverside, supra; Lindenwold, supra*

Accordingly, the result of the election will stand as announced.

COMMISSIONER OF EDUCATION

July 18, 1978

Susan Stuermer,

Petitioner,

v.

Board of Education of the Special Services School District of Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Philip Feintuch, Esq.

For the Respondent, Gruen, Olick and Ritvo (Marvin Olick, Esq., of Counsel)

Petitioner, a tenured employee of the Board of Education of the City of Hackensack, hereinafter ''Hackensack Board,'' was employed in September 1973 by the Board of Education of the Special Services School District of Bergen County, hereinafter ''County Board,'' after the Hackensack Board had discontinued its program for deaf pupils. Petitioner was employed by the County Board through June 1976 when she was terminated. She alleges that such termination was violative of her tenure status and prays that the Commissioner of Education restore her to the staff of the County Board with all the emoluments of a tenured employee.

The County Board denies that petitioner had tenure at the time of her

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termination, contends that its action in terminating petitioner was legal and proper and prays that the Commissioner dismiss the Petition.

A conference of counsel in this matter was held at the State Department of Education, Trenton, on March 10, 1977 where it was agreed that a Stipulation of Facts would be filed by the parties and that the matter would be submitted to the Commissioner for Summary Judgment. The matter is presently before the Commissioner for adjudication based on the pleadings, exhibits and arguments of law as submitted.

On July 26, 1971, the Hackensack Board notified the Commissioner of its intent to terminate its program for deaf pupils for reasons of economy and lack of proper facilities. The Commissioner approved by letter of November 3, 1972 and the program was terminated, effective June 1973. (Stipulation of Facts, at pp. 1-2)

The County Board, subsequent to July 1, 1973, assumed responsibility for the program for the deaf formerly conducted by the Hackensack Board and, additionally, established programs for hearing impaired children and for children under five and over thirteen. The admission of pupils to the program operated by the Hackensack Board and the County Board were and are effectuated by individual agreements between the sending and receiving boards based on the needs of each pupil classified as handicapped to receive an appropriate education. (Stipulation of Facts, at pp. 2-3)

Petitioner began employment with the Hackensack Board as a speech therapist, worked thereafter in its program through the school year 1972-73, and thereby attained a tenure status with the Hackensack Board. In September 1973 petitioner was employed by the County Board and her employment was terminated in June 1976. Petitioner contends that such action was violative of her tenure status under the provisions of *N.J.S.A.* 18A:28-6.1, which reads as follows:

> "Whenever, heretofore or hereafter, any board of education in any school district in this state shall discontinue any high school, junior high school, elementary school or any one or more of the grades from kindergarten through grade 12 in the district and shall, by agreement with another board of education, send the pupils in such schools or grades to such other district, all teaching staff members who are assigned for a majority of their time in such school, grade or grades and who have tenure of office at the time such schools or grades are discontinued shall be employed by the board of education of such other district in the same or nearest equivalent position; provided that any such teaching staff member may elect to remain in the employ of the former district in any position to which he may be entitled by virtue of his tenure and seniority rights by giving notice of said election to the boards of education in each of the school districts at least three months prior to the date on which such school, grade, or grades are to be discontinued. Teaching staff members so employed in such other district shall have their rights to tenure, seniority, pension and accumulated leave

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of absence, accorded under the laws of this state, recognized and preserved by the board of education of that district. Any periods of prior employment in such sending district shall count toward the acquisition of tenure in the other district to the same extent as if all such prior employment had been in such other district.''

Petitioner, arguing that the program in question, while not structured on the basis of grades, is indeed a school, relies on the following statement from the ''Enrollment Data Program for the Hearing Impaired'':

> ''The Program for the Hearing Impaired is an ungraded academic program which covers an academic span which would normally be considered Kindergarten to Fifth Grade. Class placement is made on the basis of chronological age, academic ability, hearing loss and speech and language level. Social, emotional and behavioral elements of the child's total functioning are also taken into consideration when placement is made.'' (Exhibit A)

Petitioner, arguing further that *N.J.S.A.* 18A:46-13 compels all school districts to educate handicapped children, asserts it would be impossible for each school district to maintain separate programs and therefore school districts historically join together to produce an educationally sound program. Petitioner contends that this was done in the instant matter. Before September 1973, the program was operated under the auspices of the Hackensack Board, and after September 1973 the program was operated by the County Board. Petitioner, contending that when the program was transferred to the County Board the statutory provisions of *N.J.S.A.* 18A:28-6.1 protected the staff who transferred to the County Board, avers that ''***Any other interpretation would leave a door open for districts to thwart the tenure act by changing sponsorship of this program every year***.'' (Petitioner's Brief, at p. 7)

The County Board argues that the Hackensack Board neither discontinued a school as defined in *N.J.S.A.* 18A:28-6.1 nor undertook the operation of a school previously operated by another school district in the State. The County Board asserts also that *N.J.S.A.* 18A:28-16 does not apply as it became effective November 29, 1973 and is not retrospective. (Respondent's Brief, at pp. 2-3) That statute reads as follows:

> ''Whenever an Educational Services Commission, a Jointure Commission, the Commissioner of Education, the State Board of Education, the Chancellor, the State Board of Higher Education or the board of trustees of any State college, or any officer, board or commission under his, its or their authority shall undertake the operation of any school previously operated by a school district in this State, all accumulated sick leave, tenure and pension rights of all teaching staff members in said school shall be recognized and preserved by the agency assuming operational control of the school, and any periods of prior employment in such school district shall count toward the acquisition of tenure to the same extent as if all of such employment had been under the Educational Services Commission, Jointure Commission, the Commissioner of Education, the State Board of Education,

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the Chancellor, the State Board of Higher Education or the board of trustees of any State college, as the case may be.''

The County Board argues further that whereas *N.J.S.A.* 18A:28-6.1 was effective April 24, 1967, county special services school districts were not authorized until the adoption of *N.J.S.A.* 18A:46-29 *et seq.* which became effective on July 27, 1971. Accordingly, the County Board argues that the Legislature could not have had in mind the situation in the instant matter. (Respondent's Brief, at p. 5)

The County Board contends that the language of *N.J.S.A.* 18A:28-6.1 is clear and unambiguous and leaves no room for construction or interpretation of the words ''grade'' or ''school'' citing *Lopez v. Santiago*, 125 *N.J. Super.* 268, 270 (*App. Div.* 1973) and *N.J.S.A.* 1:1-1. (Respondent's Brief, at p. 7)

The County Board contends that it is possible that its program has differed sufficiently to preclude the Hackensack Board from sending the eight children enrolled in the previous program to the program now being offered by the County Board because all pupils had to be evaluated for acceptance into the program without regard to their prior placement in the Hackensack program. (Respondent's Brief, at p. 8) For the foregoing reasons the County Board urges the Commissioner to dismiss the appeal.

At this juncture the Commissioner finds it appropriate to restate the issue: Did petitioner have a tenure status at the time of her termination of employment by the County Board?

The Commissioner will now consider *in pari materia* the statutes applicable to the instant matter: *N.J.S.A.* 18A:28-6.1, 18A:28-16 and 17 and 18A:46-29. He observes that *N.J.S.A.* 18A:28-6.1, effective April 24, 1967, is prefaced by the words ''Whenever, heretofore or hereafter***.'' This language clearly shows the intent of the Legislature that it be considered both retrospective and prospective.

County special service school districts were not authorized to be created until the adoption of *N.J.S.A.* 18A:46-29 *et seq.* which became effective July 27, 1971.

Subsequently, *N.J.S.A.* 18A:28-16 was enacted effective November 29, 1973.

Since Jointure Commissions were created only for the purpose of special education classes, ''school'' as referenced in *N.J.S.A.* 18A:28-16 must mean special education classes. Therefore, consistent with a harmonious interpretation of the statutes, ''schools or grades'' in *N.J.S.A.* 18A:28-6.1 must be interpreted in the same manner as for *N.J.S.A.* 18A:28-16 and 17.

The enactment of *N.J.S.A.* 18A:28-16 and 17 clearly evidences that the Legislature deemed it desirable to set forth in separate statutes the tenure rights

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of certified employees of Educational Services Commissions and Jointure Commissions who had previously been employed by local school boards in programs since discontinued. It is uncontroverted that *N.J.S.A.* 18A:28-16 and 28-17 were not effective until November 29, 1973 and that there is nothing in the statutes that makes them retrospective.

The act, however, which two years earlier in July 1971 authorized County Special Services School Districts, *N.J.S.A.* 18A:46-29 *et seq.*, includes the following provisions at *N.J.S.A.* 18A:46-43:

> "All teachers, principals, and other employees of the board of education of the county special services school district are hereby held to possess all rights and privileges of teachers, principals and other employees of boards of education of other school districts as provided in Title 18A of the New Jersey Statutes."

The Legislature's clear and unambiguous language may only be construed to embrace *N.J.S.A.* 18A:28-6.1 with its unlimited prospective application. Accordingly, it must be concluded that petitioner was entitled to the protection afforded by *N.J.S.A.* 18A:28-6.1 when she was employed by the County Board in September 1973. By its provisions, her rights to tenure, seniority, pension and accumulated leave of absence, under the laws of this state, were preserved when she was employed by the County Board.

For the reasons stated, the Commissioner finds and determines that petitioner's termination on June 30, 1976 by the County Board was improper and violated her tenure status.

The Commissioner hereby directs that petitioner be restored to her employment with the County Board and directs that she be paid full salary and all emoluments which she would have earned had she not been improperly terminated, mitigated by any monies received by her as salary from any substitute employment since the date of her termination.

COMMISSIONER OF EDUCATION

July 18, 1978

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Peter Contardo,

Petitioner,

v.

Board of Education of the City of Trenton and Dr. Jean F. Emmons, Superintendent of Schools, Mercer County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Kivler, Halper & Mountford (Russell T. Kivler, Esq., of Counsel)

For the Respondents, Merlino & Andrew (Robert B. Rottkamp, Jr., Esq., of Counsel)

For the Intervenor, Carl J. Kerbowski, Esq.

Petitioner requests that the Commissioner of Education stay the actions of the Board of Education of the City of Trenton, hereinafter "Board," on December 13, 1977 and January 10, 1978 which purportedly granted early tenure to Dr. Jean F. Emmons, Superintendent of Schools, after twenty months' service in the district.

In its Answer the Board denies petitioner's allegations and in its separate defenses states that petitioner lacked standing to challenge its actions and that the Petition of Appeal failed to state a cause of action upon which relief could be granted.

At a conference of counsel held on April 7, 1978 at the State Department of Education, Trenton, the Commissioner's representative was notified that the Board would not contest the Petition of Appeal filed in this matter. (Ex. 6) The Commissioner's representative allowed an attorney to intervene on behalf of the Superintendent and limited the scope of the disputed matter to the actions taken by the Board as they affected the Superintendent on and between the dates of December 13, 1977 and January 10, 1978. *N.J.A.C.* 6:24-1.1, 1.7, 1.12 Petitioner takes exception to the ruling by the Commissioner's representative, stating that factors outside this time frame must be considered.

Submitted in evidence are copies of Board minutes of meetings held on December 13, 1977 (Ex. 3) and January 10, 1978 (Ex. 4), with attached res-

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olutions Nos. 1 and 2 (Ex. 1, 2) and attachments Nos. 4 and 5 (Ex. 5, 6), and memoranda of law filed by petitioner and respondent intervenor.

Petitioner filed an Amended Petition of Appeal on April 10, 1978 in which he repeated his request for a stay of the Board's actions and, additionally, alleged bad faith and arbitrary and capricious action by the Board. Petitioner further stated that the Board's actions on the contested dates were in violation of the Open Public Meetings Act (*N.J.S.A.* 10:4-6 *et seq.*) and therefore illegal and void *ab initio*.

Citing the authority of *N.J.A.C.* 6:24-1.10 and 1.12, the Commissioner's representative rejected the Amended Petition of Appeal by letter to petitioner's counsel dated April 19, 1978 which reads as follows:

> "We are in receipt of the Amended Petition of Appeal in the above-entitled matter.
>
> "Your request to stay the actions of the Board of Education on December 13, 1977 and January 10, 1978, which purportedly granted early tenure to the Superintendent of Schools is the subject of the original Petition of Appeal. We determined procedures for handling that dispute at our conference of counsel on April 7, 1978.
>
> "Paragraph two of your Amended Petition of Appeal states that the Board's action in granting early tenure was done arbitrarily, capriciously and in bad faith. You must set forth specific instances in which you believe the *Board* so acted.
>
> "Paragraph three alleges violation of the Sunshine Law. Such complaints are correctly filed in New Jersey Superior Court***."
>
> (*Emphasis in text.*)

There was no response to this letter. At this juncture the matter will be considered by the Commissioner based upon the issues raised in the Petition and the arguments submitted by the parties.

Dr. Jean F. Emmons, Superintendent, was employed by contract dated December 22, 1975 beginning February 2, 1976 and scheduled to terminate on January 26, 1979. (Appendix la, Petitioner's Memorandum of Law) Had the contract run its course with no further employment offered, tenure could not accrue since the length of the original contract was six days less than the three full calendar years required by statute. *N.J.S.A.* 18A:28-5

At a duly scheduled public meeting of the Board held December 13, 1977 the following resolutions were introduced:

> "RESOLUTION BY THE BOARD OF EDUCATION, OF THE CITY OF TRENTON, COUNTY OF MERCER, FIXING TENURE OF POSITION

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OF THE SUPERINTENDENT OF SCHOOLS IN SERVING SAID SCHOOL DISTRICT

"BE IT RESOLVED, by the Board of Education of the City of Trenton, in the County of Mercer, State of New Jersey, that in accordance with the provisions of N.J.S.A. 18A:28-5, the time period within which any Superintendent of Schools in the City of Trenton, in the County of Mercer, State of New Jersey, may attain tenure is hereby fixed by the Board of Education as service in the School District as Superintendent for twenty months." (Ex. 1)

And,

***

"WHEREAS, the Board of Education of the City of Trenton, in the County of Mercer, in accordance with the provisions of N.J.S.A. 18A:28-5, fixed the time period as twenty months service within which any Superintendent of Schools in said district may attain tenure as said Superintendent; and

"WHEREAS, Jean Franklin Emmons, Ph.D., is presently employed as Superintendent of Schools in said School District and has been so employed since February 2, 1976 pursuant to a contract dated December 22, 1975 which is in excess of twenty months;

"THEREFORE, Be It Resolved by the Board of Education of the City of Trenton, in the County of Mercer, State of New Jersey, that said Jean Franklin Emmons, Ph.D., by virtue of the aforementioned resolution has acquired tenure in the School District of the City of Trenton, in the County of Mercer and the State of New Jersey, as Superintendent of Schools, and he shall continue to serve as Superintendent of Schools in the District with all rights and benefits accorded to tenured employees." (Ex. 2)

On January 10, 1978 the Board adopted the above resolutions after a second reading by a vote of five to three. One member was absent. (Ex. 4, at pp. 3-6)

It should be noticed that a second reading of these resolutions is not required by the education laws. Nevertheless, in this instance the Board publicly gave the community notice that it intended to act on the resolutions at its next public meeting.

On January 24, 1978, Peter Contardo, a resident of the city of Trenton, filed a Petition of Appeal with the Commissioner contesting the Board's actions regarding this tenure matter.

Subsequent to the annual school election held on February 14, 1978 in which three incumbent members of the Board were not reelected, the Board adopted two resolutions on March 22, 1978 which read as follows:

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"Move to notify the Commissioner of Education that the Trenton Board of Education does not wish to contest the action filed by Peter Contardo on January 24, 1978 and give notice to the Superintendent of Schools of the Board's decision so that the Superintendent can take whatever action necessary under the circumstances." (Ex. 6)

And,

***

"BE IT RESOLVED by the Board of Education of the City of Trenton, County of Mercer, State of New Jersey that a certain resolution adopted by the Board of Education, City of Trenton, County of Mercer, State of New Jersey on January 10, 1978 wherein it was purported that Jean Franklin Emmons, Ph.D., Superintendent of Schools of the City of Trenton, County of Mercer, State of New Jersey be granted tenure is hereby rescinded and his continued employment be in compliance with the terms of a contract dated December 22, 1975, between said Jean Franklin Emmons, Ph.D., and said Board of Education." (Ex. 5)

On April 14, 1978 the Superintendent filed a Petition of Appeal with the Commissioner in opposition to the rescinding of his tenure by the Board.

The subject of early tenure has previously been decided by the Commissioner and the Courts. *Rall v. Board of Education of Bayonne*, 104 *N.J. Super.* 236 (*App. Div.* 1969), rev'd on other grounds 54 *N.J.* 373 (1969); *Roy E. King v. Board of Education of Atlantic County Vocational School*, 1975 *S.L.D.* 547; *Gerald E. Murphy v. Board of Education of the Borough of Cliffside Park*, 1971 *S.L.D.* 317 In reaching a decision on early tenure an examination of the tenure statute was carefully made by the Appellate Court in *Rall*. The pertinent portion of that statute reads as follows:

N.J.S.A. 18A:28-5

"The services of all teaching staff members including *** superintendents *** shall be under tenure during good behavior and efficiency and they shall not be dismissed *** except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause *** after employment in such district or by such board for:

(a) three consecutive calendar years, or *any shorter period* which may be fixed by the employing board for such purpose***."
(*Emphasis supplied.*)

In *Rall*, the Court commented as follows:

"***We regard the foregoing construction of the statute as so obvious from its language and apparent purpose as to defy the contention that it authorizes a local board to simply select an individual member of an employment

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category who has served less than three years and confer tenure upon him alone, by name, *ad hoc*, without in any way undertaking to fix a specific, generally applicable, shorter-than-three-years term of service for achievement of tenure by members of that individual's staff category or of any category inclusive of his.

"This is not a matter of elevating form over substance. Far from it. The statute, as we see it, contemplates that before acting *** to fix a tenure period shorter than three years, the board will give consideration to whether such shorter period is suitable for *general application* to all present and future members of the category coming into the system until such time, in the indefinite future, as that or a later board amends or repeals the provision***. The intent was plainly not to authorize *exemptions* from the three-year probationary term on an *ad hoc* basis in individual cases***."

(*Emphasis in text.*) (104 *N.J. Super.* at 243)

Also,

"***Under the circumstances we think the legislative act of the Board—the resolution—should be construed broadly to do what it was intended to do, *i.e.*, meet and satisfy the requirement of the statute. Therefore we hold that the resolution shortened the period for acquisition of tenure for superintendents of schools generally—not just for Dr. Rall—to six and one-half months of service. That rule now prevails and will continue to do so unless and until a board of education adopts another rule of general application fixing a different tenure qualifying period.***" (54 *N.J.* at 377)

The matter herein fits precisely the pattern and the guidelines set forth in *Rall* and *Murphy, supra.*

In this instance the former Board met in public session and adopted a policy, in a procedurally correct manner, which shortened the period of time for the acquisition of a tenure status for any individual in the category of Superintendent. The Commissioner holds that the former Board's action was proper and, accordingly, the incumbent Superintendent has acquired a tenure status.

Having reached this conclusion, the Commissioner must next address the action of the present Board, taken March 22, 1978 (Ex. 5, 6), which purports to rescind the former Board's resolutions. (Ex. 1, 2) The Superintendent, having acquired a tenure status, may not be removed except in accordance with the provisions of the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.* Therefore, the present Board's resolutions, adopted March 22, 1978, are a nullity and have no force or effect. The Petition filed by the Superintendent which challenges the present Board's March 22, 1978 resolution is rendered moot by the determination of the instant matter and is accordingly dismissed.

The Commissioner is constrained to point out that the present Board has the discretion to alter or abolish the policy which shortened the period of time for the acquisition of tenure by Superintendents generally in the Trenton School

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District, but such action, if taken, will have no effect upon the tenure status of the incumbent Superintendent Emmons.

The Commissioner notices that there are no allegations in the Petition of Appeal setting forth specific instances of actions taken by the former Board which show bad faith. Further, an examination of the Board minutes of December 13, 1977 and January 10, 1978 shows that challenges to the tenure proposal resolutions were concerned primarily with alleged violations of the Open Public Meetings Act.

Finally, the Commissioner is constrained to comment about the allegations by the present Board that the former Board then seated between December 13, 1977 and January 10, 1978 acted in an arbitrary and capricious manner and exhibited bad faith in that private meetings were held in violation of the Open Public Meetings Act at which time the subject of tenure for the Superintendent was discussed by the members in attendance. (Petitioner's Memorandum of Law, at pp. 6-7, 9-10; Amended Petition of Appeal.)

As the Commissioner's representative correctly stated in his letter dated April 19, 1978, the Amended Petition of Appeal contains no specific allegations of arbitrary, capricious or bad faith actions by the Board. Further, allegations of violations of the Open Public Meetings Act are correctly filed in the New Jersey Superior Court. *N.J.S.A.* 10:4-15(a)(b).

For the reasons hereinbefore stated the Petition of Appeal and the Amended Petition of Appeal are dismissed in their entirety.

COMMISSIONER OF EDUCATION

July 18, 1978

Pending State Board of Education

Frances Dullea,

Petitioner,

v.

Board of Education of the Borough of Northvale, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg and Simon (Gerald M. Goldberg, Esq., of Counsel)

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

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Petitioner, a tenured teaching staff member employed by the Northvale Board of Education, hereinafter "Board," alleges that her termination of employment by the Board at the end of the 1974-75 academic year was in violation of her tenure and seniority rights and prays for an order of the Commissioner of Education directing the Board to reinstate her to her teaching position with lost salary. The Board admits that petitioner was tenured but denies that she had seniority rights in any other position than that of special education teacher, which teaching position for economy reasons the Board determined to eliminate effective at the beginning of the 1975-76 school year.

The matter, although filed in timely fashion, was long delayed by contention over procedures and places of depositions, which procedural disputes culminated in an order of the Commissioner dated January 11, 1977. That order, incorporated herein by reference, denied both petitioner's application to sequester witnesses at depositions and respondent's Cross-Motion for Order Prohibiting the Taking of Depositions. The matter is now ripe for Summary Judgment in the form of the pleadings, Cross-Motion for Summary Judgment, Briefs and exhibits. The factual context is as follows:

Petitioner was employed continuously by the Board from September 1965 through June 1975 as a special education class teacher. She at no time was assigned by the Board to teach a regular elementary school class but at all times while employed by the Board held an elementary school teacher certificate. (Exhibit A) During January 1970 she was issued a permanent certificate as a teacher of the handicapped by the New Jersey State Board of Examiners. (Exhibit B) The Commissioner's own records also reveal that prior thereto on August 18, 1966, petitioner was issued a provisional certificate as a teacher of the mentally retarded by the New Jersey State Board of Examiners. (Commissioner's Exhibit C-1) Thereafter, until the issuance of her permanent certificate as a teacher of the handicapped, that provisional certificate was validated annually by the Bergen County Superintendent of Schools. (Commissioner's Exhibits C-1, 2)

Petitioner, contending that she had ten years of seniority resulting from her service to the Board as an elementary school teacher while holding a regular elementary school certificate, cites, *inter alia*, in this regard *Seidel v. Board of Education of Ventnor City*, 110 *N.J.L.* 31 (*Sup. Ct.* 1933); *Vincent P. Horan et al. v. Board of Education of the Town of Kearny*, 1938 *S.L.D.* 532 (1933), aff'd State Board of Education 535, aff'd New Jersey Supreme Court 537. (Petitioner's Brief, at pp. 2-7; Petitioner's Letter Memorandum)

The pertinent statutes and rules of the State Board of Education applicable to a reduction in force are set forth as follows:

N.J.S.A. 18A:28-10 provides that:

"***[S]uch reduction shall *** be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board."

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N.J.S.A. 18A:28-13 provides that:

"The commissioner in establishing such standards shall classify insofar as practical the fields or categories of administrative, supervisory, teaching or other educational services *** and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both."

N.J.A.C. 6:3-1.10, in pertinent part provides:
***
"(b) Seniority, pursuant to N.J.S.A. 18A:28-9 *et seq.*, shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. Seniority status shall not be affected by occasional absences and leaves of absence.

"(c) Employment in the district prior to the adoption of these standards shall be counted in determining seniority.

***

"(h) Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him.

***

"(k) The following shall be deemed to be specific categories but not necessarily numbered in order of precedence:

***

"27. Secondary. The word 'secondary' shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction. *Any person holding a secondary certificate shall have seniority in all subjects or fields covered by his certificate, except those subjects or fields for which a special certificate has been or shall be required by the State Board of Education.* However, if a person has held employment in the school district in any special subject or field endorsed on his secondary certificate, such special subject or field shall, for the purposes of these regulations, be regarded as any other subject or field endorsed upon his certificate;

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"28. Elementary. The word 'elementary' shall include Kindergarten, grades 1-6 and grades 7-8 with or without departmental instruction, including grades 7-8 in junior high schools;

***

"30. Additional categories of specific certificates issued by the State Board of Examiners and listed in the State Board rules dealing with Teacher Certification.***" (*Emphasis supplied.*)

It is observed that the Legislature, pursuant to *N.J.S.A.* 18A:28-10, first directed the Commissioner with approval of the Board of Education to promulgate categories of teaching staff members in 1942. Thus it is clear that no such categories existed when the Supreme Court and the Commissioner issued opinions in *Seidel, supra,* and *Horan, supra.* See *Maurice J. O'Sullivan v. Board of Education of Jersey City*, 1961-62 *S.L.D.* 118. The Legislature, recognizing in 1942 the growing complexities of school systems of the State, directed the establishment of seniority standards for administrative, supervisory, teaching and other educational services. When promulgated, they stated that teaching staff members should attain seniority only in those categories of their employment with boards of education, regardless of the number of certificates held. *N.J.A.C.* 6:3-1.10(b) and (h) Thus, a certified teacher of secondary mathematics who also holds an elementary teacher's certificate but who never served in the category of elementary teacher may not, by seniority, claim the right to replace an experienced teacher of elementary subjects. Nor may an elementary school teacher who also holds a secondary science certificate, but who has never served in the category of secondary school teacher, replace an experienced chemistry teacher. The wisdom of establishment of seniority categories is self evident in the interests of a thorough and efficient system of education.

At all times during petitioner's employment a specific certificate issued by the State Board of Examiners was required for her to teach the class of handicapped pupils to which she was assigned. She duly made application for the proper certificate but, lacking certain required training, was issued a provisional certificate under which authority she taught those classes until in 1970 her permanent certificate to teach the handicapped was issued. It was only under the authority of those specific certificates, not the authority conferred by her elementary teaching certificate, that she could legally continue to teach and be paid for teaching. *N.J.S.A.* 18A:28-4

Accordingly, it must be concluded that petitioner's employment was in the category of a teacher of the handicapped, not that of elementary teacher. Even assuming, *arguendo*, which the Commissioner in no way concedes, that her service prior to issuance of her provisional certificate in October 1966 was under authority of an elementary teaching certificate, that time of service falls almost two years short of that period of service required by *N.J.S.A.* 18A:28-5 for the attainment of tenure.

Horan, supra, and Seidel, supra, are neither controlling nor applicable to the instant matter for the reason that statutory regulations for tenure and the

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State Board of Education rules authorized under their authority superseded and now control the factual context as herein controverted. The Commissioner so holds.

Petitioner's assertion of entitlement to displace a regular elementary classroom teacher with fewer years of service in the Board's employ is without sound legal basis. Her sole claim to reemployment rises from *N.J.S.A.* 18A:28-13 and *N.J.A.C.* 6:3-1.10 which require that the Board first place her on its preferred eligibility list for the category of teacher of the handicapped and thereafter notify her of any vacancy which may occur in that category. Petitioner has failed to show that, aside from her seniority entitlement as a teacher of the handicapped, she has earned seniority entitlement in any other category of employment to which she may revert. Accordingly, her prayers for relief may not be granted. Summary Judgment is entered in favor of respondent.

COMMISSIONER OF EDUCATION

July 19, 1978

Pending State Board of Education

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Goldberg and Simon (Gerald M. Goldberg, Esq., of Counsel)

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

This matter having been opened before the Commissioner of Education during October 1975 with the filing of a Petition of Appeal and a timely Answer; and

Counsel for both litigants having agreed in 1977 that no relevant facts were in dispute and that the Commissioner should render a determination on the pleadings, Cross-Motions for Summary Judgment and Briefs of counsel; and

The Commissioner having rendered a decision dated July 19, 1978, the full text of which is incorporated herein by reference; and

Petitioner having moved that the Comissioner review his own determination taking into consideration additional facts which were not made known by the attorneys of record when they set forth the facts which they represented

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to be all of the relevant facts concerning petitioner's employment in the Northvale Schools; and

The Commissioner having reviewed both petitioner's affidavit dated August 28, 1978 and the affidavit of the Superintendent dated October 4, 1978; and

The Commissioner having perceived therein alleged relevant facts divergent from those facts represented in 1977 by counsel to have prevailed in petitioner's employment during 1966; and

The Commissioner having concluded that the determination of those relevant facts is necessary to a justiciable decision of the issues presented in the above-entitled matter; now therefore

IT IS ORDERED that petitioner's Motion for Reconsideration be and is granted; and

IT IS FURTHER ORDERED that the Commissioner's representative schedule a second conference of counsel to determine the processes by which the additional relevant facts, *ante*, will be entered into the record.

Entered this 14th day of November 1978.

COMMISSIONER OF EDUCATION

In the Matter of the Tenure Hearing of

Marilyn Feitel,

School District of the City of Newark, Essex County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Cecil Banks, Esq.

For the Respondent, Liss and Meisenbacher (Raymond Meisenbacher, Esq., of Counsel)

The Board of Education of the city of Newark, hereinafter "Board," certified tenure charges pursuant to *N.J.S.A.* 18A:6-11 to the Commissioner of

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Education for determination against respondent, a teaching staff member with a tenure status in its employ. Respondent denies the allegations and, in the latest of a series of motions, moves for dismissal of all charges based on the alleged failure of the Board to prosecute the charges in a timely fashion before the Commissioner and for the alleged failure of the Board to comply with decisions and directives of the Commissioner previously issued in the matter. The Board opposes the Motion to Dismiss and denies the allegations which form the basis for the Motion to Dismiss.

Oral argument on the Motion was heard on May 5, 1978 at the State Department of Education, Trenton, by a representative of the Commissioner. The entire record, including the transcript of the oral argument, is referred to the Commissioner for his determination on respondent's Motion to Dismiss.

The Commissioner has reviewed the entire record of the matter and observes that a procedural history thus far is in order.

The Board originally certified charges of inefficiency and unbecoming conduct to the Commissioner for determination against respondent on August 9, 1976. Since then, the record shows that the following has occurred:

September 20, 1976—Oral argument of the parties was heard on respondent's Motion to Dismiss the charges.

April 15, 1977—The Commissioner, in a written opinion, granted respondent's Motion to Dismiss the charges of inefficiency but denied the Motion to Dismiss the charges of unbecoming conduct. The Commissioner also found that the Board did not act properly in regard to respondent's suspension, without pay, from her teaching duties. Consequently, the Commissioner directed the Board to reinstate respondent to her teaching duties together with all back pay withheld from her. Finally, the Commissioner directed that a plenary hearing into the charges of unbecoming conduct be scheduled forthwith.

April 21, 1977—The Board filed a Notice of Intent to Appeal the Commissioner's Decision on Motion to Dismiss to the State Board of Education.

August 3, 1977—The State Board of Education affirmed the Commissioner's Decision on the Motion to Dismiss.

The Commissioner observes at this juncture that the Board took no further appeal to the Commissioner's Decision on Motion to Dismiss dated April 15, 1977. The Board, however, elected not to reinstate respondent to her teaching duties until April 1978. Furthermore, the Board had not, as of May 5, 1978, restored all back pay to respondent as earlier directed.

September 14, 1977—The assigned hearing examiner notified the parties that the plenary hearing into the charges which remained against respondent was scheduled for October 19, 20, and 21, 1977.

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September 21, 1977—Respondent made telephone application to the hearing examiner to compel the Board to set forth specifications on the charges of unbecoming conduct, scheduled for hearing in October.

September 22, 1977—The hearing examiner, subsequent to numerous unsuccessful attempts to contact Board counsel by telephone, directed the Board by letter dated September 22, 1977 to serve respondent with the specifications on the remaining charges by September 30, 1977.

October 4, 1977—Respondent filed a Motion to Dismiss the remaining charges for failure of the Board to provide specifications on the remaining charges by September 30, 1977 as directed by the hearing examiner.

October 11, 1977—The hearing examiner advised the parties by letter that respondent's Motion to Dismiss for failure to provide specifications on the remaining charges would be heard on October 19, 1977, prior to taking testimony on the first day of hearing.

October 19, 1977—Respondent's Motion to Dismiss was heard. The Board produced fifty-one documents on that date, which, it argued, constituted the documentary evidence in support of the remaining charges, copies of which, it asserted, had already been served upon respondent. Thereafter, the documents were marked P-1 through P-51 for identification.

October 20, 1977—The oral argument on respondent's Motion to Dismiss was continued.

October 21, 1977—That hearing day was adjourned.

November 10, 1977—The Commissioner, by written decision, denied respondent's Motion to Dismiss.

Following the Commissioner's written decision by which respondent's Motion to Dismiss the remaining charges was denied, a conference of counsel was held on December 9, 1977 to refine the issues in preparation for hearings to be held the week of January 9, 1978. It was agreed by the Board that it would supply answers to respondent's interrogatories by December 28, 1977.

December 19, 1977—Hearing dates of January 10, 11, and 12, 1978 were established.

December 29, 1977—Respondent filed an Order of Dismissal of the charges for failure of the Board to supply answers to interrogatories by December 28, 1977.

January 6, 1978—The Board filed what it considered to be answers to interrogatories.

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In the meantime, the Board engaged new counsel who had to familiarize himself with the record. Consequently, the scheduled hearing dates of January 10, 11, and 12, 1978 were adjourned at the request of the Board.

February 15, 1978—A conference of counsel was conducted for the benefit of newly appointed Board counsel. It was agreed that the matter of respondent's reinstatement would be clarified; that the documents P-1 through P-51 would be reviewed to insure that those documents were what the Board relied upon; to specify which of those documents supported which specific charges; and to supply respondent with the names of specific witnesses whom the Board would call to support the specific charges. Those matters were to be addressed by Board counsel and carried out by March 28, 1978.

Board counsel advised the hearing examiner by telephone conversation on April 3, 1978, initiated by the hearing examiner, that none of the agreements of February 15, 1978 had been met. The documents had not been identified in terms of specific charges and the specific names of witnesses had not been forwarded to respondent. Finally, Board counsel stated that the Board would not be prepared to go to the first day of hearing into the matter until July 1978.

Given this procedural history, respondent now moves for dismissal, asserting that the Board has failed to prosecute the charges which remain against her and to comply with earlier directives and decisions of the Commissioner.

The Commissioner observes that in the second Decision on Motion dated November 10, 1977 by which respondent's then Motion to Dismiss was denied, the issue of the Board presenting the documents P-1 through P-51 was addressed. Respondent had argued that because those documents were first presented at that time, more than one year after the Board certified charges, such documents could not be considered evidential and the charges should be dismissed.

The Commissioner, in denying that Motion to Dismiss, relied upon the representation of the Board that respondent had knowledge of the documents and/or the documents had a direct bearing on the remaining charges. Notwithstanding this determination, Board counsel did agree at a conference conducted December 9, 1977 to provide answers to interrogatories, which answers would be equivalent to specifications on the charges. The answers were to be filed on December 28, 1977 but were not filed until January 6, 1978.

The Board failed to meet the time schedule set forth in the conference agreements made on February 15, 1978 and, as of May 5, 1978, the date of the argument herein, failed to provide the required information.

The Commissioner has carefully considered the entire history of this litigation and finds and determines that the tenure charges against respondent have not been vigorously pursued. The Board's argument that the delay in proceedings has not caused harm to respondent is without merit. The charges of unbecoming conduct are serious charges against a teaching staff member and, as such, must

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be prosecuted with vigor. The record of the instant matter shows that the Board has failed to do so.

In the Commissioner's judgment it would be patently unfair to allow the charges which remain against respondent to proceed, in view of the procrastination of the Board as shown, *ante*. Accordingly, the charges which remain against Marilyn Feitel are hereby dismissed without prejudice.

COMMISSIONER OF EDUCATION

July 28, 1978

Lester Bernardo,

Petitioner,

v.

Board of Education of the Township of Ewing, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, John J. Barry, Esq.

For the Respondent, Abbotts and Abbotts (John Abbotts, Esq., of Counsel)

Petitioner, a teaching staff member first employed in 1974 by the Board of Education of the Township of Ewing, hereinafter "Board," alleges that at the time of employment the Board failed to award him proper recognition on its salary guide for his years of military service. He requests a retroactive payment of salaries he avers is due. The Board maintains that petitioner was awarded credit for military service pursuant to its negotiated salary policy with respect to the payment of salary to teaching staff members at the time of employment. It further maintains that this agreement is legally correct in the context of the statutory mandate with respect to recognition of military service credit. *N.J.S.A.* 18A:29-11 The matter is submitted for Summary Judgment by the Commissioner of Education on a set of stipulated facts, the pleadings, and Briefs.

The facts which have given rise to this dispute may be recited succinctly

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as the result of a review of seventeen exhibits jointly offered by the parties at a brief hearing on October 13, 1977.

Petitioner had more than fourteen years of prior experience as a teacher at the time he made application to the Board for a teaching position in 1974. (J-11) Additionally, he had served for more than four years in military service with the armed forces of the United States. He was placed by the Board at the time of hire on its salary guide at a step appropriate to a teacher with a master's degree and with recognition for ten years of prior experience and military service. Such placement on the Board's salary guide was commensurate with Article VI of the "Agreement Between the Board of Education of the Township of Ewing and the Ewing Township Education Association" which provided:

> "A. Credit up to four (4) years less than the number of steps on the Teachers' Salary Schedule shall be given for previous outside teaching experience in a duly accredited school upon initial employment in accordance with the provisions of Schedules A and B. Included in this will be credit not to exceed four (4) years for military experience or alternative civilian service required by the Selective Service System or credit not to exceed two (2) years for Peace Corps, Vista or National Teachers Corps work. No credit will be given for less than a full year of service.***"
>
> (J-12)

In subsequent years petitioner was advanced one step on the guide each year.

The question for determination is whether the policy as set forth in the agreement, *ante* (J-12), constituted legal recognition of petitioner's military service in the context of the statutory mandate of *N.J.S.A.* 18A:29-11 and prior decisions of the courts and the Commissioner. *Howard J. Whidden, Jr. v. Board of Education of the City of Paterson, Passaic County*, 1976 *S.L.D.* 356, modified Docket No. A-3305-75 New Jersey Superior Court, Appellate Division, January 28, 1977; *Michael J. Watsula v. Board of Education of the Township of Plumsted, Ocean County*, 1977 *S.L.D.* 692

> The statute *N.J.S.A.* 18A:29-11 reads in pertinent part as follows:
>
> "Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States *** shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments.***"

The Court considered this statute in *Whidden, supra*, and determined that the word "shall" as contained therein mandated that military service credit must be awarded to a maximum of four years at the time of employment. The Court also determined that *N.J.S.A.* 18A:29-9, which authorizes a local board of

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education to establish the initial salary of a newly employed teaching staff member "***at such point as may be agreed upon***" by the member and the board, was not a waiver of the requirement that credit was required to be given for military service at the time of employment.

The Court said in these respects that:

> "***In construing a statute, full force and effect must be given, if possible, to every word, clause and sentence. *State v. Canola*, 135 *N.J. Super.* 224, 235 (App. Div. 1975), certif. den. 69 *N.J.* 22 (1975). A construction that will render any part of a statute inoperative, superfluous or meaningless is to be avoided. *State v. Sperry & Hutchinson Co.*, 23 *N.J.* 38, 46 (1956); *Hoffman v. Hock*, 8 *N.J.* 397, 406-407 (1952).***"
>
> (Slip opinion, at p. 3)

And,

> "***N.J.S.A. 18A:29-9 authorizes a school district to place a newly employed teacher at an initial place on the salary schedule as may be agreed upon between the member and the employing board of education. Nothing in the language of that section, however, suggests that the legislature intended to authorize a waiver of or a departure from the requirement of *N.J.S.A.* 18A:29-11 that credit be given for military service. See *Bd. of Ed. Englewood v. Englewood Teachers*, 64 *N.J.* 1, 7 (1973).***"
>
> (*Id.*, at p. 4)

Subsequent to the Court decision in *Whidden, supra*, the Commissioner held in *Watsula, supra*, that

> "***The words of the Court are clear and the Commissioner holds that all teaching staff members who have served in the armed forces are entitled to count the years of such service to a maximum of four years for employment increments within the scope of the Board's adopted salary schedule.***" (at 694)

Indeed, there is no argument *per se* in the matter herein with these interpretations of the statutory mandate of *N.J.S.A.* 18A:29-11 but a difference in views concerned with whether the Board's policy (J-12) does make proper provision for the credit of military service. The Board avers that the language of the statute equates years of military service with years of employment by local school districts and that the total of years gained from a combination of both of these factors constitutes "teaching experience." (Board's Brief, at p. 2) The Board maintains that

> "***Under the terms of the Teachers Employment Agreement, any teacher in his (petitioner's) category must start four steps down from the top of the salary guide. Since there are fourteen steps in the guide (J-13), it follows that anyone who has fourteen years or more of teacher's experience, must start at the tenth step, the exact position in which Petitioner found himself

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at the initiation of his employment. Thus, Petitioner has not been deprived of any credit for his military experience and the Respondent has followed the exact requirement of the statute, namely, to give to the Petitioner, 'equivalent years of employment credit.'***''

(Board's Brief, at pp. 2-3)

The Commissioner does not agree. This argument of the Board is, in essence, that all newly hired teaching staff members with fourteen or more years of prior teaching experience are treated equally by a uniformly applied blanket provision. It ignores the fact, however, that a teacher with fourteen years of teaching experience but no military service gains credit for ten of those years of teaching experience at the time of employment on the Board's salary guide while a teacher with the same number of years of teaching experience but with an additional four years of military service gains only six years of teaching credit. In this latter instance military service credit is not added to credit for teaching experience but is employed instead as a subtraction from it. The statutes *N.J.S.A.* 18A:29-6 *et seq.* cannot be construed in the context of *Whidden, supra*, to produce such a result. The Commissioner so holds.

This holding is premised on the conclusion that the statutes *N.J.S.A.* 18A:29-6 through 11 clearly separate the military service credit factor from credit for experience gained by teaching staff members while ''***holding office, position or employment in any school district***.'' *N.J.S.A.* 18A:29-8 The statutes of this chapter when read *in pari materia* in the context of *Whidden, supra*, clearly mandate that at the time of employment of teaching staff members there is to be recognition for military service which is separate from that afforded teaching or professional experience. This latter experience was required by the statutes of the designated ''Minimum Salary Law'' to be recognized ultimately by ''adjustment increments'' (*N.J.S.A.* 18A:29-10) if at the time of employment there had been an agreement by the teaching staff member to accept a lower initial salary than that to which the member would otherwise have been entitled by years of teaching experience. *N.J.S.A.* 18A:29-9 It follows then that military service credit may not as a matter of law, and/or of equity, be used as a factor to be subtracted from credit earned as the result of teaching experience but must be counted in any policy applicable to initial employment as an addition thereto.

Accordingly, the Commissioner determines that petitioner was entitled at the time of employment to the ten years of credit for teaching experience granted other teaching staff members similarly situated and to four years of credit in addition thereto for military service. The Commissioner directs the Board to adjust petitioner's salary retroactively to 1974 in accordance with this decision.

COMMISSIONER OF EDUCATION

July 28, 1978

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Barbara Kimless,

Petitioner,

v.

Board of Education of the Township of Woodbridge, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Mandel, Wysoker, Sherman, Glassner & Weingartner (Jack Wysoker, Esq., of Counsel)

For Respondent, Hutt, Berkow & Hollander (Joseph J. Jankowski, Esq., of Counsel)

Petitioner, a teaching staff member employed by the Board of Education of the Township of Woodbridge, hereinafter "Board," appeals the Board's action terminating her employment at the conclusion of the 1975-76 academic year. Petitioner alleges that she had acquired a tenure status as a teaching staff member pursuant to the provisions of *N.J.S.A.* 18A:28-5(c) and was entitled to continued employment during the 1976-77 academic year by virtue of such tenure and seniority status over any one of several nontenured teaching staff members subsequently employed by the Board to teach in those grade levels in which she previously held a full-time teaching position.

Petitioner further alleges that the Board failed to compensate her at the same salary level as other regular teaching staff members during the period of her previous employment as a regular part-time supplementary teacher. Petitioner maintains that she did not receive sick leave, health benefits or other emoluments, including but not limited to enrollment in the Teachers' Pension and Annuity Fund, hereinafter "TPAF," as did other regularly employed teaching staff members. Petitioner requests that the Commissioner determine that a tenure status accrued to her during the periods of her employment as a part-time supplementary teaching staff member.

The Board contends that petitioner did not enjoy a tenure status as a teaching staff member at the time her employment was terminated. The Board further avers that its actions with respect to the periods of employment service rendered by petitioner were in all ways proper and legally correct.

The pleadings were joined in this matter on December 8, 1976. Subsequent thereto petitioner filed a Motion for Summary Judgment with supporting Brief and exhibits on December 22, 1976. Similarly, the Board filed its own Cross-

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Motion for Summary Judgment with supporting Brief and an affidavit on January 20, 1977. Petitioner's reply was filed on January 28, 1977, by way of an affidavit and attached exhibits.

Thereafter, on February 3, 1977 oral argument was heard on the respective Motions of the parties at the State Department of Education by a representative of the Commissioner.

Prior to this matter being submitted to the Commissioner for his adjudication, the Board, on February 18, 1977 filed a reply to petitioner's affidavit, by way of its own affiavit with attached exhibits from the Assistant Superintendent in charge of personnel and educational services.

This matter is now before the Commissioner for determination based upon the record developed by the parties at that time, including the pleadings, exhibits, Briefs, and the transcript of the oral argument.

Many of the relevant facts pertaining to petitioner's employment service are not disputed by the parties. Petitioner commenced her employment in the Woodbridge School System during the 1966-67 school year. She was employed by Board resolution to serve as a part-time supplementary teacher with compensation at the rate of six dollars per hour. No fringe benefits or other emoluments, including but not limited to enrollment as a member in TPAF, to which petitioner now lays claim in her Petition of Appeal, were afforded her by the Board.

Petitioner was assigned to provide supplemental instruction on an individual or small group basis to a number of pupils who were identified and classified by the Board's child study team as having learning difficulties in certain subject areas in a normal classroom setting. The program of instruction for each of these pupils taught by petitioner was in the form of an educational prescription developed by the learning disabilities teacher-consultant as a member of the child study team. The purpose of such program of supplemental instruction is to use appropriate learning techniques and materials with individual pupils to assist them in overcoming specific learning problems.

Petitioner was employed in the same capacity and compensated in the same manner by the Board for each of the ensuing academic years until on or about November 17, 1972, when she voluntarily terminated her employment and accepted an employment contract from the Roselle Board of Education as a full-time teaching staff member for the duration of the 1972-73 academic year.

Shortly after the commencement of the 1973-74 academic year, petitioner was reemployed by the Board to serve as a part-time supplementary teacher with compensation at the rate of six dollars per hour. She continued to serve in this capacity until on or about November 19, 1973, when she accepted a contract from the Board for a full-time third grade teaching position for the remainder of the 1973-74 academic year. Petitioner was reemployed under contract with the Board to serve as a regular full-time teaching staff member and assigned to teach fifth grade during the 1974-75 and 1975-76 academic years.

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On or about April 21, 1976, prior to the conclusion of the 1975-76 academic year, petitioner was notified by the Board that her teaching contract would not be renewed for the 1976-77 academic year. She was advised that such determination was made by the Board due to declining pupil enrollment. During the 1976-77 academic year, however, the Board had occasion to employ several nontenured teaching staff members and assigned them to full-time teaching positions in either the third or fifth grades in the school district. Petitioner argues that she was entitled by virtue of her tenure and seniority to be employed by the Board in one of the several positions offered to the nontenured teachers at that time.

In the Commissioner's judgment two issues are presented herein for his determination. The first issue is whether petitioner acquired a tenure status as a teaching staff member pursuant to *N.J.S.A.* 18A:28-5(c) at the conclusion of the 1975-76 academic year when her employment was terminated. If the findings and determination are in the affirmative with respect to the first issue, then petitioner's tenure and seniority rights were preserved and she was entitled to continued employment during the 1976-77 academic year.

The second issue arises from petitioner's claim regarding her employment as a part-time supplemental teacher and has several facets such as: (1) was petitioner a regularly employed teaching staff member entitled to a pro-rated salary based upon the salary guide, (2) was she entitled to fringe benefits and enrollment in the TPAF, and (3) did she acquire a tenure status as a regularly employed part-time teacher.

In regard to the first issue set forth above, petitioner asserts that the aggregate periods of her employment service, both as a part-time supplementary teacher and as a regular full-time teaching staff member, are more than sufficient to establish her tenure entitlement to a full-time teaching position pursuant to the provisions of *N.J.S.A.* 18A:28-5(c). The statute of reference on which petitioner relies reads in pertinent part as follows:

N.J.S.A. 18A:28-5

"The services of all teaching staff members *** as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education *** shall be under tenure *** after employment in such district or by such board for:

(a) three consecutive calendar years, *** or

(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(c) the equivalent of more than three academic years within a period of any four consecutive academic years***."

It is petitioner's position that her voluntary resignation as a part-time sup-

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plementary teacher from the Woodbridge School System during the 1972-73 academic year does not interrupt the consecutiveness of her academic years of employment service for tenure purposes pursuant to statute.

Petitioner argues that the legislative intent of this section of the above-cited statute was to amend the Tenure Act so as to protect the tenure rights of teaching staff members who were subject to prior practices of local boards of education in which they were required to resign a few days before the end of a school year as a condition for obtaining an employment contract for the ensuing school year. She argues that such practices by local boards pursuant to *N.J.S.A.* 18A:28-5(a) and (b) were previously upheld before the enactment of *N.J.S.A.* 18A:28-5(c) and thereby precluded teaching staff members from attaining a tenure status in certain school districts. *Ahrensfield v. State Board of Education*, 124 *N.J.L.* 231 (*Sup. Ct.* 1940), aff'd 126 *N.J.L.* 543 (*E.&A.* 1941) and *Norwitz v. Board of Education, Harrison Township*, 128 *N.J.L.* 13 (*Sup. Ct.* 1942) (Petitioner's Brief, at pp. 10-11)

Accordingly, petitioner contends that the application of the facts to pertinent statutory and case law reveals that considering only her employment service as a part-time supplementary teacher and as a regular full-time teacher in the Board's employ commencing with the 1972-73 academic year, she had more than satisfied the statutory prerequisite for tenure purposes as a regular full-time teaching staff member at the conclusion of the 1975-76 academic year. *Zimmerman v. Board of Education of the City of Newark*, 38 *N.J.* 65 (1962), *cert.* den. 371 *U.S.* 956, 83 *S.Ct.* 508 (1963) and *Ahrensfield, supra.* (Petitioner's Brief, at p. 11)

The aforementioned periods of petitioner's employment service are established as follows:

Academic	*Employment Service*
1972-73	September through November 17, 1972 as part-time supplementary teacher at hourly rate of $6.00; voluntarily resigned position and accepted full-time employment in Roselle School System.
1973-74	Reemployed by Board September through November 19, 1973 as part-time supplementary teacher at hourly rate of $6.00; accepted full-time teaching position with the Board to teach third grade for remainder of academic year.
1974-75	Employed as a regular full-time teacher by Board to teach fifth grade.
1975-76	Employed as regular full-time teacher by Board to teach fifth grade.

The position taken by petitioner regarding the addition of her prior periods of employment service to her full-time employment service in determining her full-time tenure status is that there is nothing in the tenure statutes which distinguishes between part-time and full-time employment. *Josephine DeSimone*

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v. Board of Education of the Borough of Fairview, 1966 *S.L.D.* 43, and *Eleanor Kuett et al. v. Board of Education of Westfield*, 1976 *S.L.D.* 601

Additionally, petitioner asserts that her periods of employment service as a part-time supplementary teacher were similar to those of the teaching staff members in *Ruth Nearier, Gloria Marturano and Arlyne Schneider v. Board of Education of the City of Passaic*, 1975 *S.L.D.* 604 and in *Hazlet Township Teachers Association et al. v. Board of Education of the Township of Hazlet*, 1976 *S.L.D.* 578. It is argued that therein the Commissioner found and determined that petitioners had acquired a tenure status in accordance with the provisions of *N.J.S.A.* 18A:28-5(c) and were entitled to all the benefits, emoluments and privileges attendant thereto notwithstanding the sources of funds allotted to the Board for their employment, or the fact that the very nature of such employment did not occur at the commencement of the academic year and was concluded prior to the end of the academic year in question.

Petitioner also points out that in *Hazlet, supra*, certain petitioners had not been employed consecutively or uninterruptedly; however, their employment service was for more than the equivalent of three consecutive academic years within a period of any four consecutive academic years as prescribed in *N.J.S.A.* 18A:28-5(c). Similarly, petitioner argues that the periods of her employment during the four consecutive academic years, 1972-73, 1973-74, 1974-75, and 1975-76, in the aggregate, total thirty-two and one-half months which is more than sufficient to acquire a tenure status pursuant to statute. (Petitioner's Brief, at pp. 12-14)

The Board argues to the contrary with respect to petitioner's tenure claim. It is the Board's position in the first instance that the nature and scope of petitioner's employment as a part-time supplementary teacher was such that it may not be construed to count toward a tenure status either in a part-time or full-time teaching capacity. It is the Board's position assuming, *arguendo*, that were petitioner's employment as a part-time supplementary teacher determined to be valid pursuant to applicable statutory prescription, then her tenure status as a teaching staff member in its school system would have been terminated with her voluntary resignation. Thus, in the Board's view petitioner's second period of continuous employment toward the acquisition of tenure would have begun anew on or about the beginning of the 1973-74 academic year.

The Board contends further that if all of petitioner's employment service both as a part-time supplementary teacher and a full-time teacher were to be counted toward a new tenure entitlement (1973-74, 1974-75, 1975-76 academic years), she still would not have acquired tenure anew since she was not employed nor did she serve as a teaching staff member at any time during the 1976-77 academic year.

The Board's argument with respect to the effect petitioner's resignation has upon her claim to tenure is grounded upon *Schulz v. the State Board of Education*, 132 *N.J.L.* 345 (*E.&A.* 1945) wherein the court construed *R.S.* 18:13-16(c) as amended (now *N.J.S.A.* 18A:28-5(c)) in pertinent part as follows:

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> "***A comparison of the provisions of the amendment with the *Ahrensfield* [*supra*] facts leaves little doubt that the amendment was inspired by and was intended to apply to the incidents of that case, namely, an artificial splitting of the period of employment to avoid the application of the tenure statute to a regularly employed, full-time teacher.***" (at 351)

The Board maintains that petitioner voluntarily relinquished her teaching position as a part-time supplementary teacher on or about November 17, 1972, and that such termination of her services may not be construed as an "artificial splitting" of her employment by the Board. Accordingly, the Board argues, petitioner's claim to tenure pursuant to *N.J.S.A.* 18A:28-5(c) as it relates to her renewed periods of employment service, 1973-74 through 1975-76, is without merit. (Board's Brief, at pp. 9-11)

The Commissioner has reviewed all such facts and legal arguments presented by the parties with respect to petitioner's tenure claim in connection with the first issue raised herein and determines that the key to a final determination of this issue focuses upon the effect of petitioner's resignation from her position as a part-time supplementary teacher on or about November 17, 1972.

In this regard the Commissioner finds that the argument presented by the Board has merit. Petitioner's action in terminating her employment with the Board on or about November 17, 1972 had the effect of what is determined to be a resignation from her employment in the Woodbridge School System and may not be construed as an "artificial splitting" of her employment service by the Board. *Schulz, supra* Such holding is consistent with previous rulings of the Commissioner wherein it was held petitioners voluntarily resigned teaching positions which constituted abandonment of their rights to a tenure claim. *Thomas J. Commins v. Board of Education of the Township of Woodbridge*, 1967 *S.L.D.* 11; *Elaine Solomon v. Board of Education of the Princeton Regional School District, Mercer County*, 1977 *S.L.D.* 650 aff'd State Board of Education 657

In *Solomon, supra*, the Commissioner held that petitioner's resignation during the year following a granted leave of absence effectively terminated her tenured employment and that petitioner's tenure accrual started anew following her subsequent reemployment. The subsequent periods of employment service by petitioner were determined not to meet the statutory requirement for tenure entitlement.

Assuming, *arguendo*, that petitioner's period of employment from September 1973 through November 19, 1973, as a part-time supplemental teacher, may be added to her full-time employment from November 19, 1973 through June 30, 1976, for the purposes of considering whether she had acquired a tenure status, it is clear that she did not meet the precise requirements of the statute, *N.J.S.A.* 18A:28-5(b), by serving three consecutive academic years, together with employment at the beginning of the next succeeding academic year. Accordingly, with respect to the first issue, the Commissioner determines that petitioner did not acquire a tenure status as the result of her reemployment and teaching service between September 1973 and June 30, 1976.

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The Commissioner further finds and determines that petitioner's claim to continued employment for the 1976-77 academic year because of her alleged accrual of a tenure status is also without merit.

The Commissioner notices that the second issue dealing with petitioner's claim for additional salary, fringe benefits and emoluments which include but are not limited to enrollment in TPAF requires additional factual information with respect to the terms and conditions of her employment as a part-time supplementary teacher prior to her resignation on or about November 17, 1972. Such facts and the circumstances relating to such periods of employment service rendered by petitioner are not sufficiently developed in the record at this time. Accordingly, the Commissioner directs that this matter, as it pertains to petitioner's part-time employment relationship with the Board, proceed to a hearing as expeditiously as possible.

Finally, the Commissioner observes that amended pleadings have been filed in this matter by petitioner alleging that the Board violated her statutory and constitutional rights by failing to interview her or hire her for teaching vacancies during the 1976-77 academic year occurring after the institution of the initial pleadings in this matter. This matter is currently pending before the Commissioner accompanied by a Motion to Dismiss the amended pleadings advanced by the Board. The Commissioner directs that further proceedings with respect to these amended pleadings also be commenced without delay.

Accordingly, having found and determined that petitioner has failed to establish a claim to tenure as a teaching staff member when her employment was effectively terminated by the Board on June 30, 1976, Summary Judgment is granted in part to the Board.

COMMISSIONER OF EDUCATION

July 28, 1978

Pending State Board of Education

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In the Matter of the Application by James W. Dennis to Intervene in the Matter of the Tenure Hearing of Milton Belford, School District of the City of Long Branch, Monmouth County.

COMMISSIONER OF EDUCATION

ORDER

For the Intervenor, Joseph N. Dempsey, Esq.

For the Complainant Board, McOmber & McOmber (Richard D. McOmber, Esq., of Counsel)

For the Respondent Milton Belford, Anschelewitz, Barr, Ansell & Bonello (Charles M. Moriarty, Esq., of Counsel)

This matter having been brought before the Commissioner of Education on December 6, 1976 by James W. Dennis (Joseph N. Dempsey, Esq.) by the filing of a Motion to Intervene in the Matter of the Tenure Hearing of Milton Belford, School District of the City of Long Branch, Monmouth County; and

Oral argument on the Motion to Intervene having been heard by the Commissioner's representative at the State Department of Education, Trenton, on January 21, 1977; and

The Commissioner having considered argument of counsel for James W. Dennis which is grounded on the November 12, 1976 interlocutory decision of the Commissioner *In the Matter of the Tenure Hearing of Carmen Stephen Raciti, School District of the Township of Brick, Ocean County*, 1977 *S.L.D.* 685 wherein the Commissioner permitted counsel for petitioner in *James McCabe v. Board of Education of the Township of Brick, Ocean County*, 1974 *S.L.D.* 299, aff'd State Board of Education 315, aff'd Docket No. A-3192-73, New Jersey Superior Court, Appellate Division, April 2, 1975, to participate in the forthcoming tenure hearing proceedings at the discretion of the hearing officer; and

The Commissioner having considered counsel's argument that the instant matter is similar to *McCabe, supra,* and *Raciti, supra*, by reason of the initial refusal of the Board of Education of the City of Long Branch, hereinafter "Board," to certify charges preferred against Milton Belford (*James W. Dennis v. Board of Education of the City of Long Branch, Monmouth County*, 1976 *S.L.D.* 14; and

The Commissioner having considered the argument of counsel for Milton Belford (Charles M. Moriarty, Esq.) that reason and fairness demand that Milton Belford should not be confronted by two attorneys prosecuting the case against him; and

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The Commissioner having considered the further argument of counsel that the statutes make no provision that James W. Dennis, who has preferred charges against Milton Belford, which charges have since been certified by the Board, is in fact a party to the proceedings pursuant to *N.J.S.A.* 18A:6-10 *et seq.*; and

The Commissioner having carefully balanced those arguments of law regarding the proposed intervention as advanced by counsel for James W. Dennis, Milton Belford and the Board (Richard E. McOmber, Esq.); and

The Commissioner, having noted that the degree of resistance by the Brick Township Board in *Raciti, supra*, to the certification of charges which resulted in lengthy delays and appeals to two higher tribunals is importantly differentiated from the factual context of the instant matter wherein the Board, upon receipt of the order in *Dennis, supra*, promptly certified charges against Milton Belford; and

The Commissioner having concluded that there is within the record and factual context no reason to believe that the Board and its counsel will not appropriately prosecute the charges in accord with the statutory obligation pursuant to *N.J.S.A.* 18A:6-17; now therefore

IT IS ORDERED that James W. Dennis' Motion to Intervene be and is denied.

Entered this 24th day of March 1977.

COMMISSIONER OF EDUCATION

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In the Matter of the Tenure Hearing of

Milton Belford,

School District of the City of Long Branch, Monmouth County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Murray, Meagher & Granello (Robert J. Hrebek, Esq., of Counsel)

For the Respondent, Moore & Feldman (Paul J. Feldman, Esq., of Counsel)

Pursuant to an order of the Commissioner of Education in *James W. Dennis v. Board of Education of the City of Long Branch*, 1976 *S.L.D.* 14, a single charge of unbecoming conduct was certified against respondent, a tenured teaching staff employee of the Long Branch Board of Education, hereinafter "Board," pursuant to *N.J.S.A.* 18A:6-10 *et seq.* The essential thrust of that charge as preferred before the Board by James W. Dennis, also a tenured teaching staff member employed by the Board in its mathematics department of which respondent is chairman, states that:

> "***[A]t a conference in the office of the Departmental Chairman of the Mathematics Department *** [James W. Dennis] was struck about the body, pushed up against a filing cabinet and wrestled to the ground by [respondent]. This attack occurred after a dispute concerning the transfer of a student.***"

A Motion to Intervene by James W. Dennis was denied following oral argument by an interlocutory order of the Commissioner dated March 24, 1977 on grounds that, although the Board had initially determined not to certify the charge, there was insufficient showing that it would not appropriately prosecute the charge in accord with its statutory obligation pursuant to *N.J.S.A.* 18A:6-17.

A hearing in the matter was conducted at the office of the Somerset County Superintendent of Schools, Somerville, on October 19, 1977 by a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows setting forth the factual context revealed at the hearing by witnesses, whose testimony is corroborative of all facts essential to a determination of the matter.

Dennis and a fellow mathematics teacher approached respondent while he was eating lunch in his office to question the advisability of a proposed pupil

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transfer. During the discussion which followed, the tempers of both Dennis and respondent flared. When shouting ensued, respondent ordered Dennis to leave the room. When Dennis refused to do so, perceiving that the order was demeaning, respondent came from behind his desk and grasped Dennis by the arm, whereupon Dennis similarly grasped respondent. In the ensuing scuffle of less than thirty seconds' duration, Dennis' back struck a file cabinet and both men fell to the floor. During the entire fracas, which may best be described as grappling, no blow was struck by a clenched fist by either man. (Tr. 4-13, 32-37, 43-61, 64-69)

Respondent reported the incident immediately to the principal who gave similar opportunity to Dennis to relate what had happened. Dennis stated to the principal that he believed respondent should apologize to him and compensate him for the cost of a torn shirt and a medical examination. That examination revealed that his back had sustained no severe injury. His request for apology and compensation was not related by the principal or by Dennis to respondent. (Tr. 70)

Other than a period during which Dennis chose to absent himself from mathematics department meetings, the two men have since maintained a posture of mutual professional respect and cooperation without further acrimony. (Tr. 38-41, 70-71)

There is nothing within the record on which to base a conclusion that the brief encounter had any deleterious effect upon the educational program of the Board.

Based upon the above findings of fact, the hearing examiner recommends that the Commissioner determine that the single encounter, being mutually provoked, unpremeditated, and of short duration, was insufficient to justify dismissal or monetary penalty. This recommendation appears consistent with the determination of the Commissioner who dismissed tenure charges *In the Matter of the Tenure Hearing of Peter J. Romanoli, School District of the Township of Willingboro*, 1975 *S.L.D.* 352. Therein, where the principal allegation was that Romanoli had used foul and abusive language to a member of the Willingboro Board in a private encounter at midnight in a parking lot, following a Board meeting, the Commissioner stated:

> ''***The Commissioner does not conclude, however, that the principal allegation with respect to respondent's use of 'foul and abusive language,' *** is sufficient in the circumstances *** to warrant a disciplinary penalty by the Commissioner. Respondent's alleged actions and words occurred or were spoken at the end of a long and, it may be supposed, arduous working day. There is no allegation of premeditation in what he said or did. The incident was essentially private in nature and limited in scope***.'' (at 356)

The hearing examiner recommends dismissal of the charge without penalty and leaves to the Commissioner further comment upon any aspect of the actions hereinbefore set forth which he may deem appropriate.

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This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter and finds the factual recitation as set forth by the hearing examiner consistent therewith. It is noted that no exceptions to the hearing examiner report were filed by either party pursuant to the provisions of *N.J.A.C.* 6:24-1.17(b).

It is lamentable that the brief altercation caused temporary disruption of normal amicability between respondent and a member of his mathematics department. Nevertheless it is heartening that both participants in the unfortunate occurrence exhibited the mature judgment to reestablish their former professional relationships so necessary to insure the welfare of pupils and fellow teachers with whom they must work on a daily basis. (Tr. 22, 71)

Such indiscretions as were manifested herein are, of course, to be assiduously avoided by professional educators whose example should provide a basis for emulation by the pupils whom they serve. As was stated by the Commissioner *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson*, 1974 *S.L.D.* 97:

> "***Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully***violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.***" (at 98-99)

Absent a finding that respondent's mode of operation with his professional colleagues was sporadically blighted by lack of self control, the Commissioner determines that neither dismissal nor financial penalty is warranted. Accordingly, the tenure charge against respondent is dismissed.

COMMISSIONER OF EDUCATION

August 3, 1978

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Michael P. Malone,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Greenberg & Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Respondent, Scipio L. Africano, Esq.

Petitioner, a nontenured teacher formerly in the employ of the Union City Board of Education, hereinafter "Board," claims entitlement to credit for military service on the salary guide for his entire employment period. The Board argues that petitioner is not entitled to military service credit for his period of employment when holding emergency certification.

A conference of counsel was held July 13, 1977, in the office of the Assistant Commissioner in charge of Controversies and Disputes, Trenton, at which time it was agreed to submit the matter to the Commissioner of Education for adjudication based on the pleadings, documents and arguments of law.

Petitioner, a veteran of the United States Navy with honorable discharge whose period of service was three years, five months and twenty-three days, was initially employed by the Board on September 1, 1974 and worked for the Board for the school year 1974-75 while holding emergency certification as an industrial arts teacher. In June 1975 he received permanent K-12 certification as an industrial arts teacher and continued in the employ of the Board until his resignation on February 28, 1977.

For the first year of his employment petitioner was placed at the O step of the salary guide at the BA level, or $9,500 plus $200 additional renumeration for military service as per Article 11, B(2) of the "Agreement between the Board and the Union City Education Association, Professional Members, September 1, 1974 August 31, 1975." (Exhibit A) Petitioner's request of the Board to be accorded the benefits of *N.J.S.A.* 18A:29-11 was denied. This statute in pertinent part provides:

> "Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States or of this state, *** in time of war or an emergency, or for or during any period of

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training, or pursuant to or in connection with the operation of any system of selective service, shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments.***''

Petitioner alleges that the granting of credit for military service is mandatory citing *Howard J. Whidden v. Board of Education of the City of Paterson*, 1976 *S.L.D.* 356, modified Docket No. A-3305-75 New Jersey Superior Court, Appellate Division, January 28, 1977 and *Wall Township Education Association et al. v. Board of Education of the Township of Wall*, 1976 *S.L.D.* 269, aff'd State Board of Education 273, aff'd 149 *N.J. Super.* 126 (*App. Div.* 1977).

The Board denies petitioner's entitlement to the benefits set down in *N.J.S.A.* 18A:29-11 because petitioner was not a ''member'' as defined in *N.J.S.A.* 18A:29-6 which defines ''member'' to mean a full-time teaching staff member except one who is the holder of an emergency certificate. Accordingly, the Board contends that petitioner is entitled to credit for military service from September 1, 1975 to the date he resigned his position on February 28, 1977.

The Commissioner cannot agree. In *Louis Alfonsetti and Lakewood Education Association v. Board of Education of the Township of Lakewood*, 1975 *S.L.D.* 297, he stated:

''***[T]he matter is fundamentally one of statutory interpretation. The Courts have said that:

'***in every case involving the interpretation of a statute, it is the function of the court to ascertain the intention of the Legislature from the plain meaning of the statute and to apply it to the facts as it finds them, *Carley v. Liberty Hat Mfg. Co.*, 81 *N.J.L.* 502, 507 (*E.&A.* 1910). A clear and unambiguous statute is not open to construction or interpretation, and to do so in a case where not required is to do violence to the doctrine of the separation of powers. Such a statute is clear in its meaning and no one need look beyond the literal dictates of the words and phrases used for the true intent and purpose in its creation.***' *Watt v. Mayor and Council of Borough of Franklin*, 21 *N.J.* 274 (1956) (at p. 277)

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

''The Commissioner finds the wording of *N.J.S.A.* 18A:29-11, *ante*, to be explicit, clear and unambiguous. The statute must be construed in accord with the express intentions of the Legislature. As was said by the Court:

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> '***The purpose of [statutory] construction is to bring the operation of a statute within the apparent intention of the Legislature.***' *Sperry & Hutchinson Co. v. Margetts*, 15 *N.J.* 203 (1954) (at p. 209)
>
> '***A statute should not be construed to permit its purpose to be defeated by evasion.***' *Grogan v. DeSapio*, 11 *N.J.* 308 (1953) (at p. 322)
>
> '***We are enjoined to interpret and enforce the legislative will as written, and not according to some unexpressed intention.***' *Hoffman v. Hock*, 8 *N.J.* 397 (1952) (at p. 409)***'' (at 299-300)

The Commissioner holds that the words used in the statute, *N.J.S.A.* 18A:29-11, are determinative and that those who serve in the armed forces ''***shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some *** school *** in this *** state.***'' Such words are clear and the Commissioner holds that all teaching staff members who have served in the armed forces are entitled to count the maximum of four years of such service in an identical manner to those who have earned years of credit for teaching.

For the aforementioned reasons the Commissioner directs the Board to pay petitioner the salary difference due him by according him his military service credit beginning with his initial employment by the Board.

COMMISSIONER OF EDUCATION

August 10, 1978

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Virginia Euell,

Petitioner,

v.

Board of Education of the Princeton Regional School District, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, Smith, Cook, Lambert and Miller (Thomas P. Cook, Esq., of Counsel)

Petitioner is a teaching staff member with a tenure status employed by the Board of Education of the Princeton Regional School District, hereinafter "Board," who was reassigned to classroom teaching duties after serving in different administrative capacities. Petitioner prays for an order from the Commissioner of Education granting her tenure as a principal or an assistant principal in the school district.

A hearing was conducted on April 4 and 15, 1977 in the office of the Mercer County Superintendent of Schools, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

The facts in this matter are not in dispute. The hearing essentially perfected petitioner's precise assignments, duties, dates of those assignments and dates when she received her principal's certificate or, alternatively, when petitioner became eligible for a principal's certificate.

This Petition of Appeal also raises the question of arbitrary actions taken by the Board which issues are currently pending before the Division on Civil Rights, Trenton. (Conference Agreements, July 16, 1975) Consequently, the only issue in contention, herein, is whether or not petitioner has met the statutory tenure requirements in Title 18A, Education and thereby acquired a tenure status as a principal or an assistant principal.

Petitioner was initially employed as a classroom teacher in September 1961 and has held an appropriate teaching certificate at all times. Although she possessed only a teaching certificate, the Board purportedly appointed her as assistant principal in June 1970. Her title was thereafter changed to administrative

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assistant to the principal effective July 1, 1971 until June 30, 1973. (R-1; Respondent's Brief, at pp. 3-8) During those two years she possessed only a teacher's certificate.

As of May 19, 1973, petitioner completed the required academic studies and became eligible for the issuance of a principal's certificate. (Exhibits A, B, C; Tr. I-7, 10, 14) Petitioner received a certificate as principal/supervisor from the Bureau of Teacher Certification and Academic Credentials during September 1973. (Respondent's Brief, at p. 3)

Petitioner was appointed principal of a middle school effective July 1, 1973 and her appointment was renewed for the 1974-75 school year. The Board determined not to renew petitioner's contract on February 18, 1975 and gave her notice pursuant to *N.J.S.A.* 18A:27-10. On February 25, 1975, the Board terminated petitioner's employment as principal effective June 20, 1975, pursuant to a sixty days' notice clause contained in her contract. (Respondent's Brief, at p. 4; Exhibit C) Petitioner served as a principal with an appropriate certificate from July 1, 1973 through June 20, 1975, ten days less than two full calendar years.

The issue concisely stated is whether or not the time petitioner served as an administrator between May 19, 1973 through June 30, 1973 may be added to her service as a principal to determine that she has earned a tenure status as a principal or an assistant principal.

Regarding tenure upon transfer or promotion, *N.J.S.A.* 18A:28-6 reads as follows:

> "Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) *the expiration of a period of employment of two consecutive calendar years in the new position* unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
>
> *provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then*

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has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion." (*Emphasis added.*)

The statute provides, therefore, that tenure will accrue upon transfer or promotion in the new position after the expiration of a period of employment of two consecutive calendar years. It provides also that the time served in the new "***position *shall* be included *in determining the tenure and seniority rights in the former position****." (*Emphasis added.*)

The record shows that the Board intended to have petitioner serve as an assistant principal and appointed her as such in June 1970. (Respondent's Brief, at p. 3) At some point thereafter, it was recognized that petitioner was ineligible to serve as an assistant principal without an appropriate certificate for that position. (*N.J.A.C.* 6:11-10.4(b); Respondent's Brief, at p. 5)

The former superintendent of schools clarified petitioner's status in a letter dated April 5, 1971 which was sent to the Mercer County Superintendent of Schools. That letter reads as follows:

"I am writing to clarify the status of Miss Virginia Euell.

"Miss Euell is listed in the minutes of the Board of Education of Princeton Regional Schools as Assistant Principal, Middle School. Her duties are restricted however and do not include responsibility for evaluating or supervising the staff.

"The role which she is filling should be regarded as that of Administrative Assistant. She is currently working toward certification which ultimately will allow her to assume administrative duties at a higher level of responsibility in the operation of the Middle School." (R-1)

Regarding this letter, petitioner testified that her change in title from assistant principal to administrative principal was made because of her lack of certification which was brought to her attention by the Superintendent. (Tr. I-22-23) She testified that from July 1, 1972 through June 30, 1973 she was in charge of the Community Park Building which, together with the Valley Road Building, constituted the Middle School. (Tr. I-16) She testified further that her

"***responsibilities included all of the responsibilities of a building principal, except for the fact that I did not evaluate teachers. Although I made observations, and conferred with the principal concerning those observations, he [the principal] was responsible for the final recommendations concerning those teachers. He and I sat down together whenever I had observed a teacher *** and discussed my observations. There were several non-tenured teachers whom I observed regularly and whom I assisted whenever necessary. I was also responsible for scheduling. I was responsible

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for custodial and cafeteria maintenance. I dealt with discipline problems. I dealt with the juvenile authority *** very closely in helping resolve problems that might arise either in the school or in the community.***'' (Tr. I-16-17)

She also testified that the duties she performed between July 1, 1973 and June 30, 1975 were not different from those performed during May and June 1973. (Tr. I-25)

Her testimony was corroborated by the former superintendent who testified that ''***[s]he functioned in a position that was in all but one respect an assistant principalship. The reason she didn't function totally as assistant principal was she didn't have the full certification required [for] *** teacher evaluation. *** [S]he functioned in a role that was identical to the assistant principalship.***'' (Tr. I-37)

He testified further as follows:

''***Well, parent relations, student relations, all other staff relations, curriculum development, district-wide planning with other administrators in that particular respect, for example. In the ten years I was in Princeton, assistant principals ordinarily did not function heavily at the district level or district planning, but in her case, since she was—well, actually in her assistant principalship role, she was functioning more like a principal than any vice-principal we ever had, so she was even participating in district-wide planning. At my administrative counsel level beyond the scope of a normal assistant principalship. I just can't think of an area where she didn't function in the total running of the school. There wasn't any area where she didn't function fully. And as I said, and would repeat, she actually in her assistant principalship, particularly when she was at Community Park, functioned more like a principal that a vice-principal.***'' (Tr. I-38)

A Board member testified that petitioner was assigned to generally assist the principal in the performance of his duties. (Tr. II-11) She testified, also, that she had to rely on the Superintendent to see that petitioner would do only the things she could legally do. (Tr. II-14)

Thus, it can be seen from the record and the testimony that petitioner performed some of the duties of an assistant principal except that she did not evaluate teachers during the 1972-73 school year and during May and June 1973. She became eligible for a principal's certificate as of May 19, 1973 and thereafter could have conducted teacher evaluations if so required. Although a certificate as a principal, supervisor or school administrator is required for any person evaluating a teacher's performance or supervising instruction, the holder of such a certificate is not always required to evaluate teachers as a condition to his/her administrative position. It is common knowledge that some school systems have assistant principals who act only as school disciplinarians and do not evaluate teachers and supervise instruction, although they may do so, if required.

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The Commissioner has held that a title may not be given a person as a device to deprive that person of a right or benefit. Stated another way, a person could not be called an administrative assistant to void his/her acquisition of tenure as assistant principal if all other qualifications were met. *Elizabeth Boeshore v. Board of Education of the Township of North Bergen*, 1974 *S.L.D.* 805, 817

In the instant matter, there was no such intent by the Board. In fact, the Board's intent was to have petitioner perform as an assistant principal; therefore, it gave her the title of administrative assistant because she was not yet qualified with the appropriate certificate for assistant principal.

Given these facts, the hearing examiner finds that petitioner was an assistant principal and performed as such during the period May 19 through June 30, 1973. The Board concedes that petitioner was eligible and applied for the certificate as of the date she completed her course work. (Exhibit A) Her title remained that of administrative assistant through June 30, 1973.

N.J.S.A. 18A:28-6 provides that time in a new position upon promotion shall be included in determining the "****tenure and seniority rights in the former position.***" (*Emphasis added.*) Thus, the point to begin tolling the time for acquisition of tenure as an assistant principal would have been May 19, 1973, when she became eligible for her principal's certificate. Petitioner did not remain in that position but was promoted to the position of principal.

The Board argues that the six weeks' period of time from May 19 through June 30, 1973 may not be counted for tenure purposes and that all of the time petitioner served from June 1970 through June 1973 may be counted only toward her tenure and seniority as a teacher in the district.

The hearing examiner finds as follows:

1. The Board appointed petitioner as an assistant principal and intended that she so serve.

2. Petitioner was not eligible to be appointed an assistant principal because she did not hold an appropriate certificate. (School Principal; School Administrator) Her title was changed, therefore, to administrative assistant.

3. Petitioner performed some of the duties of an assistant principal; however, she did not evaluate teachers.

4. Petitioner became eligible for a principal's certificate on May 19, 1973 and began to acquire tenure and seniority rights as an assistant principal on that date.

5. Petitioner was promoted to principal on July 1, 1973 and served as a principal until June 20, 1975 when she was terminated and reassigned as a classroom teacher.

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When the Board terminated petitioner as a principal, she was entitled to have the time earned in that position credited toward her tenure and seniority in any and all categories in which she previously held employment. *N.J.A.C.* 6:3-1.10(g); *Boeshore, supra*

The hearing examiner recommends, therefore, that the Commissioner determine that the one year, eleven months and twenty days petitioner served as a principal be added to her six weeks' service as ''administrative assistant'' (May 19 through June 30, 1973) so that she will have acquired a tenure status as an assistant principal in the Princeton Regional School District. *N.J.S.A.* 18A:28-6

This concludes the report of the hearing examiner.

* * * *

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

The Board contends that the hearing examiner erred in the following findings and conclusions:

1. that petitioner was an assistant principal and performed as such during the period May 19 through June 30, 1973;

2. that the one year, eleven months and twenty days petitioner served as a principal be added to her six weeks' service (May 19 through June 30, 1973) as administrative assistant so that she will have acquired a tenure status as an assistant principal. (Board's Exceptions, at p. 2)

The Commissioner does not concur that these findings and recommendations are in error.

It has long been held by the Commissioner and the courts that the duties performed, not the title assigned, determine a person's category. Accordingly, the Administrative Code at *N.J.A.C.* 6:3-1.10(f) reads as follows:

> ''Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with duties performed and not by title.***''

See *August Lascari v. Board of Education of Lodi*, 1954-55 *S.L.D.* 83, aff'd State Board of Education 89, aff'd 36 *N.J. Super.* 426 (*App. Div.* 1955).

As the Commissioner said in *Ann A. Quinlan v. Board of Education of the Township of North Bergen*, 1959-60 *S.L.D.* 113, rev. State Board 1960-61 *S.L.D.* 243, aff'd 73 *N.J. Super.* 40 (*App. Div.* 1962):

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> "***The Commissioner must be vigilant to protect those who are entitled to tenure from the erosion of their tenure rights by subterfuge and evasion. *** The duties performed rather than the title of a position must be controlling in determining whether a position is protected by tenure. Nomenclatures may not be the deciding factor.***" (at 114)

See also *Cecelia Barnes et al. v. Board of Education of the City of Jersey City*, 1961-62 *S.L.D.* 122, aff'd State Board of Education 1963 *S.L.D.* 240, aff'd 85 *N.J. Super.* 42 (*App. Div.* 1964), *cert.* den. 43 *N.J.* 450 (1964); *Carmine Giannino v. Board of Education of Paterson*, 1968 *S.L.D.* 160; *John A. Brunner v. Board of Education of Camden*, 1959-60 *S.L.D.* 155.

In *Elizabeth Boeshore v. Board of Education of the Township of North Bergen*, 1974 *S.L.D.* 805, the Commissioner commented further about the use of titles as follows:

> "***It appears that titles, such as assistant to the superintendent, or assistant to the principal, are used by boards when an employee is selected to hold a particular position and he/she lacks all the specific requirements for certification in the titled categories; *e.g.*, assistant superintendent or assistant principal. Although the statutes do not prevent boards from using titles for which no certificate is required *** such a title may not be used to deny tenure for persons otherwise eligible for tenure status.***" (at 814)

In the instant matter, the Commissioner is convinced that the Board did not assign the title "administrative assistant" to deny the accrual of time for petitioner's tenure. Quite the contrary. She was initially appointed an assistant principal. Thereafter the Board changed her title simply for its own accommodation since petitioner was not eligible at that time to hold the appropriate title. (R-1, *ante*) Nevertheless, the negative result would be the same if the Board could now say that none of the time accrued under that title may count toward tenure.

In this regard the Board erred. It did not remedy the situation by merely changing petitioner's title, but simply attempted to evade the purpose of the rules which require that appropriate titles be used for all teaching staff positions.

The assignment of titles was set forth previously in *N.J.A.C.* 6:11-3.6, effective March 31, 1973 as follows:

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

That rule was then amended on November 10, 1977 to read as follows:

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"(a) School districts shall assign position titles to teaching staff members which are recognized in these regulations.

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

The record is clear that petitioner performed administrative duties. (R-1; Tr. I-25) She was in charge of the Community Park Building, which, together with the Valley Road Building, constituted the Middle School. (Tr. I-16) Petitioner functioned as an assistant principal except for teacher evaluations according to the unrefuted testimony of her former superintendent. (Tr. I-37) The Commissioner commented in *Boeshore, supra*, that he could not "***condone [the] designation of a *bona fide* administrative position by an inappropriate title, which would result in relegating petitioner's service to an amorphous limbo.***" (at 817) In *Barnes, supra*, the Superior Court said:

> "***Moreover, since tenure statutes are intended to secure efficient public service by protecting public employees in their employment, 'the widest range should be given to the applicability of the law.' *Sullivan v. McOsker*, 84 *N.J.L.* 380, 385 (*E.&A.* 1913).***" (85 *N.J. Super.* at 45)

It is also necessary to examine the applicable statute and its intent. *N.J.S.A.* 18A:28-6, *ante* It cannot be held that the statute may be manipulated so that a lateral transfer or a promotion may be used as a device to deny tenure to an otherwise eligible teaching staff member, under a holding that the teaching staff member did not serve for two consecutive years in any of the new positions.

Such a holding would nullify the statute which clearly states that the time served in the "****new position shall be included in determining the tenure and seniority rights in the former position****." (*Emphasis added.*)

Consider the effect on tenure of the following example:

A teaching staff member, appropriately certificated, may be employed initially as a teacher and be promoted for successive annual employments as follows:

1. teacher—two years

2. assistant principal—one year

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3. principal—one year

The Board, citing *Michael Keane v. Board of Education of Flemington-Raritan Regional School District*, 1970 *S.L.D.* 162 and 1970 *S.L.D.* 176, holds that pursuant to *N.J.S.A.* 18A:28-6, a person with service in a school district as set forth above would acquire tenure only as a teacher in the district. (Board's Exceptions, at pp. 4-7) The Commissioner cannot agree and determines that in the example of service, *ante*, tenure would have accrued as a teacher and as assistant principal.

Nevertheless, the Board's reliance on *Keane, supra*, requires further consideration since it appears to disagree with the findings and conclusions in the instant matter. In reviewing that decision, it is necessary to reconstruct the certificates required for employment and the certificates held by Keane at the time relevant to his employment.

The Commissioner's records in the Bureau of Teacher Certification and Academic Credentials reveal that an assistant principal's certificate, approved by the State Board of Education in March 1962, was required for employment as an assistant principal beginning September 1963. This certificate remained in effect until it was discontinued in February 1969. Thereafter, an appropriate principal's certificate was required for employment as an assistant principal; *i.e.*, a secondary principal's certificate was required for the position of assistant principal in a secondary school, and an elementary principal's certificate was required for the position of assistant principal in an elementary school. New rules now provide that a school principal or school administrator's certificate may be utilized for the assistant principal or principal position in either elementary or secondary schools. *Dominick DiNunzio v. Board of Education of Township of Pemberton, Burlington County*, 1977 *S.L.D.* 24

Although it was stipulated that Keane held elementary teacher and elementary principal certificates (at pp. 162, 164) the Commissioner's records reveal that Keane did not hold an appropriate principal or assistant principal certificate during the year of his employment as an assistant principal, July 1, 1967 to June 30, 1968. Therefore, his employment for that year as an assistant principal was improper because he did not hold an appropriate certificate. Rather, Keane held the following certificates:

1. Provisional Elementary Teacher Certificate, 1961-1964
2. Regular Elementary Teacher Certificate, issued July 1968
3. Limited Secondary English Certificate, 1961-66
4. Limited Social Studies Certificate, 1961-66
5. Regular English and Social Studies Certificates, issued May 1967
6. *Secondary Principal Certificate*, issued May 1968
7. Elementary Principal Certificate, issued July 1968

Keane's employment as an assistant principal would have to be conditioned on his holding either an elementary principal or assistant principal certificate. He held neither. During the year in question he acquired a secondary principal

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certificate in May 1968. Keane did not accrue any time in service as an assistant principal, thus the case is distinguishable from the instant matter.

The Commissioner is asked herein to assess the facts of petitioner's employment by the Board in the context of clear and precise statutory prescription as contained in *N.J.S.A.* 18A:28-5 and 6. Specifically, we are concerned with that portion of *N.J.S.A.* 18A:28-6 which sets forth the requirements of tenure accrual for those ''teaching staff members'' who are ''transferred or promoted'' while such staff members are ''under tenure'' or are eligible to obtain tenure.

The initial question is the meaning of the phrase ''eligible to obtain tenure.'' The statute *N.J.S.A.* 18A:28-6 can only be made applicable to petitioner if she were ''eligible to obtain tenure.'' What is the precise meaning of the word ''eligible''?

Black's Law Dictionary 612 (rev. 4th ed. 1968) contains this definition of the word:

> ''ELIGIBLE.
>
> ''Fit to the *chosen*. State ex rel. Sundfor v. Thorson, 72 N.D. 246, 6 N.W.2d 89, 92, 143 A.L.R. 599. Capable of serving, legally qualified to serve. State v. Johnson, 123 S.C. 50, 115 S.E. 748, 749. Capable of *being chosen*, as a candidate for office.***'' (*Emphasis supplied.*)

and this definition of ''eligibility'':

> ''ELIGIBILITY. Proper to be chosen; To *be chosen*; qualified to *be elected*; legally qualified. *** A word which, when used in connection with an office, where there are no explanatory words indicating that it is used with reference to the time of election, may be deemed to refer to the *qualification to hold the office* rather than to be elected.***'' (*Emphasis supplied.*)

The Commissioner notices that the definitions of both words are couched in terms of future circumstances—''Fit to be chosen,'' ''qualified to be elected,'' ''capable of serving.'' In such a context, how may petitioner's service with the Board be viewed?

In this regard the Commissioner finds that petitioner became eligible to obtain tenure on May 19, 1973 when she was for all intents and purposes an assistant principal. *Robert F. X. Van Wagner v. Board of Education of the Borough of Roselle*, 1973 *S.L.D.* 488; *Thomas Smith, Jr. v. Board of Education of the Township of Egg Harbor*, 1974 *S.L.D.* 430; *R. Thomas Jannarone, Jr. v. Board of Education of the City of Asbury Park et al.*, 1976 *S.L.D.* 520

The Commissioner previously ruled that the word *should*, as used in *N.J.A.C.* 6:11-3.6, prior to amendment, was mandatory. *Samuel E. Appel v. Board of Education of the City of Camden et al.*, 1975 *S.L.D.* 562. The amended

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version of *N.J.A.C.* 6:11-3.6 and the decision in *Appel* no longer permit the use of unrecognized titles.

In summarizing, the Commissioner determines that petitioner was clearly appointed to a position of school principal and served as such except that the Board changed her title to legitimize its appointment when it learned that its appointment was in violation of the State Board of Education rules. *N.J.A.C.* 6:11-10.4(b) When she became eligible for the principal's certificate in May 1973 she was in all respects a school principal.

For the above stated reasons and those set forth more fully in *Van Wagner, Smith*, and *Jannarone, supra*, the Commissioner adopts the report, findings, conclusions, and recommendations of the hearing examiner as his own.

The Commissioner determines, therefore, that the one year, eleven months and twenty days petitioner served as a principal shall be added to her prior six weeks' service during which she both performed the duties of an assistant principal and held certification of a principal while designated by the Board as "administrative assistant" (May 19 through June 30, 1973). Accordingly, it is further determined that petitioner acquired a tenure status as an assistant principal in the Princeton Regional School District.

COMMISSIONER OF EDUCATION

August 11, 1978

Pending State Board of Education

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In the Matter of the Tenure Hearing of

Maria Concetta Versocki,

School District of the Borough of South Plainfield, Middlesex County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Jacob Green, Esq.

For the Respondent, Fox & Fox (Richard H. Greenstein, Esq., of Counsel)

Charges of conduct unbecoming a teacher and conduct otherwise improper were certified on January 18, 1977, by a majority of the full membership of the South Plainfield Board of Education, hereinafter "Board," against Maria Concetta Versocki, hereinafter "respondent," a tenured teaching staff member in its employ. The complainant Board certified that the charges would be sufficient, if proven true in fact, to warrant respondent's dismissal or reduction in salary pursuant to *N.J.S.A.* 18A:6-10 *et seq*. On January 19, 1977, notice of suspension together with notice of tenure charges and certificate of determination were served on respondent and forwarded to the Commissioner of Education.

A hearing was conducted in this matter on June 28, 29, 30, July 25, 27, September 19, 21, and 30, 1977, at the offices of the Union and Morris County Superintendent of Schools by a hearing examiner appointed by the Commissioner. Numerous exhibits were received in evidence and post-hearing briefing was completed in May, 1978. The report of the hearing examiner follows:

This case went to hearing before the Commissioner primarily as a result of allegations that respondent wrote and either distributed, caused, or permitted to be distributed, at the school in which she taught, unsigned notes calling for a pupil demonstration on May 6, 1976. It is submitted that these charges, if proven to be true, constitute conduct unbecoming a teacher. There are no eyewitnesses to the acts attributed to respondent; rather, the Board relies on its presentation of a circumstantial chain of evidence, tracing the custody of handwritten notes, found in the Middle School, to the Board, and thence to handwriting experts. The opinion testimony of handwriting experts constituted the Board's only evidence directly connecting respondent with the acts charged. As rebuttal, respondent presented her own handwriting experts whose testimony was in complete contrast to and sharp disagreement with testimony of experts retained by the Board. In addition, respondent attacked the first link in the chain of custody evidence presented by the Board in its tracing of the notes.

The uncontroverted testimony of the Board's first witness, the Superin-

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tendent of Schools, reveals the following factual context within which this matter arose: In late April of 1976, the Board, as a result of budget problems and declining enrollments, voted to reduce its professional staff by approximately eighteen teachers. (Tr. I-9, 11) This event precipitated several incidents of pupil and teacher demonstrations aimed at protesting the Board's action. On April 27 or 28, 1976, approximately 15-30 pupils at South Plainfield High School "stayed out" of school. (Tr. I-11) On May 3 and 4, 1976, teachers demonstrated by marching to and from their schools in a body at the beginning and end of each school day. (Tr. I-12) On May 4, teachers wore black arm bands and "Save Our Students" buttons. (Tr. I-4, 12) on May 5, 1976, there was a pupil walkout at the high school (Tr. I-13, 24) on which date fifth and sixth grade pupils at the Franklin School refused to enter the building in the morning. (Tr. I-13, 24) Most pertinent to these proceedings, a pupil "standout" occurred at the Middle School on the morning of May 6, when pupils refused to either enter the building or to report to their classes. (Tr. I-5)

At the Board meetings of May 5 and 6, 1976, two Board members brought in unsigned notes which they alleged had been circulated at the Middle School. (Tr. I-18, 19, 21, 58) Each bore substantially the same message: "Walkout after Homeroom May 6." (P-1-4) The notes were reviewed by the Board (Tr. I-59) and became the subject of Board discussions. (Tr. I-19-20)

At some point during those Board discussions, correspondence purportedly in the handwriting of respondent was compared with the handwriting on the unsigned notes. (Tr. I-21, 51, 62, 74-75; P-6-7) In this regard the Superintendent testified:

> "***There was the discussion at the table concerning the notes. There was also some correspondence that had been written by Mrs. Versocki, at which time, some people drew the observation that the handwriting looks similar and there was a discussion at that particular point about moving to try to ascertain whether or not this, in fact, was Mrs. Versocki's handwriting.***" (Tr. I-19)

The items of correspondence to which the Superintendent referred are Exhibits P-6 and 7, dated May 6 and 4, 1976, respectively. Exhibit P-6 is admitted to be in the handwriting of respondent, who at that time was both president-elect of the South Plainfield Education Association and its chief negotiator. (Tr. I-83)

On May 14, 1976, the Board's counsel was directed to secure a handwriting analysis of the notes in question (P-1-4) in an effort to ascertain whether or not they were written by respondent or some other person. (Tr. I-36) These questioned notes and samples of respondent's handwriting (P-5-6) were forwarded to a handwriting analyst. (Tr. I-68, 81) Exhibit P-7 was not forwarded, although it had been used by the Board for comparison purposes. The report of the handwriting analyst, dated June 11, 1976, stated that P-1-4 and P-5-6 were written by the same individual. (P-8; Tr. I-36) The Board then requested counsel to secure a second opinion. (Tr. I-36) By letter dated August 13, 1976, another

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handwriting report from a different analyst stated that the notes were written by respondent. (P-9)

Because of various pressing matters requiring its attention, several months passed before any further Board action was taken regarding this matter. (Tr. I-105-106) On January 18, 1977, the Board voted to certify tenure charges against respondent to the Commissioner. (Tr. I-115)

Pursuant to the provisions of *N.J.S.A.* 18A:6-10 *et seq.*, the following charges of conduct unbecoming a teacher and conduct otherwise improper were preferred against respondent:

"*CHARGE 1:*

"On or about May 5, 1976, the said Maria Concetta Versocki wrote and either distributed or caused or permitted to be distributed about the Middle School, sixteen (16) notes which urged, counseled, advised and directed students at said school to stage an illegal demonstration in violation of lawful authority and regulations.

"*CHARGE 2:*

"On or about May 5, 1976, the said Maria Concetta Versocki, having responsibilities under the provisions of *N.J.S.A.* 18A:25-2 to prevent students from engaging in, and to hold them accountable for, disorderly conduct in school, did, in violation of her duties and contrary to the provisions of the above statute, urge, counsel, advise and direct students in her school to commit acts of disorderly conduct, to wit: an illegal student demonstration on May 6, 1976, at a time when said students were lawfully required to be in school.

"*CHARGE 3:*

"On or about May 5, 1976, the said Maria Concetta Versocki, knowing full well that students in the public schools are required, by the provisions of *N.J.S.A.* 18A:37-1, to comply with the rules established pursuant to law for the government of such schools, to pursue the prescribed course of study and to submit to the authority of the teachers and others in authority over them, did, nevertheless, in violation of the above statute, urge, counsel, advise and direct students to defy lawfully constituted authority by illegally and improperly staging a walkout without authorization at a time when said students were lawfully required to be in school.

"*CHARGE 4:*

"On or about May 5, 1976, the said Maria Concetta Versocki, in violation of the public trust reposed in her as a public school teacher and in violation of statutes and regulations, did, by means of urging, counseling, advising and directing an illegal student demonstration, wilfully and unjustifiably

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attempt to disrupt and subvert the learning process in the South Plainfield School District and at the Middle School where she was employed.

"*CHARGE 5:*

"On or about May 5, 1976, the said Maria Concetta Versocki did demonstrate extreme disrespect for and contempt of lawfully constituted school authority by urging, counseling and attempting to foment an illegal student demonstration, and did also thereby wilfully deny and interfere with the right and responsibility of the school administration to operate the school system in an efficient and proper manner and to provide a thorough and efficient public education to the students therein."

The Board's first burden of proof in this case centered on establishing that the unsigned notes, P-1-4, were actually found in the Middle School at or near the time of the pupil demonstration on May 6, 1976. The Superintendent testified that he had gathered those notes he received from the Board at its May 6 meeting and placed them in a packet for referral to counsel. (Tr. I-32) Exhibits P-1 through P-4 comprise a total of sixteen notes which, being unsigned, are of such a nature as not to be readily identifiable. All, however, contain substantially the same message and all are approximately the same size. Two members of the Board were called to establish preceding links in the chain of custody of the notes.

Dr. Morton Lehr testified that he brought two notes to the Board meeting of May 5, 1976, and added them to those already being considered by the Board. (Tr. II-47) He stated that he had received them from his son, a pupil at the Middle School. (Tr. II-64) When asked at the hearing if he could identify those two notes he had brought to the Board meeting, from the total of sixteen notes comprising Exhibits P-1-4, he was unable to do so. (Tr. II-48) His son was also unable to identify any of the notes as being those notes he had found in the Middle School and given to his father. (Tr. II-64-65)

John J. Sheehan, Board member, testified that he brought what amounted to a "handful" of notes to the Board meeting on May 5, 1976. (Tr. II-22-24) He stated that he had received the notes from his wife after work on May 5, 1976 (Tr. II-22) and added that

"***as I was sitting at dinner, when I usually go through my mail and my Board envelopes, I had the notes on the kitchen table. I was also leafing through and reading through my mail of that day and when I read through the letter that I have here [Ex. P-7], dated May the 4th, there appeared to be a similarity in some of (sic) letters on this letter and on those notes.***"
(Tr. II-23; See also II-35, 37.)

It must be clarified here that Mr. Sheehan makes no claim of being a handwriting expert. He testified that he brought all of the notes and Exhibit P-7 to the Board meeting that evening, showed them to the Superintendent and other Board members, indicated that he felt there was some similarity in the writings, and asked the Superintendent to investigate. (Tr. II-24)

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Mr. Sheehan testified that, upon being shown the sixteen notes comprising Exhibits P-1-4 at the hearing, he recognized and identified two of the notes (P-2, notes 5 and 6) as included in the handful he had received from his wife on May 5 and brought to the Board meeting that evening. He was able to identify those two notes because of a distinguishing mark which he recognized. (Tr. II-23, 32) He could not, however, specifically identify any of the other notes comprising P-1 through P-4. (Tr. II-38)

Carolyn Sheehan, wife of Board member John Sheehan, who is employed as a secretary in the Middle School, testified that she gave unsigned notes to her husband after work on May 5, 1976 (Tr. II-15, 17) but could not recall the number. (Tr. II-13, 16) Mrs. Sheehan was able to positively identify Exhibit P-2, notes 5, 6, and 7. (Tr. II-13) She further testified that she had received the notes from the matron in the Middle School. Her exact testimony in this regard follows:

Q. "How did you receive these notes?

A. "She [the matron] came into the office during the afternoon. She said she had found these and handed them to me."
(Tr. II-15; See also Tr. II-17.)

Mrs. Sheehan also testified that she showed the notes to the Assistant Principal (Tr. II-15), a remark which he disputed during his testimony. (Tr. VI-4, 8)

The Board's last witness to testify of this chain of events was a matron at the Middle School. She testified that on the day of May 5, 1976 she had seen "***all kinds of paper" in the halls of the Middle School (Tr. V-129) and had read thereon "***something about a walkout after homeroom tomorrow.***" (Tr. V-131) The matron testified that she recalled entering Mrs. Sheehan's office that day, seeing notes on her desk, and conversing with Mrs. Sheehan. (Tr. V-132-133, 143) She testified, however, as follows:

Q. "Now, Mrs. Sheehan testified that you gave her the notes.

A. "As far as I can remember, I did not give her the notes. I don't remember giving her the notes.***" (Tr. V-134)

And

Q. "And you did not bring to Mrs. Sheehan any notes?

A. "I didn't bring any of those notes, no, as far as I could remember.***"
(Tr. V-140)

And

Q. "Is there any question in your mind, to the best of your memory, that you did not give Mrs. Sheehan those notes?

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A. "To the best of my memory, I did not. I don't remember giving her those notes.***" (Tr. V-147)

This testimony cannot be construed to be corroborative of Mrs. Sheehan's description of how she came to be in possession of the notes. Nevertheless, the hearing examiner finds that it does not cast doubt upon the testimony of Mrs. Sheehan. After carefully observing the demeanor and bearing of both witnesses, the hearing examiner finds that the testimony of Mrs. Sheehan is believable and credible wherein she testified that she received the notes from the matron.

At the conclusion of the Board's case, respondent renewed its Motion to Dismiss which had been advanced and denied earlier in the proceedings. (Tr. II-106; Tr. V-151) Respondent alleged that the Board had not met its burden of producing legally sufficient evidence connecting the notes with the Middle School on May 5, 1976. Respondent argued not only that there were gaps in the chain of custody of the notes but also that the Board had not produced credible testimony showing that the notes had either originated at the Middle School, or had in any way influenced the pupils of that school. The hearing examiner again denied this Motion to Dismiss on the ground that, giving all favorable inferences to the Board, a *prima facie* case had been established requiring that respondent proceed with a defense.

The hearing examiner deems it necessary to the proof of the tenure charges that there be sufficient evidence produced to warrant a finding that the notes were found in the Middle School on or about May 5, 1976. In light of the testimony presented tracing the chain of custody of the notes, the hearing examiner concludes that the evidence establishes the following findings of fact:

1. Unsigned notes urging a pupil demonstration were physically present in the Middle School on May 5, 1976.

2. Two of the unsigned notes (P-2, notes 5 and 6) were testimonially traced with sufficient completeness to justify a finding that they were not tampered with or exchanged.

3. Of the notes submitted to the handwriting experts Exhibits P-2, notes 5 and 6 were the original notes physically present in the Middle School on May 5, 1976.

Having produced sufficient evidence to warrant admissibility of two of the notes, the hearing examiner next sets forth a summary of the expert testimony offered by the Board and respondent regarding the central factual issue in this matter of whether respondent wrote those notes.

The Board presented three handwriting experts on its behalf: Daniel Anthony, Florence Anthony, and Renee Martin. Daniel Anthony has worked in the field of handwriting analysis for over forty years (Tr. II-83) and has testified in court as a qualified handwriting expert numerous times. (Tr. II-87) Florence Anthony, qualified and accepted as an expert over objections of respondent, has

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worked professionally in the field of handwriting analysis for fifteen years but had not previously appeared in such proceedings as an expert witness. (Tr. II-104-105) Renee Martin has worked as a handwriting expert for over twenty-five years (Tr. V-95) and has testified as a qualified handwriting expert in all levels of courts. (Tr. V-97)

Daniel Anthony testified of the techniques he used in order to analyze and compare the two questioned notes, Exhibit P-2, notes 5 and 6, in relation to R-1 through 4, which were request notes prepared by respondent. (Tr. VI-139) He stated that:

> "***The basic technique in all document examination is the search and discovery of similarly structured, similarly formed letters and words, but letters and words have to be spaced. They have to be put on a piece of paper. So what *** we utilize in our profession of handwriting expertise is the totality of the positioning and the structure of the spaces as well as the structure of the words and letters themselves.***" (Tr. III-36)

Using the standards, Mr. Anthony, discussing some of the major characteristics of respondent's handwriting, stated that she has a habit of switching back and forth between manuscript, cursive and block lettering and tends to mix connected letters with unconnected letters even within the same word. (Tr. III-42-44) He stated that respondent has a great variability and variety in the forming of her words. (Tr. III-47; V-20) Mr. Anthony averred that, notwithstanding the great many fundamental differences in her writing, respondent can use a decisiveness and a remarkable consistency. (Tr. V-29-36) He testified that there were certain letters, shapes, qualities of stroke, form designs and structures of letters in sufficient number to reach his conclusion beyond a reasonable doubt that respondent was the writer of the questioned notes. (Tr. III-35-37)

At the conclusion of the Board's direct examination, when asked if his opinion was based "simply" on letters that match and are similar, he stated:

> "I think that is one firm basis. Probably the first tenet of questioned document expertise is that, unless you can find letters that are appreciably similar to those questioned letters in questioned notes or questioned handwritings, you don't have a very good case***.
>
> "In this case *** not only do we find those letters in isolation throughout all the rest of her print, script, and cursive writing, but we find them in connected combinations the same way she connects them in her known, admitted writing; ergo, we come to what we call the diagrams of unconscious configuration, which can be done only by her and by nobody else in this world.***" (Tr. V-23-24)

Florence Anthony elaborated on the "diagram of the unconscious" theory which she and her husband share as follows:

> "***Now, actually handwriting is really a misnomer because handwriting

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truly should be called brain writing. Everything that one does emanates from the brain and particularly in handwriting every movement, every contraction, every release which is what all these letters are about, they are either pulling towards you or pushing away from you with a pencil in this case or a pen, these are forming certain patterns which the brain is dictating. (Tr. IV-3)

"[H]andwriting is what we see, the projection of that writer on that page of paper, what we are seeing are what we call these diagrams of the unconscious, and they are made up of letters. They are made up of heights, of breadths, or widths, of all kinds of strokes, and they are made up of space because we are writing on a piece of paper which is spaced.***" (Tr. IV-4)

The Anthonys averred that individuals cannot change consciously the spatial distributions of their writings, which are highly individualized. (Tr. IV-21) They testified that, although one can make writing larger or smaller, the individual will cover similar space no matter what kind of writing is used. (Tr. IV-9)

Florence Anthony used a lightbox, magnifying glass, photographic enlargements and the process of superimposition in comparing the writing on the questioned notes with the standards. (Tr. III-62) She painstakingly measured spaces in millimeters in her process of comparison. (Tr. III-78) Both she and Mr. Anthony carefully compared the writing, letter by letter, word by word. By the technique of superimposition, Mrs. Anthony found what she described as "phenomenal similarities." (Tr. III-86)

The Anthonys' testimony was extremely detailed, pointing out similarities in contours, shapes, forms and spatial arrangements. (Tr. III-55) Mrs. Anthony also pointed out dissimilarities explaining that persons can not write exactly the same way every single time they sit down to write. (Tr. III-58) She averred, however, that the "patterning" remains the same and that individual dissimilarities would not be a factor in her determination. (Tr. III-60, 110)

As a result of her examination of the questioned notes with the notes which served as standards of comparison Mrs. Anthony iterated this opinion:

"***There is a repetition of letters that I mentioned over and over again in *** [the standards]. *** I did use the process of superimposition in doing all of my work and found all of these similarities and congruences, which absolutely convinced me that the writer of the *** [questioned notes] was the same as the one writer of *** [the standards]." (Tr. III-75-76)

In reaching her final conclusion that respondent was the writer of the questioned notes, Mrs. Anthony said:

"***[U]sing the process of superimposition, similarities have occurred in places that can only be the hallmark of one writer.***" (Tr. III-109)

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> "I have proved to myself time and time again in examining questioned notes five and six and comparing them with all 16 request notes [Ex. R-1-4] that no one but the writer of those request notes, Maria Versocki, could possibly have written the questioned notes, number five and number six."
> (Tr. IV-42)

Renee Martin, the Board's third handwriting witness, described her method of analysis in which she places the documents under ten and twenty-power magnification, utilizing direct, high intensity light and examines strokes, letter formation, pressures, rhythms, spacings, proportions, base lines and punctuations. (Tr. V-99) Mrs. Martin corroborated the testimony of the Anthonys by stating that the same person wrote both the questioned and the known documents. (Tr. V-106) She explained the basis of her finding as follows:

> "***First of all, I found the same letter formation somewhere or another all the way along the line. The writing that is considered known on P-5 and P-6 had a wide scope of variation. Now, some people have a very narrow scope of variation, whereby they write every letter virtually the same. This is not the case in this known writing. The writing varied within itself, within a word, more often than not, and it was merely a matter of search to determine, to find formations that were in the questioned documents that matched the known documents, and I found, in every single instance, every single letter formation in the questioned documents that were in the known documents, and every single letter that was in the known documents appeared, in one form or another, in the questioned documents."
> (Tr. V-106-107)

Using Exhibits P-5 and 6, Mrs. Martin then proceeded to point out the areas in which she found the similarities that led to her conclusion: the angle of the writing, the spacing between letters, the combinations of caps and lower case, the T-crossings, the capital M's, the proportion, the printed R's, the connecting strokes and the N's. (Tr. V-106-111) Finding only one basic dissimilarity in the regularity of the stroke, Mrs. Martin enunciated the opinion that respondent wrote all of the known writings, as well as the questioned notes. (Tr. V-111-112)

Respondent presented two expert witnesses on her behalf: Ordway Hilton and Karl Aschaffenburg. Ordway Hilton explained that he is an "examiner of questioned documents, commonly known as a handwriting identification expert." (Tr. VII-25) Mr. Hilton first started in the field in 1938 and has testified as a qualified handwriting expert in a great number of cases over the years in many locales and at various court levels. (Tr. VII-29-31) Karl Aschaffenburg has worked as a handwriting expert for thirty-seven years and has testified in court between 80 and 100 times. (Tr. VIII-2-3)

Ordway Hilton explained that he arrived at his determination by examining a particular writing for "identification characteristics" and then seeking to find those characteristics in the unknown or questioned writing. He looks for similar

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writing habits, including form, skill, shading, interruptions, speed of writing and slant. However, since variation in letters is very important in his identification, he looks with equal diligence for dissimilarities. He emphasized that even when a "***couple dozen points of similarity***" are found, the presence of two or three basic differences indicates "[i]t has to be a different writer***" unless there is some logical explanation such as disguise or illness. (Tr. VII-45-46)

Mr. Hilton's approach was in marked contrast to that utilized by the Board's experts. He rejects superimposition as a valid way of identifying handwriting, except when dealing with a traced forgery. (Tr. VII-80) Rather, he seeks to establish a person's writing habits—how the writing is put together, the movement, the smoothness of the writing and the skill exhibited. (Tr. VII-81, 102) He avers that superimposition concentrates on minute parts of a writing and contends that handwriting should, conversely, be examined as a whole. (Tr. VII-101) Thus, he relies upon a "back and forth" comparison, rather than superimposition. (Tr. VII-100)

Using photographs and charts, Mr. Hilton compared respondent's known writing with the writing on the questioned notes. To Mr. Hilton, differences between writings are much more significant than similarities. He pointed out several basic differences: the M's, A's, Y's, K's (Tr. VII-61-62, 64), the letter sizes (Tr. VII-63), the letter heights (Tr. VII-64), the rounded tops of letters (Tr. VII-65), the irregular pattern (Tr. VII-66), the lack of consistency (Tr. VII-70) and the slant of the writing (Tr. VII-82).

> "***These differences are, in spite of general similarities in some letters, *** important differences because they show that the writing of these two notes gets well beyond the variables that we find in Mrs. Versocki's known writing. There are basic differences in my opinion and establish without a question that she had no part in writing either one of these two notes, numbers 5 and 6 that are part of Exhibit P-2.***" (Tr. VII-66)

Karl Aschaffenburg does not believe differences are controlling. (Tr. VIII-36) Mr. Aschaffenburg testified that the two questioned notes are examples of a completely well-integrated writing: the slant is almost even; the size of the letters is almost even (Tr. VIII-21), the notes are very speedily and spontaneously produced (Tr. VIII-22), the notes are written with great fluency and facility (Tr. VIII-14), the writing has a certain rhythmic quality (Tr. VIII-14) and there was no hesitancy (Tr. VIII-15).

He stated that respondent's handwriting, by contrast, is very uneven, inharmonious and irregular. (Tr. VIII-14) He testified that he perceives it as unusually inconsistent, changing from document to document with variations in slant and connectives. (Tr. VIII-2) It was Mr. Aschaffenburg's opinion that, in order for respondent to have produced these two notes, she would have had to reduce her writing speed considerably. (Tr. VIII-22) As he explained:

"***The one thing that a person cannot do under any conceivable circum-

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stances is to produce a speedy, spontaneous disguised writing that is better integrated than his own mature writing.***'' (Tr. VIII-22)

Mr. Aschaffenburg explained how he determined that the questioned notes were written spontaneously and speedily:

> ''***The speed of writing, of course, is first a matter simply of your impression. You can see whether a writing is halting or fluent, but you have, of course, also a number of signs, direct signs, of speed. For example, the 't's' of 'tomorrow' are linked to the next letter. There are no interruptions. The finals of certain letters like 'r' in 'tomorrow' are somewhat lengthened, as well as pointed, and pointed endings are usually a sign of speed.***
>
> ''Also, there are certain other indications of speed. For example, *** the word, 'out.' [P-2, note 5] You can see the downstroke at the bottom turning a little to the left, which means that the motion toward the T bar is already anticipated by the movement. That also is a sign of fast speed. ***
>
> ''I have also examined these under a microscope to see whether there might be a hesitancy in the trace. That is something one can usually see very well under a microscope. But, the trace, all the points are perfectly smooth, perfectly clear. There is no hesitancy.***'' (Tr. VIII-14-15)

In summary, Mr. Aschaffenburg stated that since he perceived that the two questioned notes were written with such a great speed and spontaneity, that respondent absolutely could not be the writer. (Tr. VIII-71)

In considering the sharply contrasting expert evidence offered, the hearing examiner observes that, from the five experts, several different theories of handwriting analysis emerged. The Anthonys searched for similarly structured letters, words and spatial distributions. Renee Martin sought to match letter formations. Ordway Hilton emphasized the dissimilarities between writings. And, Karl Aschaffenburg believed the speed and spontaneity of the writings was determinative. Each of the experts testified firmly and positively. All patiently withstood the detailed cross-examinations. Nevertheless, the testimony of the Board's expert handwriting witnesses, however sincerely and firmly held their opinions, was effectively rebutted by respondent's competent experts.

Respondent has been charged with conduct unbecoming a teacher, a charge which, if proven true, warrants dismissal or reduction in salary. Having brought such serious charges, it was incumbent upon the Board to not only meet the burden of production of evidence, but also the ultimate burden of persuasion. After careful consideration of the conflicting testimony of competent witnesses, the hearing examiner finds that the Board has not met the burden of persuasion on this issue and has not established by a preponderance of credible evidence that respondent was the author of the questioned notes.

Before concluding this report, the hearing examiner notes that respondent's

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defense to these charges included calling several witnesses who testified of relevant events prior to, and during May 6, 1976. Four teachers at the Middle School (Tr. VI-12, 20, 26, 35) and two members of the Parent Teachers Association (Tr. VI-44, 49) related their impressions of that day. The President of the Student Council (Tr. VI-54) and seven of respondent's pupils also testified. (Tr. VI-58, 61, 66, 70, 73, 82, 87) The cumulative effect of this testimony, by those persons who had close personal contact with respondent, or were in a position to see respondent's activities that day, support the further finding that the Board has failed to prove that respondent either encouraged or abetted the pupil demonstration of May 6, 1976.

The hearing examiner recommends that the Commissioner, in consideration of these findings of fact, determine that the Board has failed in its burden of proof to show that the charges are true. It is recommended that the charges be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner, after a careful review of the record in the instant matter, including the pleadings, documents in evidence, testimony of witnesses, Briefs of counsel, and the hearing examiner report, finds the record fully supportive of the findings of the hearing examiner which are held henceforth as the Commissioner's own. It is noticed that neither party, pursuant to the provisions of *N.J.A.C.* 6:24-1.17(b), has filed exceptions to those findings set forth in the hearing examiner report.

The Commissioner finds no preponderance of credible evidence in support of the Board's charges that respondent was the author of the controverted notes, that she caused those or other unsigned notes to be written or that she abetted their distribution to pupils. Therefore, the Board has failed in its burden of proving the truth of those charges.

Respondent's Motion to Dismiss the charges, advanced on the second day of hearing and renewed at the close of the Board's case, has been held in abeyance for disposition of the Commissioner. (Tr. II-109; Tr. III-3-4; Tr. V-151, 156-159) Absent proof of the truth of those charges the Motion to Dismiss is granted. Accordingly, the Board is directed to reinstate Maria Versocki to her teaching position, forthwith, together with all salary and attendant benefits which she otherwise would have received had she not been suspended from her teaching position without pay pending the determination of the truth of those charges of unbecoming conduct which the Board certified against her.

COMMISSIONER OF EDUCATION

August 11, 1978

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In the Matter of the Tenure Hearing of David Earl Humphreys, School District of the Township of Pennsville, Salem County.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Complainant Board, Bernstein & Epstein (Willard Bernstein, Esq., of Counsel)

For the Respondent, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

Respondent is a teacher with a tenure status employed by the Pennsville Board of Education, hereinafter "Board." Charges were filed against him by the Superintendent of Schools and thereafter certified to the Commissioner of Education pursuant to the Tenure Employees Hearing Act (*N.J.S.A.* 18A:6-10 *et seq.*) by resolution of the Board dated November 23, 1976. Respondent was suspended without pay pending a determination of the charges which the Board avers will be sufficient, if true in fact, to warrant dismissal or reduction in salary.

The Statement of Charges in pertinent part follows:

> "***1. The said David Earl Humphreys has been guilty of conduct unbecoming a teacher in violation of *N.J.S.* 18A:6-11 in that on November 13, 1976 he was arrested and charged by the Pennsville Township Police Department for possession of controlled dangerous substances, to wit: marijuana in an amount greater than 25 grams and hashish in an amount greater than 5 grams in violation of *N.J.S.A.* 24:21-20a4, both of which charges, if proven, constitute indictable criminal offenses.
>
> "2. Annexed hereto and made a part hereof is a copy of the complaint setting forth the criminal charges which have been filed against him by the Pennsville Township Police Department.***"

Oral argument on respondent's Motion to Dismiss was heard at the State Department of Education, Trenton, on February 9, 1977, and is presently before the Commissioner for adjudication based on the pleadings, exhibits and transcript.

Respondent in his argument to dismiss the charges filed against him without prejudice to recertification by the Board at an appropriate time, relies on *In the Matter of the Tenure Hearing of William Megnin, School District of the Township of Wayne, Passaic County*, 1973 *S.L.D.* 641 arguing that the matter presently before the Commissioner is in the exact same posture as in *Megnin*. Therefore, respondent avers, he should not be required to produce a defense before the

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Commissioner but, as in *Megnin*, the criminal process should be allowed to run its appropriate course and, if guilt is shown, that would be the proper time for the Board to certify charges against him. (Tr. 5-7)

The Board in reply cites *In the Matter of the Tenure Hearing of Wesley L. Myers, School District of Gloucester City, Camden County*, 1976 *S.L.D.* 1024 and argues that the Commissioner should act independently of other branches of the government relying on the reasoning expressed in *Myers* that a unique position of trust and eminence is held by teachers within the community. The Board argues further that harm may be done to the pupil-teacher relationship in this small town confronted with an alleged drug problem which could well result in lack of parental confidence in the schools of the community. (Tr. 16-17)

The Commissioner agrees. The problem of the possession of drugs and the possible attendant use of such drugs is one of the great problems facing today's society. Parents must be assured that all professional school employees to whom they entrust the care and education of their children shall rise above the possible taint of drug possession or usage.

The Board has expressed great concern in having the teacher in contact with pupils in the classroom. In the instant matter the case has not been judged in criminal court, respondent has been suspended without pay, and time has tolled whereby the Board, as required by *N.J.S.A.* 18A:6-14, has resumed payment of salary on the 121st day.

For the aforestated reasons the Commissioner finds and determines that respondent's argument to dismiss is without merit and is accordingly denied. The Commissioner retains jurisdiction in this matter pending a determination made by a court of proper jurisdiction of the charges filed against respondent by the Pennsville Township Police Department.

COMMISSIONER OF EDUCATION

July 11, 1977

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COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Jordan and Jordan (John D. Jordan, Esq., of Counsel)

For the Respondent, Joel S. Selikoff, Esq. (Steven R. Cohen, Esq., of Counsel)

Respondent is a teacher with a tenure status employed by the Pennsville Board of Education, hereinafter "Board." Charges were filed against him by the Superintendent of Schools and thereafter certified to the Commissioner of Education pursuant to the Tenure Employees Hearing Act (*N.J.S.A.* 18A:6-10 *et seq.*) by resolution of the Board dated November 23, 1976. Respondent was suspended without pay pending a determination of the charges which the Board avers will be sufficient, if true in fact, to warrant dismissal or reduction in salary.

The Statement of Charges in pertinent part follows:

> "***1. The said David Earl Humphreys has been guilty of conduct unbecoming a teacher in violation of *N.J.S.* 18A:6-11 in that on November 13, 1976 he was arrested and charged by the Pennsville Township Police Department for possession of controlled dangerous substances, to wit: marijuana in an amount greater than 25 grams and hashish in an amount greater than 5 grams in violation of *N.J.S.A.* 24:21-20a4, both of which charges, if proven, constitute indictable criminal offenses.
>
> "2. Annexed hereto and made a part hereof is a copy of the complaint setting forth the criminal charges which have been filed against him by the Pennsville Township Police Department.***"

Oral argument on respondent's Motion to Dismiss was heard at the State Department of Education, Trenton, on February 9, 1977. In his Decision on Motion of July 11, 1977, the Commissioner said:

> "***The problem of the possession of drugs and the possible attendant use of such drugs is one of the great problems facing today's society. Parents must be assured that all professional school employees to whom they entrust the care and education of their children shall rise above the possible taint of drug possession or usage.
>
> "The Board has expressed great concern in having the teacher in contact with pupils in the classroom. In the instant matter the case has not been judged in criminal court, respondent has been suspended without pay, and

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time has tolled whereby the Board, as required by *N.J.S.A.* 18A:6-14, has resumed payment of salary on the 121st day.

"For the aforestated reasons the Commissioner finds and determines that respondent's argument to dismiss is without merit and is accordingly denied. The Commissioner retains jurisdiction in this matter pending a determination made by a court of proper jurisdiction of the charges filed against respondent by the Pennsville Township Police Department."

Subsequently, respondent filed a Motion for reconsideration of the aforementioned Commissioner's decision. The Board filed a Motion for consolidation of the matters charged in Indictment I-19-77-S handed down by the Salem County Grand Jury with those tenure charges already under consideration by the Commissioner. Oral argument on both Motions was heard at the State Department of Education, Trenton, on May 30, 1978. The matter is presently before the Commissioner for determination based upon the pleadings, exhibits, transcript and Briefs as submitted.

Respondent argues that invocation of the provisions of *N.J.S.A.* 18A:6-11 violates the constitutional rights of a teacher who is the subject of a tenure charge which has an arrest and the truth or falsity of criminal allegations as its basis. Respondent cites *Joseph C. Ott v. Board of Education of the Township of Hamilton*, 160 *N.J. Super.* 333 (*App. Div.* 1978). (Respondent's Brief in Support of Motion for Reconsideration, at pp. 7-8) The Commissioner notices that a decision was also rendered in *Ott* by the Superior Court, Appellate Division (Docket No. A-1386-77) on July 6, 1978 which held that respondent was not entitled to immunity on federal constitutional grounds because there exists no compulsion for him to submit a statement in response to a tenure charge, nor is there an automatic penalty of dismissal for failure to do so. The Court decided the *Ott* matter by devising an equitable solution to the dilemma faced by him, namely, the potential prejudice of foregoing his defense of the administrative tenure charge or risking self-incrimination in the criminal charge, which were virtually identical. The Court determined that under such circumstances a restraint of the tenure proceedings was warranted and within its equitable power. Nevertheless, the Court pointed out that since Ott applied for the restraint of the tenure proceedings for his own purposes and protection, he was not entitled to payment of his salary after 120 days. The Commissioner concludes that under such circumstances the delay caused by a respondent would be added to the 120 days set forth in *N.J.S.A.* 18A:6-14 in determining when the payment of salary would resume.

Respondent argues further that to grant the Board's Motion for consolidation of charges would deprive him of procedural due process as provided by *N.J.S.A.* 18A:6-11. (Respondent's Brief in Opposition to Motion for Consolidation, at p. 2)

The Board contends that *Ott, supra*, is inapposite to the present matter. (Board's Brief in Opposition to Motion for Reconsideration, at p. 2) In support of its Motion for Consolidation of Charges, the Board argues that in an admin-

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istrative, civil proceeding the quantum of proof is substantially different than in a criminal proceeding, citing *In re Darcy*, 114 *N.J. Super.* 454 (*App. Div.* 1971). (Board's Supplemental Brief, at p. 2)

The Commissioner observes that subsequent to the oral argument of May 30, 1978 on the two Motions, certain events transpired which changed the posture of the instant matter. Respondent appeared before the New Jersey Superior Court, Salem County Criminal Law Division, Indictment No. 18-77-S S.B.I. No. 775905 where he retracted a previous plea of not guilty and entered a plea of guilty to the possession of a controlled dangerous substance. *N.J.S.A.* 24:21-20(a.4) This sentence by the Honorable Norman Telsey, Judge of the Salem County Criminal Court, is summarized as follows:

> "***It is, therefore, on June 23, 1978, Ordered and Adjudged that the defendant be and is sentenced to the Salem County Jail for six months thirty days to serve, balance suspended, one year probation, fine $200.00***."

The Commissioner views with favor the statement of reasons of Judge Norman Telsey re *R.*3:21-4(e) wherein he said, *inter alia*:

> "***[W]e are in the midst of a sociological crisis. We have an unusual amount of crimes committed today. It has been increased dramatically just over the past few years and among the many crimes being committed are crimes involving drugs, particularly among the younger generation. Many crimes have been committed either as the result of drug useage or have been motivated by the need for funds to make drug purchases. I believe that one of the reasons that the younger people are flaunting laws today is because they do look to their elders for an example and when their elders or people in authority don't set the proper example, in my judgment, this does create a serious and sometimes deleterious effect upon the minds of the younger people. I believe that one who is vested with a public trust to teach has an opportunity and does mold the minds of his pupils, not only through the teaching of the academic curriculum but for the example he sets in his lifestyle. *** [I]t appears to me that it is the duty of everyone, particularly those who set examples, to uphold the laws while they presently exist. I find that you did not—not only failed to uphold it but you openly flaunted it. I believe that this can have a very serious effect upon the pupils whose minds you help mold and who look to you to set an example. It could encourage your pupils to do likewise.***"

The Commissioner has addressed himself to a similar matter in his prior determination *In the Matter of the Tenure Hearing of Wesley L. Myers, School District of Gloucester City*, 1976 *S.L.D.* 1024 as follows:

> "***[T]he Commissioner is constrained to observe that the conviction of a criminal offense is admissible evidence toward a tenure charge.***"
> (at 1027)

Teachers are public employees who hold positions demanding public trust

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and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.

In making a determination in the instant matter, the Commissioner must consider not only the effect of his decision on respondent, but on the pupils, their parents, other teaching staff members, and the community at large.

The conviction and sentencing of a teacher to jail for criminal offense is sufficient reason for a finding of unbecoming conduct and the teacher's subsequent dismissal from his position. *In the Matter of the Tenure Hearing of Raymond Exum, School District of the City of East Orange*, 1971 *S.L.D.* 259; *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson*, 1974 *S.L.D.* 97; *In the Matter of the Tenure Hearing of Alex Smollok, Passaic County Technical and Vocational Board*, 1976 *S.L.D.* 361; *In the Matter of the Tenure Hearing of Mims Hackett, School District of Union City, Hudson County*, 1978 *S.L.D.* (decided February 22, 1978); *Myers, supra*

The Commissioner has consistently pointed out that those who enter the teaching profession have a significant influence upon those they teach and, therefore, should exhibit exemplary behavior. The Commissioner stated *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 *S.L.D.* 302 as follows:

> "***Of***concern to the Commissioner is the situation where the teacher, who should set the good example, assumes that some higher right justifies activities, which are inimical to the public interest and which are designed to impede the orderly process of public education.***He is constrained to remind the teachers of this State, however, that they are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.***"
>
> (at 321)

The Commissioner determines that respondent has not continued to serve and exhibit "good behavior" as described in *N.J.S.A.* 18A:28-5 which reads in part as follows:

"The services of all teaching staff members including all teachers *** shall

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be under tenure during good behavior *** and they shall not be dismissed *** except for *** conduct unbecoming such a teaching staff member or other just cause ***.''

Additionally, the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10, reads in pertinent part as follows:

''No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior *** in the public school system of the state *** except for *** unbecoming conduct, or other just cause***.''

The Commissioner determines, therefore, that respondent's plea of guilty, conviction and sentence are sufficient proof that his behavior represents conduct unbecoming a teacher.

The Commissioner finds also that the construction of *N.J.S.A.* 2A:135-9 is applicable in the instant matter. That statute reads as follows:

''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 higher 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.

''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.''

The Commissioner observes that teaching staff members are not the holders of a public ''office'' within the meaning of *N.J.S.A.* 2A:135-9, in view of the fact that they exercise no governmental powers. The mere attainment of a tenure status does not convert the employment of a teaching staff member into a public office. *Thorp v. Board of Trustees of Schools for Industrial Education*, 6 *N.J.* 498 (1951), vacated as moot 342 *U.S.* 803 (1951) A teaching staff member's duties are, however, of sufficient certainty and permanency to make him the holder of a public ''position'' within the meaning of *N.J.S.A.* 2A:135-9. Accordingly, when a teaching staff member 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 position, or which involves moral turpitude, the Commissioner will not grant a hearing pursuant to *N.J.S.A.* 18A:6-10 *et seq*. Under such circumstances the teaching staff member automatically forfeits his position by operation of law. *N.J.S.A.* 2A:135-9 *Romanowski v. Board of Education of the City of Jersey City*, 89 *N.J. Super.* 38 (*App. Div.* 1965)

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In his determination of *In the Matter of the Tenure Hearing of Emil J. Guasconi, School District of the Town of West New York, Husdon County*, 1977 *S.L.D.* 513, affirmed State Board 517, the Commissioner pointed out that respondent, a business manager with a tenure status, pleaded guilty to one count of a criminal indictment charging him with falsification of a United States income tax return. The Hudson County Prosecutor's Office reported the matter to the Office of the Attorney General, stating its position that such an offense was within the ambit of *N.J.S.A.* 2A:135-9. Subsequently, the Office of the Attorney General addressed a letter to the Board of Education of the Town of West New York advising the Board that Mr. Guasconi's position was to be forfeited and that the Board had no discretion to disregard the mandate of the statutory provision. The West New York Board then filed tenure charges against Mr. Guasconi, although it was under no obligation to take such action. The Commissioner held that respondent therein was not entitled to a tenure hearing and was required to forfeit his tenured position by the operation of law as the Attorney General's letter to the Board had clearly stated.

In this instance respondent has entered a guilty plea to a crime encompassed by *N.J.S.A.* 2A:135-9, and is required to forfeit his position as a teaching staff member as of the date of his entry of plea. It is so ordered.

COMMISSIONER OF EDUCATION

August 11, 1978

In the Matter of the Tenure Hearing of Kathy Windsor, School District of the Township of Washington, Gloucester County.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Complainant Board, Hyland, Davis & Reberkenny (William D. Hogan, Esq., of Counsel)

For the Respondent, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

Charges that Kathy Windsor, a teacher under tenure, hereinafter "respondent," demonstrated conduct unbecoming a teacher were certified to the Commissioner of Education by the Board of Education of the Township of Washington, Gloucester County, hereinafter "Board," by resolution of the Board adopted at a regular meeting held on March 16, 1976. The Board certified that the charges would be sufficient, if true in fact, to warrant dismissal of

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respondent. The Board at this meeting suspended respondent without pay. Respondent moved for dismissal of charges on March 19, 1976 to which the Board responded on April 19, 1976. Additionally, respondent answered the initial certification of charges by letter dated May 17, 1976.

A conference of counsel was held on July 9, 1976 at the State Department of Education, Trenton, and a thirty day period for discovery was established contingent upon the availability of personnel.

Pursuant to the provisions of *N.J.S.A.* 18A:6-14, respondent is entitled to be restored to full salary commencing on the 121st day after the certification of such charges by the Board. The 121st day would coincide with the commencement of the 1976-77 school year. (Board's Brief, at p. 2)

On September 14, 1976, at a special meeting, the Board adopted a resolution restoring respondent to full salary with the commencement of the 1976-77 school year and lifting her suspension, pending a determination of the charges by the Commissioner, provided respondent returned to work immediately to perform such professional duties of a teacher as assigned by the administrative staff. (Board's Brief, at p. 2)

Respondent, on advice of counsel, refused to return to work and the Board did not resume salary payments to her.

On September 16, 1976, respondent appealed to the Commissioner to direct the Board to resume salary payments to her as of the first pay day of the 1976-77 school year (September 15, 1976) by placing her on the proper level of the 1976-77 teachers' salary guide with accompanying emoluments. (Respondent's Motion, at p. 1)

Oral argument was heard on October 26, 1976 on the narrow issue of the resumption of salary payments to respondent on the 121st day of suspension conditioned by the Board's requirement that she return to work and her refusal to do so.

Respondent argues that she has the right, under the law, to salary as of the 121st day, free of the condition that she resume full-time teaching duties. She further contends that full salary should include all insurance, medical and hospitalization benefits. (Tr. 3-4) She relies on *In the Matter of the Tenure Hearing of Dale Miller, School District of the Borough of Manville, Somerset County*, 1973 *S.L.D.* 409 and *In the Matter of the Tenure Hearing of Carmine F. Perrapato, School District of the City of Garfield, Bergen County*, 1974 *S.L.D.* 525. (Tr. 28-29) She contends that suspension without pay becomes suspension with pay on the 121st day by the clear language of the statute, and that status continues until the Commissioner reaches his final determination. (Tr. 7-8)

The Board asserts that the Legislature never intended that the restoration of salary be a gift or a waste of public funds. (Tr. 17) The Board contends that it has a legal right to condition the restoration of respondent's salary, as of the

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121st day, on her return to work and earning that salary. (Tr. 18) The Board states that what respondent has done is serious and justifies the termination of her employment based upon what the Board alleges is a use of five paid sick leave days when respondent, in fact, was not sick but was rather on a vacation in the Caribbean. (Tr. 16)

The Board asserts the charge is not something of such outrageous public nature that having her back in the school is going to create harm either to the teaching staff or pupils. The charge is not of a heinous nature. (Tr. 55-56)

Additionally, the Board argues that the two Commissioner's decisions, *In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville. Middlesex County*, 1973 *S.L.D.* 157 and *In the Matter of the Tenure Hearing of James C. MacDonald, School District of Middle Township, Cape May County*, 1973 *S.L.D.* 287, have no validity because the determinations, made subsequent to the amendment to *N.J.S.A.* 18A:6-14 (effective February 10, 1972), were based on the statutory language prior to the amendment. These decisions refer to the phrase "pending final determination of the same" which was deleted by amendatory language. (Tr. 22-23) The Board disavows the propriety and dictum of the Commissioner's decisions. *Miller, supra; Perrapato, supra* (Tr. 28-29)

The Commissioner finds the Board's argument to be without merit.

The Commissioner's determinations in *Miller, supra*, are pertinent to the instant matter and are set down below:

> "***The amendment of *N.J.S.A.* 18A:6-14 by *L.* 1971, *c.*435, §2, effective February 10, 1972, removed the words '***pending final determination of the same [charges], and if the charge is dismissed, the person shall be reinstated immediately with full pay as of the time of such suspension.' The purpose of this removal can be clearly seen when the present wording of the statute is read in its entirety as follows:
>
> > 'Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing

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or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.'

"The amendment of *N.J.S.A.* 18A:6-14 added a provision for the payment of full salary after 120 calendar days following the certification of the charges to the Commissioner, providing the determination has not been made after the passage of said 120 calendar days. The person charged, under these circumstances, still does not receive the full salary for said 120 days, pending a final determination by the Commissioner in his favor, or pending a final appeal in his favor from an adverse determination. The statute also makes provision for the mitigation of any earnings '***from any substituted employment assumed during such period of suspension.***' In sum, the thrust of the statute as amended, provides that any tenured employee against whom charges are certified may be deprived of only full salary for a total of 120 days, regardless of the length of time of his suspension, pending determination of the original hearing or an appeal therefrom. Therefore, the removal from and amendment to *N.J.S.A.* 18A:6-14 by *L.*1971, *c.*435, §2 did not empower local boards to set the length of time of the period of suspension with or without pay, and the Commissioner so holds. The suspension without pay will in every instance run for at least 120 calendar days if the matter is not decided, or if the charges are not withdrawn during that time. On the 121st day, full salary will be resumed for the suspended employee. *N.J.S.A.* 18A:6-14 In the judgment of the Commissioner, this construction of the statute is reasonable and comports with the true intent of the law.***" (1973 *S.L.D.*, at 412-413)

Further, the intent of *N.J.S.A.* 18A:6-14 is clearly enunciated *In the Matter of the Tenure Hearing of Paula M. Grossman, a/k/a Paul M. Grossman, School District of the Township of Bernards*, 127 *N.J. Super.* 13 (*App. Div.* 1974), *cert.* denied 65 *N.J.* 292 (1974), wherein the Court stated:

"***It seems clear that in enacting it [*N.J.S.A.* 18A:6-14] the Legislature must have had in mind the economic hardship endured by teachers and other board of education employees suspended without pay pending the outcome of charges filed against them and certified for hearing to the Commissioner of Education. We are certain, moreover, of the Legislature's awareness that in many instances, because of the volume of matters awaiting hearing, a prompt disposition of charges is not feasible. Thus, the obvious intent and purpose of the amendment was to alleviate the financial plight of those affected by providing for the payment of their full salary (less sums received from other employment during suspension) from the 121st day following the certification of charges until the determination thereof by the Commissioner, or in the case of an appeal by a board from a decision adverse to it, until the determination of the appeal.***"

(127 *N.J. Super.* at 35-36)

The Board questions legislative intent in making pay on the 121st day a gift or waste of public funds. The Commissioner opines that neither of these

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alternatives was intended by the amendment of *N.J.S.A.* 18A:6-14. Rather, the language of the Court is clear, unambiguous and definitive in *Grossman* wherein it is stated:

> "***Thus, the obvious intent and purpose of the amendment was to alleviate the financial plight of those affected***." (*Id.* at 36)

The Board errs in its contention that it has a legal right to condition the restoration of respondent's salary as of the 121st day, on her return to work and earning her salary.

The Commissioner opines that this argument clearly ignores a primary discretion conferred on boards by statutory prescription; namely, whether at the time of certification of charges against a teaching staff member that individual is to be suspended at all from the performance of duties. The statute *N.J.S.A.* 18A:6-14, as amended, reads in its entirety as follows:

> "Upon certification of any charge to the commissioner, *the board may suspend* the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day *until such determination is made*. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension."
>
> (*Emphasis supplied.*)

Such suspension is clearly discretionary since the statute states the Board "may" suspend, and it does not preclude a decision to certify charges without a suspension. If this latter course is pursued, the Board has exercised discretionary judgment that the charges certified against the teaching staff member are not of such severe nature as to warrant exclusion from the school system. The teaching staff member continues productive employment and the Board is not required to pay dual salaries.

Such holdings applied to the instant matter cause the Commissioner to recite the following facts:

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Upon certification of any charge to the Commissioner:

1. A board may continue the employment of the person against whom such charges have been made until the determination of the charge by the Commissioner.

2. A board may suspend with pay until the determination of the charge by the Commissioner.

3. A board may suspend without pay with probable immediate financial benefit to the board, for a period of 120 days, at which time salary must resume by statutory prescription on the 121st day.

It is this latter alternative to which the Commissioner now turns his attention. The Commissioner is not insensitive to the pleadings of the Board that provision must be made to obviate and minimize the expenditure of tax moneys where such expenditure is made without the recompense of productive effort.

The Commissioner determines that an ameliorative intervention may be made on or before the 121st day of any undetermined certification of charges where the employee has been suspended without pay. Either the Board or the teaching staff member against whom charges have been certified may apply to the Commissioner for his consideration of the restoration of the suspended member to employment on the 121st day until the determination of the charges by the Commissioner. The Commissioner shall make such a decision based on the merits, pleadings, facts, and circumstances surrounding each such certification of charges so that the ends of justice may best be served for all concerned. If the Commissioner determines that interim restoration to active employment is appropriate and desirable under the specific circumstances of the individual case, such restoration shall be within the field of certification held by the member and shall consist of such duties as might be expected to be performed by other Board employees similarly situated.

In the instant matter the Commissioner directs the Board to award respondent, beginning on the 121st day after the certification of charges, her full salary and emoluments less any sum received by her by way of pay or salary from any substitute employment assumed after the initial 120 calendar days. Respondent is hereby reinstated and is accordingly directed to report to the administration for assignment of duties. The Commissioner directs that a full plenary hearing on the charges be held as expeditiously as possible.

COMMISSIONER OF EDUCATION

January 11, 1977

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STATE BOARD OF EDUCATION

DECISION

Decision on Motion by the Commissioner of Education, January 11, 1977

For the Complainant-Appellant, Hyland, Davis & Reberkenny (William D. Hogan, Esq., of Counsel)

For the Respondent-Cross Appellant, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

We affirm the decision of the Commissioner of Education for the reasons expressed therein. However, we clarify the decision of the Commissioner by holding that the ameliorative intervention may be made on or before the 121st day. We recognize that this modifies *In the Matter of the Tenure Hearing of Dale Miller, School District of the Borough of Manville, Somerset County*, 1973 *S.L.D.* 409, 413, aff'd State Board of Education 1974 *S.L.D.* 1412, which states:

> "***The suspension without pay will be (sic) in every instance run for at least 120 calendar days if the matter is not decided, or if the charges are not withdrawn during that time.***"

We feel that in the best interests of both parties in tenure hearings, either party should be allowed to petition for reinstatement at any time during the suspension.

Mr. David Brandt took no part in the decision of this case.

May 4, 1977

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Hyland, Davis & Reberkenny (William D. Hogan, Esq., of Counsel)

For the Respondent, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

Charges that Kathy Windsor, a teacher under tenure, hereinafter "respondent," demonstrated conduct unbecoming a teacher by the misuse of sick leave were certified to the Commissioner of Education by the Board of Education of

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the Township of Washington, hereinafter "Board," by resolution adopted at a regular meeting held March 16, 1976. The Board certified that the charges would be sufficient, if true in fact, to warrant dismissal of respondent and, at that meeting, suspended respondent without pay. Respondent moved for dismissal of charges on March 19, 1976 to which the Board responded on April 19, 1976. Additionally, respondent answered the initial certification of charges by letter dated May 17, 1976.

It is an uncontroverted fact that respondent was absent from the school district on January 5, 6, 7, 8 and 9, 1976, days in which school was in session, and claimed illness as a reason for the absence. The Board denied respondent's entitlement to the use of sick leave and deducted five days' pay from her salary.

On July 26, 1976, respondent filed an amended Petition of Appeal contesting the Board's deduction of five days' pay from her salary and further claiming an additional sum of $180.56 in salary payment.

On September 14, 1976, at a special meeting, the Board adopted a resolution restoring respondent to full salary with the commencement of the 1976-77 school year and lifting her suspension, pending a determination of the charges by the Commissioner, provided respondent returned immediately to perform such professional duties of a teacher as assigned by the administrative staff. Respondent, on advice of counsel, refused to return to duty and the Board did not resume salary payments to her.

On September 16, 1976, respondent appealed to the Commissioner to direct the Board to resume salary payments to her as of the first pay day of the 1976-77 academic year (September 15, 1976) by placing her on the proper level of the 1976-77 teachers' salary guide with accompanying emoluments. Oral argument was heard on October 26, 1976 on the narrow issue of the resumption of salary payments to respondent on the 121st day of suspension conditioned by the Board's requirement that she return to duty and her refusal to do so.

In this matter the Commissioner rendered a decision on Motion on January 11, 1977 in which he said:

> "***The Commissioner determines that an ameliorative intervention may be made on or before the 121st day of any undetermined certification of charges where the employee has been suspended without pay. Either the Board or the teaching staff member against whom charges have been certified may apply to the Commissioner for his consideration of the restoration of the suspended member to employment on the 121st day until the determination of the charges by the Commissioner. The Commissioner shall make such a decision based on the merits, pleadings, facts, and circumstances surrounding each such certification of charges so that the ends of justice may best be served for all concerned. If the Commissioner determines that interim restoration to active employment is appropriate and desirable under the specific circumstances of the individual case, such restoration shall be within the field of certification held by the member and shall consist

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of such duties as might be expected to be performed by other Board employees similarly situated.

"In the instant matter the Commissioner directs the Board to award respondent, beginning on the 121st day after the certification of charges, her full salary and emoluments less any sum received by her by way of pay or salary from any substitute employment assumed after the initial 120 calendar days. Respondent is hereby reinstated and is accordingly directed to report to the administration for assignment of duties. The Commissioner directs that a full plenary hearing on the charges be held as expeditiously as possible."

On appeal to the State Board of Education this decision was affirmed on May 4, 1977 as follows:

"We affirm the decision of the Commissioner of Education for the reasons expressed therein. However, we clarify the decision of the Commissioner by holding that the ameliorative intervention may be made on or before the 121st day. We recognize that this modifies *In the Matter of the Tenure Hearing of Dale Miller, School District of the Borough of Manville, Somerset County*, 1973 *S.L.D.* 409, 413, affd. State Board of Education, 1974 *S.L.D.* 1412, which states:

> '***The suspension without pay will *** in every instance run for at least 120 calendar days if the matter is not decided, or if the charges are not withdrawn during that time.***'

"We feel that in the best interests of both parties in tenure hearings, either party should be allowed to petition for reinstatement at any time during the suspension."

Respondent was restored to duty on January 24, 1977 and protested her assignment by an Order to Show Cause on February 15, 1977. By agreement of the parties this matter is included in the tenure hearing and is presented to the Commissioner for adjudication based on the pleadings, exhibits, and Briefs as submitted. Subsequently, hearings on the tenure charges were held in the office of the Gloucester County Superintendent of Schools on January 20 and 21, February 22, and April 13, 1977. The report of the hearing examiner follows:

A single charge was filed with the Board against respondent by the Acting Superintendent of Schools as follows:

"Kathy Windsor, a tenured teacher at the Washington Township High School, is hereby charged by me with conduct unbecoming a teacher and other just cause warranting her dismissal from her position or other penalty in that she falsely claimed five paid sick days for a period when she was in fact vacationing."

Respondent's claim of illness as a reason for the absence is denied by the

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Board which alleges that respondent was not absent because of illness but rather was on a brief vacation and offers a document purporting to be an admission of guilt signed by her at a meeting on February 27, 1976, with three members of the administrative staff, the Acting Superintendent of Schools, the Assistant Superintendent of Schools and the Principal of Washington Township High School and a representative of the Washington Township Education Association, hereinafter "Association." (P-3) This document states in pertinent part that:

> "***During the meeting, Miss Windsor admitted having misused sick leave in order to take a brief vacation.***"

On March 2, 1976 the Acting Superintendent met with the Board to report on the Windsor matter. The Board concurred in his recommendation to deduct five days' pay from her salary and to certify charges against her. (Tr. I-49-50) On March 3, 1976, the Acting Superintendent and two other members of the administration and several representatives of the Association met with respondent to inform her of the salary deduction and of her suspension with pay pending a hearing before the Board on March 16, 1976. (P-4; Tr. I-50-52)

The Board provided respondent with a copy of the written charge on March 5, 1976 and solicited a written statement of position prior to her meeting with the Board. (P-6) Respondent submitted such a statement under date of March 15, 1976. (P-7) Subsequent to her meeting with the Board on March 16, 1976, she was suspended without pay effective March 17, 1976 and written charges were certified to the Commissioner pursuant to *N.J.S.A.* 18A:6-11. (P-8)

The Acting Superintendent testified that he called respondent to the meeting with administrators on February 27, 1976 without prior notice because he did not think it was required. (Tr. I-25-26) He testified further that he or his assistant insisted on the presence of a representative from the Association prior to informing respondent of an allegation that could have some serious effect on her. (Tr. I-27-28) He testified further that while waiting for the Association representative, he observed that respondent was curious about the allegation and relatively calm. (Tr. I-31) He testified that following the appearance of the Association representative, a discussion was held concerning the allegation of the improper use of sick leave by respondent culminating in the preparation of a statement by the representative which respondent signed. (P-3) The Acting Superintendent testified further that during the meeting there was no indication from respondent of reasons for her illness or that she had taken the trip for health reasons. (Tr. I-35)

Respondent testified that she had health problems prior to Christmas vacation, including a mouth infection (Tr. II-129), a vaginal problem (Tr. II-130), and vision trouble. (Tr. I-132) She testified that, even had she not taken a trip, she would not have been able to perform her teaching duties. (Tr. III-17) When asked why she cancelled on Wednesday arrangements made on Tuesday for a substitute teacher respondent testified that "***the trip had been called off." (Tr. III-21) She testified that she could have waited until later in the week to

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ask for a substitute but contacted again the substitute secretary because "Miss O'Halloran called me and said the trip was back on." (Tr. III-23)

Miss O'Halloran, an employee of a travel agency and former teaching friend of respondent, testified that the trip was to Curacao and was totally *gratis* to her and respondent. Miss O'Halloran testified that while on the trip she and respondent were virtually always together, that respondent was very quiet, that they found the trip very restful and they engaged in no physical activity at all. (Tr. II-153-156)

Respondent further testified that during the meeting with the administration no one asked about her illness or requested corroboration in the form of a doctor's certificate. When asked if she had attempted to secure a physician's certificate from any one of the three physicians she had consulted because of her health problems she testified that the two physicians she had asked had refused such a request. (Tr. III-153) Respondent testified that during her meeting she was nervous, frightened and too afraid and upset to say anything on her own behalf. When asked if the administrators prevented her from changing her written statement she answered in the negative. (Tr. III-122) Respondent testified that upon leaving the office she told the representative she did not agree with the statement but had been too afraid and upset to say anything. (Tr. II-164)

The representative from the Association, who is a tenure teacher in the employ of the Board, testified that she heard the Assistant Superintendent make a statement about malicious lies during the course of the meeting. (Tr. IV-70) She testified further that she wrote the statement (P-3, *ante*), alleging respondent's misuse of sick leave to take a vacation (Tr. IV-80) and that respondent had an opportunity to review the statement before it was shown to the administrators. (Tr. IV-115)

The Assistant Superintendent testified that at the meeting with respondent the Acting Superintendent "***was very cautious to point out that he did not want to tell [respondent] what the charges were until she had a witness***." (Tr. I-125) The Assistant Superintendent characterized respondent's demeanor as quizzical; she did not appear frightened, nor did she cry. (Tr. I-142) He testified that during the meeting there was no reference at all to the state of respondent's health. (Tr. I-158)

The high school principal testified that he called respondent to the meeting on February 27, 1976 by having her paged. (Tr. I-167) He stated he did not believe that calling a teacher before three administrators created an intimidating atmosphere, nor did he remember anyone using the phraseology "***[l]ies are one thing, but malicious lies are another." (Tr. II-34) The principal testified that at no time did respondent indicate she had taken the trip for health reasons. He said she appeared puzzled but he believed she was being honest. He testified further that she did not cry although she seemed confused when asked to put a statement in writing. He also testified that none of the administrators tried to intimidate or coerce her. (Tr. I-174-175) He stated further that there was no doubt in his mind that respondent said, "I did it," much to his surprise. (Tr.

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II-26) The principal, when questioned concerning respondent's prior teaching record, characterized her as a very competent teacher with a serious concern for pupils and that he rated her highly as a mathematics teacher. (Tr. II-10)

The assistant high school principal, respondent's immediate administrative superior, testified that respondent told her that she had been on vacation and had indicated on her absence slip that she had taken sick leave. (Tr. II-105) The assistant principal testified that she asked respondent, "***Why would you have done a dumb thing like that?" (Tr. II-106) The assistant principal characterized respondent as a competent teacher who had been considered for the role of area specialist or resource person. (Tr. II-110, 112)

The president of the Board testified that the matter was brought to the Board's attention by the Acting Superintendent and he was directed to suspend the teacher with pay pending a hearing. (Tr. II-51, 53) Subsequently, it was established that the Board granted her a hearing, although no such procedure is contemplated in the school law. It was stipulated that the Board followed the proper procedural requirements with respect to the certification of charges against respondent. (Tr. II-56)

This concluded the affirmative case of the Board and respondent's Motion to Dismiss was denied.

The hearing examiner now turns his attention to two ancillary matters engendered by the suspension of respondent from her teaching assignment and her subsequent return to duty as ordered by the Commissioner in his decision on Motion, January 11, 1977, *supra*.

Respondent contends that the Board still owes her the sum of $180.56 as she had worked at a yearly salary of $12,148 in a school year of 185 days for a daily rate of $65.6648 for 117 days, of a total salary due her of $7,682.78. The Board denies respondent's entitlement to $180.56 stating that she received thirteen of twenty salary installments as per the negotiated agreement (P-2), less the disputed five days' salary, for a total of $7,502.22.

The hearing examiner finds that both the Board and respondent erred in their salary calculations. The only statutory authority for the calculation of a per diem rate for teaching staff members is found in *N.J.S.A.* 18A:30-6 which states in pertinent part that:

"***A day's salary is defined as 1/200th of the annual salary."

By this calculation of respondent's salary the Board should have paid her in accordance with the following:

$12,148 ÷ 200 equals a per diem rate of $60.74 which multiplied by the five days in question equals $303.70. The annual salary of $12,148 ÷ 20 equals a semimonthly installment of $607.40. The hearing examiner determines that the Board should have paid respondent thirteen installments minus the disputed

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five days' sick leave, or $607.40 × 13 = $7,896.20 minus $303.70 or $7,592.50. Accordingly, the hearing examiner finds an insufficiency of $90.28 between this amount and the $7,502.22 paid her.

The second matter was precipitated on respondent's return to duty as ordered by the Commissioner's decision on Motion, ordering the "interim restoration to active employment" of respondent and her subsequent assignment on January 24, 1977 to the position of teacher in charge of the restriction room.

Respondent argues that such assignment is punitive, outside of her field of certification, and that other positions for which she was certified and held seniority rights were available in the school system. She argues further that her duties are so confining as to deny her the opportunity to attend faculty meetings.

The Board contends that its assignment of respondent to the position of teacher in charge of the restriction room was legal and proper and consistent with her certification.

The hearing examiner agrees. He finds that the position was created by the Board as part of its policy to convert external or out-of-school suspensions to in-school suspensions. By means of this provision the Board is attempting to insure that a suspended pupil will receive some appropriate educational program during the period of suspension. Inasmuch as the duties encompass the supervision of pupils and assistance to pupils with respect to their academic assignments, the hearing examiner finds that such duties do require the services of a certified teacher. The hearer must now examine respondent's arguments that her duty assigned on January 24, 1977 was (1) other than in her field of certification, (2) so confining as to preclude her attendance at faculty and Association meetings, (3) discriminatory of her seniority rights to other available positions, and (4) punitive in nature.

The record shows clearly that respondent holds comprehensive certification in the field of mathematics. Certification in each and every field licenses a teacher to supervise pupils (*N.J.A.C.* 6:11-3.1 *et seq.*), hold pupils responsible for their behavior (*N.J.S.A.* 18A:37.1 *et seq.*), and teach pupils within a subject matter area (*N.J.A.C.* 6:11-4.1 *et seq.*). All pupils assigned to the restriction room of Washington Township High School fall within the first two categories of pupil-teacher relationship and the competence of respondent's certification. Those pupils assigned to the restriction room who are currently enrolled in mathematics courses fall directly into respondent's subject matter area certification and could be assisted directly by respondent in their mathematical studies. The hearing examiner finds no merit to respondent's contention that her assignment is outside the scope of her teaching certificate.

Respondent's assertion that some of her assigned periods take place after the school day is denied by the high school principal when he states that the time on which she "***must report to school and the time that she may leave school on any given day is the same as that for every other teacher in the High School.***" (Principal's Affidavit) This statement is unrefuted in subsequent

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arguments. There is nothing in the record that shows that the detail of duties of the position were devised solely because of respondent's assignment to the restriction room. The hearing examiner determines that there is no merit to respondent's claims that her duty assignment is excessively restrictive or punitive in nature.

Respondent contends that her duty assignment on January 24, 1977 was violative of her seniority rights to other available positions. The hearing examiner does not agree. The Board has the discretion to assign respondent to any position within her area of certification. Seniority does not exist except for cases of reduction in force.

The hearing examiner now turns his attention to an examination of the allegations, evidence and arguments of law generated by four days of hearing and subsequent submission of six Briefs and/or Memoranda of Law.

Respondent contends that she was called before the Acting Superintendent illegally as he is a member of the Board and argues that she is protected by *N.J.S.A.* 18A:25-7 which says:

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

She argues further that for this reason the document, P-3, in evidence must be excluded and relies further on *Gregory Cordano v. Board of Education of the City of Weehawken*, 1974 *S.L.D.* 316.

The Board denies this contention arguing that *N.J.S.A.* 18A:25-7, *ante*, does not govern such a meeting with a superintendent as he is not a member of the Board but rather only holds a seat on the Board but shall have no vote. The hearing examiner agrees. The statute clearly means the board or committee of the board or member thereof, not a superintendent or other administrators, such as a principal. Consequently, the hearing examiner finds that respondent cannot invoke the protection of *N.J.S.A.* 18A:25-7. To construe *Cordano, supra*, as determining that the superintendent of schools is a member of the board would be so restrictive in nature as to excessively impede and impair the necessary administrative function of the superintendent in his administrative and supervisory relationship with teachers. Accordingly, the hearing examiner determines that P-3 is properly before the Commissioner as a document in evidence.

The Board denies respondent's contention that she was subjected to harassment, intimidation or coercion at the February 27, 1976 meeting. The hearing examiner finds that such contention is not borne out by the record. Nor is her

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allegation that she was prevented from making a knowing and intelligent choice of representatives substantiated by the evidence. The administrators insisted that she be represented by a member of her Association prior to any discussion. The suggestion by them of Mrs. Manganello as this representative could have been refused by respondent and/or by the representative. The record is devoid of any such action by either person. The hearing examiner finds further that none of the administrators suggested the content of P-3, nor was respondent denied the opportunity and right to change any part of this document.

The hearer determines that respondent's contentions of verbal harassment by the administrators' alleged referral to "malicious lies" is not supported by any credible evidence. Rather, the record shows only conflicting testimony concerning this allegation.

Respondent claims that "***[t]ravel to a warmer climate has long been recognized as a substantial aid to regaining good health, and must be considered a legitimate use of sick leave to cure 'personal disability due to illness'.***" (Respondent's Brief, at p. 19) Respondent does not, however, offer any supporting evidence from any medical expert, particularly with respect to her January absence. The hearing examiner concludes that respondent has not proved that her trip was necessary for physical recuperation.

Accordingly, the hearing examiner finds that:

1. Respondent falsified the reason for her absence on January 5, 6, 7, 8 and 9, 1976 by submitting in writing a statement that she was ill.

2. When questioned by her superiors she submitted without intimidation or coercion a statement in writing that she had falsified the reason for her absence in an attempt to utilize sick leave.

3. At no time was respondent denied her rights under any negotiated policies, the laws or constitution of this State or the United States.

4. There is nothing in the record upon which to base a conclusion that respondent's prior record as a teaching staff member has been less than exemplary.

5. Her assignment upon return to work was proper in that it fell within the scope of her teaching certificate.

6. There is an insufficiency of $90.28 in respondent's salary account.

After considering all the circumstances and facts in the instant matter, the hearing examiner recommends that dismissal of respondent would be too harsh a penalty for the Commissioner to impose. As the Commissioner said *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township*, 1967 *S.L.D.* 101:

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''***Although unfitness may be demonstrated by a single incident (see *Redcay v. State Board of Education*, 130 *N.J.L.* 369 (*Sup. Ct.* 1943), affirmed *o.b.*, 131 *N.J.L.* 326 (*E.&A.* 1944), the Commissioner does not consider the single episode herein sufficiently flagrant to warrant such a finding. In the Commissioner's judgment, a less severe punishment will serve the necessary purposes of correction and deterrent.***'' (at 219)

The hearer recommends that the Commissioner determine that respondent's suspension of 120 days without pay stand on the record and that she be returned to her role of a regular classroom teacher of mathematics at the same rate of pay as her employment during the 1976-77 school year. The hearing examiner also recommends that the Commissioner direct the Board to remit to respondent the sum of $90.28.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter including the report of the hearing examiner and observes that exceptions have been filed by the Board and respondent pursuant to *N.J.A.C.* 6:24-1.17(b). He concurs with the findings of fact set forth in the hearing examiner's report and adopts them as his own. The Commissioner finds the Board's argument that respondent's conduct warrants dismissal from employment to be without merit. He has addressed himself to such determinations in previous decisions.

In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, 1971 *S.L.D.* 566, aff'd State Board of Education 773, aff'd Docket No. A-1680-72 New Jersey Superior Court, Appellate Division, November 28, 1973 (1973 *S.L.D.* 773) the Commissioner determined that in a single incident ''***the conduct of the teacher *** was a demonstration of unprofessional conduct so gross, and so fraught with peril to the continued safety and well-being of both the teacher and the pupils, as to warrant the forfeiture of tenure rights.***'' (1971 *S.L.D.* at 575) However, *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 *S.L.D.* 302 the Commissioner concluded that, although respondent was found guilty of four of the six charges, ''[i]n view of respondent's long record of above-average teaching performance, the school administrations' recommendations, and the year-long suspension suffered by respondent, *** the penalty of dismissal is not warranted***.'' (at 322)

Similarly, in the instant matter, the Commissioner determines that dismissal would be too harsh a penalty. Respondent's record as a mathematics teacher has been exemplary and she has been characterized by administration as a competent and concerned teacher.

The Commissioner finds the conduct of respondent unbecoming and improper, but he finds nothing in the record to show that such conduct endangered

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the continuing safety and well-being of pupils, nor did it significantly disrupt the day-to-day operation of the school program.

The Commissioner for the reasons stated therein reaffirms the determination of the hearing examiner in finding that the Board owes respondent an additional $90.28.

The Commissioner cannot agree with the respondent's argument that, because of the hearing examiner's prior background of familiarity with the acting superintendent of schools as a fellow chief school administrator, such professional association renders the hearing examiner's judgment tainted against the teacher-respondent.

The Commissioner has examined the record and the alleged incidents prior to the opening of the record. He finds that no relationship existed between the hearing examiner and the acting superintendent of schools other than the casual and occasional professional contact between two chief school administrators employed by different boards of education in autonomous and disparate school districts geographically separated by about 8.5 miles and several intervening communities. (Franklin Map, Gloucester County Franklin Survey Company) As the Commissioner said in *Fred J. Hoffman v. Board of Education of the City of Asbury Park*, 1975 *S.L.D.* 929, aff'd State Board 1976 *S.L.D.* 1147:

> "***The Assistant Commissioner and each hearing examiner is a former school administrator in this State; therefore, occasionally, litigants are known or have had some earlier professional relationship with each of them. In most instances, however, hearing examiners are selected for individual appeals because they have had no prior association or knowledge of the matters appealed to the Commissioner. Such is the case herein.***"
>
> (at 936)

Respondent argues that her five days' absence was, at the very worst interpretation, a vacation taken in order to recuperate from several health problems. She offers, as proof, the testimony of Miss O'Halloran, her personal friend presently in the employ of a travel agency, through whose auspices the *gratis* trip was arranged.

Respondent alleges that the record was unfairly paraphrased because the hearing examiner did not include her testimony that the two physicians who had treated her, when approached by her for a certificate, declined because they did not want to get involved in legal proceedings. (Tr. III-153) The Commissioner observes that respondent failed to produce testimony, voluntarily or by subpoena, from the doctors from whom she received treatment for her health problems and whose testimony could be deemed important to respondent's contention that the trip was necessary for health reasons. Her only corroboration is that offered through the testimony of Miss O'Halloran, a former teacher associate. Miss O'Halloran did not testify as a medical expert, and the Commissioner cannot agree that her testimony proves conclusively that the trip was necessary for health reasons. (Respondent's Exceptions, at p. 11)

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The Commissioner disagrees with respondent's contention that she was protected by *N.J.S.A.* 18A:25-7 because the acting superintendent was a member of the Board. Her reliance on *Gregory Cordano v. Board of Education of the City of Weehawken*, 1974 *S.L.D.* 316 is misplaced. The superintendent of schools has a seat on the board (*N.J.S.A.* 18A:17-20) but is not a member of the board nor does he have a vote on the board for any purpose.

The Commissioner finds no evidence in support of respondent's contention that the atmosphere at the meeting with administration on February 27, 1976 was so oppressive as to render her incapable of reaching a decision, or making her so distraught as to be incapable of speech. The Commissioner observes that respondent, a former member of Officer Training for the United States Marine Corps ROTC, has the demeanor of a determined, intelligent, resourceful person, who, during litigation, placed several telephone calls on her own behalf to the Board president and to the Commissioner's office. The Commissioner finds that at the meeting of February 27, 1976 administration accorded her the due process to which she was entitled.

In summary, the Commissioner finds respondent's conduct in the instant matter unbecoming and improper but avers that dismissal from her position would be too harsh a penalty. He directs the Board that respondent's suspension of 120 days without pay stand on the record and that she be returned to her role of a regular classroom teacher of mathematics at a rate of pay which shall provide for the withholding of one year's employment and adjustment increment. He further directs the Board to remit to respondent the sum of $90.28.

Respondent's request for the dismissal of the instant charges in their entirety is denied and the Board is directed to expeditiously implement the aforementioned directives of the Commissioner in the instant matter.

COMMISSIONER OF EDUCATION

August 16, 1978

Pending State Board of Education

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Kathleen Gushue,

Petitioner,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Respondent, Cerrato, O'Connor, Mehr & Saker (Dominick A. Cerrato, Esq., of Counsel)

For the Respondent, Cerrato, O'Connor, Mehr & Saker, (Dominick A. Cerrato, Esq., of Counsel)

Petitioner is a teacher employed by the Board of Education of the Freehold Regional High School District, hereinafter "Board," who contests both her employment on a part-time, rather than full-time, basis and the Board's policy which automatically terminates all part-time nontenure teachers. The Board denies that its actions are arbitrary and asserts that petitioner has been afforded all her rights pursuant to applicable laws and decisions of the Commissioner of Education and the courts.

The salient facts are not in dispute. Cross-Motions for Summary Judgment were filed with appended Briefs. Thereafter an Amended Petition of Appeal was filed followed by an Amended Answer. Oral argument was heard on March 8, 1977 at the State Department of Education, Trenton. Briefs were filed thereafter and several exhibits have been submitted as evidence.

Petitioner was initially employed to teach art on a full-time basis beginning September 1975. At the same time two other art teachers were employed for their first year as full-time employees. In March 1976, petitioner was offered and accepted a second contract for a full-time teaching position for the 1976-77 academic year. (Exhibit B) That contract contained a sixty day termination clause which the Board exercised on June 28, 1976, allegedly because no art teaching position was available for the coming school year.

The Board avers that petitioner's termination was based on a Consent Order and Decree executed by the Board on August 16, 1976 and by the Division on Civil Rights on September 1, 1976. (Petitioner's Statement of Facts; Respondent's Counter-Statement of Facts) The Consent Order provided for the full-

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time employment of Lewis A. Weigand which "***reflect[s] the desire [of the Board] to take affirmative action *** to assure that employment opportunities are made available to minority group individuals.***" (Exhibit A) Board policy did not permit husbands and wives to be employed in the district, and Weigand claimed discrimination because of his marital status. (Tr. 15; Exhibit A) Because the Consent Order demanded that Lewis Weigand be given full-time employment as an art teacher, there were insufficient full-time art positions remaining so that petitioner could also be employed on a full-time basis. Although the Order of the Division on Civil Rights was entered in September 1976, its terms were generally agreed upon in June 1976. Therefore, the Board knew at that time that it would have no full-time art position to assign to petitioner in September 1976 and acted to terminate petitioner. The Board avers that the Order rendered the contract (Exhibit B) "impossible of performance." *Porcelli et al. v. Titus et al.*, 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert.* den. 55 *N.J.* 310 (1970) (Board's Brief, at pp. 2-3)

Nevertheless, petitioner was reemployed for September 1976 as a part-time art teacher when such a position was available. By letter dated June 30, 1976, the Board offered, and petitioner accepted, a part-time position teaching art for the 1976-77 academic year. (Exhibits C, D; Board Minutes June 28, 1976, Exhibit E)

Regarding its determination to notify all part-time teachers (and substitute teachers) that they will not be reemployed, the Board argues that until scheduling of fall semester classes is completed, it is unable to determine its need for part-time teachers and long-term substitute teachers. The Board admits its long-standing practice to terminate all such employments effective June 30 of each school year. (Board's Amended Answer, at p. 2) Accordingly, petitioner was notified on April 18, 1977 that she would not be reemployed. She states that the automatic non-reemployment of part-time teachers is arbitrary and capricious and should be set aside. (Amended Petition of Appeal)

The Commissioner has reviewed all arguments advanced by the litigants and examined the documents accepted as evidence. Attached to the Amended Petition of Appeal are eleven teacher evaluations submitted by petitioner. Petitioner's evaluations are not considered for the purposes of this decision since her performance and her evaluations are not in question. It will be assumed for the purposes of this decision that she is a satisfactory teacher since she has enjoyed continuous employment by the Board since September 1975, albeit that during her second and third years her employment was part-time.

It is well established that nontenure teachers who are not reemployed must be told why when they request the reasons. *Donaldson v. Board of Education of the City of North Wildwood*, 65 *N.J.* 236 (1974) In that decision the Court discussed the purpose of the statement of reasons as follows:

> "***Perhaps the statement of reasons will disclose correctible deficiences and be of service in guiding his future conduct; *perhaps it will disclose that the nonretention was due to factors unrelated to his professional or*

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classroom performance and its availability may aid him in obtaining future teaching employment; perhaps it will serve other purposes fairly helpful to him as suggested in *Drown* (435 *F.2d* at 1184-1185); and perhaps the very requirement that reasons be stated would, as suggested in *Monks* (58 *N.J.* at 249), serve as a significant discipline on the board itself against arbitrary or abusive exercise of its broad discretionary powers.***''

(*Emphasis added.*) (65 *N.J.* at 245)

It may be concluded from the above-cited passage that a statement of reasons is essentially for the benefit of the teaching staff member.

In the instant matter petitioner was notified on April 21, 1977, pursuant to law, that she would not be reemployed. (Exhibit F) This notice followed the action taken at a public meeting of the Board on April 18, 1977. (Exhibit G) Petitioner thereafter requested reasons for her termination and was given the reasons in a letter from the assistant superintendent dated May 13, 1977. (Exhibits J, K) That letter states quite clearly that the reason is ''uncertainty of positions for the coming school year'' because master schedules were not completed and, therefore, personnel needs were uncertain.

In the Commissioner's judgment such reason is in full compliance with the letter and spirit of the law as set forth in *Donaldson, supra*. There is no showing of bad faith. Neither is there any showing that the Board's determination, regarding petitioner and all other part-time teachers, was an arbitrary or capricious determination. Rather, the Board's determination was grounded on the uncertainty of staff needs for the coming year. In each year, petitioner was reemployed when those needs were finally determined.

Petitioner suggests that the Board had other options available to it that would have increased the time of her employment. Assuming this to be a fact, the Board is not compelled to make other personnel arrangements that would be more suitable to petitioner. (Tr. 30-31, 36-38)

In the judgment of the Commissioner, the record of the instant matter contains no evidence of bad faith, or arbitrary or capricious motivation on the part of the Board. Nor is there any evidence of any violation of petitioner's constitutional rights. This being so, the Commissioner will not substitute his judgment for that of the Board and its school administrators. *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 332 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966); *Schinck v. Board of Education of Westwood Consolidated School District*, 60 *N.J. Super.* 448, 476 (*App. Div.* 1960) Petitioner has established no cause for action on which relief can be granted. *Ocean Cape Hotel Corporation v. Masefield Corporation*, 63 *N.J. Super.* 369 (*App. Div.* 1960) Respondent's Motion is granted; therefore, the Petition of Appeal and the Amended Petition of Appeal are hereby dismissed.

COMMISSIONER OF EDUCATION

August 18, 1978

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James Ackerman,

Petitioner,

v.

Board of Education of the Borough of Kinnelon, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Rowe, McMahon, McKeon & Curtin (Thomas R. Curtin, Esq., of Counsel)

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Borough of Kinnelon, hereinafter "Board," alleges that the Board has illegally refused to afford him proper placement on its 1977-78 salary guide. He requests the Commissioner of Education to direct the Board to compensate him in the amount of salary which is due. The Board avers that it has acted in conformity with law (*N.J.S.A.* 18A:29-14) to withhold petitioner's salary increment and that there is no relief the Commissioner may afford. It requests dismissal of the Petition of Appeal.

The Petition is before the Commissioner as the result of a Motion for Summary Judgment advanced by petitioner. An oral argument on the Motion was conducted at the State Department of Education, Trenton, on January 10, 1978. Briefs have been filed.

The essential facts on which the Motion is based are not in dispute and may be set forth succinctly as follows:

Petitioner was placed by the Board during the 1976-77 academic year on step nine of the salary guide applicable to teaching staff members with a bachelor's degree plus 30 credits. His salary for the year was $14,056. On June 15, 1977 the Superintendent addressed the following letter to petitioner:

> "This is to inform you that the Board intends to take official action on the recommendation made by Mr. Finnerty that no increase in pay be granted for the 1977-78 school year.
>
> "You have the right to request an informal hearing to be held in executive session with the Board of Education before the action takes place. If you

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intend to do so, please make your request known to me prior to the meeting." (R-1)

Thereafter on June 20, 1977 the Board resolved by a vote of six to one to deny petitioner "***an increment for the 1977-78 school year.***" (R-2) The Superintendent then addressed a letter to petitioner on June 21, 1977 which advised him of the Board's action and set forth the following reasons for it:

"***Ineffective teaching that is based on evaluations of the high school principal and your failure to correct inefficiencies after receiving a ninety-day notice.***" (P-1)

Petitioner has since received the same salary payments in the 1977-78 academic year as he received in 1976-77 although such payments are not in conformity with a new salary schedule applicable to the 1977-78 year for a teaching staff member with petitioner's academic credentials and years of experience. The stated salary of the two schedules for each of the years may be shown as follows:

Salary Scale — Step Nine
Teachers with a Bachelor's Degree and
30 Credits

1976-77	—	$14,056
1977-78	—	$14,650

Petitioner does not contest the Board's action to withhold an increment *per se* but does aver that he is at least entitled to be assigned a place on the same salary step of the new salary guide that he was placed on in the prior year. Thus the claim in the instant matter is for an adjustment of $594. Petitioner's basic argument in support of this avowal is that there is a basic difference between an "increment" and a "salary increase." (Tr. 7) He does not deny the Board's entitlement in the matter to withhold the increment. He does maintain that a withholding of both the increment which would otherwise be due him in an advancement to the salary guide's 10th step and additionally a withholding of the "salary increase" which results from an altered salary schedule constitutes a double penalty. (Tr. 8)

The Board avers that petitioner's contention that he is entitled to Summary Judgment as a matter of law because of such facts is incorrect and that there is no entitlement to an automatic salary increase because of a change in a salary scale. It cites *Clifton Teachers Association, Inc. v. Board of Education of Clifton*, 136 *N.J. Super.* 366 (*App. Div.* 1975) and *Westwood Education Association v. Board of Education of the Westwood Regional School District*, Docket No. A-261-73 New Jersey Superior Court, Appellate Division, June 21, 1974 (1974 *S.L.D.* 1436), *cert.* den. 66 *N.J.* 313 (1974).

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The statute of reference, *ante, N.J.S.A.* 18A:29-14 provides in pertinent part that:

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. *** It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

It may be observed at this juncture that petitioner has not challenged the Board's reasons for a denial of any salary increase. These reasons were "ineffective teaching" and a "***failure to correct inefficiencies.***" (P-1) Neither does he contend that he was not afforded a written notice in compliance with the statute. His complaint, succinctly stated, is that the Board's failure to advance him in a parallel manner to a new salary guide step at the same level constitutes a double penalty and in fact amounts to a reduction in salary. (See Tr. 21.)

The Commissioner does not agree and determines that such argument has been rendered *stare decisis* by a series of court decisions. *Kopera v. Board of Education of the Town of West Orange*, 60 *N.J. Super.* 288 (*App. Div.* 1960); *Clifton Teachers Association, supra; Westwood, supra* Thus, in *Kopera* the Court said:

> "***We hold that it is lawful and reasonable for West Orange to require 'favorable reports by superintendents and those charged with supervisory responsibility and approval by the Board of Education [as] a prerequisite to the granting of *all increases* in salary.'***"
>
> (*Emphasis supplied.*) (at 294)

And,

> "***Appellant further argues that the denial of the increment *and the increase* was in effect a *reduction in salary* of the appellant, and West Orange was, therefore, required to proceed in accordance with *N.J.S.A.* 18:13-17. That is not so. *The failure to receive an increase of salary does not constitute a reduction.****" (*Emphasis supplied.*) (at 297)

The holding in the instant matter is the same. Petitioner's salary for the 1977-78 year is the same as that paid him in 1976-77. A determination by the Board not to grant him an increase cannot be construed, even in the context of a salary scale alteration, as a reduction. The Commissioner so holds.

The Commissioner further holds that, absent a viable challenge to the

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reasons the Board afforded petitioner for the action to withhold his salary increment and adjustment increment, there is no cause of action before the Commissioner. The Board's action was within the parameters of its discretion pursuant to law. *N.J.S.A.* 18A:29-14; *Kopera, supra*

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

August 24, 1978

Winona D. Bendon,

Petitioner,

v.

Board of Education of the Borough of Keansburg, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Healy & Falk (Patrick D. Healy, Esq., of Counsel)

Petitioner, a certified librarian, was employed in September 1974 by the Keansburg Board of Education, hereinafter "Board," to serve as librarian in the Keansburg Junior-Senior High School from which position she resigned on April 25, 1975. For the school year 1975-76 petitioner was appointed to and served in the newly created position of district librarian and was paid on the regular teacher's salary guide for both years. Petitioner alleges she was never evaluated formally during school year 1975-76. On April 26, 1976 she was advised by the Board that she would not receive an offer of employment in the district for the 1976-77 school year. She sought and was given a statement of reasons for her non-reemployment and was further accorded an informal appearance before the Board. Petitioner contends that the Board has not, as claimed, abolished the position of district librarian since the job of high school librarian is essentially the same position. She claims that the Board's determination not to offer her employment for school year 1976-77 is arbitrary, unreasonable and illegal and prays for entitlement to employment as high school librarian for 1976-77 with resulting back salary.

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The Board alleges that its actions were proper and reasonable and denies petitioner's entitlement to a position in the school district.

A hearing on the matter was held March 14, 1977 in Freehold at the office of the Superintendent of Schools of Monmouth County. Briefs were subsequently filed by the respective parties. The report of the hearing examiner follows:

Petitioner testified that she was employed by the Board as the Junior-Senior High School librarian for the school year 1974-75 (Tr. 11) from which position she resigned on April 25, 1975. (R-4) She was appointed to and served in the newly created position of district librarian for the 1975-76 school year. (Tr. 11) Petitioner received three formal observations and/or evaluation reports in the school year 1974-75, all of which were performed during January 1975. (Tr. 83) She testified that she received no formal observations and/or evaluations during the school year 1975-76. (Tr. 12) The Superintendent of Schools testified that the explanation for this omission was "[t]he reasons they weren't made [was] because of the newness of the position and the realization that perhaps I should have been making them***." (Tr. 58) It was adduced that there was some confusion on the part of administration as to who should have been making the observations and evaluations. (Tr. 59) Petitioner relies on *Richard Dooley and the Keansburg Teachers Association v. Board of Education of the Borough of Keansburg*, 1975 *S.L.D.* 540.

The Board alleges that at the time petitioner was employed as district librarian "***there [were] no statutory requirements or standards for evaluating (nontenured) non-teaching staff members such as librarians.***" (Board's Brief, at p. 11) The hearing examiner observes that such argument is faulty. *N.J.S.A.* 18A:27-3.1 through 3.3 became effective July 1, 1975 and require that three evaluations be provided each nontenured teaching staff member "***during each school year but not less than once during each semester***" each evaluation to be followed by a conference between the teaching staff member and his superior or superiors. Petitioner, as a certified school librarian and teaching staff member, was covered by this statute during her period of employment as district librarian for the 1975-76 school year. Further, the hearing examiner observes that *N.J.A.C.* 6:3-1.19 and 1.20 became effective January 16, 1976.

The Board alleges that duties and requirements of the position of district librarian differed substantially from those described for the position of Junior-Senior High School librarian. (Board's Brief, at p. 12)

The record adduced at the hearing refutes this allegation. Petitioner testified that there was no difference in the job descriptions except for being in a different location (Tr. 14) which was corroborated by testimony of the Superintendent. (Tr. 39)

Petitioner argues that the Board intentionally misled her when she appeared on July 1, 1976, prepared to deal only with the letter to her of June 3, 1976 which stated that her non-reemployment was due to factors unrelated to professional or classroom performance. (P-4) She had not come prepared to take issue with observations and evaluations which had not been performed or the prin-

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cipal's recommendations which she had never seen. (Petitioner's Brief, at p. 7)

The Board contends that evaluative discussions involving petitioner, the school principal and Superintendent were held throughout the year. (Board's Brief, at p. 11)

The hearing examiner observes that the record clearly shows that the discussions as alleged were never formalized in writing to form part of her personnel record as evaluations. (Tr. 56)

Petitioner argues that in *Elizabeth Rockenstein v. Board of Education of the Borough of Jamesburg*, 1974 *S.L.D.* 260, 1975 *S.L.D.* 191, aff'd State Board of Education 199, aff'd Docket Nos. A-3916-74 and A-4011-74 New Jersey Superior Court, Appellate Division, July 1, 1976, it is indicated that the Commissioner of Education retains the authority to order a nontenured teacher reinstated with back pay. (Petitioner's Brief, at p. 8)

The Board cites *N.J.S.A.* 18A:28-9 and *Arthur L. Page v. Board of Education of the City of Trenton et al., Mercer County*, 1975 *S.L.D.* 644, aff'd State Board January 7, 1976 as giving the Board the statutory right to abolish positions.

The Board contends that petitioner failed to establish that the reasons given her were frivolous, capricious, or arbitrary, citing *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District*, 1968 *S.L.D.* 7, dismissed State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, 1969 *S.L.D.* 202. The Board argues further that petitioner as a nontenure staff member has no property right to continued employment. *Perry v. Sindermann*, 408 *U.S.* 593 (1972); *Board of Regents of State Colleges v. Roth*, 408 *U.S.* 564 (1972); and *Sallie Gorny v. Board of Education of City of Northfield et al., Atlantic County*, 1975 *S.L.D.* 669

The hearing examiner has examined the pleadings, documents, arguments of law, and the transcript of the hearing and concludes that there is one predominant concern in this matter. In *Dooley, supra*, the Commissioner said in pertinent part:

> "***The Legislature has recently enacted *N.J.S.A.* 18A:27-3.1 through 3.3, effective July 1, 1975. It requires that three evaluations be provided each nontenured teaching staff member '***during each school year but not less than once each semester***' each evaluation to be followed by a conference between the teaching staff member and his superior or superiors. *It is incumbent upon all efficient school supervisors and administrators to give proper and timely priority to this important function intended to strengthen the thorough and efficient education of the pupils in this State.****" (*Emphasis supplied.*) (at 546)

This decision of the Commissioner was made on August 5, 1975, a full month prior to the start of the 1975-76 school year during which petitioner was

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employed as a district librarian. In spite of this clear and compelling Commissioner's caveat to the very district in which petitioner was employed for that school year, the record clearly shows that petitioner was not evaluated formally nor is there anything in her personnel record to show that such formal evaluations were made. Further, the hearing examiner finds that such inaction on the part of the Board grossly contravenes the intent of *N.J.A.C.* 6:3-1.19, effective January 16, 1976, which states:

> "Supervision of instruction; observation and evaluation of nontenured teaching staff members
>
> "(a) For the purpose of this section, the term 'observation' shall be construed to mean a visitation to a classroom by a member of the administrative and supervisory staff of the local school district, who holds an appropriate certificate for the supervision of instruction, for the purpose of observing a nontenured teaching staff member's performance of the instructional process.
>
> "1. Each of the three observations required by law shall be conducted for a minimum duration of one class period in a secondary school and, in an elementary school, for the duration of one complete subject lesson.
>
> "(b) The term 'evaluation' shall be construed to mean a written evaluation prepared by the administrative/supervisory staff member who visits the classroom for the purpose of observing a teaching staff member's performance of the instructional process.
>
> "(c) Each local board of education shall adopt a policy for the supervision of instruction, setting forth procedures for the observation and evaluation of nontenured teaching staff members, including those assigned to regular classroom teaching duties and those not assigned to regular classroom teaching duties. Such policy shall be distributed to each teaching staff member at the beginning of his/her employment.
>
> "(d) Each policy for the supervision of instruction shall include, in addition to those observations and evaluations hereinbefore described, a written evaluation of the nontenured teaching staff member's total performance as an employee of the local board of education.
>
> "(e) Each of the three observations required by law shall be followed, within a reasonable period of time, but in no instance more than fifteen days, by a conference between the administrative/supervisory staff member who has made the observation and written evaluation and the nontenured teaching staff member. Both parties to such a conference will sign the written evaluation report and retain a copy for his/her records. The nontenured teaching staff member shall have the right to submit his or her written disclaimer of such evaluation within ten (10) days following the conference, and such disclaimer shall be attached to each party's copy of the evaluation report.

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''(f) The purposes of this procedure for the observation and evaluation of nontenured teaching staff members shall be to identify deficiencies, extend assistance for the correction of such deficiencies, improve professional competence, provide a basis for recommendations regarding reemployment, and improve the quality of instruction received by the pupils served by the public schools.''

The hearing examiner recommends that the Commissioner order the restoration of petitioner to a position of librarian in the school district of Keansburg for the school year 1977-78. The hearer further recommends that the Commissioner order that she be placed on the same step of the salary schedule as she held in the school year 1975-76 and that the Commissioner order the Board to accord her a full year's salary at this level, mitigated by any earnings she may have received during the 1976-77 school year. The hearing examiner calls to the attention of the Commissioner that such reinstatement would constitute petitioner's third year of employment by the Board.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter including the report of the hearing examiner and observes that exceptions have been filed by both parties pursuant to *N.J.A.C.* 6:24-1.17(b).

The Commissioner finds that the Board errs in its classification of petitioner that ''***she was a librarian and *not* a teacher during the school year 1975-76.'' The Board compounds this error by concluding that, accordingly, evaluations need not have been made of petitioner.

The Commissioner calls to the attention of the Board that in *N.J.A.C.* 6:11-3.4 a teaching staff member is defined as:

'' '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.''

Further, *N.J.A.C.* 6:11-12.6 defines teacher-librarian certification as follows:

''(a) This certificate is required for service as a teacher-librarian and for instruction in the use of the school library in the elementary and/or secondary schools.

''(b) The requirements are as follows:

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1. A standard New Jersey teacher's certificate;

2. A minimum of eighteen semester-hour credits in library science related to public school service, in such areas as:

   i. Cataloguing;
   ii. Classification;
   iii. Reference work;
   iv. Bibliography;
   v. Selection of instructional materials, including book selection for children;
   vi. Library organization and administration.''

The record is clear that petitioner was a certified librarian, as, indeed, she must have been for the Board to employ her.

Pursuant to *N.J.A.C.* 6:11-3.1

''(a) No teacher shall be entitled to any salary unless such teacher shall be the holder of an appropriate teacher's certificate. (N.J.S.A. 18A:26-2)

''(b) The standard employment contract supplied by the Commissioner of Education states that the teacher '. . . before entering on the duties of such position will exhibit the certificate to the County Superintendent of Schools and to the Superintendent of the district in which such school is situate, or to the Secretary in the district where there is no Superintendent.'

''(c) The certificates should always be kept in the possession of the teacher.''

Accordingly, the Commissioner finds and determines that the phrase ''non-tenured teaching staff member'' as used in both *N.J.S.A.* 18A:27-3.1 and *N.J.A.C.* 6:3-1.19 have direct applicability to petitioner. The Board was required to make the prescribed evaluations and failed to do so.

The Commissioner herewith restores petitioner to a position of librarian in the school district of Keansburg at the salary she would have received had she not been dismissed. It is further directed that the Board pay to petitioner all lost salary and other emoluments for the period from September 1976 to the date of her reinstatement, mitigated by any earnings she may have received from alternate employment during that period.

COMMISSIONER OF EDUCATION

August 30, 1978

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In the Matter of the Tenure Hearing of

Nancy Patras,

School District of the Township of Woodbridge, Middlesex County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant, Hutt, Berkow & Hollander (Joseph J. Jankowski, Esq., of Counsel)

For the Respondent, Sauer, Boyle, Dwyer, Canellis & Cambria (William A. Cambria, Esq., of Counsel)

Respondent, a tenured secondary school teacher in the employ of the Board of Education of the Township of Woodbridge, hereinafter "Board," was suspended without pay on December 6, 1976 by the Board, pursuant to *N.J.S.A.* 18A:6-11 *et seq.*, upon the certification of charges of conduct unbecoming a teacher, insubordination and abandonment of position preferred against respond ent by the Secretary of the Board. The Board believes the charges sufficient, if true in fact, to warrant a dismissal or reduction in salary. Respondent denies that she engaged in conduct unbecoming a teacher or actions which constituted insubordination, or that she abandoned her teaching position.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner of Education at the office of the Union County Superintendent of Schools, Westfield, on March 30, 1977. Numerous exhibits were accepted in evidence and Briefs were filed subsequent to the hearing. The report of the hearing examiner is as follows:

The charges against respondent were grounded on her absence from her teaching duties from November 1 to November 29, 1976 as follows:

CHARGE

> "The said Nancy Patras, a tenured teacher employee of the Woodbridge Township School District, engaged in conduct unbecoming a teacher and actions constituting insubordination in that she wilfully and without authorization abandoned her teaching position at John F. Kennedy Memorial High School on November 1, 1976 to go on a trip out of the country for personal reasons, and did not return to her teaching position aforesaid until November 29, 1976, resulting in considerable disruption of the educational process to the detriment of her students, the professional staff and the school district."

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On or about October 7, 1976, respondent informed her department chairperson that she had an opportunity to accompany her husband on a trip around the world and was considering taking it. The department chairperson suggested that respondent discuss the matter with the school principal. On the same day respondent inquired of the principal about the possibility of receiving a leave of absence without pay for approximately three and one-half weeks to accompany her husband on a business related trip to the Far East. The principal testified that he advised respondent that he did not believe such a leave would be granted due to the extended period of time and that such an absence would occur at a critical period for the school. Respondent's requested absence would coincide with the school's evaluation by the Middle States Association of Colleges and Secondary Schools accrediting agency, and the end of the school's first marking period for the evaluation of its pupils.

The principal testified that he informed respondent that he could not grant her request but that he would inquire further and report to her with a decision. He stated that subsequent to the receipt of respondent's written request on October 8, 1976, he telephoned the Assistant Superintendent for Personnel and Educational Services and presented respondent's request anonymously and as a hypothetical case. He asserted that the Assistant Superintendent informed him that such a request was absolutely out of the question and under no circumstances would such a leave be granted. He testified that subsequently, on the same day, he informed respondent of the Assistant Superintendent's decision. (Tr. 4-8, 24; P-1)

The principal testified that on October 13, 1976, he inquired of respondent about her intentions with regard to the leave of absence and she indicated to him that she would not take the trip. He stated that he subsequently advised the Assistant Superintendent that the leave of absence they discussed on October 8, 1976 was now a moot issue. (Tr. 9)

On October 29, 1976, a Friday, respondent informed the principal that she had decided to accompany her husband on the trip and that Friday would be her last day in school until her return on the Monday following Thanksgiving, November 29. The principal testified that, notwithstanding his advice that her unauthorized absence could result in the certification of charges against her and other similar actions, respondent did in fact absent herself from her teaching duties from November 1 until November 29, 1976. (Tr. 10)

The Assistant Superintendent testified that it was his responsibility to administer the Board's adopted policy with regard to employee attendance. (P-2) He stated that he attempted to insure that there were no abuses of the sick leave policy and that whenever personal leave days were requested they were to be used within the framework of the Board's negotiated policy agreement. He testified that the Board had specified that personal leaves of absence were not to be granted for vacations, extending vacations, days taken in conjunction with vacation periods or business trips. He was permitted the latitude to grant personal leaves of absence for employee marriages, family illness not covered by the negotiated policy agreement, religious reasons not covered by the agreement and legal matters. (Tr. 40-45; C-1)

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The Assistant Superintendent testified that the procedure for the submission of requests for unpaid personal leaves of absence was in existence for many years and was known to the school district employees. He stated that an employee may freely seek the advice of any of the personnel in a school's chain of command with respect to the procedure to request a leave of absence and that the grievance procedure had been used by employees whose requests for such leaves had been denied. (Tr. 45, 63, 87-88)

With regard to the procedure, he stated that the employee would submit the request for an unpaid personal leave of absence and set forth the reasons in a letter to the personnel office for action. The facts underlying the request are reviewed and measured against the Board's directive to grant such leaves and a decision is subsequently rendered. He asserted that denials of such requests by his office were subject to appeal to the Superintendent and a denial by the Superintendent could be appealed to the Board. As a matter of practice, all requests for unpaid leaves of absence for a period of one month or greater were presented directly to the Board for consideration and formal action. (Tr. 43-50; C-1)

In response to interrogatories propounded by respondent, the Assistant Superintendent prepared a five page document setting forth the names of teachers who had requested paid or unpaid personal leaves of absence since January 1, 1975. The document included: the length of leave requested, the reason the leave was requested, whether such request was granted or denied and the reasons for the action taken. (P-3) He testified that of the total of ninety-eight such requests, as set forth in the document, thirty-nine were denied and that none were granted for vacation or for personal business or a spouse's personal business. Of the fifty-nine requests granted, he asserted that each was approved in strict accord with the Board's policy for employee marriages, family illness, religious reasons, legal reasons and/or facts of a compelling nature. (Tr. 49-51, 89-90; C-1)

The Board asserts that respondent's request for a leave was treated no differently than other requests of a similar nature. It contends that its policy with regard to unpaid personal leaves of absence was proper and properly administered with respect to respondent's request. It asserts further that respondent's unauthorized and deliberate absence from her teaching responsibilities from November 1 to November 29, 1976 constituted misconduct, insubordination and abandonment of her position which warrants her dismissal.

Respondent argues that the instant matter involves the adequacy and reasonableness of the Board's policy concerning the request for an unpaid leave of absence and whether, under the circumstances, she was guilty of insubordination, abandoning her position, or conduct unbecoming a teacher. She testified that she was married on July 26, 1976 and for a variety of reasons, including her husband's business commitments, she and her husband were unable to take a honeymoon following their marriage. Respondent testified that early in October 1976 she and her husband were presented the opportunity to take a trip around the world while her husband conducted business for a client in

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Western Samoa and New Zealand. She stated that because this was a most unusual opportunity for her and that it was important to her husband and his client, she verbally requested the leave of absence from her principal. After the principal indicated to her that he did not believe the leave would be granted, she stated that on the following day she submitted her request to the principal in writing, wherein she requested three and one-half weeks vacation without pay to accompany her husband to Auckland, New Zealand. She testified that the vacation was also to be a belated honeymoon. The principal informed respondent that her request was denied. (Tr. 141-142, 162, 174; P-1)

Respondent testified that she discussed the matter with her husband and it was mutually agreed to cancel the plans for the trip. She asserted that she did not intend to take the trip at the time the principal inquired of her intentions on October 13, 1976. (Tr. 144)

Respondent's husband advised his client that she was unable to obtain the requested leave of absence and that he did not want to take the trip without her. On October 27, 1976, respondent's husband's client arrived from Europe with tickets for them. The client again requested that respondent's husband take the trip and represent him in the business transaction because he was unable to attend to the matter himself and there was no one else available. Respondent testified that the matter was discussed late into the evening of October 27 and on the morning of Thursday, October 28, respondent made her decision to accompany her husband. (Tr. 177-180)

Respondent stated that as the result of extremely heavy pressure, which her husband imposed on her to have her agree to take the trip, she became emotionally upset, suffered nausea and an upset stomach and that she was unable to attend school on Thursday, October 28, 1976. She stated that she talked with her department chairperson to discuss the lesson plans for her classes for the day; however, she was too ill and upset at the time to mention her decision to take the trip. (Tr. 145-146, 171-172, 180-182)

Respondent's husband testified that on the afternoon and evening of October 28, 1976, respondent prepared lesson plans, grades, progress charts and tests to be used for her pupils during her absence. (R-1, 2, 3, 4) Respondent testified that she met with her department chairperson on October 29 to discuss her decision to take the trip and to leave the necessary lesson plans with her. She stated that the department chairperson advised her to talk with the principal with regard to her decision. She testified that she informed the principal on October 29 that she intended to accompany her husband on the trip. (Tr. 110, 145-150, 181)

On Sunday, October 31, 1976, respondent left on the trip and returned on Friday or Saturday subsequent to Thanksgiving. Upon her return to school on Monday, November 29, respondent was directed to the principal's office and told to report to the Assistant Superintendent of Schools. Thereupon, respondent was suspended with pay until the charges in the instant matter were certified by the Board on December 6, 1976 at which time she was suspended without pay.

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Respondent argues that although the trip was from October 31 until November 27, or 28, 1976, she was absent from her assigned duties for a total of only fourteen school days. She contends that the Board had no written procedures or guidelines for teaching staff members to request unpaid leaves of absence. She asserts that although there was testimony that teachers had the right to appeal a denial by the Assistant Superintendent to the Superintendent or the Board, no such notice of this right had been given to teaching staff members in writing. The only written policy of the Board, asserts respondent, was a generalized statement of policy without procedures (P-20) and subsequent to the incident in the instant matter, administrative guidelines were prepared and submitted to the hearing examiner. (C-1)

Respondent argues that she was given an inadequate opportunity to request the leave of absence and present the information in support of her request to the proper Board administrator for decision. In certain respects, asserts respondent, the Board policy with regard to unpaid leave of absence is open to question and under the facts as presented herein, the Board, in the proper exercise of its discretion should have granted the requested leave of absence. (Respondent's Brief, at pp. 6-7, 11-12)

Respondent also referred to the testimony of the principal and department chairperson who testified that respondent was a competent teacher and that there was no testimony that she had any prior difficulties in her employment.

Respondent does not ask the Commissioner to give his approval to her absence, but rather that he understand the circumstances involved, the difficult choice faced by her and the need for her to choose between two important responsibilities. (Respondent's Brief, at p. 19)

The hearing examiner finds the credible evidence to support and sustain the charges of conduct unbecoming a teaching staff member and insubordination. He finds, however, that the evidence is insufficient to support the charge of abandonment of position. With respect to the latter charge, the evidence is to the contrary. Respondent prepared lesson plans, grades, progress charts and tests to be used during her absence and, in fact, returned to her school on the day she had reported that she would return from her trip.

The hearing examiner finds no merit with regard to respondent's assertion that she was given an inadequate opportunity to request the leave of absence and to present the information to the proper Board authority for decision. There was no showing that the decision would have been different had respondent presented her request directly to the Assistant Superintendent rather than through the principal. The Assistant Superintendent testified with respect to the Board's constraint for the approval of personal leaves of absence. Additionally, respond ent did not make her final decision until October 28, a day she was absent from school, and did not report her decision until October 29, that she would be leaving on the trip on October 31, 1976. To argue that respondent was not provided adequate opportunity to present her request, which was reported on a Friday that she would be leaving on the following Sunday, is incredible in the

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judgment of the hearing examiner. In addition, respondent absented herself from her assigned duties with the full knowledge that her request for a personal leave of absence had been denied.

In summary, the hearing examiner finds that respondent is responsible as charged for the act of leaving her assigned duties to take a trip, which had previously been denied, from November 1 until November 29, 1976. He further finds that this act stands alone in an otherwise unblemished record of service to the Board for a period of five years. It remains for the Commissioner to determine what penalty, if any, shall properly be imposed upon respondent.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions and objections filed thereto by respondent. The Commissioner, after a thorough review of the record and respondent's objections, finds and determines that the weight of credible evidence establishes the truth of the charge of conduct unbecoming a teacher. The Commissioner does not agree with the examiner's finding that respondent was insubordinate as charged. This later determination is grounded upon the fact that respondent's principal failed to specifically forward her written request for a leave of absence through the appropriate administrative channels for determination and subsequent appeal. The evidence is clear that the principal erred when he presented respondent's request orally and as a hypothetical matter to the Assistant Superintendent rather than the *bona fide* written document submitted by respondent. (Tr. 4-8, 24; P-1) Notwithstanding the finding that the principal erred in not forwarding respondent's written request for a leave of absence through the appropriate administrative channels, respondent informed the principal on October 13, 1976 that she would fulfill her responsibilities and not take leave of her assigned teaching duties. Respondent neither renewed nor amended her request, thus rendering the issue moot. The principal was not aware, until Friday, October 29, 1976, that respondent intended to absent herself commencing the following Monday, November 1, and continuing until November 29, 1976. At that time the principal did not direct respondent to appear for her assigned duties; rather, he informed her of the possible consequences should she take a leave of absence. Accordingly, that portion of the charge of insubordination is dismissed.

Additionally, the Commissioner adopts as his own the hearing examiner's finding that the charge of abandonment of position is not supported by the evidence. It remains, therefore, for the Commissioner to determine whether respondent's conduct warrants dismissal from her position with the Board or some lesser penalty.

The Commissioner is mindful that conflicts arise between family and professional responsibilities from time to time. Such conflicts should not, however, interrupt nor interfere with the orderly conduct of the educational process. Given

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all of the facts and circumstances, the Commissioner finds that respondent used poor judgment in taking such leave from her position without proper authorization. Respondent had the duty and obligation to serve the pupils assigned to her charge. The Board had every expectation that she would indeed attend to her assigned duties and responsibilities. As the Commissioner observed *In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, Hudson County*, 1977 *S.L.D.* 403 when he stated:

> "***The Commissioner has held that *pupils are required to be in regular attendance in the public schools*. [Citation omitted] *No less a requirement should be made upon the teachers* who are to serve the pupils required to be in attendance pursuant to the compulsory education statutes of this State.***" (*Emphasis supplied.*) (at 414)

The Commissioner concludes after a careful study of this matter that respondent's action, although regrettable, does not rise to the level to warrant dismissal. As the Commissioner said in an order on remand from the Superior Court *In the Matter of the Tenure Hearing of David Fulcomer*, 1967 *S.L.D.* 201:

> "***Although unfitness may be demonstrated by a single incident (see *Redcay v. State Board of Education*, 130 *N.J.L.* 369 (*Sup. Ct.* 1943), affirmed *o.b.*, 131 *N.J.L.* (*E.&A.* 1944), the Commissioner does not consider the single episode herein sufficiently flagrant to warrant such a finding. In the Commissioner's judgment, a less severe punishment will serve the necessary purposes of correction and deterrent.***" (at 219)

Moreover, in the Commissioner's judgment respondent has suffered mental anguish, a hearing which could have resulted in the loss of her teaching position, damage to her professional reputation, and she will be required to exert herself to reestablish her reputation and standing because of her error.

Accordingly, the Commissioner determines that respondent's suspension of 120 days without pay stand on the record and directs the Woodbridge Township Board of Education to reinstate respondent to her position of regular classroom teacher at the salary she would have received for the 1977-78 academic year. Stated another way, respondent will forfeit all increments she would have received for the 1978-79 academic year, above her salary rate for the 1977-78 academic year.

COMMISSIONER OF EDUCATION

August 30, 1978

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Hunterdon Central High School Board of Education,

Petitioner,

v.

Paul J. McCormick,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

In accordance with the rules and regulations of the Commissioner of Education, James P. Granello, Esquire, on behalf of Petitioner Hunterdon Central High School Board of Education, and Edmund R. Bernhard, Esquire, on behalf of Respondent Paul J. McCormick, appeared before the Commissioner of Education, by his Deputy Assistant Commissioner of the Division of Controversies and Disputes, August E. Thomas, for a conference of counsel; and it appearing that Respondent Paul J. McCormick has been suspended by the Petitioner without pay for more than 120 days; prior to the conference of counsel, Paul J. McCormick demanded payment pursuant to N.J.S.A. 18A:6-14, and at the conference of counsel Paul J. McCormick, by his attorney, Edmund R. Bernhard, Esquire, likewise having demanded payment pursuant to N.J.S.A. 18A:6-14. The Commissioner of Education, by his Deputy Assistant Commissioner of the Division of Controversies and Disputes, August E. Thomas, considered the demands, and therefore;

It is on this 31st day of August, 1978, ORDERED that Hunterdon Central High School Board of Education make payment forthwith to Respondent, Paul J. McCormick, of full salary, commencing August 9, 1978, and continue until the matter of the tenure charges is determined, or any further Order by the Commissioner.

The Commissioner recognizes that there is pending a Declaratory Judgment action before him, dealing with T&E Program and Budgetary matters, involving petitioner Hunterdon Central High School Board of Education and this Order is entered pending consideration and method of reimbursement, if any is required, in light of any decisions of Declaratory Judgment Petition in the Declaratory Judgment action brought on behalf of Petitioner Hunterdon Central Regional High School District.

COMMISSIONER OF EDUCATION

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Board of Education of the Hunterdon Central Regional High School District, Hunterdon County,

Petitioner,

v.

Paul J. McCormick,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Murray & Granello (James P. Granello, Esq., of Counsel)

For the Respondent, Bernhard, Durst & Dilts (Edmund R. Bernhard, Esq., of Counsel)

The matter having been opened before the Commissioner of Education by formal Petition for Declaratory Judgment filed by the Board of Education of the Hunterdon Central Regional High School District, thereinafter "Board," seeking a determination that the Board has complied fully with the decision of the Commissioner, *Paul J. McCormick v. Board of Education of the Hunterdon Central Regional High School District, Hunterdon County*, 1978 *S.L.D.* (decided February 28, 1978), in which the Board was directed to pay respondent back salary, and an Answer having been filed thereto; and

It appearing that the Board has paid respondent the difference between the salary he earned and the salary he would have earned had he not been illegally demoted by the Board, less seventeen days' vacation pay in each of the two years, 1976-77 and 1977-78 (Exhibits A, B, C); and

It appearing that the withholding of the thirty-four days' pay is occasioned by the fact that, during his demotion, respondent's annual work schedule was reduced from twelve months to ten months thereby causing him to have a longer vacation period; and

It appearing that the Commissioner's decision in this matter stated in pertinent part that:

> "***[I]t is ordered that the Board restore petitioner to an appropriate position commensurate in duties, salary and emoluments with his tenure status as a supervisor of instruction. *It is similarly ordered that the Board reimburse petitioner for the difference between the salary and emoluments which he had received since November 10, 1975 and that which he would otherwise have received had he not been reassigned with reduction in benefits*

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*on that date. The amount of the difference shall be mitigated only by applicable earnings, which petitioner received for summer employment, if any, during the intervening period.****'' (*Emphasis added.*) (at)

It appearing that respondent's additional vacation allowance was forced upon him and he was precluded from working by his illegal demotion; and

It appearing that the Board has not complied fully with the Commissioner's directive, *ante*, which clearly states that the amount of the difference shall be mitigated only by applicable earnings, which respondent received for summer employment, if any, during the intervening period; now therefore

IT IS HEREBY ORDERED on this 19th day of September 1978 that the Board of Education of the Hunterdon Central Regional High School District pay respondent the additional thirty-four days' salary which was improperly deducted from the salary he would have received had he not been illegally demoted by the Board.

COMMISSIONER OF EDUCATION

Board of Education of the Borough of Fair Lawn, Bergen County,

Petitioner,

v.

Harold F. Schmidt,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel (Reginald F. Hopkinson, Esq., of Counsel)

For the Respondent, Harold F. Schmidt, *Pro Se*

The Fair Lawn Board of Education, hereinafter ''Board,'' petitions the Commissioner of Education for a declaratory judgment on an issue over which a controversy has arisen between the majority membership of the Board and Harold F. Schmidt who is also a member of the Board. Respondent disputes the

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legality of charging pupils for costs of food and lodging incident to their participation in the Board's Outdoor Education Program.

The matter comes before the Commissioner in the form of a stipulation of facts with relevant exhibits and memoranda of the respective parties to the dispute. The facts are these:

The Board offers the Outdoor Education Program in which eighth grade pupils in groups of seventy-five may participate on a voluntary basis. Those participating do so for a continuous period of two and one-half days at a YMCA camp on days during which school is in session. Pupils who choose not to participate for reasons of health, religion or personal preference are required to attend school.

The Board bears costs for transportation, equipment, supplies and consultant fees, as well as salaries and expenses of teachers and nurses who participate in the program. Pupils who participate are required to pay a twenty-five dollar fee for use of camp facilities, all meals and two nights' lodging. The program has proved so attractive that, although not required to do so, most pupils do participate. In the carefully prepared outline provided to participants are listed the following daytime instructional activities: outdoor culinary arts, ecology, geology and mineralogy, survival, archaeology, textures in the environment, and meteorology. Electives for evening activities include fishing, tennis, archery, boating, volleyball, riflery and terrariums. That same outline sets forth, *inter alia*, the following reasons for participation:

***

"a. *Science*—You have been studying about conservation, rocks, minerals, chemicals, erosion, glaciers, water, forests, cells, wild life and the survival of certain plants and animals as well as man. At camp you will go on walks through swamps and forests that will enable you to see or to touch, to smell, or to avoid things that you will have been reading and talking about in many of your classes. We will also search for certain specific minerals found nowhere in the world—unique to that area.

"b. *Physical Education*—hiking, square-dancing, fishing, riflery, archery, tennis, boating and volleyball are among the activities that are possible to enjoy at Silver Lake. Many of these activities are either not available or they are difficult to include in our regular school curriculum.

"c. *English*—you will have an opportunity to communicate with the entire group by reporting, writing, and discussing about the outdoors in a creative manner.

"d. *Music*—outdoor group singing and songs dealing with nature are relaxing and fun for all. Songs can be sung at mealtime, while hiking, or in the cabins. Perhaps some of you can provide musical accom-

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paniment or present a special musical skit. Also, time will be provided for group singing.

"e. *Guests*—we hope to have a famous naturalist perform as a 'staff member.' He will inform us about the basics in camping, show us examples of his travels, and the possibilities of a vacation for any interested student.

"f. *Other activities* that may be included depend upon your imagination, creativity, and interest. Early morning bird walks, casting, fishing, and crafts are just a few suggestions.***"

(Stipulation of Facts, at p. 2)

The issue simply stated is whether, given the above stated factual context, the Board is required to assume responsibility for payment of all costs for food and lodging of each participating pupil.

The matter of responsibility of a board of education for field trips was addressed in *Melvin C. Willett v. Board of Education of the Township of Colts Neck*, 1966 *S.L.D.* 202, aff'd State Board of Education 1968 *S.L.D.* 276 and is herein reaffirmed as follows:

"***The term 'field trip' as used in this case is understood and is limited to mean a journey by a group of pupils away from the school premises under the supervision of a teacher for the purpose of affording a first-hand educational experience as an integral part of an approved course of study. For example, pupils may visit the post office, the fire house, a bank, a farm, a museum, government buildings, a factory; they may take nature walks, visit a planetarium, observe examples of air and water pollution, attend a professional theatrical performance. There are many such opportunities for first-hand observation and learning and the educative value of such experiences is beyond question. Teaching is more effective and learning is enhanced when it is not confined to activities within the classroom and the school building but moves out into the child's environment and employs actual observation and experience to supplement and enrich classroom procedures. Such a field trip is a proper and desirable element of the school curriculum. It is not a holiday, a recess, a reward or a vacation from school work even though it may be a welcome change from ordinary routine, and pupils may find it interesting, exciting, and enjoyable. Learning occurs most effectively when such conditions are present. A field trip is, or should be, a valuable learning experience, planned, carried out, and followed up as an integral part of the course of study with clearly understood objectives in terms of learning. If the trip does not meet such criteria, it is to be questioned whether it has any place in the school program. The Commissioner holds that field trips which supplement and enrich pupils' classroom learning are an important and desirable element of the school's program of instruction and as such are a proper cost of instruction which cannot be imposed by rule involuntarily on the parents of pupils.

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> "It should be clearly understood that the Commissioner's determination herein that pupils cannot be required to bear the costs of school programs is limited to field trips and such other activities as are part of the regular classroom program of instruction or course of study. It does not extend to and is not applicable to such other school affairs as dances, concerts, dramatic productions, athletic events and the like, for which admission charges are ordinarily made. Such activities, while certainly part of the total school curriculum, are not part of the classroom teaching program. They occur after normal school hours and attendance at them is voluntary. A field trip is scheduled during normal school hours and attendance is not optional. It is the classroom made mobile. Such is not true in the case of those activities which although generally referred to as 'extra-curricular' are actually curricular but are 'extra-classroom.' The distinction made here is between procedures which, like field trips, use of the library, assembly programs, gymnasium-playground activities, etc., are an integral part of the classroom teaching-learning process, which occur during regular school hours and in which all pupils in a class automatically participate, as contrasted with other activities which are not directly related to the classroom program, which take place outside of the normal school day, and which pupils elect to attend. The expenses of these latter elective activities are often underwritten by charging participants or spectators a fee. The Commissioner finds no infirmity in such practice although he would prefer, as would most public school educators, that all such events could be made free.***" (at 205-206)

Similarly reaffirmed is that which was stated in *Melvin Willett and Freehold Regional High School Education Association v. Board of Education of the Freehold Regional High School District*, 1976 *S.L.D.* 282 as follows:

> "***The Commissioner encourages the Board to look favorably upon those events which in the Board's judgment add to the scope and dimension of pupil opportunities which are not otherwise found in the curricular and cocurricular program.***" (at 289)

Such supplemental opportunities abound both within and outside the boundaries of New Jersey and are increasingly accessible through safe and economical modes of travel. There has been expansion of facilities at state and national parks as well as purchase by boards of education of nature study and ecological study sites. The need for members of our highly technological society to avail themselves of such quiet retreats continues unabated. In this respect the public schools may properly assume a function in preparing pupils both for such participation and the preservation of the environment for generations to follow.

This Board has devised a limited two and one-half day program in which pupils may freely choose to participate or not participate. That most of its eighth grade pupils choose to participate makes it no less optional than voluntary participation by pupils in a small group chaperoned by a teacher who organizes

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a visit to an art exhibit, ballet, theater, opera, sports event, debate, college campus, or historical site.

As stated in *Willett, supra*, a field trip is scheduled during normal school hours and participation is not optional. The Board's Outdoor Education Program, although scheduled in part during school hours, extends beyond the normal school day throughout two evenings and nights for each participating pupil. Those instructional activities of the day and evening hours must be viewed as a field trip, albeit one in which pupils voluntarily engage. As aptly characterized in *Willett, supra* (1968) "***[i]t is the classroom made mobile.***" (at 206)

Reasonable charges may be made to those pupils who voluntarily engage in the program for costs of food and lodging, which costs are normally borne by pupils and their families. Although the Board is free to assume such costs, it is not obligated to do so. In no way is this holding to be interpreted as invalidation of those well conceived plans and practices by boards of education which choose to pay for the meals and lodging of members of forensic groups, performing musical organizations or athletic teams which are scheduled for activities that require that they be away from their communities for meals and lodging.

The instant matter is, nevertheless, importantly differentiated from *Willett* since it is stipulated herein that participation is optional in an activity conducted in part during school hours and in part during the sixteen hours of the day when school is not ordinarily in session. There is no showing that participation in the Outdoor Education Program, or lack of such participation, has any effect on a pupil's grades or requirements for graduation. Nor is there within the record anything that supports a conclusion that those who do not elect to participate are not provided with suitable instructional opportunities while some of their classmates are away from the school. When a board approves such trips on an optional basis during the school day it must not only arrange suitable transportation and supervision for pupils but must continue to provide a viable program of education for those who do not wish to participate. It is not required to provide food for those pupils who would have furnished their own meals had they chosen to remain in the school. While they may do so, boards of education are not required to pay for food, lodging and transportation for those who voluntarily choose as delegates or officers to attend state and national conventions of vocationally oriented pupil organizations such as the Future Farmers of America or Health Occupations Students of America. To invoke such a stringent requirement could result in undue expenditures of public funds in a period in which budget caps limit the expansion into such areas. It would not only preclude schools from encouraging such activity but also cause the unfortunate demise of well formulated effective programs of leadership training. Such a result is not in the public interest. The Commissioner so holds.

While the laws of this State require that a thorough and efficient system of free public education be made available to each resident pupil in a school

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district, it is not mandatory that each pupil participate in every curricular and cocurricular opportunity authorized by a board of education. Such a requirement would be both untenable and contrary to the reality that individual differences, abilities, interests and potentialities exist. See *Montclair Concerned Citizens Association et al. v. Board of Education of the Town of Montclair, Essex County*, 1977 *S.L.D.* 1014.

Absent a showing that pupils who do not voluntarily participate in the Board's Outdoor Education Program are pressured to do so, are disadvantaged in their regular instructional program or are stigmatized by their nonparticipation, the Commissioner finds no reason to question the Board's exercise of its discretionary authority to develop, implement and continue to operate that program within the parameters hereinbefore set forth.

COMMISSIONER OF EDUCATION

September 19, 1978

Pending State Board of Education

Charles R. Baker,

Petitioner,

v.

Board of Education of the Borough of Bergenfield, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg & Simon (Louis P. Bucceri, Esq., of Counsel)

For the Respondent, Greenwood, Weiss & Shain (Stephen G. Weiss, Esq., of Counsel)

Petitioner, an administrator with a tenure status employed by the Bergenfield Board of Education, hereinafter "Board," alleges that he was wrongfully denied a salary increment for the 1974-75 school year because the Board violated the provisions of *N.J.S.A.* 18A:29-14 when it failed to adopt a resolution expressly withholding his salary increment and also failed to inform him in writing within ten days of its action to withhold said increment. The Board admits the refusal

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to grant such salary increment but denies that its action was improper or unlawful and asserts that petitioner is guilty of laches and, further, that this Petition of Appeal was not filed in a timely fashion pursuant to *N.J.A.C.* 6:24-1.2 and therefore should be dismissed.

Petitioner advanced a Motion for Summary Judgment with supporting Brief and the Board subsequently filed its Brief in Opposition to Motion for Summary Judgment. Oral argument on petitioner's Motion was heard by a hearing examiner appointed by the Commissioner of Education on September 26, 1977 at the State Department of Education, Trenton.

The Board's Opposition to the Motion for Summary Judgment is grounded upon petitioner's assertion that the Board failed to inform him in writing within ten days of its action to withhold his increment as required by *N.J.S.A.* 18A:29-14. (Petition of Appeal, paragraph 10) The Board contends that the facts with respect to that issue could only be disposed of at a hearing.

Although the Board admits that "***no official communication was delivered to [petitioner] in writing within ten days after the respondent's vote on October 8, 1974***" (Board's Answer, at para. 10), petitioner produced a salary notice from the Board which was stipulated by the parties and marked into evidence as P-6. (Tr. 5-6) There being no other factual matters in dispute in the instant matter, the Board advanced its own Motion for Summary Judgment. (Tr. 33) The facts are these.

Petitioner, a tenured member of the Board's administrative staff received a letter dated June 17, 1974 whereby the former Superintendent of schools formally notified petitioner that the withholding of his 1974-75 negotiated adjustment increment was under consideration. (Exhibit A, R-3) The former Superintendent stated that such action was contemplated based upon an evaluation of petitioner's work during 1973-74. (R-1, R-2(1), R-2(2)) Petitioner and the former Superintendent met on June 26, 1974 to discuss the issue of petitioner's increment. The Superintendent thereafter informed petitioner by letter dated August 1, 1974 that he could not recommend petitioner for a salary increment for the 1974-75 school year. (Exhibit B, R-2(2)) On October 4, 1974, petitioner received a letter from the Board's new Superintendent wherein it was stated that the Board would adopt a 1974-75 salary resolution which would not include any salary adjustment for petitioner. (R-5, Board's Answer)

On October 6, 1974, the Board adopted a resolution to ratify the negotiated agreement between the Board and the Bergenfield Supervisors' Association, hereinafter "Association." (P-2, at p. 4) Attached thereto was a list of employees' names and their adopted salaries for the 1974-75 school year, including petitioner's name and salary in the amount of $21,775. (P-2, at p. 12) Petitioner asserts that the adopted salary of $21,775 did not include an amount of $850 due him as the negotiated salary increase for those Association employees at the top of the applicable salary guide. Subsequently, on an unspecified date in October 1974, the Board Secretary notified petitioner in writing that the Board had adopted an annual salary of $21,775 for him for the 1974-75 school year

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and, further, that he had until October 25, 1974 to either accept or reject the Board's offer. (P-6)

On November 13, 1974, pursuant to the Board's negotiated policy, petitioner instituted a grievance with regard to the withholding of his salary increment. (P-3) On February 3, 1975 the Board rejected petitioner's grievance and indicated that it had the discretionary authority to withhold an increment by adopting a salary amount for an individual employee that did not include an increment rather than adopt a resolution to expressly withhold an increment. (P-4)

Thereafter, on July 16, 1975 petitioner filed a complaint before the Federal District Court for the District of New Jersey wherein he alleged that the Board had deprived him of a property interest (withholding his salary increment) without due process of law. Subsequently, on January 3, 1977 petitioner entered into a stipulation of dismissal without prejudice before the Federal District Court. (P-5) On January 5, 1977, the instant Petition of Appeal was filed before the Commissioner pursuant to *N.J.A.C.* 6:24-1.1 *et seq.*

The Board does not dispute the facts as set forth, *ante*. It asserts that petitioner's evaluations during the 1973-74 school year were such as to make him a likely candidate for the withholding of a salary increment and that petitioner had notice prior to the end of that school year of the Superintendent's inclination to make such a recommendation to the Board. (R-1, R-2(1), P-1) The Board asserts that it communicated with petitioner during the summer months of 1974 and made known to him the deficiencies identified in the various evaluations. (R-2, R-3, R-4) It further asserts that petitioner conceded the fact that he was notified on October 4, 1974 that the Board intended to take formal action on October 8, 1974 to withhold his salary increment. (R-5) At a public meeting held October 8, 1974, the Board, by an official roll call vote of the majority, formally determined to maintain petitioner at his 1973-74 annual salary level for the 1974-75 school year. (P-2) It argues, however, that the form of the Board's resolution regarding petitioner's salary was designed to spare him ridicule and embarrassment which might have resulted from a separate and specific motion. (Board's Brief, at p. 2) The Board concedes, *arguendo*, that petitioner was not served written notice of its action, accompanied by reasons therefor within ten days. It asserts, however, that it met the legislative intent of *N.J.S.A.* 18A:29-14 and, therefore, its determination should not be set aside. *George Hillman v. Board of Education of Caldwell-West Caldwell, Essex County*, 1977 *S.L.D.* 218 (Board's Brief, at p. 10 *ff.*)

The Board moves to dismiss the instant Petition of Appeal grounded upon petitioner's failure to file in a timely fashion pursuant to *N.J.A.C.* 6:24-1.2 and the equitable doctrine of laches. The Board argues that petitioner's delay of approximately twenty-six months before he filed his Petition of Appeal before the Commissioner prejudiced the Board in its preparation of a proper defense.

The Commissioner has consistently held that where the doctrine of laches as an equitable defense has been raised, he will consider all the circumstances

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to determine whether there has been unreasonable and inexcusable delay which would bar action. *Barbara Witchel v. Board of Education of the City of Passaic et al.*, 1967 *S.L.D.* 1, aff'd State Board of Education, January 3, 1968

The Commissioner observes in the instant matter that petitioner made known his complaint and filed a grievance against the Board within thirty-six days subsequent to the Board's action. Petitioner continued his complaint to the Federal District Court subsequent to the Board's determination of his grievance, albeit, some five months later and in the wrong forum. The Board filed its Answer to that federal action and subsequently stipulated to dismiss such action "without prejudice." The Commissioner finds that petitioner did not rest his complaint but rather continued a course of action for relief and, therefore, he was not dilatory in filing the instant Petition. There was no showing that petitioner deliberately delayed his complaint in order to place the Board in an indefensible position. Accordingly, the Commissioner rejects the Board's argument that petitioner is guilty of laches.

There remains the central issue of the Board's withholding of petitioner's salary increment and whether or not the Board was in compliance with *N.J.S.A.* 18A:29-14, which provides, *inter alia*, as follows:

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. *It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor*, to the member concerned.***"
>
> (*Emphasis added.*)

The facts in the instant matter are clear that subsequent to its action on October 8, 1974 to withhold petitioner's salary increment, the Board notified petitioner of his annual salary for the 1974-75 school year. (P-6) The Board's salary notice did not include an amount of $850 which represented a negotiated salary increment due petitioner by virtue of his placement at the top of the administrators' salary guide. (P-2, at p. 4) Nor did the Board, by separate resolution, approve the withholding of the negotiated salary increment. The Board approved a list of salaries for administrative personnel including petitioner and retained petitioner at the same salary for the 1974-75 school year which he had received for the 1973-74 school year. (P-2, at p. 12) The notice of salary for the 1974-75 school year did not include the reasons for the Board's withholding of the salary increment from petitioner. (P-6)

The Commissioner finds that the Board's actions were not consistent with the legislative intendment of *N.J.S.A.* 18A:29-14. He observes that the instant matter is similar, in many respects, to the matter of *Ralph Marshall v. Board of Education of the Southern Ocean County Regional High School District, Ocean County*, 1978 *S.L.D.* (decided July 10, 1978) wherein he stated:

> "***The Commissioner observes that petitioner was in receipt of the Su-

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perintendent's evaluation and was well aware that the Superintendent had recommended that the Board withhold his increment. *** To argue that the Board failed '***to give written notice of such action, together with the reasons therefor ***' in the Commissioner's judgment places form over substance. Petitioner was aware '***of such action, together with the reasons***.' *N.J.S.A.* 18A:29-14 As the Commissioner stated in the matter of *Hillman, supra* [1977 *S.L.D.* 218]:

> '***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)***'' (at)

The Commissioner has carefully reviewed the facts in the instant matter and the legal arguments set forth by respective counsel in light of relevant statutory and case law. He finds that the Board was 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 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.

As in the matter of *Marshall, supra*, the Commissioner is constrained to issue a caveat to this Board and all other local boards of education that the withholding of any salary or adjustment increment is to be accomplished in accordance with the provisions of *N.J.S.A.* 18A:29-14. Such compliance will prevent allegations of improper procedures and subsequent litigation. In the judgment of the Commissioner, the instant matter might not have arisen if the Board had followed the directive set forth in the statute rather than make its own determination that it had substantially complied with the intent of the statute.

The Commissioner finds and determines that the action of the Board of Education of the Borough of Bergenfield on October 6, 1974 to withhold the salary increment of Charles Baker was proper and legal. Accordingly, for the reasons stated, the Petition is dismissed.

COMMISSIONER OF EDUCATION

September 19, 1978

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Ellen Porcelain,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

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

Petitioner, who was employed as a nontenured elementary teacher by the Fort Lee Board of Education, hereinafter "Board," alleges that the Board's refusal to reemploy her for the 1975-76 school year was not only in violation of her constitutional, statutory and elementary rights of due process but also contrary to the provisions of the negotiated agreement then in effect. Specifically, she charges that the reasons given her for non-reemployment were but a subterfuge for the true reasons which she alleges were based on malice, intolerance, and unacceptance of her positive contributions to the educational system. The Board, conversely, asserting that its determination not to reemploy petitioner was a reasoned application of its legal discretionary authority to determine which nontenured teachers shall teach in its schools, asks that the Petition of Appeal be dismissed.

Hearings in the controverted matter were conducted by a hearing examiner appointed by the Commissioner on May 24 and July 29, 1976 and continued, following the lengthy illness of counsel for petitioner, on March 17, April 28, May 18 and October 11, 1977. Post-hearing briefing was concluded February 3, 1978. Those uncontroverted facts which form the contextual setting of the dispute are set forth as follows:

Petitioner, who was employed by the Board as an elementary school teacher in September 1973, was recommended by both her principal and supervisor and reemployed for the 1974-75 school year. (P-8, 15, 19-20) She was suspended for two days during October 1974 pending an investigation of the truth of certain questioned statements on her employment application form, but was thereafter reinstated.

By letter dated April 3, 1975 petitioner was notified that the Board, based

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on the recommendations of its Superintendent, would vote on April 14 on a resolution not to reemploy her for the ensuing school year. (R-4; P-14) Petitioner was afforded opportunity to appear with a representative or counsel at a meeting of the Board on April 10 to present facts pertinent to the Board's reasons for its contemplated action. Those reasons were stated as follows:

> "1. You evidence insufficient mastery of the teaching of reading and other subject areas to meet the standards of the Fort Lee Public School System.
>
> "2. You require a great deal more supervision than should be required by a teacher with your experience both in the Fort Lee Public Schools and in prior districts.***" (R-4)

Although petitioner appeared with counsel before the Board on April 10 to speak in her own behalf, the Board resolved on April 14 not to reemploy her and notified her of its action on the following day. (R-7)

The testimony of witnesses is succinctly summarized by the hearing examiner as follows:

Petitioner testified that as a teacher she sought to bestow love and affection upon her pupils and to develop and maintain close relationships with them by showing personal interest in them, by giving them gifts, serving as a Girl Scout leader, taking them to lunch at her expense on a rotational basis, and spending after-school hours with them both at the school and in their homes. She stated that although she took each of her pupils to lunch at least twice during the 1974-75 school year, she rewarded some pupils more frequently for their outstanding accomplishments. (Tr. V-24, 34, 37-46, 100, 116, 140, 151)

Petitioner testified that certain jealousies developed between her pupils over her attentions and that as the result of parent complaints she sought the assistance of a guidance counselor after which she was able to better meet the needs of her pupils. The guidance counselor testified that on two separate occasions petitioner had enlisted her aid in developing procedures to alleviate such misunderstandings between her pupils. (Tr. V-49-50, 74-78, 91, 98, 100, 111-114)

Petitioner testified that after these and other misunderstandings had come to the attention of the administration she was placed under restrictions which stifled her relationships with pupils. (Tr. V-75; P-10)

Petitioner testified also that in October of 1974 she was suspended for two days while inquiries were made into the veracity of a statement on her employment application form whereon she had claimed ten months of experience during 1971-72 in another school district. (R-2) She testified that she had in fact claimed ten months of experience for that school year. She stated, however, that although it was learned that she had not worked from April through June 1972, the Superintendent nevertheless restored her to her teaching duties after a two day suspension. (Tr. V-19-21) That he did so was corroborated by the Superintendent who also stated that his investigation revealed that petitioner was terminated

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from her kindergarten teaching duties in the other district effective January 1972. (Tr. III-21) Documentary evidence reveals that when petitioner was reassigned to alternate duties, which arrangement proved unsatisfactory, she was paid but did not work during February and March of 1972. (R-3)

Petitioner, testifying that friendly relationships of certain of her teacher associates had deteriorated early in the 1974-75 school year, alleged that the negative recommendations of her supervisor, the principal and the Superintendent to the Board were improperly based on innuendos, malice, untruths, hysteria and unconfirmed rumors. She further alleged that both her evaluations and those recommendations were dishonest and lacking in objectivity. (Tr. V-31-46, 121, 131, 171; Tr. VI-3-4, 17, 21-24) While she does not attribute such improprieties to the Board, she asserts that its actions were fatally tainted by its reliance upon allegedly incompetent and improperly based recommendations of its administrators. (Tr. VI-32-34, 37, 40) Petitioner further testified that she believes her rights of free speech were stifled by the Board's refusal to respond to those points which she made in her own behalf at her informal appearance of April 10, 1975. (Tr. V-134, 137; Tr. VI-43)

Petitioner's principal testified regarding a number of occasions wherein teachers and other persons and anonymous callers had privately advised him that they felt petitioner was acting or speaking unwisely or in an unprofessional manner. He stated that other teachers had reported that petitioner too frequently requested that Girl Scouts in her troop be allowed to leave their classrooms, that they felt intimidated by petitioner's comments, and that friction and emotional upset were generated between pupils by petitioner's attentions to certain individual pupils. (Tr. I-99, 102-105, 108-110, 114, 122-134) The principal testified that he counseled the complainants not to deal in rumors. (Tr. I-93) He stated that he filed written records of certain of these complaints, advised his superiors of the nature of them, but formed no immediate conclusion as to the truth thereof. (P-6-9) He testified, further, that when petitioner was suspended for two days in October 1974 he discussed with petitioner her relationships with fellow teachers, as well as problems of tension between pupils in her classes, and issued the following directives upon her reinstatement:

> "***(1) Truth must be told when discussing faculty members of Fort Lee, including all members of administration. Negative statements are not to be condoned. Quoting people falsely will not be tolerated. No one, including all Fort Lee employees, is to be maligned at any time. The reputation of each individual is a very precious part of his life and must be treated accordingly.
>
> "(2) You are never to leave School No. 1 with a student of the school, or take one or more to lunch, or to their homes. Normal exceptions to this rule would be class trips approved by the principal, or Girl Scout activities. Of course, it is permissible to have lunch or dinner with the child and his parents, but you are not to provide the transportation.
>
> "(3) You are not to request teachers to send children to you during school

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time and you are not to receive children from other classes if they have requested to visit you during the school day.

"(4) You are to meet in my office for a discussion no less than one time per week during the school year. The day and time of the meeting will be initiated by me. All discussions at these sessions are expected to be confidential." (P-10)

The principal testified that his decision not to recommend petitioner for reemployment was in no part motivated by innuendo or rumor but based solely on recorded impartial observations of her performance in the classrooms, school and playground.

When asked why he had not shared with petitioner those innuendos and allegations made by others charging that her relationships with pupils were improper, he stated:

"***I felt I would be betraying a confidence and since it had no bearing on my thinking I felt why upset a teacher more who was obviously upset. I thought she should have a fighting change.***" (Tr. II-84)

When asked his reason for recommending non-reemployment of petitioner, the director of elementary education averred that his judgment was not affected by rumors but that:

"***The basic reason was the observation of the reading lessons in particular in the last two times. Previous recommendations although satisfactory were not outstanding. They were all marked satisfactory in the previous year and in the previous fall. But I was disturbed by the fact that many of the things I had pointed out in the reading lesson that I had observed in January were still evidenced in the March reading lessons. I had then pointed out the evidence of the very same things in the reading it was obvious was evident to me and I made a point in coming back to see a reading lesson. I also made an indication and it's reflected in my comments, by that time, for better than a year and a half, Miss Porcelain had been a very conscientious and very good working member of our curricular Board in our district. My contacts with Miss Porcelain as a curriculum council member had been very good and as I indicated, she was an extremely conscientious member of that council. On the basis of my observation of her teacher performance, five the previous year and three that year, I felt her deficiency as a teacher in reading was sufficient to warrant my recommendation.***" (Tr. VI-63-64)

The Superintendent testified that he based his recommendation for petitioner's non-reemployment on the evaluation reports and recommendations of the principal and the director of elementary education. (Tr. III-111-114)

The father of "E.S.," a pupil who had been in petitioner's class during the 1973-74 school year and in her Girl Scout troop during 1974-75, testified

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that his daughter's teacher had summoned him in October 1974 to appear at the school. He testified that the teacher asked him if he thought the relationship between petitioner and his daughter was "a little strange" or "unusual." (Tr. I-5, 23) He stated that the teacher then advised him to discontinue the relationship "because it is not wholesome." (Tr. I-6) He testified that after he discussed the matter with his wife he was called to the school later that month by the principal who told him that the relationship between his daughter and petitioner was unwholesome and should be discontinued. (Tr. I-8) He testified that when the principal again called him to the school in November and asked him if petitioner had a boy friend he became angered because he perceived that the school authorities were "head hunting." (Tr. I-11) He stated that he informed the principal that petitioner did have male companions, that he knew of no moral problem and that he should be informed if and when there was proof thereof. He testified that, after being twice again summoned to the school in December 1974 and March 1975 at which times additional innuendos and allegations of improper relationships were made regarding petitioner and his daughter, he and his wife complained of "head hunting" tactics to the Superintendent. (Tr. I-18, 46)

E.S.'s mother testified that her husband had first met with the principal in November rather than October 1974. She stated that she and her family hold petitioner, who is a frequent visitor at their home, in high regard as a close friend. (Tr. I-70)

The hearing examiner notes sharp and incompatible divergence between the principal's testimony and that of the parents of E.S. The principal testified that he had had no meetings with E.S.'s father in October, November or December of 1974 but that his first meeting with him had been on January 3, 1975. The principal testified that he had himself initiated that meeting at the suggestion of E.S.'s fifth grade teacher. He related that E.S.'s father had at that time, in agitated manner, expressed concern over petitioner's relationship with his daughter. The principal testified, further, that he assured E.S.'s father that he would advise him if he observed any reason for concern. (Tr. I-128, 132-139) The diametrically contrary testimony is further enmeshed by the testimony of the parent of yet another fifth grade pupil who stated that E.S.'s father could not have attended a meeting on January 3 with the principal for the reason that he had worked the entire day redecorating at his home. (Tr. II-3-8)

E.S.'s fifth grade teacher testified that E.S.'s father had appeared at her classroom door unannounced on the last day of school prior to the Christmas vacation and related to her in agitated manner numerous problems that he attributed to petitioner's association with E.S. in the prior school year. (Tr. VI-90-95) She stated that he asked her, "***Is she [petitioner] a *** queer?***" (Tr. IV-94) She further testified that, when she did not respond to this query:

> "***He jumped up very angry and he said, all you teachers stick together, but I'll get two of my friends and we'll beat her up.***" (Tr. IV-95)

She related that upon her return to school she advised the principal that she felt he should set up a conference to discuss the concerns which E.S.'s father

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had expressed to her. The fifth grade teacher described in detail the intricate flow and cross-currents of gossip and rumor which had prevailed during a large part of the 1974-75 school year in which both she, the principal, petitioner, and others were implicated. (Tr. VI-30-50, 62-68, 86, 94, 146-151) Yet another teacher corroborated the rampant extent of such gossip. (Tr. II-128-137)

The hearing examiner, faced with this irreconcilable testimony both as to when the principal first met with E.S.'s father and also which of them initiated the expression of concerns over petitioner's relationships with E.S., has carefully reviewed the testimony in the record and the demeanor, consistency and forthrightness and objectivity of witnesses. He concludes that the testimony of the principal as corroborated by E.S.'s fifth grade teacher and documented in the principal's own files (P-5) is that which may be relied upon as credible evidence. The findings of the hearing examiner relating to these meetings, as set forth, *post*, are predicated on this evaluation of relevant testimony and documentary evidence.

Those findings are also, in pertinent part, based on numerous classroom observation reports and evaluations of petitioner's teaching performance by her supervisors which are summarized as follows:

Four observation reports of petitioner in 1973-74 by her then principal and the director of elementary education gave petitioner predominantly satisfactory ratings as a teacher and listed both commendations and suggested improvements. (P-16-17; R-8, 16)

During November 1974 the director of elementary education again commended petitioner for certain aspects of her classroom instruction but criticized her in a classroom observation report for failure to follow the fourth grade course of study, for placing incorrect spellings on the blackboard and for keeping an untidy classroom. His subsequent highly professional and thoroughly detailed reports of January 21 and March 3, 1975 further criticized her at length for ineffectual vocabulary and reading instruction. (R-10-11)

The principal in his classroom observation reports of November 14 and December 4, 1974 similarly criticized petitioner for maintaining an untidy room, her teaching of reading, and her practice of having pupils report disciplinary infractions of other pupils and tensions between pupils. (P-11-12) His ensuing observation reports noted certain improvement in classroom neatness, commendable classroom procedures and normal pupil response. (P-4, 22)

The director of elementary education on March 5, 1975 in his report on nontenured teachers commended petitioner for her conscientious service on the curriculum committee but recommended that she not be reemployed on the basis of:

"1. Insufficient mastery of the teaching of reading to meet our standards in Fort Lee.

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"2. Insufficient rapport with a number of staff members and a deteriorating relationship with the school community." (R-5)

The principal similarly recommended that petitioner not be reemployed on the basis of his perception of her weaknesses as a classroom teacher, unsatisfactory social relationship with pupils, teachers and parents, lack of cooperation with other teachers, and excessive need for supervision. (P-14)

Petitioner, who had frequently disputed the criticisms of her supervisors, expounded thereon in a letter to the director of elementary education. Therein she also criticized other teachers for their unwillingness to dedicate themselves more fully to their pupils' welfare and stated:

"***The words you spoke to me still ring in my ears—that I 'care too much' is probably true. I am deeply concerned for the welfare of my students and perhaps I come on a bit too strong.***

"I am concerned for deeper issues than my own personal employment problem. I am concerned that our school systems are becoming very cold institutions devoid of any element of warmth and humanity.***" (R-12)

The hearing examiner, having carefully reviewed and considered both the documentary evidence and the frequently conflicting testimony of witnesses at the hearing, sets forth his findings of fact, as follows:

1. Petitioner was accorded the due process to which she was entitled as a nontenured teacher in that she was notified in timely fashion of the reasons for non-reemployment and granted an informal appearance wherein both she and counsel of her own choosing were given unlimited opportunity to attempt to persuade the Board to reemploy her. *Barbara Hicks v. Board of Education of the Township of Pemberton*, 1975 *S.L.D.* 332

2. Petitioner has failed in her burden of producing a preponderance of credible testimony to prove her allegations that the Board and/or its administrative and supervisory staff gave invalid and false reasons in an attempt to dissemble the true reasons for her non-reemployment. While petitioner disagrees with those reasons which were given, the credible evidence clearly establishes in the mind of the hearing examiner that her supervisors recommended that she not be rehired because they were convinced that she lacked rapport with pupils and fellow teachers, that her performance as a teacher in reading and other areas was deficient, and that she required more supervision than was expected for a teacher with her years of experience.

3. Petitioner's zeal in seeking to establish strong and influential relationships with her pupils by taking them to lunch and seeking to foster activities of her Girl Scout troop during school hours did create problems and friction between both pupils and staff necessitating special supervisory attention.

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4. The record is devoid of proof in support of petitioner's allegations that her freedom of speech was suppressed.

5. The record does not support petitioner's allegations that the classroom observations and evaluations of her teaching performance were based on innuendo, malice, dishonesty or lack of objectivity. Nor does the record give credence to her further allegations that her administrators or the Board acted from hysteria, rumor, or incompetent or improperly based information.

6. The principal, when faced with what he conceived to be unsubstantiated rumor and innuendo directed toward petitioner, made written records thereof but discreetly refrained from assuming that such were true absent substantiating proof.

The hearing examiner, on the basis of the findings of fact set forth above, recommends that the Commissioner determine that petitioner has failed to prove that the Board's determination not to reemploy her was tainted by malice, based on rumor, innuendo or dishonesty, or lacking in objectivity or rationality. It is further recommended that the Commissioner determine that petitioner has failed to prove that her constitutional rights of free speech or her due process rights were violated.

It is also recommended, however, that the Commissioner direct the Board at the conclusion of this litigation to remove from its records Exhibits P-6 through P-9, lest those records, filled as they are with unsubstantiated rumor and innuendo, should in future years be misconstrued by administrators unfamiliar with their origin and work to petitioner's possible disadvantage by being used as a basis for unfavorable recommendations to other school districts or employers. *Sayreville Education Association, Inc. v. Board of Education of the Borough of Sayreville*, 1971 *S.L.D.* 197, aff'd State Board of Education 203 While there is no evidence that those exhibits have been improperly used to this date, they would serve no further useful purpose in the future and should be removed from the Board's records.

This concludes the report of the hearing examiner.

* * * *

A thorough review of the entire record of the controverted matter substantiates the validity of the hearing examiner's findings of fact which the Commissioner henceforth holds as his own. No exceptions were filed to the hearing examiner report by either party to the dispute pursuant to *N.J.A.C.* 6:24-1.17(b).

Nontenured teachers in New Jersey have no property rights to renewed contracts of employment by boards of education. As was stated in *Board of Regents of State Colleges v. Roth*, 408 *U.S.* 564, 92 *S.Ct.* 2701 (1972):

> "***To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a

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> unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.***" (at 2709)

See also *Sallie Gorney v. Board of Education of the City of Northfield et al.*, 1975 *S.L.D.* 669.

Boards of education, however, may neither act in bad faith nor in contravention of the statutory or constitutional rights of nontenured teachers when determining not to reemploy them. *Elizabeth Rockenstein v. Board of Education of the Borough of Jamesburg*, 1974 *S.L.D.* 260, decision on remand 1975 *S.L.D.* 191, aff'd State Board of Education 199, aff'd Docket Nos. A-3916-74, A-4011-74 New Jersey Superior Court, Appellate Division, July 1, 1976 (1976 *S.L.D.* 1167)

Nor may a board in such matters act, with impunity, in an arbitrary or capricious manner. *David Payne v. Board of Education of the Borough of Verona*, 1976 *S.L.D.* 543, aff'd State Board of Education 554, aff'd Docket No. A-1543-76 New Jersey Superior Court, Appellate Division, October 3, 1977 (1977 *S.L.D.* 1303, *cert.* den. 75 *N.J.* 602 (1978)

In the instant matter, petitioner has failed in her burden to prove that the Board, either by statutory or constitutional violation or denial of due process rights, acted in prejudicial manner in reaching its determination not to reemploy her. Absent proof of bad faith or other abuse of its discretionary authority in staffing its schools, the Board's judgment must prevail. As was stated by the Appellate Court in *Porcelli et al. v. Titus et al.*, 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert.* den. 55 *N.J.* 310 (1970):

> "***We endorse the principle, as did the court in *Kemp v. Beasley*, 389 *F.2d* 178, 189 (8 *Cir.* 1968), that 'faculty selection must remain for the broad and sensitive expertise of the School Board and its officials'***." (at 312)

The record fails to reveal a basis upon which the relief sought by petitioner in the form of reinstatement to her teaching position with lost salary and attendant emoluments may be granted. The record supports the conclusion that the recommendations of administrators and the Board's decision was properly based on educational evaluation of her teaching performance. Accordingly, the relief sought is denied.

Nevertheless, the Commissioner determines that the final cautionary recommendation of the hearing examiner should be carried out lest, through inadvertance, unsubstantiated rumor and innuendo should be used to the future detriment of petitioner's welfare in her chosen profession. Therefore, it is ordered that all documentation relating to and constituting Exhibits P-6 through P-9 be eliminated from the Board's files and not be used as a basis of reference for unfavorable recommendations to other school districts in which petitioner may seek employment. *Sayreville, supra*

COMMISSIONER OF EDUCATION

September 19, 1978

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"T.E.E.," a minor by his parents and guardians *ad litem*,

Petitioners,

v.

Board of Education of the Township of Livingston, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Schechner & Targan (Edward Weisslitz, Esq., of Counsel)

For the Respondent, Riker, Danzig, Scherer & Debevoise (Thomas C. C. Humick, Esq., of Counsel)

Petitioners, parents of a handicapped pupil, reside in the School District of the Township of Livingston and allege that the Livingston Board of Education, hereinafter "Board," has improperly denied their son, T.E.E., a written, planned educational program setting forth an individualized course of instruction with criteria for evaluation. Petitioners allege that such denial by the Board caused them to remove T.E.E. from the public school and enroll him in a private institution. Petitioners seek reimbursement of school tuition costs and other related expenses incurred for transportation of T.E.E. The Board maintains that it provided petitioners with the information required by law and that at all times it complied with the provisions of *N.J.S.A.* 18A:46-1 *et seq.* The Board further contends that petitioners voluntarily withdrew T.E.E. from its public school to enroll him in a private school and, therefore, are not eligible for the reimbursement for tuition expenses.

The Board advanced a Motion for Summary Judgment in the instant matter. Oral argument was heard on the Motion on March 13, 1976 and subsequently on June 7, 1976 the Commissioner of Education denied the Board's Motion and ordered that the matter proceed to a plenary hearing.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner at the office of the Essex County Superintendent of Schools on October 19 and November 17, 1976 and on December 10, 1976 at the office of the Union County Superintendent of Schools. Summations and Briefs were subsequently submitted by the parties. The report of the hearing examiner is as follows:

Certain undisputed facts are summarized as follows: T.E.E. was born on November 2, 1967 and subsequently in September 1971 he was enrolled in a private nursery school. T.E.E. was eligible by age to enter the Board's kinder-

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garten program in September 1972 and his mother requested the Board to administer tests to T.E.E. in order to determine his readiness for entrance. He did not enter the Board's kindergarten program in September 1972 and remained enrolled in the private nursery school for the 1972-73 school year. The Board's Child Study Team tested him on January 19 and February 7, 1973 and he was subsequently enrolled in its kindergarten program in September 1973. (Tr. I-11-13; P-1, P-2, R-5)

T.E.E.'s mother testified that she had not been given any indication that he would receive a special classification or was in need of special education at the time of his kindergarten enrollment. She testified that she had a conference with T.E.E.'s teacher in October 1973 at which time she was informed that he was not functioning too well in kindergarten. (R-10) The evidence reveals that T.E.E. was a subject for consideration by the Board's Child Study Team at its November 9, 1973 meeting (P-3) and subsequently on December 14, 1973 (P-4) when the Team determined to have T.E.E.'s mother visit a special education classroom prior to T.E.E.'s placement in that setting.

In December 1973, T.E.E.'s mother testified he was examined by a neurologist who concluded that he suffered from a developmental lag in the areas of coordination and cerebellar function and that it was conceivable that he had minimal brain dysfunction. The neurologist recommended that T.E.E. receive tutorial help with his coordination problems and further recommended that T.E.E. be maintained at his then current class level. The neurologist also recommended that, unless there was a major contraindication, T.E.E. should enter a regular first grade the subsequent school year. (P-5) A copy of the neurologist's report was received by the Board's Child Study Team.

Subsequently, on January 9, 1974 the Board's school psychologist wrote to the neurologist and stated, *inter alia*, as follows:

> "***At this time, it is our conclusion that [T.E.E.] cannot be successful in a regular first grade program; this judgment has been shared with [T.E.E.'s mother].***" (P-6) (R-8)

T.E.E.'s mother testified that she was invited and subsequently visited and observed the Board's classroom for neurologically impaired pupils in February 1974. She testified that subsequent to her visitation she asked the school psychologist whether T.E.E. could be placed in that class immediately, as of February 1974. She stated that the school psychologist informed her that T.E.E. could not be placed immediately because there was no room in the class at that time, but that he would be placed in September 1974. She testified that on several occasions she requested that she receive the special program of individualized activities that was to be afforded T.E.E. in the special class, but she received oral responses that were general in nature from the Superintendent, the Director of Pupil Personnel Services, the school psychologist and the special class teacher. (Tr. I-25-32)

T.E.E.'s mother testified that additional medical data and diagnosis of his neurological impairment were supplied to the Board from a pediatrician and the

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Easter Seal Society for Crippled Children and Adults of Morris County in the spring of 1974. (Tr. I-32-33, 37-40; P-8, P-13, R-1, R-13) She testified that she was unsuccessful in her efforts to obtain a written or oral prescription of T.E.E.'s program even though the Board's Child Study Team had determined that he was neurologically impaired in May 1974. (P-9, P-10, P-12) In its report dated June 1974 the Child Study Team recommended T.E.E.'s placement in the Board's class for neurologically impaired pupils. (P-14)

Subsequently, petitioners met with the Superintendent and were informed that if they were dissatisfied with the findings of the Board's Child Study Team they could appeal to the Essex County Supervisor of Child Study. (Tr. I-45-48) The record reveals that the County Supervisor reviewed the record of T.E.E. and on August 9, 1974 addressed a letter to the parents which stated, *inter alia*, as follows:

> "***After thoroughly reviewing all of the reports concerning [T.E.E.], I noted that the classification requirements for neurological impairment have all been met in accordance with the Rules and Regulations pursuant to Title 18A, Chapter 46, New Jersey Statutes.***" (P-16)

Subsequently, and upon the advice of the Essex County Supervisor of Child Study, petitioners sought a review of his evaluation from the State Department of Education's Regional Coordinator of Special Education and also made a request for tuition payment for his enrollment in a private institution. The Regional Coordinator's letter addressed to petitioners dated September 30, 1974 stated, *inter alia*, as follows:

> "***The review of your appeal for payment of tuition by the Livingston Board of Education for your son's day school program at the Center School has been completed.
>
> "The results of this review indicate that the public school district child study team has met the requirements of Title 18A:46 New Jersey Statutes and the Rules and Regulations pursuant thereto. The reports sought privately by you do not disagree with the findings of the Child Study Team. The Livingston Child Study Team had intended to place your son in an approved program within the Livingston School system in accordance to the procedure prescribed in 6:28-3.4, Rules and Regulations pursuant to Title 18A:46 N.J.S.
>
> "In conclusion, it appears that you have exercised your right to place your son in the Center School program rather than the program prescribed by the Livingston Child Study Team. In so doing, however, your decision does not commit the Livingston Board of Education to the payment of tuition to the Center School.***" (P-17)

T.E.E.'s mother denied that she withdrew him from the public schools and testified that in September 1974 "***since I did not get a designated program for [T.E.E.], I became very upset and worried so I enrolled [him] in Center

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School.***'' (Tr. I-49) T.E.E. was enrolled in the private institution for the 1974-75 school year. His mother testified she received a written prescription dated January 30, 1975 from the Board's Child Study Team with regard to his evaluation and the educational program available to him in the public school. (Tr. I-52; P-18; P-20)

She testified that T.E.E. was subsequently scheduled to be retested by the Board's Child Study Team on September 3, 1975; however, due to conflicts in vacation schedules, he did not meet the appointment for his retest and his parents enrolled him in the Center School for the 1975-76 school year and subsequently for the 1976-77 school year. (Tr. I-50-56)

Extensive testimony was offered on petitioners' behalf by a psychologist who had been the Director of two private schools in the Washington, D.C. area. He testified that petitioners contacted him early in 1974 and in June 1974 they took T.E.E. to his private school and he observed him in a two-day classroom experience. He testified that he did not administer any standardized test to T.E.E. that had previously been administered by the Board's Child Study Team. He testified that he had been informed that T.E.E. was classified as neurologically impaired by the Board and that he also had the opportunity to review its educational prescription. (P-18) He testified that, in his judgment, the Board's prescription did not fit the individual needs of T.E.E. (Tr. III 6-33) and offered the parents a set of recommendations dated July 16, 1974.

The psychologist testified that he was not licensed to practice in New Jersey (Tr. III-55), that he was not aware of the provisions of Chapter 46 of Title 18A of the statutes of New Jersey, the rules and regulations in Title 6 pursuant to the classification of handicapped pupils (Tr. III-71), nor the composition of a Child Study Team as provided by statute and the regulations embodied in the Administrative Code. (Tr. III-73)

At the conclusion of petitioners' testimony the Board propounded a Motion for Summary Judgment in its favor grounded upon the fact that petitioners withdrew T.E.E. from its school and that they are not entitled to tuition payments for his private schooling. (Tr. I-108-110, 113-116) The Board renewed its Motion at the conclusion of the psychologist's testimony together with a Motion to Strike the psychologist's testimony. (Tr. III 65, 79) Both Motions were held in abeyance by the hearing examiner. (Tr. I-119; Tr. III-67)

The Board contends that it acted properly and had an appropriate educational program to offer T.E.E.; nevertheless, his parents withdrew him from its school and placed him in a special class for neurologically impaired pupils in a private institution. (Tr. I-77) The Board argues that petitioners' contention that they withdrew T.E.E. from the public school due to the Board's failure to supply them with a written prescription is without legal foundation. The Board asserts that on November 1, 1974 the Superintendent offered petitioners a conference to provide all information related to T.E.E.'s educational program. (P-20) The Board argues that in November 1974 it had no legal obligation to provide written educational programs to parents of special education pupils, because such a

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requirement did not become effective until August 18, 1975. (*N.J.A.C.* 6:28-1.9 *et seq.*) In September 1975, T.E.E. had already been withdrawn from the school for more than one school year. (Tr. II-32-33)

The Board asserts that although it had no legal obligation to do so it provided petitioners with a written educational program (P-18) subsequent to his withdrawal from its school system. (Tr. II-31-32) The Director of Pupil Personnel Services testified that he met with petitioners on August 7, 1975 at the request of their counsel. (Tr. II-34-35) Subsequent to that meeting he addressed a letter to petitioners dated August 19, 1975 and stated, *inter alia*, as follows:

> "At our meeting on Thursday, August 7, 1975, I reviewed for your benefit the potential program arrangements for your son, [T.E.E.], in our Livingston School System program for the neurologically impaired child.***
>
> "It is unfortunate that the original date that I set for [T.E.E.'s] evaluation, Monday, August 18, 1975, appears to conflict with your plans for vacation. I have arranged for [T.E.E.] to be evaluated on Wednesday, September 3, 1975, at 9:00 a.m., at the Department of Pupil Personnel Services' Office.***" (R-2)

The Director testified that petitioners cancelled the appointment on the morning T.E.E. was scheduled to be evaluated. (Tr. II-37) He subsequently addressed a letter to the parents dated September 3, 1975 wherein he expressed, *inter alia*, his regrets with regard to their action. (R-3) There was no further communication between the Board and the parents to establish a subsequent testing date for T.E.E. (Tr. II-37, 65)

The Board contends that petitioners are not entitled to tuition reimbursement as a matter of law and, therefore, the Petition of Appeal should be dismissed.

The hearing examiner has examined the total record in this matter and finds the following to be true:

1. T.E.E. was eligible, by age, to enter the Board's kindergarten grade in September 1972 and did not enroll until September 1973.

2. Prior to his enrollment in the kindergarten program, T.E.E. was tested and evaluated by the Board's Child Study Team on January 19 and February 7, 1973. (P-1, P-2, R-5)

3. T.E.E. was a subject for consideration by the Child Study Team beginning in November 1973 and continuing through the 1973-74 school year including its determination to classify him as a neurologically impaired pupil. (P-3, P-4, P-6, P-7, P-9, P-10, P-12)

4. Prior to the beginning of the 1974-75 school year, T.E.E.'s parents withdrew him from the Livingston Public Schools and enrolled him in a private institution for the neurologically impaired.

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5. Subsequent to T.E.E.'s withdrawal from its school, the Board supplied petitioners on January 30, 1975 with a prescription for an educational program in its schools. (P-18) The hearing examiner notes that *N.J.A.C.* 6:28-1.9, "Parental notification and participation," was adopted by the State Board of Education on August 6, 1975.

6. The Board on August 7, 1975 conducted a conference with petitioners and arranged to have T.E.E. evaluated on September 3, 1975. Petitioners failed to keep the appointment and instead enrolled T.E.E. in the private institution for the 1975-76 school year. (R-2, R-3)

7. The hearing examiner finds after a complete review of all the evidence adduced at the hearing that the classification of T.E.E. as a neurologically impaired pupil was correct. He further finds that the Board's specification of an educational program for T.E.E. was appropriate.

The hearing examiner finds that the Board was in compliance with the statutes and the then applicable rules and regulations of the New Jersey Administrative Code. He further finds that petitioners voluntarily withdrew T.E.E. from the Livingston Public Schools in September 1974. He further finds that petitioners are not entitled to reimbursement of tuition payment for T.E.E.'s private school education.

Accordingly, for the reasons hereinbefore stated, the hearing examiner recommends that the Petition be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the record, the documents in evidence and the report of the hearing examiner and observes that neither party filed exceptions thereto.

The Commissioner adopts as his own the hearing examiner's finding that the Board's Child Study Team accurately classified petitioners' child pursuant to statutory mandate. *N.J.S.A.* 18A:46-1 *et seq.*; *N.J.A.C.* 6:28-1.1 *et seq.* The Commissioner determines that such classification was then reviewed and supported by qualified personnel of the office of the Essex County Child Study Supervisor and the State Department of Education.

As the Commissioner observed in the matter of *"R.D.H." and "J.D.H." v. Board of Education of the Flemington-Raritan Regional School District*, 1975 *S.L.D.* 103, aff'd State Board of Education 111, aff'd Docket No. A-3815-74 New Jersey Superior Court, Appellate Division, November 8, 1976 (1976 *S.L.D.* 1161) as follows:

> "***The jurisdiction and authority of the Commissioner with respect to the classification and placement of handicapped children is, thus, not pri-

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> mary in nature but one of appellate review. In all such cases, as the hearing examiner correctly observed, the Commissioner's authority is concerned with the correctness of procedures followed by local boards and with the reasonableness of their respective exercise of discretion. Absent a showing of gross negligence or abuse in such matters, the Commissioner has not, and will not, substitute his own discretion for that of local boards or of properly certificated personnel directed by such boards to render professional judgments. This determination follows the general rule that, when an administrative agency created and empowered by legislative fiat acts within its authority, its decisions are entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decisions are arbitrary, capricious or unreasonable. *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327 (*App. Div.* 1965), 45 *N.J.* 581 (1966); *Boult and Harris v. Board of Education of the City of Passaic*, 1939-49 *S.L.D.* 715, 136 *N.J.L.* 521 (*E.&A.* 1947)***'' (at 110)

There is no evidence in the record to support the claim that the Board failed to strictly adhere to the statutory mandate or the Administrative Code, then in effect, at the time petitioners withdrew their child from school. In a similar matter the Commissioner said in *''K.K.'' v. Board of Education of the Town of Westfield*, 1971 *S.L.D.* 234, rem. State Board of Education 240, decision on remand 1973 *S.L.D.* 30, aff'd State Board 34, aff'd Docket No. A-1125-73 New Jersey Superior Court, Appellate Division, February 13, 1975 (1975 *S.L.D.* 1086) as follows:

> ''***While parents have a right to send their children to private schools, they do not have a right to require that public school districts pay the tuition costs involved.***'' (at 240)

In the circumstances herein, therefore, petitioners have no valid claim against the Livingston School District. The Commissioner so holds. The Commissioner finds no cause for action in this matter and, accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

October 5, 1978

Pending State Board of Education

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

Edward Knoblauch,

Petitioner,

v.

Board of Education of the Borough of Point Pleasant, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, Doyle and Oles (John Paul Doyle, Esq., of Counsel)

Petitioner resigned from his position as a teaching staff member in which he had acquired a tenure status in the employ of the Board of Education of the Borough of Point Pleasant, hereinafter "Board." Petitioner alleges that, because he was mentally incompetent at the time he offered his resignation, the Board was estopped from accepting it as a valid cessation of his employment and that the Board improperly refused to honor his written rescissions of the resignation. Petitioner seeks reinstatement to his position of employment with the Board. The Board denies the allegations and asserts that its acceptance of petitioner's resignation and its refusal to honor his written rescission is in all respects proper.

A hearing was conducted in the matter on July 21 and December 1, 1976 at the office of the Ocean County Superintendent of Schools by a hearing examiner appointed by the Commissioner of Education. Thereafter, the parties filed Briefs and supplemental arguments in support of their respective positions. The record in the matter was fully developed on September 28, 1977. The report of the hearing examiner is as follows:

Petitioner was first employed by the Board for the 1962-63 academic year and was thereafter assigned to teach pupils in the sixth, seventh and eighth grades. Petitioner submitted his controverted resignation from the Board's employ to the Superintendent on April 15, 1975, effective June 30, 1975. The Board asserts that it accepted the resignation at a special meeting on June 16, 1975. Petitioner contends that he attempted to rescind his resignation on June 17 and 28, 1975 and that in each instance the Board improperly refused to honor his request.

Firstly, the hearing examiner observes that the resignation as originally submitted to the Superintendent by petitioner states in full as follows:

"Dear [Superintendent],

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"Please accept my resignation, effective end of '74-75 School Year, June 30 (my mother's original wedding anniversary) and give my best wishes to the best fishes all the good dishes

Wish es
Fish es
Dish es

"Treasures of Point Pleasant

"Power to the People of Point Pleasant, New Jersey, U.S.A."

The resignation is continued on the reverse side of the paper as follows:

"Men and Boys
Ladies and Girls
and Principles all
A fond farewell
See you at #88 Lanes or
Asbury Lanes or
Shore Lanes
or on a
baseball diamond.

[signed]

Edward Knoblauch

"P.S. or Howell Golf Course or on the Boardwalk" (P-1)

Petitioner testified that when he submitted this resignation, the Superintendent requested him to submit another more conventional letter. The Superintendent took petitioner to a typewriter, left him, and petitioner typed and submitted the following resignation:

"april 15, 1975

***

"Dear [Superintendent],

"please accept my resignation effective june 30, 1975.

"many thanks to you and yours.

[signed]

edward knoblauch, teacher" (R-4)

The Superintendent testified that because he is traditional and conservative

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in his views, he did request petitioner to prepare a more conventional letter of resignation than the one he originally submitted. (P-1) The Superintendent testified that he is not accustomed to receiving resignations composed in rhyme. The Superintendent explained that based on petitioner's past behavior he saw nothing unusual in petitioner's original letter of resignation. The Superintendent testified that he submitted both letters of resignation to the Board for its consideration. (P-1; R-4; Tr. II-73-75) The Superintendent testified with respect to petitioner's past behavior that he is a skilled song writer, newspaper reporter and writes plays in rhyme. (Tr. II-26, 102)

The Board accepted petitioner's controverted resignation from its employ at a special meeting conducted on June 16, 1975. (C-4) Petitioner's challenge to the legality of this special meeting shall be discussed, *post*. Petitioner submitted his first letter of attempted rescission on June 17, 1975. (R-8) The Board, at its meeting conducted on June 26, 1975, affirmed its earlier decision to accept the resignation. (C-2) Petitioner's second attempt to rescind his resignation was submitted in writing to the Board President on June 28, 1975. (R-9) The Board Secretary notified petitioner by letter dated July 7, 1975 that the Board, at a meeting held July 3, 1975, again affirmed its earlier decision to accept his resignation. (R-12; Tr. II-42)

Thereafter, petitioner filed the instant complaint against the Board on October 31, 1975.

Petitioner grounds his appeal on four basic issues as follows:

1. He was mentally incompetent at the time he tendered his original letter of resignation (P-1), as well as the revised letter of resignation. (R-4)

2. The Board had knowledge that he was mentally incompetent. Consequently it was without legal authority to accept such an instrument as binding upon him.

3. The special meeting the Board conducted on June 16, 1975, at which it purportedly accepted his resignation, was illegally called. Therefore, all actions taken at that meeting are null and void.

4. Because the Board had not legally accepted his resignation by June 17, 1975, it was bound to honor his written rescission dated June 18, 1975. (R-8)

Petitioner was reprimanded by his school principal in writing on February 27, 1975 for what was considered excessive tardiness in reporting to his duties. The principal advised petitioner, *inter alia*:

> "The number of tardinesses accumulated by you is increasing and now numbers 11, with 6 occurring during February of this year.
>
> "Regardless of personal problems, which I personally understand and sym-

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pathize with, you have a professional obligation to your job and this should be a major consideration.***

"I would expect to see an improvement on your part before the Superintendent becomes involved." (R-1)

Petitioner testified that he contracted pneumonia on March 8, 1975. Petitioner testified that when he returned to his teaching duties during the first week of April 1975, he found a note in his mailbox from the vice-principal alleging that he had been absent without proper reason. Petitioner testified that he became "unsettled" by the allegation because he had earlier submitted to the Board a medical note from his physician which verified his illness. (Tr. I-24; R-2)

Petitioner testified he also discovered on the same day a letter request from the principal to meet with him and the vice-principal that day to discuss nine stated concerns they had relevant to his performance. The final paragraph of the principal's letter request states in full as follows:

"***These items [the nine concerns] must be resolved to the satisfaction of the building administrators or further action will be requested through the office of the Superintendent of Schools." (R-3)

Petitioner testified that he elected to wait in the teachers' room for the principal in order to hold the meeting in front of other teachers instead of in the principal's office. Petitioner testified that he did not trust the principal. (Tr. I-27)

The following day, April 8, 1975, the principal advised the Superintendent that petitioner, on the previous day, would not meet in his office but, rather, elected to meet in the teachers' room. The hearing examiner observes that the principal's requested meeting did not occur at either place. The principal finally advised the Superintendent that he, the principal, requested petitioner be charged with insubordination, unprofessional conduct and dereliction of responsibility. (P-2)

Petitioner testified that during the evening of the day before the scheduled meeting with the Superintendent, he walked eight miles. During the course of his walk, he contracted symptoms of pneumonia again and called in sick the next day. He testified that he sent a telegram to the Superintendent requesting an adjournment of the meeting. The telegram is dated April 8, 1975 and states:

"SORRY ABOUT MISSED APPOINTMENT WITH YOU APRIL 8. WALKED TOO FAR IN THE COLD LAST NITE RTE 35 WANAMASSA TO MY APARTMENT 308 FOURTH AVE. A.P. [Asbury Park] NOT AS STRONG AS I THINK. HEART TO HEART TALK AND YOUR ADVISE [ADVICE] CARDINAL IMPORTANCE. SOMEDAY SOON"

Petitioner testified that his mother then suffered a stroke. Consequently, he took the rest of the week off. (Tr. I-97) Petitioner testified that when he

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returned to his teaching duties the following Monday, he went to his classroom where he found a substitute teacher. Petitioner then reported to the Superintendent's office and a conversation ensued in regard to the principal's request to have charges filed against him. (Tr. I-96-97)

Petitioner testified that midway through this meeting, he decided to request the presence of an Association representative which he did. The President of the Association joined the meeting. Petitioner testified that he consulted privately with the President of the Association following the meeting, at which time petitioner was disgusted and upset by the alleged charges. He testified that the President of the Association stated he would try to secure paid sick leave for him until the end of June. Petitioner testified that he was tired of being at odds with the administration and decided to resign. (Tr. I-99)

Petitioner testified that between the time he first contracted pneumonia on March 8, 1975 until the day he resigned and even thereafter his behavior remained similar in nature; that is, he was not living with his wife. He had rented a room and he had a dispute with his landlord. The fact that he was ill and his mother was ill upset him. He left his boarding room and took his personal belongings to a friend for safekeeping. Petitioner testified he did not have a house so he would simply wander around. Sometimes he would sleep at a friend's house, but that most of the time he would walk all night, or sleep in the Asbury Park railroad station, or under the boardwalk, or in a doorway, or in the Asbury Park Press lounge. The hearing examiner observes that petitioner is presently employed as a free lance writer for the Asbury Park Press newspaper. (Tr. I-22, 100)

Petitioner testified that when he met with the Superintendent to discuss the charges he was dirty and disheveled. He had slept in the newspaper warehouse the preceding night. Petitioner explained that during the next morning he went to his mother's house for a change of clothing but got in a dispute with his stepfather and was told to leave. Consequently, he appeared before the Superintendent in the clothes in which he had slept. (Tr. I-101)

The record discloses with respect to the first stated issue that petitioner had been under the care of a practicing and licensed psychologist, Dr. Morris Laitman, since 1960. (Tr. I-31) Dr. Laitman, who was qualified as an expert witness, testified that he began treating petitioner for a condition known as psychothymic permanent, which signifies that petitioner was experiencing alternating moods of depression and elation. Dr. Laitman explained that psychothymic permanent is a condition similar to the manic-depressive. While the former condition is not accompanied by a loss of judgment on the part of the patient, the latter condition is. (Tr. I-47-48) Dr. Laitman testified that between 1960 and 1975 he treated petitioner on an individual basis, in group individual psychotherapy and in group psychotherapy.

Dr. Laitman testified that during February 1975 petitioner sought his assistance which was the first time in about one and one-half years that petitioner reported to him. He testified that petitioner, at that time, was highly agitated,

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excited and overreacting to all experiences. Dr. Laitman testified that petitioner's energy level was high and that in his judgment petitioner felt omnipotent. Dr. Laitman explained that petitioner was possessed of the attitude that he could achieve beyond his ability and that petitioner's evaluation of his own situation was not realistic. Dr. Laitman testified that petitioner felt he was functioning properly when, in Dr. Laitman's judgment, he was not. Dr. Laitman concluded that petitioner was suffering from the condition of a manic-depressive, circular type. At the time of the February 1975 visit Dr. Laitman testified petitioner was experiencing a manic high which continued until at least July 1975. (Tr. I-31-34, 66-67) Dr. Laitman testified that due to petitioner's condition he was not competent to make important decisions.

Dr. Laitman testified that at this time petitioner was elated in regard to his own perceived creative ability to write songs and poems. Dr. Laitman explained that he reviewed the efforts of petitioner in this regard and found nothing of merit therein. (Tr. I-61)

Dr. Laitman testified that petitioner was actively under his care between February 1975 and approximately the end of March 1975 when petitioner ceased his therapy. Thereafter, Dr. Laitman explained, petitioner's wife would contact him for assistance because petitioner was causing trouble at home and with his friends. (Tr. I-38)

The hearing examiner observes that petitioner had ceased consulting with Dr. Laitman by the time he resigned on April 15, 1975. Petitioner returned to the care of Dr. Laitman on January 9, 1976. (Tr. I-42)

In the meantime, petitioner was admitted to the Lyons Veterans Administration Hospital, East Orange, on May 7, 1975 and discharged himself contrary to medical advice on May 30, 1975. (Tr. I-39, 105; J-16) Petitioner was readmitted to the hospital on July 9, 1975 and remained until November 1975 (Tr. I-107; J-4-9) During both stays at the hospital, petitioner was diagnosed as being manic-depressive. (J-9) Upon petitioner's discharge from the hospital during November 1975 he was declared competent, employable and not committable to a recovery institution. (J-4) Dr. Laitman testified that he also finds petitioner's present mental condition such that he is capable of resuming his duties as a teacher. (Tr. I-44)

Dr. Laitman testified that in his judgment petitioner's resignation was the product of an impaired mind. Dr. Laitman explained that while petitioner's resignation was the result of an impaired mind, his written rescissions are not so classified. Dr. Laitman testified that the rescissions were prompted by friends and by petitioner's family and that such an act had long-range effects. The resignation, on the other hand, was prompted by his state of misperceived reality and his impaired view of the short-range effect. (Tr. I-73-78)

The hearing examiner observes that petitioner's medical records (J-1 through J-80) compiled during his admissions at the Lyons Veterans Administration Hospital were produced prior to the time of hearing to allow the Board's

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medical expert to review them. Petitioner called the Board's medical expert as his own witness which was successfully objected to by the Board. (Tr. I-3-5)

The hearing examiner finds on the basis of the testimony of Dr. Laitman, the medical reports of petitioner compiled at the Lyons Veterans Administration Hospital and petitioner's own testimony that petitioner's mental capacities were impaired before and at the time he resigned. It is recognized that petitioner, subsequent to his submission of the controverted resignations, made efforts to go on disability retirement from the New Jersey Teachers' Pension and Annuity Fund. It is also recognized that the Superintendent, the President of the Point Pleasant Teachers' Association and a representative of the New Jersey Education Association assisted petitioner in his attempts to qualify for disability retirement. The fact remains that petitioner was mentally disabled during this period of time and, absent proof to the contrary and in light of the clear and convincing proof offered by petitioner, that he was incompetent, his resignation must be deemed to be the product of an impaired mind.

Next, the hearing examiner shall consider whether the Board had a reasonable basis to conclude that petitioner's judgment was impaired at the time he resigned and at the time it originally accepted his resignation on June 16, 1975. Further, the hearing examiner shall also consider the responsibility, if any, the Board may have had if it is established it had reason to believe petitioner's judgment was impaired.

The Superintendent testified that he transmitted to the Board petitioner's resignation as originally submitted (P-1) and also the revised resignation. (R-4) The hearing examiner finds, notwithstanding petitioner's efforts in the area of creative arts, that the original resignation is of such composition that any reasonable person must question the mental ability of its composer. In the instant matter it is unreasonable to conclude that petitioner, who had served thirteen years as a teaching staff member in the Board's employ, could have competently discarded his professional career by virtue of the original letter of resignation. Even the second letter of resignation submitted by petitioner, in a more conventional style, is somewhat unusual. With the exception of the salutation, petitioner utilized lower case letters throughout. (R-4)

The hearing examiner finds that the Board, on the basis of the two written resignations, had sufficient reason to believe that petitioner's stability was impaired at that time.

But even beyond the two letters of resignation, other knowledge existed that petitioner's mental capacities may have been impaired. The Superintendent testified in this regard that after petitioner submitted his resignation, but before the Board accepted it, he had had a conversation with petitioner on or about May 15, 1975. The Superintendent testified that at that time petitioner's attempt to secure disability retirement was discussed as was his psychiatric problem. (Tr. II-103) The Superintendent testified, however, that he did not report petitioner's condition to the Board. (Tr. II-104) The Superintendent testified that

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a parent had complained about a telegram petitioner had sent his daughter on April 5, 1975 which stated:

> "YOU O.K.? I'M O.K. LOVE TO ALL 6-7-8 CATS A TO Z. SEE YA SOON" (C-3)

The hearing examiner finds that neither the Board nor the Superintendent engaged in any attempt to coerce petitioner in order to secure his resignation. Petitioner's behavior, however, since February 1975, in addition to the established state of his mind, is convincing proof that the resignation was not competently tendered. The Board, under these circumstances, had the option of requiring petitioner to undergo a psychiatric examination pursuant to its authority at *N.J.S.A.* 18A:16-2, since petitioner did show "***evidence of deviation from normal, physical or mental health***." In the alternative, the Board could have moved for petitioner's dismissal pursuant to *N.J.S.A.* 18A:6-10, the Tenure Employees Hearing Law. That the Board took no action other than to accept petitioner's purported resignation does not validate an otherwise incompetent act by petitioner. Equitable principles demand that petitioner be given the opportunity to establish his present mental state in order to resume his duties as a teaching staff member in the Board's employ.

The hearing examiner finds that, absent any effort on the part of the Board or its Superintendent to determine petitioner's mental capacity in light of the evidence available to it, the acceptance of the resignation may not be sustained.

The hearing examiner finds nothing illegal in regard to the special meeting conducted by the Board on June 16, 1975 as argued by petitioner. The minutes of that meeting show that all five members of the Board were present and that all five members voted affirmatively to accept petitioner's resignation, effective June 30, 1975. (C-4) Petitioner erroneously argues that the Board was bound by the provisions of *N.J.S.A.* 10:4-6 *et seq.* (Open Public Meetings Act) with respect to prior notice of special meetings. That law was not approved until October 21, 1975 and its provisions were not effective until January 1976.

The hearing examiner recommends that petitioner's resignation from the employ of the Board be declared null and void and that the Board be directed to have petitioner undergo a psychiatric examination pursuant to the provisions of *N.J.S.A.* 18A:16-2. If petitioner is found to be mentally competent he should be reinstated to his former position of employment. If petitioner is found not to be mentally competent the Board should be directed to place him on extended sick leave or, in the alternative, move for his dismissal pursuant to *N.J.S.A.* 18A:6-10. Given the finding and recommendation that petitioner's resignation is a nullity, the hearing examiner points out that petitioner may continue to exercise the option of applying for a disability retirement.

This concludes the report of the hearing examiner.

* * * *

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The Commissioner has reviewed the entire record in the instant matter, including the report of the hearing examiner and the exceptions and objections filed thereto.

The Board complains that, contrary to the finding of the hearing examiner, the record does not support the conclusion that petitioner's mental capacities were impaired before and at the time he tendered his resignation, that the Board had any knowledge of petitioner's alleged mental deficiency or that petitioner's resignation from his employment must be set aside.

In support of these contentions, the Board asserts that the hearing examiner totally ignored a medical report it submitted from Dr. Michael J. Doyle which, it maintains, establishes that petitioner was not in ill health. The Commissioner observes that the hearing examiner did refer to that purported medical report, properly characterized by him as a medical note, in his report. Dr. Doyle treated petitioner for pneumonia and upon his recovery prepared the note (R-2) for petitioner to submit to school authorities prior to his return to his teaching position. The note, or as the Board now contends the medical report, has nothing to do with petitioner's mental stability.

The Board next contends that the hearing examiner failed to consider the assistance offered petitioner by the President of the Association at the time of his resignation and thereafter, as well as the counsel offered him by his wife and best friend. The Board asserts that, because these three persons cautioned petitioner in regard to the effect a resignation would have upon him, he obviously made a deliberate, conscious choice to resign in order to pursue a career in the creative arts.

In the Commissioner's judgment, the Board's contention in this regard is not on point. If petitioner were mentally impaired at the time of his resignation and thereafter, his ignoring the efforts by others to convince him not to resign his position may not be viewed as evidence showing that his resignation was a rational and deliberate act.

The Commissioner finds and determines that the record herein firmly establishes that petitioner was mentally impaired at the time of his resignation and thereafter. The record also establishes that petitioner has been declared mentally competent as of November 1975, when he was discharged by the Lyons Veterans Administration Hospital.

In the instant matter, petitioner's initial resignation (P-1) is composed in such a ludicrous fashion as to have caused the Superintendent to inquire into his mental condition. It is of no moment that petitioner agreed to redraft his resignation (R-4) at the request of the Superintendent. The question then arises as to the responsibility a board of education may have to establish the mental competence of a person who proffers such a resignation. The Commissioner knows of no rule or law that would require, on a general basis, a board of education to establish the mental competence of an employee who resigns. In this instance, however, petitioner manifested his mental aberration to the Su-

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perintendent by his conduct in and away from school, his two letters of resignation (P-1; R-4), his telegrams, as well as his discussion with the Superintendent regarding his psychiatric problem.

It is fair to conclude that, given these actions of petitioner which were known by the Superintendent, the Board knew or should have known that a serious question existed in regard to petitioner's mental condition. The Board then should have caused petitioner, or at the very least made an attempt to cause petitioner, to undergo a psychiatric examination prior to accepting his resignation.

The Commissioner cannot allow a teaching staff member who has served a local board of education for a duration sufficient to acquire a tenure status, to terminate his employment under these kinds of circumstances.

Accordingly, the Commissioner, on equitable principles, hereby sets aside the Board's acceptance of petitioner's resignation. Petitioner shall be deemed to have been on an unpaid leave of absence for illness since September 1, 1975. The Board is also directed to reinstate petitioner to his former teaching position as of September 1, 1978 at an appropriate step on the teacher's salary scale without incremental credit for the period during which he rendered no services. Stated another way, petitioner is entitled to the next year's step on the salary guide, without credit for the 1975-76, 1976-77 or 1977-78 academic years. The Board may, if it elects, require current proof that petitioner is mentally competent consistent with its authority at *N.J.S.A.* 18A:16-2.

COMMISSIONER OF EDUCATION

October 5, 1978

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Richard Gunthner,

Petitioner,

v.

Board of Education of the Borough of Bay Head, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Pepe, Butch & Moroney (F. Allen MacDuffie, Jr., Esq., of Counsel)

For the Respondent, Robert Fall, Esq.

Petitioner alleges that by virtue of his domicility in the Borough of Bay Head his three children are entitled to enrollment in the public schools operated by the Board of Education of the Borough of Bay Head, hereinafter "Board," pursuant to *N.J.S.A.* 18A:38-1. The Board claims that petitioner is not domiciled within its district and that if it is found that his domicile is in its community, the three children reside with their mother in another community. Thus, the Board asserts it has no responsibility for their education.

A hearing was conducted in this matter on August 23, 1977 at the office of the Ocean County Superintendent of Schools, Toms River, by a hearing examiner appointed by the Commissioner of Education. Thereafter, petitioner filed a Brief and the Board filed a letter memorandum in support of their respective positions. The report of the hearing examiner is as follows:

The Board operates its own kindergarten through eighth grade program. It sends its pupils to Point Pleasant Beach High School, on a tuition basis, for grades nine through twelve.

Petitioner's children were first enrolled as pupils in Bay Head for the 1976-77 academic year. The youngest was enrolled in the Bay Head elementary school, while the two older children were enrolled in Point Pleasant Beach High School. Until that year, the three children received their formal education in Switzerland where they resided with their mother and their two younger sisters. Petitioner testified that he and his wife are separated though no formal separation agreement in regard to custody of the children was ever executed.

The Board determined during the course of the 1976-77 academic year that petitioner was not domiciled within Bay Head and, therefore, it was not responsible for the public school education of his children. The Board did agree,

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however, to continue their enrollment in its schools pending disposition of the matter by the Commissioner.

While the children and their mother were living in Switzerland prior to the 1976-77 academic year, petitioner explained that he was a resident of Argentina. Petitioner is the principal shareholder of a realty company which has interests in five other countries, as well as in New Jersey. One of the interests in New Jersey owned by petitioner is property in Bay Head which contains a house, a commercial office with showrooms and an apartment on the second floor, and four storage buildings. Petitioners also operates one of his yacht basins from this Bay Head property.

Petitioner testified that while he had owned this Bay Head property for about four years, he elected to make the apartment above the commercial office his residence and domicile in September 1976.

In the meantime, his wife and five children returned to New Jersey. A new house was built for his wife by him in Seaside Park where she resides with the two younger daughters. Petitioner testified that when he is in the country he and the three older children stay in the Bay Head apartment. Petitioner explained that the nature of his business requires frequent travel out of the country to the extent that during 1976-77 he spent approximately forty nights at the Bay Head address with the three children. Petitioner testified that when he is out of the country, the three children stay in Seaside Park with their mother or grandmother who also lives in Seaside Park.

Petitioner explained that when the children did reside temporarily with their mother or grandmother, the one enrolled in Bay Head elementary school would be driven to the Bay Head address in the morning, and from there he would be transported by school bus to school. After school, he would be bused back to the Bay Head address from where he would be driven to Seaside Park. The two older children would be driven from Seaside Park to Point Pleasant Beach High School and back.

Petitioner testified that his New Jersey driver's license has his address listed as Bay Head. He has no personal telephone listed in his name, he is not registered to vote, nor did he file a personal income tax return. Petitioner further testified that he has spent much time in Seaside Park because he and his wife both want their five children together as much as possible.

Subsequent to the enrollment of the three children as pupils by the Board, it requested petitioner to complete a questionnaire in regard to his and their residency. (C-1) Petitioner completed the questionnaire on February 7, 1977 in which he stated that from September 1976 to that date the three children had stayed in Bay Head a total of ten school nights while they had spent forty-seven school nights in Seaside Park. Eighteen other school nights were spent by the children at two other properties in New Jersey owned by petitioner.

The hearing examiner has considered petitioner's testimony, as well as his Brief in support of his position. Petitioner may very well have his domicile in

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Bay Head although no such finding is made herein. The three children involved in the matter may be found to reside with their mother in Seaside Park. In the best light possible, the three children may be found to be intermittent visitors to Bay Head on those few occasions when petitioner is in the country and stays in the Bay Head apartment. There is no formal separation agreement which provides sole custody of the three children to petitioner. Consequently, the facts of this matter disclose that the children do, in fact, reside with their mother in Seaside Park. They spend the greater amount of time by far in Seaside Park under the supervision of their mother.

Accordingly, the hearing examiner finds that the three children do not have a claim to school enrollment in the Bay Head schools. Rather, the Seaside Park Board of Education is wholly responsible for their public school education. It is recommended that the Commissioner adopt this finding and direct the Seaside Park Board of Education to accept the three children for enrollment as of September 1978.

This concludes the report of the hearing examiner.

* * * *

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

Petitioner asserts that the hearing examiner failed to set forth sufficient findings of fact upon which his conclusion is based, that he failed to consider and address the questions of law presented by the parties, that he failed to establish the location of petitioner's domicile, that he ignored certain testimony of petitioner in regard to damage which occurred at his Bay Head address thereby temporarily preventing his occupancy, that he placed too much weight on the absence of a formal separation agreement between him and his wife, and that he ignored the fact that petitioner's eldest son has his New Jersey driver's license registered at the Bay Head address. Finally, petitioner requests that the Commissioner remand the matter to the hearing examiner for the preparation of a more thorough report.

The Commissioner has considered petitioner's foregoing exceptions to the hearing examiner's report and finds such exceptions, individually and collectively, to be without merit.

Petitioner lays claim to being domiciled within the Borough of Bay Head. Petitioner extends this claim of domicility in Bay Head to cloak his three children with the statutory right to attend the Bay Head schools pursuant to *N.J.S.A.* 18A:38-1. The facts in this case, presented by the hearing examiner and in light of petitioner's objections thereto, simply do not support the claim that his three children are domiciled within Bay Head for purposes of school enrollment.

Petitioner testified that he spent approximately forty nights, with his children, at the Bay Head address. Petitioner was away from Bay Head the remainder

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of time during the 1976-77 school year. His three children stayed with their mother and grandmother in Seaside Park while he was away. Petitioner implies that had it not been for the damage caused to the Bay Head apartment by a fire and by frozen water pipes he would have spent more time there. (Tr. 21-22) Thereafter, however, petitioner testified that under the best of circumstances he could plan to spend, at a maximum, approximately sixty days in any school year at his Bay Head address because of his business commitments which require his presence elsewhere. (Tr. 37)

Finally, the Commissioner observes, subsequent to a complete review of the transcript of the testimony herein, that the hearing examiner did fail to report that petitioner rented out the apartment, where he resides forty to sixty days a school year, every summer to the same tenant and plans to continue renting the property in the future. (Tr. 44)

The Commissioner observes that *N.J.S.A.* 18A:38-1 provides in pertinent part that:

> "Public schools shall be free to the following persons***:
>
> "(a) Any person who is domiciled within the school district;
>
> ***
>
> "(c) Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-around dwelling place within the district for 1 year or longer shall be deemed to be domiciled within the district for the purposes of this section***."

The Commissioner has reviewed the New Jersey Supreme Court's ruling in *Board of Education, Township of Little Egg Harbor v. Boards of Education of the Township of Galloway et al.*, 71 *N.J.* 537 (1976), reversing the Appellate Division ruling at 145 *N.J. Super.* 1 (1975), and affirming the dissenting opinion at page seven. The Commissioner has also reviewed his previous determination in *M.A.M. v. Board of Education of the Black Horse Pike Regional School District*, 1974 *S.L.D.* 845.

In the instant matter, the issue is the domicile of petitioner's three children. Since an informal separation agreement exists between the parents, the three children are not legally in the custody of the mother or the father, petitioner herein. Consequently, the Commissioner is guided by the principle articulated in *C.K.F. v. Board of Education of Upper Township*, 1975 *S.L.D.* 723 which provides:

> "*** ' ***[A] minor child's domicile, in the case of divorce of its parents, is that of the parent to whose custody it has been legally given; and if there has been no legal fixing of custody, its domicile is that of the parent with whom it lives, but if it lives with neither, it retains father's domicile.***'

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Ross v. Peck, 86 *A.2d* 463 (Court of Appeals Md. (1952) at p. 467)***''
(at 723)

The facts established herein that petitioner's children resided with him approximately twenty-two percent of the time on the basis of a one-hundred eighty school day calendar. The remaining time of seventy-eight percent was spent by the children at their mother's place of residence. At best, petitioner would plan to remain in Bay Head with his children in ensuing years no more than sixty days. The remainder of the time the children would reside in Seaside Park with their mother or grandmother.

Thus, for purposes of school enrollment the Commissioner finds that petitioner's children do, in fact, reside in Seaside Park and are domiciled therein. The hearing examiner pointed out that the domicile of petitioner is not critical to a resolution of the issue of the proper school for the children's enrollment. The Commissioner affirms that finding. Petitioner's three children have a claim to school enrollment in Seaside Park because, in the circumstance of this case, their domicile is in Seaside Park.

Petitioner's children are presently attending Point Pleasant Beach High School on a tuition basis, based upon the sending-receiving relationship between the Bay Head Board and the Point Pleasant Beach Board. By virtue of this determination the children are eligible to attend Central Regional High School, since Seaside Park is a constituent district of that Regional District. Should petitioner desire to continue the enrollment of his children in the Point Pleasant Beach High School, he will be required to request such an arrangement, on a private tuition basis, from that Board of Education.

The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

October 11, 1978

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In the Matter of the Tenure Hearing of

Nancy Bacon,

School District of the Borough of Clementon, Camden County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Muller and Kancher (James L. Muller, Esq., of Counsel)

For the Respondent, Joel S. Selikoff, Esq.

The Board of Education of the Borough of Clementon, Camden County, hereinafter "Board," certified to the Commissioner of Education for determination tenure charges of incapacity against respondent, a school nurse, in its employ. The Board suspended respondent without pay at the time it certified the tenure charges on September 29, 1977. Respondent denies that she is incapable of performing her assigned duties as school nurse and has moved for dismissal of the tenure charges against her.

Oral argument on respondent's Motion to Dismiss was heard on July 11, 1978 at the State Department of Education by a representative appointed by the Commissioner. Respondent's Motion is referred directly to the Commissioner for determination on the record, including the transcript of oral argument, the pleadings, exhibits, affidavits and Briefs of counsel.

The Commissioner observes that a brief chronology of the events giving rise to the certification of charges against respondent is in order, prior to a discussion of said charges in connection with respondent's Motion to Dismiss.

Respondent has been employed by the Board as a school nurse since September 1973 and has acquired a tenure status in this position. Respondent became ill at the commencement of the 1976-77 academic year. She attests that she had contracted a viral illness which was accompanied by a high fever. It has been established that respondent was absent from her duties because of this illness until October 29, 1976. (C-15) Subsequent thereto respondent was involved in an automobile accident in March 1977 and sustained head injuries. Respondent attests that as a result of the automobile accident she accepted the advice of her physicians and decided not to drive her automobile until March 1978. (C-1, at p. 2)

Upon her return to her duties in the Clementon School District in April 1977, following her automobile accident, she informed the administrative prin-

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cipal of her decision not to operate her car. The Commissioner observes at this juncture that respondent was assigned as a school nurse in the two schools operated and maintained by the Board, located approximately one mile apart, and she was required by the Board to travel from one school to another as necessary.

The administrative principal attests that on April 25, 1977 he informed the Board of respondent's decision not to drive her automobile for a period of time. He further attests that the Board directed that arrangements be made to accommodate respondent in this regard until the conclusion of the 1976-77 academic year whereby the administrative principal, a janitor or a teacher would drive respondent between the two schools as necessary during this period of time. The Board also directed the Board Secretary to notify respondent that her continuing employment for the ensuing 1977-78 academic year would be contingent upon her securing a statement from her physicians regarding her physical condition. (C-2)

The Board Secretary, by way of a letter dated April 28, 1977, advised respondent that the Board was concerned because of her inability to drive her car. The Board Secretary further advised respondent that:

> "***[The Board] plans to employ you if there is no physical limitation that would interfere with your executing all job responsibilities, [but] it would be necessary for you to provide a medical statement by your attending physician *** by July 1, 1977." (C-3)

Respondent replied by way of a letter dated May 11, 1977 that she intended to continue her employment for the 1977-78 academic year. (C-4)

The Board Secretary advised respondent by letter dated May 25, 1977 that her employment was still conditional, pending its receipt of a medical statement that her physical condition was such that she was able to fulfill her assigned responsibilities. (C-5)

The Board received a statement from respondent's physician on June 2, 1977 at which time it was advised that respondent

> "***will be able to perform all of her job responsibilities for the 1977-1978 school year. There will be no limitations nor restrictions on her activities." (C-6)

The Board Secretary sent a letter to respondent's physician dated June 30, 1977 requesting clarification of his statement (C-6) regarding her physical condition. More specifically, the Board Secretary requested that:

> "***The Board would like a clarification as to whether [respondent] would be permitted to drive her car***." (C-7)

The Board did not receive a response to its request for clarification. Con-

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sequently, the Board Secretary again requested clarification by way of a letter dated July 26, 1977 to respondent's physician. (C-8) The physician's written reply dated July 28, 1977 advised the Board that:

> "***I would suggest that you discuss the operation of an automobile with [respondent] personally." (C-9)

The administrative principal attests that, subsequent to the receipt of the physician's statement (C-9), the Board, at a meeting held on August 22, 1977, directed him to advise respondent that she could return to her duties only upon her submission of a satisfactory medical statement. The administrative principal informed respondent of the Board's determination on September 1, 1977. (C-2, at p. 3)

Thereafter, the administrative principal filed written charges of incapacity against respondent with the Board on September 8, 1977. The essence of these charges is that respondent is incapable of performing her duties which, in conclusion, the Commissioner observes, is based solely upon her

> "***inability to travel from building to building and to drive a motor vehicle***." (C-2, at p. 4)

The Board considered the evidence in support of the charge pursuant to *N.J.S.A.* 18A:6-14 and determined to certify the charge on September 26, 1977.

The Commissioner observes that the administrative principal filed an additional charge of incapacity against respondent with the Board on November 1, 1977. The administrative principal attests that he received a letter (C-11) from another of respondent's physicians on September 26, 1977. Inexplicably, the letter from the second physician is dated August 27, 1977. The second physician acknowledged the Board was seeking medical certification that respondent could operate a motor vehicle and advised that:

> "***This decision is pending with the State. As you may or may not know, information concerning seizure is provided to the State of New Jersey, Division of Motor Vehicles; and they make a determination as to whether or not a person may operate a motor vehicle. Said information has been provided the State; and, to my knowledge, [respondent] has not heard from them as of this time. There is no way that either [the first physician] or myself (sic) can provide you with the document that you wish, nor any other physician who does not have State authorization through the Division of Motor Vehicles." (C-11)

The administrative principal attests in his additional charge filed against respondent that:

> "***[the second physician] sets forth that [respondent] is subject to seizures. Although it is not spelled out as to what nature of seizure, in fact, [respondent] suffers it is the first indication that I have had, although by

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innuendo only that [respondent] may have serious neurological problems resulting in seizure.***'' (C-10, at p. 2)

The Commissioner observes that the seizures suffered by respondent and referred to in the second physician's statement (C-11) occurred twice in her lifetime. The first seizure occurred during the fall of 1976 when she had contracted the viral illness, while the second seizure occurred following the automobile accident in which she sustained head injuries. (C-1, at p. 1)

The Commissioner finally observes, by way of respondent's supplemental affidavit in support of her Motion to Dismiss, that she attests that her driving privileges have never been revoked or suspended by the Division of Motor Vehicles and, further, that she purchased an automobile on March 23, 1978. (C-12, at p. 1) Attached to the affidavit are two letters from the second physician dated May 2 and May 16, 1978 which assert that respondent is physically capable of driving a car and that she suffers no physical impairment.

This concludes the chronology of events which resulted in the certification of charges against respondent. It is also upon these facts that respondent has moved for the dismissal of the tenure charges against her.

Respondent prays for dismissal of the charges on the grounds that neither charge of incapacity rises to the level of tenure charges pursuant to *N.J.S.A.* 18A:6-10 *et seq*. Respondent asserts that she is not now, nor has she ever been, incapable of performing her duties as school nurse.

She admits that she did not drive an automobile following her accident in March 1977. Respondent points out, however, that subsequent to her accident and upon her return to school in April 1977, she still performed her duties at both schools while being transported back and forth between the two schools by others.

Respondent argues that there is no evidence to support the charge of incapacity against her and relies upon the definition of incapacity as it was viewed by the courts *In the Matter of the Tenure Hearing of Paula Grossman*, 127 *N. J. Super*. 13, 29 (*App. Div*. 1974), *cert*. den. 65 *N.J*. 292 (1974).

The Commissioner has reviewed the remaining arguments set forth by respondent in her Brief in support of the Motion herein.

In the first instance, the Commissioner observes that local boards of education may ''***make rules *** governing the employment *** of teaching staff members***.'' *N.J.S.A.* 18A:27-4 Respondent, as a school nurse, is a teaching staff member within the scope of *N.J.S.A.* 18A:1-1 and as such is subject to those rules established by the Board. One of the rules so established required respondent to provide her own means of transportation from one school to another within the Clementon School District. Respondent had abided by that rule by driving her car until the March 1977 accident. Thereafter, through the conclusion of the 1976-77 academic year, alternate means of transportation were

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afforded her. There is nothing in the record which alleges that respondent was incapable of performing her professional duties as school nurse prior to the conclusion of the 1976-77 academic year.

The gravity of the charges herein are prospective in application. The charges assert that respondent may have been unable to drive at the beginning of the 1977-78 academic year. Even if it were to be established, in fact, by way of testimony that respondent was unable to drive during the period set forth, such may not be considered as adequate reason for a determination that respondent was incapable of performing her professional duties. In the Commissioner's judgment, incapacity denotes that a person simply is not capable, either by way of mental or physical processes, of performing his/her assigned duties. *Grossman, supra* The only fact the Board could establish at best, in view of the circumstances herein, is that respondent could not drive an automobile until March 1978. A search for an alternate solution to the problem which existed at that time would have been more prudent by the Board, in lieu of its action which resulted in the certification of tenure charges against respondent. Respondent could have been required to furnish her own means of transportation between schools.

Moreover, the Board admits that its certification of the original charge of incapacity and the additional charge with respect to the seizures respondent had experienced was taken without ever having a medical diagnosis of her condition. (Board's Brief, at p. 4) The additional charge of incapacity filed by the administrative principal was pure speculation of respondent's ability to perform her duties based solely on his interpretation of the word "seizure." In the Commissioner's judgment, the Board's action certifying charges of incapacity based upon respondent's physical health, absent a medical diagnosis from a competent physician, is without merit.

The Board could have caused respondent to submit to a physical and/or psychiatric examination pursuant to the provisions of *N.J.S.A.* 18A:16-2 through 5, if it so elected. See also *John Gish v. Board of Education of the Borough of Paramus*, 1974 *S.L.D.* 1150, aff'd State Board of Education 1975 *S.L.D.* 1085, aff'd 145 *N.J. Super.* 961 (*App. Div.* 1976), *cert.* den. 74 *N.J.* 251 (1977), *cert.* den. 434 *U.S.* 879 (1977).

The Board's determination to certify tenure charges against respondent upon the speculative conclusions reached by its administrative principal without further professional medical diagnosis in this instance is fatal.

The Commissioner, as a matter of law, hereby grants respondent's Motion to Dismiss on the grounds that even if it is established that respondent could not, or would not on the advise of her physicians, drive a car, such fact does not rise to the level of a finding of incapacity as a school nurse.

In regard to the second charge of incapacity, which addresses itself to respondent's propensity toward seizures, the Commissioner finds and determines that the Board at no time had competent credible evidence before it to determine probable cause as set forth in *N.J.S.A.* 18A:6-14.

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Accordingly, the Board is directed to reinstate respondent to her former position of employment as a school nurse with all back pay, less mitigation by earnings from substituted employment, and to grant her all benefits and emoluments otherwise withheld from her.

COMMISSIONER OF EDUCATION

October 12, 1978

In the Matter of the Tenure Hearing of

Jerome Pasek,

School District of the City of Garfield, Bergen County.

COMMISSIONER OF EDUCATION

ORDER

For the Complainant Board, Nasarenko & Meola (Nicholas P. Nasarenko, Esq., of Counsel)

For the Respondent, Saul R. Alexander, Esq.

This matter having been opened before the Commissioner of Education by the filing of charges against respondent by the School District of the City of Garfield, a Motion to dismiss the tenure charges by respondent, and a Cross-Motion by the Complainant Board to strike the defenses of respondent; oral argument having been conducted at the State Department of Education, Trenton, on June 8, 1978; and

It appearing that the tenure charges were filed subsequent to the filing of a Petition of Appeal on August 12, 1977 in the matter of *Jerome Pasek v. Board of Education of the City of Garfield, Bergen County*; and

It appearing that the charges of inefficiency, as set forth by the Board, were not filed pursuant to statutory prescription (*N.J.S.A.* 18A:6-11) in part because the ninety day notice to improve (Superintendent's Letter, November 28, 1977) was not given to respondent by the Board as set forth specifically by statute (see *In the Matter of the Tenure Hearing of Marilyn Feitel, School District of the City of Newark, Essex County*, 1977 *S.L.D.* 451, aff'd State Board of Education 458 and

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The record reveals that other procedural safeguards as provided by statute and case law were not afforded respondent, to wit:

1. The notice of inefficiency and the serving of charges were set forth by the Superintendent who lacks such authority which is vested exclusively with the Board (*N.J.S.A.* 18A:6-11);

2. The evidence supporting the charges was not certified under oath nor served upon respondent within 72 hours (*N.J.S.A.* 18A:6-11; *Feitel, supra*);

3. Respondent was not notified of his opportunity to respond in writing to the charges and to file a statement of evidence executed under oath with the Board (*Feitel, supra*);

4. The Board failed to notify respondent at the expiration of the period which charges of inefficiency had not been corrected (*Feitel, supra*); and

It appearing that the record reveals that all of the charges are inefficiencies (Superintendent's Letters, November 28, 1977, February 17, 1978); and

It appearing that the Commissioner has previously stated that:

> "***N.J.S.A.* 18A:6-11, as amended, is clear and unequivocal that the board alone shall notify the employee of charges of inefficiency and afford a ninety day period for improvement. Thus, charges of inefficiency must, in the first instance, be filed with the board secretary along with a statement of evidence in support thereof executed under oath. The board, through its board secretary, shall direct that a copy of those charges and a written statement of evidence in support thereof be served on the employee within a seventy-two hour period. The board shall direct that the employee be informed that, unless such inefficiencies are corrected within ninety days, the board intends to certify those charges of inefficiency to the Commissioner pursuant to *N.J.S.A.* 18A:6-11.
>
> "***If, however, the board has reason to believe that any or all inefficiencies have not been corrected, it shall notify the employee in writing of an opportunity to respond within fifteen days to the charges of inefficiency by filing a statement of evidence, under oath, in opposition to those charges. *** In the event that the board determines to certify such charges, it shall forward them to the Commissioner accompanied by a copy of the original charges of inefficiency, the sworn statement of evidence in support thereof, and a statement of the basis upon which the board relied to determine that the alleged deficiencies were not corrected. Those charges which are certified, with accompanying documentation, shall also be served on the tenure employee.***" (1977 *S.L.D.* at 457)

The following appears *In the Matter of the Tenure Hearing of Lillian H. Levine, School District of the City of Paterson, Passaic County*, 1977 *S.L.D.* 1129, aff'd State Board of Education January 11, 1978:

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> ''***[P]rior to the amendment of *N.J.S.A.* 18A:6-11 and the repeal of *N.J.S.A.* 18A:6-12, the latter statute provided authority to '***the board or the superintendent of schools***' to serve notice of inefficiency upon a tenured employee. *N.J.S.A.* 18A:6-11, as amended, has specifically deleted the Superintendent's authority to serve notice of inefficiency upon an employee. Such authority is specifically reserved for the employing board of education. In a recent decision the Commissioner held that the board secretary is responsible to act for the board with respect to the serving of charges, inefficiency or otherwise, upon the affected employee.***'' (at 1132); and

It appearing that the Board failed to adhere precisely to procedures mandated by statute and the aforementioned decisions rendered by the Commissioner and the State Board of Education; now therefore

IT IS ORDERED on this 16th day of October 1978 that Jerome Pasek be reinstated in his position with back salary and emoluments from the date of his illegal suspension by the Board.

This Order is rendered without prejudice to the Board to again file inefficiency charges in accordance with statutory prescription and prior decisions of the Commissioner and the State Board or to file tenure charges other than inefficiency against respondent.

COMMISSIONER OF EDUCATION

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Edward N. Ross,

Petitioner,

v.

Board of Education of the Borough of Elmwood Park, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Bartlett & Turitz (Stanley Turitz, Esq., of Counsel)

Petitioner, a tenured employee of the Elmwood Park Board of Education, hereinafter "Board," appeals from an action of the Board establishing his salary for the 1976-77 school year at $18,148, an amount $1,852 less than the $20,000 which he was paid for the 1975-76 school year.

Petitioner alleges that this action of the Board constitutes a reduction in salary in contravention of *N.J.S.A.* 18A:6-10 which provides in part that:

> "No person shall be dismissed or reduced in compensation, (a) if he is or shall be under tenure *** except for the inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, *** after a written charge or charges, or the cause or causes of complaint, shall have been preferred against such person *** and filed and proceeded upon as in this subarticle provided.***"

Petitioner requests the Commissioner of Education to issue an order declaring this action of the Board null and void and directing the Board to compensate him at least $20,000 for the 1976-77 school year with other appropriate relief.

The Board denies that its action which established petitioner's salary at $18,148 for the 1976-77 school year constituted a reduction in salary in violation of *N.J.S.A.* 18A:6-10 or was in any way improper or illegal.

The parties to the dispute have stipulated all relevant facts and waived their rights to file Briefs. Thus, the matter comes directly before the Commissioner for summary judgment in the form of the pleadings, the Stipulation of Facts, addendum, and accompanying exhibits. The facts are these:

Petitioner was employed by the Board from the 1958-59 school year through

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the 1967-68 school year as a school psychologist. (J-1-10) He was employed in the ensuing 1968-69 school year on a twelve month basis with one month of vacation entitlement in the combined position of "School Psychologist—Director of Special Services." (J-10-12) Petitioner was employed for the 1969-70 school year and the subsequent school years until November 30, 1975 in the administrative position of "Director of Special Services," a twelve month assignment which also entitled him annually to one month of vacation. (J-13-19a)

On November 18, 1975 the Board, by unanimous vote, resolved to eliminate the position of Director of Special Services and assign petitioner as school psychologist effective December 1, 1975. (J-28) Concurrent therewith, the Board resolved to reassign its then school psychologist to alternate duties for the remainder of the 1975-76 school year and to terminate his employment effective June 30, 1976. (J-28) The Board on November 18 also designated that the duties of the director of special services be reassigned to an elementary principal and to the holder of the newly created position of assistant superintendent of schools. (J-31, 34)

Petitioner was notified by the Superintendent on November 19, 1975 that he was reassigned to the position of school psychologist effective December 1, 1975. The Board, however, continued to pay him until June 30, 1976 at the annual salary of $20,000 as designated for the position of director of special services in its negotiated agreement with the Elmwood Park Administrative Association. (J-32, at p. 10; J-33, 37) On June 14, 1976 the assistant superintendent notified petitioner that he would be assigned to the position of school psychologist for the ensuing year and be paid at his proper grade and step on the teachers' salary guide. (J-36-37) He was in fact paid the sum of $18,148 for services rendered during ten months of the 1976-77 school year, which amount was $1,852 less than he had received for the previous year when he had been paid on a twelve-month basis.

Petitioner alleges that the Board's action reducing his salary and transferring him to the position of school psychologist was illegal, without proper notice, and should be set aside. He prays for an order of the Commissioner directing the Board to pay him a sum for the 1976-77 school year equal to that which he received during 1975-76, together with increases or adjustments and emoluments to which he may be entitled.

The Commissioner, having carefully perused the factual context set forth above, has considered petitioner's prayers for relief in the light of applicable statutory and case law. *N.J.S.A.* 18A:28-9 provides that:

> "Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, 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 for other good cause****." (*Emphasis supplied.*)

N.J.S.A. 18A:11-1 vests in local boards of education broad powers to:

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> "***Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees***."

Similarly, the Tenure Employees Hearing Law (*N.J.S.A.* 18A:6-10 *et seq.*) states that:

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

The broad powers of local boards have consistently been recognized by the Commissioner, as in *William A. Wassmer et al. v. Board of Education of the Borough of Wharton*, 1967 *S.L.D.* 125 wherein it was stated:

> "***Local boards of education are vested with broad powers in the making of decisions affecting the day-to-day operation of the schools under their jurisdiction. They have the authority to adopt rules and policies for the government and management of the schools, provided such regulations are not inconsistent with the school laws or rules of the State Board. *R.S.* 18:7-56 In the exercise of this authority boards of education are constrained to act reasonably and in ways which are not arbitrary or capricious. *Angell et al. v. Board of Education of Newark*, 1959-60 *S.L.D.* 141, 143, dismissed by State Board of Education, October 17, 1964***" (at 126-127)

The authority of boards to determine staff assignment was further recognized in *Leroy Lynch et al. v. Board of Education of the Essex County Vocational School District*, 1974 *S.L.D.* 1308, aff'd State Board of Education 1975 *S.L.D.* 1098, as follows:

> "***The appointment of teaching staff members, and the pattern of staff utilization are two of the vital factors which influence and determine the quality of the educational program within a given school district. This is so because the ability and competence of the teaching staff members have a higher coefficient of correlation to the instructional process and the achievement of pupils than any other factor such as the schoolhouse, or the materials for instruction. It was an understanding of these principles that caused the court in the case of *Victor Porcelli et al. v. Franklyn Titus, Superintendent, and the Newark Board of Education*, 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert. den.* 55 *N.J.* 310 (1970), to state that:
>
> > "***We endorse the principle, as did the court in *Kemp v. Beasley*, 389 *F.2d* 178, 189 (8 *Cir.* 1968), that 'faculty selection must remain for the broad sensitive expertise of the School Board and its officials'***.' (at p. 312)***" (1974 *S.L.D.* at 1315)

That a board may eliminate the position held by a tenured employee and reassign

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the duties of that position to other staff members was affirmed in *Adele Vexler v. Board of Education of the Borough of Red Bank, Monmouth County*, 1977 *S.L.D.* 625.

In *Arthur L. Page v. Board of Education of the City of Trenton et al.*, 1973 *S.L.D.* 704, aff'd in part/rem. in part 1974 *S.L.D.* 1416, the Commissioner characterized as both frivolous and inconsiderate a board action abolishing Page's administrative position and reducing his salary as late as August of the 1973-74 school year. Although he did not order the position restored, he directed that Page be restored to a comparable position and compensated at the same rate of salary which he had received in his administrative post, for the remainder of that school year.

In the instant matter, although the Board acted in November to abolish petitioner's position as director of special services, it did not reduce his salary during the remaining seven months of the 1975-76 school year. Such action cannot be termed inconsiderate. Nor can the incorporation of the duties of the director of special services with duties of an elementary principal and assistant superintendent be characterized as frivolous. Such action is within the discretionary authority of a local board of education and may be deemed a managerial prerogative.

The distribution of duties of an abolished position among other positions was recognized by the Court as a proper function of a local board of education in *Weider v. Board of Education of Borough of High Bridge*, 112 *N.J.L.* 289 (*Sup. Ct.* 1934). In *Dunellen Board of Education et al. v. Dunellen Education Association et al.*, 64 *N.J.* 17 (1973) at page 31 the Court held that the consolidation of department chairmanships was an educational policy function of the Dunellen Board, reviewable by the Commissioner, and not an arbitrable matter.

Similarly, the Commissioner affirmed that local boards have such rights to combine positions in *Charles Arangio v. Board of Education of the City of Clifton, Passaic County*, 1978 *S.L.D.* (decided March 2, 1978) when he stated:

> "***In the Commissioner's judgment the question of whether a local board of education may combine the duties of attendance officer with the existing duties of another position has been settled in *Georgia L. Johnson v. Board of Education of the Township of West Windsor*, 1964 *S.L.D.* 145, aff'd State Board of Education 1965 *S.L.D.* 174 wherein the Commissioner held that the West Windsor Board of Education could combine the duties of attendance officer with those of its school nurse.***" (at)

Petitioner's argument that he is entitled to a continuing salary no less than $20,000 is predicated on his assertion that the Board never abolished the combined position of "School Psychologist—Director of Special services." This argument is without merit in view of petitioner's having served from 1969-70 through November 1975 only as "Director of Special Services." He may not

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now, having in the interim accepted the benefits of the position of "Director of Special Services," rely upon what might have been a technical procedural fault in the Board's failure to abolish a combined position. Nor is the Board required to continue to pay him at the rate of salary to which his former position entitled him. *Michael J. Keane v. Board of Education of the Flemington-Raritan Regional School District*, 1970 *S.L.D.* 176

Absent a showing of bad faith or statutory violation, the Board's exercise of its statutory discretionary authority to order the staffing of its schools is entitled to a presumption of correctness. *Schinck v. Board of Education of Westwood Consolidated School District*, 60 *N.J. Super.* 448, 476 (*App. Div.* 1960) Petitioner has been accorded his seniority rights pursuant to *N.J.S.A.* 18A:28-9 through 13 and *N.J.A.C.* 6:3-1.10 by reassignment to his former position as school psychologist. Such action is statutorially sanctioned and need not, as petitioner argues, be negotiated. (Petition of Appeal, at p. 3) See *Board of Education of the Township of Madison v. Madison Township Education Association et al.*, 1974 *S.L.D.* 488. Accordingly, petitioner's prayer for relief seeking an order of the Commissioner directing the Board to increase his salary and attendant emoluments is denied. Similarly denied is the Board's counterclaim that it overpaid petitioner for the period from December 1, 1975 to June 30, 1976. No reimbursement for this period is in order. *Page, supra*

There remains only petitioner's further prayer for relief seeking an order directing the Board to compensate him for vacation entitlement earned during the 1975-76 school year. The stipulations are insufficiently explicit on which to base such an order. Nevertheless the Commissioner directs the Board to compensate petitioner for such entitlement if he can demonstrate his entitlement by showing that he did not receive vacation benefits to which he was entitled for the period which he worked as director of special services from July 1 through November 30, 1975. In the event that the parties cannot agree on this limited aspect, they may apply to the Commissioner for supplemental order.

COMMISSIONER OF EDUCATION

October 16, 1978

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"C.P.," by his parents "R.P." and "B.P.,"

Petitioners,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, R.P. and B.P., *Pro Se*

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

Petitioners are parents of a twelfth grade pupil, C.P., who attends high school in the district operated by the Board of Education of the Borough of South Plainfield, hereinafter "Board," who has been denied an opportunity to participate in the varsity soccer program at the high school. The Board's denial is based on the advice of its medical inspector. Petitioners pray that the Commissioner of Education direct the Board to allow their son the right to participate in its soccer program so as to avoid causing him further irreparable harm.

A conference between the litigants was conducted on April 3, 1978 at the State Department of Education, Trenton, at which time the following issues were established:

1. Is the matter timely pursuant to *N.J.A.C.* 6:24-1.2?

2. If it is timely, is the Board required to follow the advice of its medical inspector?

3. If the Board chooses to follow the advice of its medical inspector, such as occurred herein, can the Commissioner direct the Board to ignore that advice and allow petitioner to participate in its soccer program?

The litigants agreed to submit these questions directly to the Commissioner on Briefs. Therefore, the matter is ripe for Summary Judgment by the Commissioner. Attached to the Board's Brief are several exhibits and an affidavit executed by the Superintendent of Schools.

The Commissioner determines initially that the matter is timely because

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C.P. is presently in school and is being denied an opportunity to participate in soccer. *N.J.A.C.* 6:24-1.19 provides that the rules governing matters presented to the Commissioner for adjudication "***may be relaxed or dispensed with *** in his discretion *** where a strict adherence thereto *** may result in injustice."

The more important questions are posed in issues nos. 2 and 3, *ante*, regarding the obligation, if any, of a board of education to follow the advice of its medical inspector, and the Commissioner's authority with respect to that advice.

The statutes provide that boards of education must employ a physician or physicians (medical inspector) licensed to practice medicine in this State. *N.J.S.A.* 18A:40-1 Further, *N.J.S.A.* 18A:40-4 reads as follows:

> "The medical inspector, or the nurse under the immediate direction of the medical inspector, shall examine every pupil to learn whether any physical defect exists, or in lieu thereof the medical inspector may accept the report of such an examination by a physician licensed to practice medicine and surgery within the State. The frequency and procedure of and selection of pupils for such examinations shall comply with the rules of the State board, but a pupil who presents a statement signed by his parent or guardian that a medical examination interferes with the free exercise of his religious beliefs shall be examined only to the extent necessary to determine whether he is ill or infected with a communicable disease or to determine his fitness to participate in any health, safety and physical education course required by law. A health record of each pupil shall be kept, in which shall be entered the findings of each examination, and such record shall be the property of the board of education and shall be forwarded to any public school to which the pupil is transferred, if such school is known."

C.P., who has only one kidney, was examined routinely by the school medical inspector along with other pupils who applied to participate in the school's soccer program in the 1976-77 academic year. Upon determination that C.P. and three other pupils were in possession of only one of paired organs, the medical inspector disqualified all four from participating in "contact" sports. Obviously, soccer is considered by the medical inspector as a contact sport. The medical inspector concluded:

> "***I feel very strongly about this matter and am dead set against any student participating in contact sports who has only one of paired organs.***" (Exhibit B)

Petitioners aver that their son has the permission of their personal physician to participate and that he has declared C.P. to be physically fit to participate in soccer. They submitted a signed release from liability to the Board. (Exhibits C, D) Nevertheless, the Board again denied C.P. an opportunity to participate in soccer for the 1977-78 academic year. (Superintendent's Affidavit)

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Pursuant to *N.J.A.C.* 6:29-6.4 each candidate for a position on a school athletic squad or team is required to undergo a complete physical examination by the medical inspector employed by a board of education. The purpose of this examination is, obviously, to determine the candidate's fitness to participate. (See *N.J.S.A.* 18A:40-4, *ante*.)

In the instant matter the medical inspector determined that C.P., among others, was not physically fit to participate in soccer. Although the statutes permit the medical inspector to be guided by the advice of other physicians, he has elected to disqualify certain pupils for his reasons set forth very strongly and explicitly in Exhibit B. The Board would be ill-advised to ignore the advice of its medical inspector. A similar matter was previously decided by the Commissioner. *''P.N.'' v. Board of Education of the City of Elizabeth*, 1975 *S.L.D.* 783 In that decision the Commissioner determined that:

> ''***In the judgment of the Commissioner, the interests of the pupil, his parents and the community at large are best served by permitting the Board to exercise its legal discretion in adhering to the advice of its own medical inspector, absent a clear showing that the medical inspector's determination was arbitrary or discriminatory.***'' (at 786)

Such is the case in the instant matter. The Board has relied on the advice of its medical inspector for the 1976-77 and 1977-78 school years regarding C.P.'s application to play soccer. Although his parents claim that he is a victim of discrimination by the medical inspector who will not consider other physicians' recommendations, the record is devoid of any proof of discrimination. Rather, the record shows that C.P. and others were denied participation for medical reasons as set forth explicitly by the medical inspector in Exhibit B. The medical inspector is not obligated to follow the recommendation of another physician. He may concur with another physician's report but he has no obligation to do so. *N.J.S.A.* 18A:40-4

Having determined that the decision not to allow C.P. to participate in soccer for the seasons in question has been determined properly by the Board's medical inspector, and absent any showing of discrimination against C.P. or of any abuse of discretion by the Board, such determination may not be altered by the Commissioner. *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966); *Schinck v. Board of Education of Westwood Consolidated School District*, 60 *N.J. Super.* 448 (*App. Div.* 1960)

Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

October 17, 1978

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

Genevieve Freitag,

Petitioner,

v.

Board of Education of the Borough of Glen Rock, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

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

Petitioner, a tenured teacher of Spanish in the employ of the Glen Rock Board of Education, hereinafter "Board," taught journalism for the Board during the school year 1975-76. On April 27, 1976 she was informed by the Board that due to a reduction in staff her position as teacher of Spanish was abolished and that her services would terminate June 30, 1976. Petitioner, alleging eligibility for a certificate to teach English, claims seniority as a secondary school English teacher and pleads for continued employment with the Board in such capacity. The Board denies her claim to a position as a teacher of English and alleges that its action terminating her employment was legal and proper and moves for Summary Judgment by the Commissioner of Education.

The matter is presently before the Commissioner for adjudication based on the pleadings as submitted and the Brief filed by the Board. Petitioner declined to submit a Brief.

The facts of the matter are these:

Petitioner, a properly certified teacher of Spanish, acquired tenure in that field in the employ of the Board. For the school year 1975-76 petitioner, although not certificated in the field of English, taught a course in journalism for the Board. The Commissioner observes that such teaching assignment by the Board was outside of petitioner's field of certification and therefore was an improper assignment.

On April 27, 1976 petitioner was notified by the Board that because of declining enrollment her position as a Spanish teacher had been eliminated and her employment would be terminated as of June 30, 1976. (Exhibit D) Petitioner protested the Board's action on May 6, 1976 and claimed entitlement to a

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position as a teacher of English. (Exhibit E) The Board denied such entitlement by letter of May 10, 1976. (Exhibit F) On June 15, 1976 petitioner applied for certification as a teacher of English. (Exhibit A) The State Board of Examiners on June 22, 1976 notified the Bergen County Superintendent of Schools as follows:

> "We shall be able to issue certification to serve as teacher of English when she presents an official transcript from Montclair State College containing three credits earned in 'Seminar in American Literature,' completed in the Summer of 1976.
>
> "Certification can be based only on official college transcript credit." (Exhibit B)

In September 1976 the State Board of Examiners issued a certificate to petitioner as a teacher of English. (Exhibit C)

The Board argues that the decision of the Commissioner in *Elisabeth K. Morer v. Board of Education of the Township of Teaneck, Bergen County*, 1976 *S.L.D.* 963 is dispositive of all the issues in the instant matter and pleads for dismissal of the Petition. Morer at the time of her employment by the Teaneck Board of Education held certification only in general business education and subsequently acquired tenure in that field. Her position was abolished by the board and she was dismissed as a result of a reduction in force at the end of the 1974-75 school year. By virtue of her eligibility for temporary certification as an English teacher at the time of termination, petitioner claimed entitlement to a position in the English department. The Commissioner determined that issuance of a temporary certificate (*N.J.A.C.* 6:11-4.2) to teach English did not entitle her to seniority over those certified nontenure teachers newly employed or retained to teach English.

In the instant matter the Commissioner observes that petitioner was not eligible for a certificate as a teacher of English at the termination of the school year on June 30, 1976. Indeed the record is clear that petitioner had to successfully complete three credits in "Seminar in American Literature" in the summer of 1976 subsequent to her date of termination. The only certificate held by petitioner at the time of her employment and when she was terminated was that of a teacher of Spanish. As the Commissioner said in *Morer, supra*:

> "***[T]he Commissioner finds that petitioner's claim to seniority protection *** must be determined in accordance with the subject field endorsed on her certificate at the time of her initial employment with the Board. This endorsement specifically indicates that petitioner possessed a certificate to teach general business education *** when she was first employed. Consequently, petitioner can only claim a tenure status and seniority protection within the scope of the subject field endorsed on her teaching certificate at that time.***" (at 968)

In conclusion, the Commissioner finds and determines that petitioner's

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employment by the Board as a teacher of Spanish was properly terminated and she has no claim to protection over other nontenure teachers who were certified in the field of English prior to her termination on June 30, 1976. Petitioner's name is to remain on the preferred eligible list which protects her seniority as a teacher of Spanish, in the event that the Board reestablishes an additional teaching position or positions in its foreign language department or such a position becomes vacant in the future.

Accordingly, the Board's Motion for Summary Judgment is granted and the Petition is hereby dismissed.

COMMISSIONER OF EDUCATION

October 18, 1978

Linda Wetherell and Norma Carnivale,

Petitioners,

v.

Board of Education of the Township of Burlington, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Dennis J. Quinn, Esq.

For the Respondent, Maurice Denbo, Esq.

Petitioner Wetherell, a twelfth grade pupil, is joined by her parent in alleging that in June 1977 the Burlington Township Board of Education, hereinafter "Board," arbitrarily and capriciously denied her credit for twelfth grade English and a diploma of graduation.

The Board denies the allegations and asserts that its action was none other than a reasonable exercise of its discretionary authority.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner of Education at the office of the Burlington County Superintendent of Schools, Mount Holly, on April 19, 1978. The report of the hearing examiner follows setting forth first the relevant uncontroverted facts:

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Petitioner was absent from her English classes during 1976-77 in excess of forty days. (P-3, 7) Administratively mandated grading penalties were imposed for all absences in excess of ten by petitioner's English teachers. (Tr. 38, 68; P-1, questions 11 and 12) Those penalties were imposed in accord with the grading policy published in the student handbook (P-9) which specified, *inter alia*, that:

> "***When a student is absent from any class beyond ten days in the school year, .*75* will be deducted from the [class participation] grade for loss of participation credit for those days missed in the current marking period.***" (*Emphasis in text.*) (at p. 16)

A then prevailing administrative directive to teachers on grading policy, which was later adopted for the first time by the Board for the 1977-78 school year, required that the passing grade necessary for the award of credits varied according to the degree of absenteeism, as follows:

> ***
>
> "a. A student absent twenty days or less for whatever reason* must attain a final average of 69 to receive course credit;
>
> "b. A student absent 21-30 days for whatever reason* must attain a final average of 77 to receive course credit;
>
> "c. A student absent 31-39 days for whatever reason* must attain a final average of 85 to receive course credit;
>
> "d. A student absent 40-49 days for whatever reason* must attain a final average of 90 to receive course credit;
>
> "e. A student absent 50 or more days will be denied course credit.
>
> "*Except for *** [home instruction, religious holy days, student senate meetings, guidance pass, rotating music lessons, class trips and labs]***." (P-10)

A credit review board did deny petitioner twelfth grade English credit, as indicated by the testimony of the administrative assistant to the principal, in accordance with the grading policy. (Tr. 77; P-10 at p. 2) The Board tabled the adoption of the administration's *de facto* grading policy at its June 15, 1977 meeting in order to provide careful review of that proposal by the entire Board. (P-12, at p. 1) Petitioner's appeal to the Board for her diploma was denied by a 4-4 vote at its June 15, 1977 meeting. (P-12, at p. 4) At a special meeting of the Board on June 22, 1977, to which petitioner was invited but chose not to attend, a motion to grant diplomas to all students who received passing grades was defeated by a vote of 3-5. (P-12, at p. 10)

Relevant testimony of witnesses is succinctly summarized as follows:

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Both of petitioner's 1976-77 English teachers testified that petitioner had turned in all assigned work and that they had imposed penalties for absenteeism in accordance with the grading policy which then resulted in quarterly grades of 86, 84, 80, and 69 for a final average of 79. (Tr. 38, 133)

The principal testified that the grading policy was implemented administratively prior to Board adoption, which occurred after the June 16, 1977 graduation exercises. (Tr. 111) He made it clear, however, that the .75 penalty was for class participation only, which represented one third of the total grade and therefore only .25 of the final grade for each day's absence beyond ten. (Tr. 112)

The administrative assistant to the principal testified that the grading policy incorporated a sliding passing grade requirement upward which related to the extent of absenteeism beyond ten days; *i.e.*, the greater the absenteeism, the higher the required passing grade to receive course credit. (Tr. 68) He also testified that he chaired a credit review board which included petitioner's guidance counselor and her second semester English teacher in Research Writing. He stated further that he made the decision not to award English credit to petitioner based on the statistical input of grades and absenteeism by relating these statistics to the requirements of the grading policy. He also stated that when he had done so, he concluded that petitioner had not demonstrated mastery of the subject of twelfth grade English. (Tr. 77) He further testified that he had not conferred with other members of the credit review board relative to either the reasons for petitioner's absences or whether petitioner had demonstrated a mastery of subject matter in twelfth grade English. (Tr. 85)

Petitioner's record of absenteeism, as revealed by documents in evidence, shows that in the second semester she was most frequently absent during March and April. (P-3) On May 18, 1977 an unsatisfactory progress letter was mailed to petitioner's parent by the Research Writing teacher with the handwritten comment, "If Linda continues to attend as she has in the last two weeks, she will have no problem." (P-5) The attendance record indicates four days of absence from May 18 to June 9, on which date a letter was sent from both the principal and administrative assistant to petitioner's parent advising that no credit was being awarded for twelfth grade English. It stated further that

> "***Under these circumstances (over 30 absences, grade below 85) it is not reasonable to conclude that she [petitioner] acquired a mastery of the subject taught.***" (P-7)

The issues confronting the Commissioner in this matter for his determination are:

1. Is the pupil grading policy of the Burlington Township Board of Education unjust, inequitable, arbitrary and capricious?

2. Was petitioner denied her high school diploma because of the arbitrary application of the student grading policy?

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The pupil grading policy had not been adopted by the Board until after graduation exercises in June 1977. Prior to that time, the policy had, however, been implemented administratively. The Board, upon review of the appeals of petitioner and others on June 15 and June 22, determined that the application of the policy was, in its judgment, supportable. Hence, that policy will hereafter be referred to as if it had been previously adopted.

The philosophy undergirding the attendance policy published in the student handbook was stated precisely in the Commissioner's decision, *William J. Wheatley et al. v. Board of Education of the City of Burlington*, 1974 *S.L.D.* 851, which states, *inter alia*:

> "***Frequent absences of pupils from regular classroom learning experiences disrupt the continuity of the instructional process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra after-school instruction. Consequently, many pupils who miss school frequently experience great difficulty in achieving the maximum benefits of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic programs. The school cannot teach pupils who are not present. The entire process of education requires a regular continuity of instruction, classroom participation, learning experiences, and study in order to reach the goal of maximum educational benefits for each individual child. The regular contact of the pupils with one another in the classroom and their participation in well-planned instructional activity under the tutelage of a competent teacher are vital to this purpose. This is the well-established principle of education which underlies and gives purpose to the requirement of compulsory schooling in this and every other state in the nation.***" (at 864)

A portion of the above was also written into the grading policy, preceded by the statement that "***In determining grades, the teacher must consider the dictum of the Commissioner of Education***." (P-10)

It is necessary to comment regarding the broad use of previous decisions of the Commissioner when a portion of a decision is, in fact, *obiter dictum*. Although Commissioner's decisions should be relied upon for guidance in the development of policy, extreme care must be exercised whenever a portion of a decision is utilized as a basis for a policy determination. The import of the decision in its entirety must always be given full consideration. In *Wheatley, supra*, the Commissioner upheld the Board's denial of diplomas to eight petitioners but ordered the granting of a diploma to one other. The evidence, testimony and finding of fact with the application of law must be separately addressed on a case by case basis.

The instant matter is clearly distinguishable from *Wheatley, supra*, in that a double penalty was imposed on petitioner for excessive absences. There can be no doubt that the .75 class participation penalty per day dilutes demonstrated achievement. Although there was a slight discrepancy in testimony and evidence on the number of days' absence, it was conceded that petitioner had been

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penalized approximately nine points in quarterly grades and two points in her final grade. Further, the passing grade as required by the administration's interpretation of the grading policy for the number of petitioner's absences was 85. (P-7)

In the case of *Gustave M. Wermuth et al. v. Julius C. Bernstein, Principal of Livingston High School, and the Board of Education of the Township of Livingston*, 1965 *S.L.D.* 121, the Commissioner was requested to consider a practice that had the effect of lowering a pupil's grade when routinely assigned for disciplinary reasons. Specifically, in this regard, he said:

> "***The use of marks and grades as deterrents or as punishment is likewise usually ineffective in producing the desired results and is educationally not defensible. Whatever *system of marks and grades* a school may devise will have serious inherent limitations at best, and it *must not be further handicapped* by attempting to serve disciplinary purposes also.***"
> (*Emphasis supplied.*) (at 128-129)

In *Dawn Minorics v. Board of Education of the Town of Phillipsburg et al.*, 1972 *S.L.D.* 86, the Commissioner, when asked to consider allegations that the grading policy of the school system, in certain instances, was used as a measure of disciplinary penalty and thus improper, stated:

> "***[T]he practice [of weighting the term grade downward by arbitrarily assigning a zero for absences] must be viewed as one of the kind the Commissioner cautioned against in *Wermuth*; a practice that serves 'disciplinary purposes.' As such, the Commissioner holds that the practice is improper and should be terminated at the earliest practicable time.***" (at 90)

The hearing examiner further finds that the modus operandi of the credit review board was improper. That review board functioned in name only, in that the decision-making was done by the chairman of the credit review board in the perfunctory manner of relating data to policy without in depth consultation with other review board members. Therefore, petitioner's case was not afforded a full discussion and review in an attempt to determine if she had, in fact, achieved a mastery of subject matter. The examiner is unable to find a rational basis for the determination that a pupil with fewer than twenty absences and a final grade of 69 (minimum passing grade) has attained a mastery of subject matter, when confronted with a contrary determination that petitioner's achievement of a final grade of 79, after penalties were imposed, was insufficient to attain a mastery of subject matter.

The absences of petitioner are not to be condoned. Although petitioner did put forth adequate effort to fulfill all her class assignment responsibilities, her efforts to attend classes were found to be far from laudatory.

Both the administrative staff and the Board are to be complimented for their concern over pupil absenteeism and efforts to reduce them. The fact that the

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means utilized are not in accord with approved practices does not in any way detract from their efforts. Nor does it invalidate other schools' well devised and successfully implemented pupil grading policies which have reduced pupil absenteeism by imposing reasonable penalties for truancy and other unjustified absences or for failure to complete assigned work within a reasonable period after a pupil's return to school following any absence.

The hearing examiner urges the Commissioner to determine that the pupil grading policy with its double penalty for absences is unjust and inequitable and that petitioner was improperly denied her high school diploma because of the application of that policy. Accordingly, it is recommended that the Commissioner:

1. Direct the Board to review its grading policies and to promulgate such policies anew prior to the start of the 1978-79 school year with the expectation that the policies will be consistent with the judgments expressed, *ante*. In this respect, it is recommended that he retain jurisdiction in this matter until he has reviewed and approved the Board's promulgation of said policies.

2. Order relief to petitioner by directing the Board to grant twelfth grade English credit and her high school diploma, forthwith, in consideration of her demonstrated mastery of the subject matter of that course.

This concludes the report and recommendations of the hearing examiner.

* * * *

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

The exceptions state, in summary, that the Board's policy is not punitive but rather recognizes the fact that the pupil who is absent from class loses the benefits derived from the interaction among pupils and between teacher and pupils; that the .75 deduction had no effect on the passing or failing grade; that the policy at issue does establish a rational relationship between achievement grades and class attendance in determining the award of credit; and that the procedural deficiencies noted by the hearing examiner are insufficient to invalidate the policy and to cause the award of the diploma to petitioner.

The Commissioner commends the Board and its administrative staff for making a concerted effort to reduce pupil absenteeism. Nevertheless, the finding of the hearing examiner that the total impact of the Board's policy is punitive is borne out by the record. This, and all other findings set forth in the hearing examiner's report, the Commissioner adopts as his own.

It must be noted that some pupil absences are unavoidable, *i.e.*, death in the family, communicable disease, or hospitalization due to accident or illness. In such cases, automatic penalties should not be exacted, but instead pupils must

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be given the opportunity to make up their assignments to the fullest possible extent.

It cannot be presumed that all pupils in a school have reached a high level of maturity, or that they will at all times exhibit sound judgment. Pupil counseling to modify undesirable patterns of behavior must be considered essential. Such counseling was conspicuously absent in the instant matter. The record reveals that petitioner was given detention once for leaving school early and missing a class, and that a subordinate of the administrator in charge of discipline and attendance talked to her on but one occasion concerning her absenteeism. The Commissioner is constrained to emphasize, as was the case in *E.H. v. Board of Education of the Town of Boonton et al.*, 1975 *S.L.D.* 455, 459, that it cannot be assumed "***that adolescent pupils are capable of greater judgmental reasoning than is frequently the case.***"

It is reasonable to expect the imposition of penalties for unjustifiable tardiness, improper absences from classes, truancy, and absences considered to be inexcusable due to the nature of the cause. Such penalties may in effect reduce the final grade in a course of study for which a determination of subject matter mastery must be made for the awarding of credit. Those penalties may not, however, be compounded by again subjecting a pupil to an upward sliding scale of passing grades, as in the instant matter. *Minorics, supra; Henry Talarsky et al. v. Edison Township Board of Education et al.*, 1977 *S.L.D.* 862

In the case of all pupil absences, pupils must be held responsible for making up missed school assignments. Teachers are expected to give reasonable assistance to pupils in this process. *Wheatley, supra*

In the instant matter, petitioner made up all assignments missed while absent. Her final grade, with or without penalties imposed, was significantly higher than the passing grade required for pupils with fewer than twenty days of absence. The conclusion must be reached that petitioner's achievement was sufficiently adequate to support a determination that she had mastered the subject matter of twelfth grade English.

The Commissioner directs that the Board grant credit for twelfth grade English to petitioner and award her a diploma of graduation, forthwith. The Commissioner further directs the Board to amend its grading policies anew at its earliest convenience, and remove from such policies the double penalty requirements regarding permissible grades as related to total days of absence. (P-10, 5(a) through (e))

COMMISSIONER OF EDUCATION

October 20, 1978

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Board of Education of the Borough of East Newark,

Petitioner,

v.

Mayor and Council of the Borough of East Newark, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Greenwood, Weiss & Shain (Stephen G. Weiss, Esq., of Counsel)

For the Respondent, Libero Marotta, Esq.

Petitioner, the Board of Education of the Borough of East Newark, hereinafter "Board," appeals from an action of the Borough Council of the Borough of East Newark, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Hudson County Board of Taxation a lesser amount of appropriations for school purposes for the 1978-79 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter are these:

At the annual school election held February 14, 1978, the Board submitted to the electorate a proposal to raise $312,474 by local taxation for current expenses. This item was rejected by the voters and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Borough of East Newark for the 1978-79 school year pursuant to the mandatory obligation, imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Hudson County Board of Taxation an amount of $300,474 for current expenses. The pertinent amount in dispute is shown as follows:

	CURRENT EXPENSE
Board's Proposal	$312,474
Council's Proposal	300,474
Amount Reduced	$ 12,000

The Board contends that Council's action was arbitrary, unreasonable and

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capricious and documents its need for restoration of the reduction recommended by Council with written testimony, affidavits and Brief.

On April 3, 1978 the Hudson County Superintendent of Schools conducted a conference with the parties and on May 18, 1978 he forwarded a letter to the Assistant Commissioner, Division of Controversies and Disputes, Department of Education, which stated, *inter alia,* as follows:

> "***The Mayor and Council of East Newark have been reluctant to supply an Answer to the Petition of Appeal filed by the Board of Education. The Mayor and Council have also failed to adhere to N.J.A.C. 6:24-7.5.
>
> "Therefore, pursuant to N.J.A.C. 6:24-7.7, I recommend that this budget dispute be heard by the Commissioner. Enclosed, please find documentation regarding this matter."

A conference of counsel was scheduled and held in the instant matter on June 5, 1978 at the State Department of Education, Trenton, at which counsel for the Board and a hearing examiner appointed by the Commissioner appeared. The attorney for Council failed to appear. The hearing examiner attempted to contact him by telephone without success and thereafter proceeded *ex parte* with the conference of counsel. The conference agreements are not disputed and are recited in the following summary:

1. Respondent failed to file its Answer together with proof of service with the Commissioner and petitioner pursuant to *N.J.A.C.* 6:24-7.4.

2. Respondent's counsel failed to appear for the scheduled conference of counsel.

3. A representative of the Commissioner attempted to contact respondent's counsel, without success, by letter and telephone on the dates of: May 10, 19, 22, 23, 24 and June 5, 1978.

The conference agreements were sent to the parties on June 6, 1978. On June 30, 1978 the Board filed a Notice for Summary Judgment in the instant matter with supporting affidavits and Brief. Council did not acknowledge the Board's Notice of Motion for Summary Judgment in any way. Subsequently, on July 13, 1978 the parties were notified by letter that oral argument on the Board's Motion was scheduled for July 29, 1978 at the State Department of Education, Trenton. Council did not acknowledge receipt of the Notice nor did it appear for the scheduled oral argument on the Notice of Motion for Summary Judgment filed by the Board. Oral argument on the Board's Motion was granted *ex parte*. *Board of Education of the City of Orange v. Board of Commissioners of the City of Orange,* 1976 *S.L.D.* 315

The Board argued that because Council failed to file its Answer to the Petition of Appeal it was without sufficient information and knowledge to prepare its affirmative defenses with regard to Council's reduction of $12,000 in its

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proposed current expense budget for the 1978-79 school year. The Commissioner agrees with the Board's argument and further observes the principles which the Court set forth to establish the context of law in such matters as stated in *Board of Education of the Township of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966) as follows:

> "***Though the law enables voter rejection, it does not stop there but turns the matter over to the local governing body. That body is not set adrift without guidance, for the statute specifically provides that it shall consult with the local board of education and shall thereafter fix an amount which it determines to be necessary to fulfill the standard of providing a thorough and efficient system of schools. Here, as in the original preparation of the budget, elements of discretion play a proper part. The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in veiw of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, *it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.****"
>
> (*Emphasis supplied.*) (at 105-106)

Further, in the matter of the *Board of Education of the Borough of Haledon v. Mayor and Council of the Borough of Haledon,* 1970 *S.L.D.* 70, aff'd State Board of Education 75, the Commissioner, in restoring budget reductions, observed that Council's determinations must be independent ones properly related to educational considerations. Otherwise its determinations would be considered arbitrary and the reductions therefore restored. In affirming the Commissioner's decision, the State Board of Education held:

> "***The decision is affirmed in each and every other respect, based on the fact that the Respondent-Appellant, Mayor and Council of the Borough of Haledon, Passaic County, have, despite their opportunity to do so, failed 'to submit either to Petitioner, or later for the guidance and consideration of the Commissioner' in the appeal herein, a 'detailed stateament setting forth the governing body's underlying determinations and supporting reasons.' (*East Brunswick Board of Education v. East Brunswick Council,* 48 *N.J.* 94 (1966) (at Page 106),' which would justify their action."
>
> (at 76)

The Commissioner, having carefully examined the record and the arguments of the Board, finds and determines that Council failed to meet its obligations and requirements as set forth by the New Jersey Supreme Court in *East Brunswick, supra.* Accordingly, the Commissioner hereby certifies to the Hudson County Board of Taxation the additional total amount of $12,000 to be raised

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by local taxation for current expenses of the school district of the Borough of East Newark for the 1978-79 school year, so that the total amount of the tax levy for school purposes shall be $312,474. It is so ordered.

COMMISSIONER OF EDUCATION

October 23, 1978

"H.D." and "M.D.," on behalf of "H.D.,"

Petitioners,

v.

Board of Education of the Township of Roxbury, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

For the Petitioners, Ralph Neibart, Esq.

For the Respondent, Schenck, Price, Smith & King (Alton W. Read, Esq., and William J. Zaino, Esq., of Counsel)

For the Intervenor, Education Law Center, Inc. (W. William Hodes, Esq., of Counsel)

On June 23, 1977 a decision in the above entitled matter, the procedural recitation of which is incorporated herein by reference, was rendered in his appellate review capacity by the Commissioner of Education pursuant to *N.J.A.C.* 6:28-1.11(e). *"H.D." and "M.D.," on behalf of "H.D." v. Board of Education of the Township of Roxbury, Morris County*, 1977 *S.L.D.* 760 rem. State Board of Education 771, Report on Remand, March 16, 1978 Therein was affirmed the October 7, 1976 Hearing Examiner Decision issued pursuant to *N.J.A.C.* 6:28-1.11(d) wherein an impartial hearing examiner confirmed the appropriateness of H.D.'s classification as perceptually impaired by the child study team of the Roxbury Board of Education, hereinafter "Board."

Subsequent thereto on November 9, 1977, the State Board of Education remanded the case to the original hearing examiner directing that he apply appropriate *de novo* criteria to the record already established and that he reach his findings and decision without according a presumption of correctness to the

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child study team's prior determination. It was further directed that separate findings be set forth in regard to the educational placement of H.D. prior to and following the summer of 1974. In compliance with those directives the hearing examiner, who is a classification officer of the Branch of Special Education and Pupil Personnel Services of the Department of Education, issued his Report on Remand on March 16, 1978. Therein, the hearing examiner determined that the Board's child study team had appropriately classified and provided a suitable educational program for H.D.

The hearing examiner's Report on Remand was appealed directly to the State Board of Education which, on May 3, 1978, directed that the appeal be made before the Commissioner. It is those Points of Appeal by petitioners and the Education Law Center as intervenor and the Board's Answering Points of Appeal which are addressed herein.

Petitioners are joined by the Education Law Center in a renewed assertion that the hearing examiner failed to apply appropriate *de novo* criteria in reaching his determination that H.D. was properly classified. In this regard petitioners complain of similarities of the Report on Remand to the original Hearing Examiner Decision. (Petitioners' Points of Appeal, at pp. 7-8)

While it is apparent that similarities do exist, they are consistent with the record and the Commissioner imputes no fault thereto in view of the State Board's directive to apply *de novo* criteria *to the record already established.*

Both petitioners and the Education Law Center charge that the hearing examiner failed to either exercise independent judgment or apply *de novo* criteria when reaching his determination of whether H.D. was properly classified and given a suitable educational placement. The Commissioner cannot agree.

When faced with the responsibility of rendering a decision pursuant to *N.J.A.C.* 6:28-1.11(d)(5), the hearing examiner was obligated to examine *both* the process utilized by the child study team which led to H.D.'s classification and all evidence presented at the *de novo* hearing by petitioners, intervenor and the Board. In so doing, the process of classification, compliance or noncompliance with statutory requirements and the State Board's rules, as well as the reasonableness of interpretation of all evidence entered at the *de novo* hearing, must come under scrutiny of a hearing examiner who has special expertise in the fields of classification and education of the handicapped. When, as the result of such review, a hearing examiner concludes that a classification is inconsistent with statutory or administrative code provisions, that due process has not been afforded or that the interpretation of items in evidence is contrary to a reasonable analysis, the examiner is obligated to set forth in the decision those faults and order appropriate remedies.

Herein, the examiner, finding no such fault, stated, *inter alia,* that:

"***Based solely upon a careful review of the documents entered into evidence and the testimony adduced at the hearing from expert witnesses

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and others, the hearing examiner finds that petitioners have failed to carry the burden of proof in support of their allegations that the Board, through its child study team, inappropriately classified H.D. Based solely upon the same *de novo* criteria, it is also found that petitioners similarly failed to prove that the Board failed to comply with statutory requirements or rules of the State Board of Education in its placement of H.D. in an appropriate educational program.***'' (Report on Remand, at p. 11)

The Commissioner, on the basis of his reveiw of the entire record including the pleadings, Points of Appeal, all documents in evidence, Briefs of counsel, and each of the fifteen electromagnetic tapes which provide a verbatim record of the *de novo* hearing, reaffirms his prior conclusion as set forth in his June 23, 1977 decision that a *de novo* hearing was afforded petitioners. He further concludes that the hearing examiner in his Report on Remand, as directed by the State Board, has applied only *de novo* criteria in arriving at his findings of fact and his decision. The applications of law to those findings as set forth in the Commissioner's decision of June 23, 1977 are reaffirmed. Although not set forth herein in explicit detail, they are incorporated by reference, as are the numerous references therein to the verbatim tapes and exhibits in evidence.

The Commissioner's independent review of the entire record reveals a preponderance of credible evidence supporting the conclusion that the hearing examiner's decision is correct. H.D. was both properly classified and also afforded an educational program which was available in the Roxbury Schools. The Commissioner so holds.

Accordingly, both that decision and the further decision of the hearing examiner that petitioners are not entitled to be compensated for tuition costs which they incurred when they voluntarily withdrew H.D. from Roxbury Schools and entered him in Coral Gables Academy are affirmed for reasons set forth in detail in the Commissioner's decision of June 23, 1977.

Accordingly, the decision of the hearing examiner is affirmed. The appeal is denied.

COMMISSIONER OF EDUCATION

October 25, 1978

Pending State Board of Education

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George A. Sharp,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, John J. Pagano, Esq.

Petitioner, who was employed by the Bayonne Board of Education, hereinafter "Board," as "Superintendent of Buildings and Grounds and Repairs" from 1960 through July 31, 1977, alleges that he is entitled to payment by the Board for 56 days of unused accumulated sick leave. The Board avers that it has compensated him fully for his services and that he is not entitled to compensation for unused accumulated sick leave because of his involuntary retirement for disability, approved on July 20, 1977 by the Board of Trustees of the Public Employees' Retirement System, hereinafter "PERS." (Exhibit R-2)

The matter comes before the Commissioner in the form of amended pleadings, a Motion for Summary Judgment by petitioner, transcript of oral argument held at the State Department of Education, Trenton, on March 8, 1978 (Tr. II), and memoranda of counsel filed subsequent thereto. There being no relevant material facts in dispute, the matter is ripe for determination. The facts are these:

The Board on January 20, 1977, unilaterally applied to PERS for petitioner's retirement for physical incapacity, pursuant to *N.J.S.A.* 18A:66-110(c). On that same date, without recourse to the provisions of *N.J.S.A.* 18A:16-2, which authorize a board to require a physical examination of an employee, the Board placed petitioner, contrary to his wishes, on involuntary sick leave. (R-1) Thereupon, petitioner filed the Petition of Appeal before the Commissioner together with a Motion for Reinstatement, *pendente lite*.

Following oral argument on that Motion, the Commissioner by interlocutory Order dated April 14, 1977, incorporated herein by reference, directed the Board to reinstate petitioner on the basis that it had neither required that petitioner submit to a physical examination pursuant to *N.J.S.A.* 18A:16-2 nor afforded petitioner the due process to which he was entitled. The Commissioner, therein, determined that the record was "***lacking in evidence upon which to base a

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conclusion that petitioner either refused to perform his duties after his return from the hospital or was in fact unable to perform those duties without endangering his own health or that of his associates***." (Commissioner's Order dated April 14, 1977) That Order further directed that the Board was free to "***proceed with the processing of its unilateral application for petitioner's retirement pursuant to *N.J.S.A.* 18A:66-110(c) and/or with further examination of petitioner's physical well-being pursuant to *N.J.S.A.* 18A:16-2 *et seq.****"

The Board appealed the Commissioner's Order to the State Board of Education which on July 6, 1977 affirmed the Order and also directed that the Board restore to petitioner all days of his accumulated sick leave which it had charged against his entitlement during the time he had been on involuntary sick leave.

In compliance with the Commissioner's directive, the Board, on June 9, 1977, reinstated petitioner. It also restored those sick leave days with which he had been charged during the period when he had been on involuntary sick leave. (Exhibits R-4-5) His accumulated sick leave days as of July 20, 1977, including the ten days of his entitlement for 1977-78, total 56. (Exhibit R-5)

By letter dated July 26, 1977 the Secretary of PERS notified petitioner that the Board of Trustees had, on July 20, 1977, approved the Board's unilateral application for his retirement. (Exhibit R-2)

In view of the Board's compliance with the directives of the Commissioner and the State Board, the sole remaining issue raised in the Amended Petition is whether the Board, which has no policy to pay retirees for unused accumulated sick leave, is required to pay petitioner for his unused accumulated sick leave days upon approval by PERS of its application for his involuntary retirement for physical incapacity.

In claiming such entitlement, petitioner relies on *Fred J. Hoffman v. Board of Education of the City of Asbury Park,* 1975 *S.L.D.* 928, aff'd State Board of Education 1976 *S.L.D.* 1147. That reliance is misplaced. The factual context of *Hoffman* is sharply divergent from the facts of the instant matter. The issue in *Hoffman* was whether petitioner therein was afforded the due process to which he was entitled when he resisted the Board's directive to submit to a psychiatric examination pursuant to the provisions of *N.J.S.A.* 18A:16-2 *et seq.* No issue of due process remains, herein, following the Board's compliance with directives of the Commissioner's Order and the decision of the State Board of Education. Nor was petitioner ever directed by the Board to submit to an examination. Accordingly, *Hoffman* is inapplicable to the issue hereinbefore stated.

The instant matter bears strong factual resemblance to *Dr. Constant J. DeCotiis v. Board of Education of the Borough of Woodcliff Lake et al.,* 1972 *S.L.D.* 456. Therein, the petitioner, who upon unilateral application by his employing board was retired by reason of physical incapacity by the Trustees of the Teachers' Pension and Annuity Fund, claimed entitlement to payment for 159 days of accumulated sick leave which he possessed on the day of his

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disability retirement. (*Id.*, at 460) Therein, the Commissioner cautioned that no inference could properly be drawn from the sick leave statutes, *N.J.S.A.* 18A:30-1 *et seq.*, that "***sick leave is a personal privilege which, if not required to be utilized in entirety, may be transformed to a claim for wages or salary.***" (*Id.*, at 460-461) Cautioning that local boards of education must constantly be alert to protect the public interest and guard the public purse, the Commissioner rejected DeCotiis' claim to entitlement for unused sick leave pay, as follows:

> "***In the instant matter petitioner was involuntarily retired for total and permanent disability, which did not arise out of and in the course of his duties. The Legislature has provided that, in such instances, either the employee or the employer can institute retirement proceedings under *N.J.S.A.* 18A:66-39. It can logically be assumed, therefore, that the accumulated unused sick leave is not intended to be used for the prolongation of employment because of extensive sick leave, and thus thwart the intendment of the statute, *N.J.S.A.* 18A:66-39***." (*Id.* at 461)

The instant matter is indistinguishable from *DeCotiis, supra*. Both petitioner and DeCotiis were retired for disability and both were recipients of Workmen's Compensation awards. Both were retired by New Jersey retirement funds on dates selected by those funds while they still had unused sick leave entitlement with their respective Boards.

The familiar canons of statutory interpretation required that statutes be interpreted in such manner as to render effective the statutory intent. As was stated by the Court in *Board of Education of Plainfield v. Plainfield Education Association,* 144 *N.J. Super.* 521 (*App. Div.* 1976):

> "***It is elementary that a grant of authority to an administrative agency is to be liberally construed so as to enable the agency to discharge its statutory responsibilities. *In re Promulgation of Rules of Practice*, 132 *N.J. Super.* 45, 48-49 (App. Div. 1974). In short, the authority delegated to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent. *Cammarata v. Essex Cty., Park Comm'n,* 26 *N.J.* 404, 411 (1958). Moreover, when construing a statutory enactment it is fundamental that the general intention of the act controls the interpretation of its parts. *Hackensack Water Co. v. Ruta,* 3 *N.J.* 139, 147 (1949). All statutory provisions are to be related and effect given to each if such be reasonably possible. *Jamouneau v. Harner,* 16 *N.J.* 500, 513 (1954).***" (at 524)

Herein, PERS, an administrative agency under the Division of Pensions, Department of Treasury, upon certification by its physicians of permanent and total mental or physical incapacity, is empowered to retire a member of the system. Inherent in that authority is the right to determine when that retirement becomes effective. The Commissioner knows of no authority whereby he may recommend to PERS when such disability retirement should begin. Nor does authority exist whereby he may direct the Board to pay petitioner for unused sick leave. The Commissioner so holds. *DeCotiis, supra*

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The Commissioner is further constrained to comment that the provisions for sick leave contained in the school laws of this State apply only when there exists a contractual employment agreement wherein it may be presumed that an employee, absent for illness or accidental injury, is expected to return to his employment. Such presumption was ended by the action of PERS on July 20, 1977, thus terminating petitioner's claim to continued sick leave benefits thereafter.

It is stipulated that the Board has paid petitioner at his proper rate or salary not only for each day he worked but also for those days when he was improperly placed on involuntary sick leave. It has also paid him for a number of days between July 20 and July 31, 1977 when it was not yet aware of the action of PERS.

The Commissioner determines that petitioner is not entitled by law to any further relief. Accordingly, his Motion for Summary Judgment is denied.

COMMISSIONER OF EDUCATION

November 3, 1978

Joseph M. Graham, Jr.

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Shebell & Schibell (Peter Shebell, Jr., Esq., of Counsel)

For Respondent, Elliott H. Vernon (Stephen G. Schueler, Esq., of Counsel)

Petitioner, an adult pupil, who was classified as being neurologically impaired by the Special Services Child Study Team, hereinafter "child study team," of the Ocean Township School District, alleges that the concerted actions of the child study team, the Superintendent, and the administrators of the Ocean Township High School, hereinafter "High School," and the Ocean Township Board of Education, hereinafter "Board," have deprived him of his right to

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continue his education at the High School toward the receipt of a diploma. Petitioner alleges further that such actions complained of herein resulted in his improper suspension from the High School on December 9, 1976, and that the subsequent recommendation by the child study team and the Superintendent to the Board for his placement in an educational program outside the school district may not be implemented pending the determination of his appeal before the Commissioner of Education pursuant to *N.J.A.C.* 6:28-11 *et seq.*

Petitioner seeks an order of the Commissioner setting aside the Board's action and reinstating him to the regular High School program.

The Board rejects petitioner's allegations and avers that its actions based upon the determinations and recommendations of its professional staff are proper and legally correct in all respects. The Board further maintains that petitioner may not now pursue his claim to a free public school education pursuant to applicable law inasmuch as he attained twenty years of age during the 1976-77 academic year.

The instant Petition of Appeal was filed *pro se* by petitioner before the Commissioner on August 4, 1977 and the pleadings were joined by the Board on August 23, 1977. A conference of counsel was held in this matter on October 4, 1977, after petitioner had obtained representation of counsel. These proceedings are being conducted by a hearing examiner appointed by the Commissioner.

The hearing examiner procedurally determined at the time of the conference of counsel that the factual issues, with respect to petitioner's suspension from the High School and his challenge of the Board's actions pursuant to *N.J.A.C.* 6:28-1.11 *et seq.*, would not be separated and, accordingly, the matter would proceed to a hearing on the factual contentions hereinbefore set forth.

A hearing was conducted in this matter at the office of the Monmouth County Superintendent of Schools on January 10, 1978, after the parties were given an opportunity to file the pertinent records and other exhibits relevant to these proceedings. At the time of the hearing the parties jointly submitted a series of exhibits in evidence and additional testimony was elicited from petitioner, the Superintendent and the assistant principal of the High School in support of the respective positions of the parties.

The hearing examiner at this juncture will set forth the facutal pattern giving rise to the controverted matter as set forth in the joint exhibits presented by counsel. The chronology of events are recorded by academic year as follows:

1972-73 Academic Year:

Petitioner was initially enrolled at the High School as a ninth grade pupil. He was approximately 15½ years old at the commencement of the academic year and attained 16 years of age on March 15, 1973. He failed to complete any of his subjects successfully during this academic year, and in fact left the High

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School on March 23, 1973 and did not return to school for the remainder of the academic year. (J-8E, Summary of Petitioner's Academic Record as of November 29, 1976)

1973-74 Academic Year:

Petitioner enrolled in summer school prior to the beginning of the 1973-74 academic year and successfully completed Basic English I, earning a grade of C. (J-8E) Thereafter, petitioner commenced classes in September 1973 and continued in attendance at the High School until October 31, 1973, when he officially withdrew from school with his parents' consent. Shortly thereafter, on November 13, 1973, he was involved in a serious automobile accident in which he sustained an injury to his head and was hospitalized for an extended period of time. (J-8E)

1974-75 Academic Year:

Prior to the commencement of the academic year, petitioner contacted the High School authorities and requested to be readmitted to the regular program. Petitioner was placed on homebound instruction at that time until the extent of his injury could be determined and an educational assessment could be made by the child study team with respect to his educational program.

The coordinator of the child study team received the following letter dated September 30, 1974 from petitioner's neurologist diagnosing his injury and giving a prognosis for his recovery. The body of this letter reads as follows:

> "As per your request of 9/27/74. The above patient [petitioner] is currently under my care for management of injuries sustained in an automobile accident approximately a year ago. He is currently recovering from neurologic impairment sustained at the time of this head injury. I believe that his recovery will continue at this slow pace until it reaches its maximum level and then will taper off. There is a good possibility that he may never achieve a complete recovery, this, however, only time will tell.***"
>
> (J-7)

During the period pending petitioner's further evaluation and classification by the child study team, while he was on homebound instruction, it was reported by his tutor that he failed to keep three successive appointments for English instruction during October 1974. (J-8, Part III Guidance Office Report dated January 20, 1977; J-7H, Special Services Office Evaluation Information dated July 12, 1977) Petitioner was contacted by the High School authorities and he informed them at that time that he planned to withdraw again from school. It is observed that petitioner officially withdrew from the High School on November 14, 1974, without having his complete evaluation and classification determined by the child study team, and accepted employment at Fort Monmouth. (J-8, Part II; J-8E; J-7H)

The report of the Guidance Office establishes that petitioner again applied

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for re-admittance to the High School at the conclusion of the academic year and reads in pertinent part as follows:

> "June 1975
>
> [Petitioner's Mother] and [petitioner] visited the Guidance Office - spoke to Mr. Rizzi [guidance director] about [petitioner's] re-admittance into school in September 1975. [1975-76 Academic Year] [Petitioner] was reminded that he had no accumulated credits. Mr. Rizzi suggested an evening high school, a G.E.D. [High School Equivalency] program or vocational training. [Petitioner] was adamant in his determination to return to the high school.
>
> "Mr. Rizzi recommended that [petitioner] attend summer school as a first step in the determination of whether a return to the high school was, in fact, appropriate for him." (J-8, Part II)

The above report further establishes that petitioner did attend summer school and successfully completed the subject(s) undertaken at that time.

1975-76 Academic Year:

Petitioner was 18½ years old when he was readmitted to the High School at the beginning of the academic year.

The report of the child study team's Learning Disabilities Teacher-Consultant dated December 1976 provides a summary of petitioner's educational status and the efforts made by the child study team during the 1975-76 academic year to provide petitioner with an appropriate educational program at the High School. This report reads in pertinent part as follows:

> "***He [petitioner] was enrolled in the regular program in September 1975. [Petitioner] was assigned to the Tech Program. This is a series of courses wherein there has been curriculum adjustment so that learning materials and teacher demands are geared to the level of the learner.
>
> "The teacher discovered that [petitioner's] performance was erratic. There was an emotional liability noted. At times, his achievement was adequate. At other times, he was disruptive and abusive. He established unrealistic goals for himself and when he was frustrated by his limitations, he became hostile toward teachers and other students. He roamed the corridors, refused to go to classes, demanded to see his guidance counselor, the Director of Guidance, the vice-principal and/or the principal.*** Frequently, these crisis periods resulted in extended absences that made the possibility of academic success more remote.
>
> "In the 1975-76 school year, the staff made successive changes in [petitioner's] program in an effort to ameliorate his difficulties. These shifts in scheduling included the following strategies:

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1. placement in a program structured to meet his prescribed needs.

2. selective mainstreaming

3. selective mainstreaming with prescribed periods in the Resource Room

4. an adjusted day with the Resource Room providing all academic instruction.

"When none of these alternatives was successful, [petitioner] was referred to the [Long Branch] Rehabilitation Center. He refused to meet with Rehabilitation personnel and has clearly stated, 'I will not go there!'***" (J-7G)

The hearing examiner finds that there is ample evidence in the joint exhibits filed by the parties to support the above assessment made by the Learning Disabilities Teacher-Consultant with respect to petitioner's educational status and behavior during the 1975-76 academic year.

More specifically, the summary of petitioner's academic record (J-8E), which includes in part petitioner's grades for the academic year, establishes that petitioner was having considerable difficulty in achieving passing grades in many of his subjects during the second and third quarter marking periods and that he was absent 52 days and tardy 11 times during the academic year. It was not until petitioner was placed on an adjusted day during May 1976, with a larger concentration on supplemental instruction, that he was able to achieve passing grades in English, history, biology and health. It is also evident that the supplemental instruction provided to petitioner in English and science during the first half of the 1975-76 academic year resulted in some initial academic achievement by petitioner. These reports of the supplemental instructor also reveal, however, that petitioner's achievement and attitude regarding the completion of his assignments and his attention span in class deteriorated during the months of November and December 1976. (J-6 through J-6C, Individual Monthly Progress Reports)

In regard to petitioner's disciplinary record during the 1975-76 academic year (J-8, Part I), there are two instances reported during October and November 1975 wherein petitioner was reported as having verbally and physically abused and threatened other pupils. This report of the assistant principal goes on to state that there were three other occurrences during December 1975, and January and February 1976 when petitioner either refused to attend certain of his classes or became disrespectful and abusive to his teachers.

Additionally, the record reflects that petitioner was re-evaluated by the school psychologist on March 16, 1976 and that his test results were such that he fell within the range of a "slow-learner" and exhibited weaknesses in the areas of "***arithmetical reasoning, speed and mental activity, visual motor integration and coordination.***" and further that his "***visual imagery ap-

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pears to be weak and can be an influencing factor in ability for immediate recall and/or memory deficit. Motor activity is slow. Mode of learning appears to be through imitation.***'' (J-7A)

The evaluation report of the school psychologist recommended that, in light of the original diagnosis given to the child study team by petitioner's neurologist (J-7), he be referred to the Rehabilitation Center for further evaluation and that further evaluations be deferred until such time as the child study team met for the purpose of further planning of petitioner's program.

The Progress Notes of the child study team for the 1975-76 academic year (J-8A) reflect that attempts were made on four occasions to have petitioner attend the Rehabilitation Center in Long Branch without success due to his lack of cooperation.

1976-77 Academic Year:

Petitioner was 19½ years old when he began the academic year in September 1976.

The child study team met on September 10, 1976, to discuss the problem of petitioner's school placement without the benefit of an evaluation of petitioner by the Rehabilitation Center. The results and recommendations of these reports (J-7D, E, F) are set forth in the Classification Report (J-7D) wherein petitioner's classification status remained as being neurologically impaired with the following recommendations:

> ''***Regular 10th [grade] maladjusted program *** [Petitioner's] adjusted school program will be monitored by *** the [Learning Disabilities Teacher Consultant]. He will attend [resource room] ***in school day as needed.***'' (J-7E)

The Guidance Office Report (J-8, Part II) as well as the report of the Learning Disabilities Teacher (J-7G) reflect that until the time of petitioner's suspension from school in December 1976, he refused supplemental instruction, cut classes, had been abusive to others, and had failed all of his courses during the first quarter of the academic year. Petitioner's report card (J-8I) confirms the fact that he had failed to achieve a passing grade in his subjects during the first quarter of the academic year. A review of petitioner's progress in his subjects through November 29, 1976 prepared during January 1977 by his instructors discloses problems such as poor attendance in class, lack of preparation for and completion of assignments, failure to pass tests, poor peer relationships, disruptive behavior and, at times, the requirement and demand for special attention which was resented by pupils in his class. (J-8J, Electronics; J-8K, U.S. History II; J-8L, Accounting; J-8M, Contemporary Science)

Petitioner was suspended from High School on December 9, 1976 and the reason given for his suspension is contained in the body of a letter sent to him dated the same day which reads as follows:

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"Please be advised that you have been suspended from school, effective today for an indefinite period of time, for refusing to follow a directive issued to you to by a member of our teaching staff.

"You will be advised at a later date when you may return to school." (C-1)

Petitioner's disciplinary record prepared by the assistant principal reports that petitioner was referred to his office in September 1976 for fighting with another pupil and that in November 1976 the assistant principal received telephone calls from parents complaining about petitioner's harassment of their children. On another occasion petitioner was reported to be creating a disturbance at the Junior High School.

This report concludes with the events which occurred in December 1976 which read as follows:

***

"December 1976

[Petitioner] was referred to me for fighting with [C.W.] After further investigation, I learned that Joe had threatened [C.W.] because [C.W.] had refused to ride in [Petitioner's] car and refused to associate with [petitioner].

[C.W.'s mother] [called to complain.

Later that day, [petitioner] was observed by Mr. Gray in the guidance office (during his regularly scheduled study hall), looking up [C.W.'s] schedule. [Petitioner] wanted to go to [C.W.'s] math class and finish what he had started. When Mr. Gray intercepted [petitioner] going down the hall he requested that [petitioner] follow him to the office but [petitioner] refused to come with Mr. Gray and became loud, abusive and insubordinate.

After several complaints from the security guard and other students about [petitioner's] careless driving habits, I directed [petitioner] to turn in his parking permit but he refused to do so. He became insolent and insubordinate and refused to leave school. A short while later he did in fact leave the building, get into his automobile and exit the premises at a high rate of speed.

Suspended: December 9, 1976 - Effective December 10, 1976

[Petitioner] was suspended for his refusal to follow the directions of the corridor supervisor, Mr. Gray. He was further insubordinate to Mr. Gray and myself for refusing to leave the building when he was suspended and created a disturbance in the outer office. He was suspended from school for gross insubordination. The suspension was for an indefinite period of time until an alternative educational plan could be developed for [petitioner].***" (J-8, Part I)

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Thereafter petitioner was placed on homebound instruction on December 20, 1976. (C-3, Add-Drop Register Notice)

The child study team had completed its re-evaluation at the request of the assistant principal by December 22, 1976. The reports of the Learning Disabilities Teacher (J-7G) and the School Social Worker (J-7F) had been updated in December 1976 prior to this meeting. The Child Study Team Case Review (J-6F) dated December 22, 1976 establishes that petitioner as well as the assistant principal were present at that time. The recommendations of the child study team which were discussed with petitioner for his educational program and school placement were as follows:

> "1. To attend [High School] Part time and be involved with REHAB for part time in order to screen and determine vocational alternatives (strengths and weaknesses).
>
> "2. Attend Jonathon (sic) School. A plan was arranged whereby [petitioner] could visit Jonathon (sic) School with Ms. Marino [Learning Disabilities Teacher] and Mr. Rizzi [guidance director] on 1/5/77 at 10:00 a.m." (J-6F)

Petitioner, the Learning Disabilities Teacher and the guidance director visited the Jonathan School on January 5, 1977. A letter to this effect from the child study team coordinator to petitioner dated January 7, 1977 reads:

> "***This is to confirm a conference held with you and the Child Study Team on December 22, 1976. At the meeting two educational alternatives were offered to you.
>
> "An alternative program was to meet with the counselor from REHAB, Ms. Lynn Rudman to be advised of opportunities for career training available at that center. A second alternative was to attend the Jonathon (sic) School in Holmdel to complete a prescribed program for your high school education. On January 5, 1977 you visited Jonathon (sic) School with Mr. Rizzi and Ms. Marino.
>
> "We will await hearing from you as to your decision regarding these alternative programs.
>
> "Enclosed is a copy of the current state law regarding procedures.***" (J-5A)

The coordinator of the child study team was notified in writing on January 18, 1977, by the Director of the Jonathan School, that petitioner's placement in an educational program at that facility was approved on a trial basis as a result of a review of his records and an interview with him. (J-5C) A letter dated January 18, 1977 was directed to petitioner by the coordinator of the child study team scheduling a conference with him on January 20, 1977. (J-5B)

The Superintendent, Assistant Principal and members of the guidance office

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were present at the meeting held between petitioner and the child study team on January 20, 1977. One additional alternative was offered to petitioner at that time. The Progress Notes of this meeting read as follows:

> "Review of Case. Present were Mr. Rizzi, Ms. Zuchowski, Mr. Carelli, Ms. Marino, Mr. Sutherland, Mr. Mahon, Mr. Attlee, Mrs. Young, Mrs. Crystal and Joe Graham.
>
> Offered alternatives and read the law: (1) Jonathan School, (2) REHAB, and (3) Brookdale. Joe refused all alternatives, Jonathon, REHAB, and Brookdale. He wants to go to Catholic High School. Considered returning to OTHS but prefers Catholic High School. Reviewed his behavior. Feels hassled in this school. Counselor offered to take him to Brookdale to visit. Conclusion: Joe will let us know of his decision in two weeks as to what he decides to do, Feb. 3rd or 4th." (J-8C)

The hearing examiner points out at this juncture that the Jonathan School is a private nonsecretarian high school which offers a four year instructional program for neurologically and perceptually impaired pupils, approved by the State Department of Education and designed for pupils who need assistance with basic academic and prevocational skills to become self-supporting.

The course offerings are consistent with the requirements of law. The only exceptions permitted in a pupil's school program regarding his required subjects must be approved in writing by the local board of education which provides such educational services on behalf of its pupils. Upon graduation from the high school program a pupil is issued a regular high school diploma awarded by the local school district.

The programs offered at the Rehabilitation Centers throughout the State are under the supervision and direction of the New Jersey Department of Labor and emphasize the many aspects of prevocational or vocational training.

The hearing examiner observes that one of the alternative programs offered to petitioner at the Brookdale Community College would allow him to pursue courses toward completion of his high school education and thereby receive a high school equivalency certificate.

Petitioner was requested in writing by the child study team coordinator on February 4, 1977 to notify them of his decision with respect to the educational alternatives previously offered to him. (J-5E) A letter dated February 17, 1977 (J-5F) confirms that a meeting for this purpose was scheduled between petitioner and the child study team for February 24, 1977.

The Progress Notes (J-8C) of the child study team confirm the fact that a meeting was held on February 24, 1977 between petitioner and the child study team. Also present at that time were the assistant principal and the director of guidance. This report establishes that petitioner rejected all of the educational alternatives offered to him.

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Subsequent to this meeting, a letter dated February 24, 1977 was sent to petitioner from the child study team coordinator. The body of this letter reads as follows:

> "This letter confirms our meeting of February 24, 1977 held for the purpose of the Child Study Teams' hearing your decision regarding acceptance of educational alternatives presented to you at our meeting of January 20, 1977.
>
> "The alternative programs proposed to you were:
>
> 1. Attendance at Jonathon (sic) School
>
> 2. Exploration of REHAB Programs
>
> 3. Attendance at Brookdale Community College program as described by Mr. Rizzi.
>
> "At the meeting of the 24th you reaffirmed your decision not to accept any of the above programs.
>
> "We wish to notify you at this time that the interim program of Home Instruction will be suspended as of February 28, 1977. You were advised at the conferences of 1/20/77 and 2/24/77 that you have the alternative as described by the enclosed law to appeal your case at the Monmouth County Office of Education." (J-5G)

One final Individual Monthly Progress Report (J-6E) dated March 1, 1977 was submitted by petitioner's homebound instructor in U.S. History II. This report states that petitioner had been doing above average work in U.S. History II during the month of February 1977. The record reveals that petitioner's home instruction was terminated on February 28, 1977. (J-5G) Thereafter, petitioner was requested by way of a letter dated March 11, 1977, from the child study team coordinator, to provide the High School with a copy of a neurological evaluation conducted by his physician during December 1976. The information was requested in order to update his school medical records. The note attached to a copy of this letter reveals that petitioner rejected such request. (J-5H)

Petitioner became 20 years old on March 15, 1977, and subsequent thereto at his request, on March 30, 1977, a meeting was held in the Superintendent's office with members of the High School administration, the Director of Guidance, the child study team, petitioner's mother and petitioner in attendance. The purpose of this meeting was to discuss petitioner's education with a member of the State Legislature from Monmouth County. The meeting was adjourned because of the unavailability of the legislator. Such meeting was to be reconvened upon notification from petitioner. The hearing examiner finds that a subsequent meeting of this nature did not occur. (J-8D)

The Board agenda prepared by the Superintendent for a meeting of the

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Board's Instruction Committee held on June 7, 1977 indicates that petitioner requested to meet with the Board on that date to challenge his educational placement pursuant to *N.J.A.C.* 6:28-1.11. Some background information was enclosed by the Superintendent to the Board members regarding petitioner's request. (J-1)

There were no minutes recorded of this June 7, 1977 meeting; however, the Superintendent's Summary of the meeting reveals that petitioner did, in fact, present his case to the Board at that time. It is further recorded that the Board decided to reject petitioner's request to return to classes at the High School and uphold the recommendations of the Superintendent and child study team. (J-2, item 5)

A letter to this effect dated June 14, 1977 was sent to petitioner from the Superintendent and reads in part as follows:

> "After careful review of your request for a change in placement it is the decision of the Board of Education to uphold the decision of the Special Services Team recommending that you attend a special class or enroll in a program at Brookdale which would result in an equivalency diploma.
>
> "It was the feeling of the Board that the district should assist you in anyway possible to accomplish your goal. This assistance however would have to conform with the requirements of the law. As you are aware it is the district's responsibility to determine the educational program which will best serve its students. It is our opinion that returning to Ocean Township High School is not the best program for you.
>
> "I hope you will accept this decision and pursue your goal of attaining a diploma through one of the options available. Please let us know if we can be of assistance." (C-2)

Two further reports to the Superintendent from the child study team dated July 12, 1977 (J-7H; J-7I) were prepared at petitioner's request. The first of these reports provides nothing new by way of background except that petitioner's mother is reported to have agreed with the child study team's alternative to have petitioner pursue a training program for a vocational education at the Rehabilitation Center in Long Branch. (J-7H)

The second report of the same date (J-7I) pertained to the evaluation of petitioner by the school psychologist. This report indicates in part that petitioner's speech "***was somewhat slow***" as well as his ability to perform tasks requiring pencil and paper. The IQ test (WAIS) administered at that time showed no marked difference from those administered during the previous academic years. The report concluded as follows:

> "***Within the present earned scores verbal strengths appear in practical knowledge and arithmetical computation. Impaired ability was noted in long range retention of information gained from experience and education.

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Within Performance scaled scores low average ability was scored in alertness to environmental detail. Visual insight, visual perception of relationships, comprehension of total situation and analysis and formulation of abstract design fall within impaired range.

"Gestalt appears intact.

"Need to impress others by stressing self-ability, insistance on self-adequacy suggest insecurity and reliance on denial of inadequacy is a need relied upon to cope with situations. This denial indicates extreme inability to tolerate the frustration of 'not knowing' which is an essential ingredient of the educational process. The facade of adequacy is supportive to an acceptable self-image and results in avoidance in facing the reality of the situation." (J-7I)

The memorandum dated August 15, 1977, prepared by the Superintendent to all Board members, summarizes the meeting of the Board's Instructional Committee of August 9, 1977, wherein the Superintendent informed the Board that petitioner had filed a Petition of Appeal in this matter before the Commissioner of Education. (J-3- Item 3)

Finally on August 17, 1977 the following letter was directed to petitioner from the Superintendent. The body of this letter reads:

"In reply to your request that the Township of Ocean School District provide tutoring for you until your appeal is resolved I must inform you that such an arrangement is not acceptable. As I have indicated to you previously it is our position that the best educational program for you will be in one of the three alternatives we discussed. These alternatives are:

(1) The Jonathan School
(2) Monmouth Center Vocational Rehabilitation
(3) Brookdale Community College

Our position in this matter is based on our responsibility as a school district to provide an educational program for all the students in the district and our right to determine the best program for each of those students. I would suggest that your education be continued in either the Jonathan School or the Monmouth Center Vocational Rehabilitation pending a decision on your appeal. In this way you will be able to resume your education while awaiting a decision.

"Please let me know whether this plan is acceptable to you." (J-5I)

At the hearing petitioner testified that his decisions to withdraw from school during the academic years 1972-73, 1973-74, 1974-75 were based on his assessment that he was not learning much from the High School program at the time. Petitioner denied, however, that he had been uncooperative, disruptive or

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abusive to any of his peers or his teachers as reflected in the record herein. It is maintained by petitioner throughout his testimony that his problems with his education at the High School were a direct result of the verbal harassment heaped upon him by his peers.

Petitioner further maintains that the incident or incidents in connection with his appearance in the guidance office just prior to his suspension in December 1976 are false and that he was at that time trying to determine what his own class schedule would be for the next class period.

Petitioner does admit, however, that when confronted by the teacher in question in the school corridors on December 9, 1976, he did refuse to accompany him to the Principal's office because he was of the opinion that he had done nothing wrong.

It was also testified by petitioner that he attempted to cooperate as best he could on the occasions in which he was provided homebound instruction. He maintained that in the instances when he failed to keep the appointed times for home instruction, he was either ill or was visiting the doctor's office. In any event petitioner claimed he contacted the school authorities in such instances.

Finally, in regard to his challenge to his educational placement alternatives recommended by the child study team, petitioner does not deny that he was given an opportunity to visit the various facilities with a member of the child study team and the Director of Guidance. He stated that after visiting the Jonathan School, which he had determined did not meet his educational needs, he also rejected the program at the Rehabilitation Center in Long Branch, because he had previously investigated another of these Centers on his own and found that they were mainly for persons who were drug addicts.

Petitioner's testimony also reflects that he rejected the G.E.D. program offered at Brookdale Community College after talking with other unnamed college students about the program. He claims to have been told at that time that such a program was geared to pupils with a fifth grade achievement level.

The assistant principal stated that the reasons given to petitioner in his letter of December 9, 1976 (C-1) were the real reasons for his indefinite suspension of petitioner and for his request to the child study team to have his educational placement re-evaluated. The assistant principal also maintains that petitioner's suspension was reported to the Principal of the High School and the Superintendent shortly after he investigated the matter and discussed the incidents with petitioner.

The Superintendent testified that the decision to suspend petitioner indefinitely pending re-evaluation for his school placement by the child study team was an administrative determination and that such suspension was not pursued before the Board. Additionally, the Superintendent maintained in his testimony that the school authorities delayed taking such action regarding petitioner's educational placement, prior to his suspension, in an effort to accede to his demands that he remain in the regular High School program and be permitted

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to pursue his goal toward the completion of his education resulting in the ultimate receipt of a high school diploma.

The hearing examiner has reviewed the transcript of the testimony and the facts of the matter set forth in the joint exhibits filed in the record by the parties. His findings of fact and the recommendations are hereinafter set forth:

The hearing examiner finds that the record establishes that petitioner did, in fact, exhibit insubordinate conduct on December 9, 1976 when he refused to obey the directions of a teaching staff member which resulted in his suspension from the High School by the assistant principal. It is further found, however, that petitioner's indefinite suspension for this act or acts of insubordination were procedurally defective and contrary to applicable statutory and case law inasmuch as his actions were never properly brought before the Board for further action after his preliminary hearing by the assistant principal.

N.J.S.A. 18A:37-4 and 5 are the applicable statutes of reference herein and read in pertinent part as follows:

N.J.S.A. 18A:37-4

> "***[T]he teacher or principal suspending a pupil shall report the suspension to the board of education of the district at its next regular meeting. Such teacher, principal or superintendent may reinstate the pupil prior to the second regular meeting of the board of education of the district***, unless the board shall reinstate the pupil at such first regular meeting."

N.J.S.A. 18A:37-5

> "No suspension of a pupil by a teacher or a principal shall be continued longer than the second regular meeting of the board of education of the district after such suspension unless the same is continued by action of the board, and the power to reinstate, continue any suspension reported to it or expel a pupil shall be vested in each board."

The elapsed time between a preliminary pupil hearing before the school authorities and a pupil's appearance before a local board of education for a full adversary hearing, has been construed by the Court not to exceed 21 days. *R.R. v. Board of Education of Shore Regional High School,* 109 *N.J. Super.* 337 (*Chan. Div.* 1970) In that decision the Honorable Judge Merritt Lane held in pertinent part:

> "***If after this preliminary hearing the school officials had reasonable cause to believe R.R. was a danger to himself, others, or school property, he could be suspended but was entitled a full hearing affording him procedural due process within a short period of time, no more than 21 days.***" (at 350)

The hearing examiner finds that the record is barren of any evidence which would establish that petitioner's indefinite suspension for insubordination was

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in fact reported to the Board or that a full adversary due process hearing was afforded petitioner in connection with his suspension from school. While it is true that petitioner as a classified handicapped pupil was not entitled to be educated by the Board beyond the academic year in which his twentieth birthday occurred (*N.J.S.A.* 18A:46-13), it is found that petitioner's attendance at the High School was prematurely and improperly terminated by the school officials in the instant matter.

The findings with respect to petitioner's challenge to his educational placement by the school authorities and the Board will be considered, *post*.

The hearing examiner has considered the facts as set forth in the entire record and finds that petitioner did reject the alternatives offered to him in connection with his recommended educational placement outside the school district. It is further found that what petitioner considers to be abusive treatment by his peers, without any remedial action taken by the school authorities, may not be directly attributed to his excessive absences from school or his poor academic performance and achievement.

The hearing examiner finds that the Board admits the possibility that petitioner in certain instances, subsequent to his return to the High School after his accident, may have been unfairly and improperly treated by his peers. The Board does, however, maintain that it did take the necessary steps to try to provide petitioner with an opportunity to pursue his education within the High School environment. It was not until all of these efforts by the teachers, the child study team, the guidance office and the High School Administration were exhausted that the Board sought placement of petitioner in an educational program in facilities outside the school district.

The Board was willing to continue petitioner's high school education beyond the time prescribed by law provided that petitioner would cooperate with the school authorities and accept one of the alternatives offered to him so as to permit him to complete his high school education. Such alternatives were rejected by petitioner commencing with the 1974-75 academic year and thereafter.

The hearing examiner finds that the record herein is replete with evidence to support the Board's position in this regard. This finding is grounded upon the following facts:

1. The voluntary interruption of petitioner's High School Education caused by his withdrawal from school on three occasions wherein he had an opportunity to accomplish his educational goals.

2. Petitioner's excessive absences, poor classroom performance, and his refusal to cooperate in many instances with his teachers and the child study team in pursuing an appropriate educational program at the High School.

3. Petitioner's failure to achieve passing grades in many of his subjects commencing with the period of time during the 1972-73 academic year and

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following his return after his injury to the High School in the 1974-75, 1975-76 and 1976-77 academic years.

4. The test results and the evaluations of petitioner's academic potential and performance as indicated by the reports of his teachers and the child study team commencing with the 1974-75 academic year and each ensuing year thereafter.

5. The reports of petitioner's disciplinary infractions commencing with the 1975-76, 1976-77 academic years.

The hearing examiner finds further that the reluctance of the Board through its school administrators and child study team to insist upon appropriate educational placement for petitioner at the beginning of the 1976-77 academic year, after all educational remedies at the High School had been exhausted in the prior academic years, was in error. It is found that such action, as indicated by the testimony of the Superintendent, was taken in deference to petitioner and by virtue of his prior refusal to accept an educational program which was designed by the child study team and recommended to him at the conclusion of the 1975-76 academic year.

Consequently, the alternative recommendations for petitioner's school placement were delayed for approximately one academic year (1976-77). The hearing examiner finds that the recommendations made by the child study team and ultimately approved by the Board upon recommendation of its Superintendent represent viable alternatives for petitioner's school placement according to his classified handicap.

Finally, the hearing examiner finds that petitioner, contrary to the advice given to him by the school authorities, has made an untimely appeal of the recommendations for his placement before the Commissioner pursuant to the provisions of *N.J.A.C.* 6:28-1.11(h) which reads in part as follows:

> "No recommendation for placement, change in placement or exclusion from placement of a handicapped child shall be implemented before a hearing is held on a parental challenge to such recommendation and a decision entered, provided that a request for a hearing is made within ten days***."

Petitioner, as an adult pupil, was notified of all of the recommendations for his school placement by the child study team on January 20, 1977, however his appeal to the Board was not made until June 7, 1977.

The hearing examiner recommends the following alternatives be provided to petitioner toward the completion of his high school education:

1. That petitioner is entitled and should be permitted to attend the Jonathan School in Monmouth County at Board expense for one academic year, or for

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a longer period with Board approval, so that he may complete his high school education and be awarded a diploma by the Board; or

2. That petitioner be permitted to attend Brookdale Community College at Board expense for the same period of time as recommended above, so that he may enroll in the G.E.D. program and earn a high school equivalency certificate.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in the matter, including the report of the hearing examiner and the exceptions filed thereto by the Board. The Commissioner observes that no exceptions to the hearing examiner's report were filed by petitioner.

The Board asserts that, contrary to the findings of the hearing examiner, it adhered to its responsibilities in attempting to secure placement for petitioner in a suitable educational program at the beginning of the 1976-77 academic year. The Board explains that petitioner adamantly refused its efforts to assist him in this regard.

The Board also complains that the hearing examiner erred in recommending relief in the form of placement at the Jonathan School or at the Brookdale Community College, The Board grounds this objection on the fact that petitioner, as his requested relief, seeks readmission to its regular high school program. Furthermore, the Board asserts that because petitioner is over the age of twenty years, *N.J.S.A.* 18A:38-4 vests it with the discretionary authority to determine whether it should continue to provide for him.

The Commissioner has considered the objections of the Board in light of the total record herein and agrees that in 1975-76 the Board, through its administration and child study team, attempted to provide suitable placement for petitioner which he refused. During 1976-77 petitioner was provided three alternatives for educational placement. Petitioner refused all three alternatives.

In the Commissioner's judgment the Board did err seriously, however, in not affording petitioner a formal hearing before it, within twenty-one days following his indefinite suspension by the high school administration on December 9, 1976. The Board, in failing to do so, ignored petitioner's rights to a due process hearing. *R.R., supra* the Board's violation of petitioner's rights was further complicated by the fact that his suspension was from a regular school program. The suspension resulted in his placement on home instruction and continued thereafter. A hearing should have been afforded petitioner prior to such a significant change in his educational program. Accordingly, the Board, in this regard, acted improperly.

It is clear from the record herein, however, that petitioner will not benefit

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from reinstatement in the regular high school program. Consequently, the relief requested by petitioner will not be granted.

Relief must be granted, however, by virtue of the Board's violation of his rights by the imposition of the long-term suspension. The fact that petitioner is now beyond twenty years of age does not negate the Board's responsibility to make petitioner whole because of its improper action.

The Commissioner hereby directs the Board to cause its child study team to reevaluate petitioner and to recommend a suitable program of education for his needs. The Board shall offer petitioner such a suitable program. Should petitioner fail to cooperate with the child study team in this regard or, in the alternative, refuse to accept the Board's proposed program, at the educational facility it designates, within fifteen days of such offer, petitioner will have no further claim against the Board.

COMMISSIONER OF EDUCATION

November 3, 1978

Cynthia Greiner Wagner,

Petitioner,

v.

Board of Education of the Bridgewater-Raritan Regional School District, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris & Oxfeld (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent, Daniel C. Soriano, Jr., Esq.

Petitioner is a teacher who was employed by the Board of Education of the Bridgewater-Raritan Regional School District, hereinafter "Board," for the three academic years 1973-74, 1974-75, 1975-76, and was not reemployed for a fourth year. She prays for reinstatement in her teaching position together with back pay, costs, and reasonable attorney fees. The Board filed with its Answer a Motion to Dismiss the Petition of Appeal with a Brief and an affidavit in support thereof. Petitioner filed a letter in opposition to the Motion.

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Oral argument on the Motion was conducted at the State Department of Education, Trenton, on November 3, 1977. For the purposes of its Motion, the Board accepts as fact the allegations in the Petition of Appeal and the affidavit of its Superintendent of Schools.

In the Petition of Appeal, the following allegations are set forth as the basis for demanding reinstatement:

1. Petitioner's rights have been violated by the Board's refusal to abide by its own policy regarding reemployment.

2. Petitioner's evaluations were less favorable subsequent to a gymnastics program in which she was involved.

3. Petitioner was transferred from the high school to the junior high school, she avers, because of her sex and because she complained about that transfer.

4. Petitioner contends that she was asked to apologize for instituting a civil rights action against the Board which she contends was never instituted and that she was never a party to the contemplated action which may have been the intention of other teachers. (Petition of Appeal, paragraphs 4-7, 9)

The Board's Motion to Dismiss sets forth the following grounds:

"1. The Petition was not filed within 90 days after receipt of the notice by Petitioner of the action concerning which the hearing is requested, as required by N.J.A.C. 6:24-1.2, and

"2. The Petition fails to state any claim for which relief can be granted by the Commissioner of Education."

The Board argues that petitioner was notified by letter dated March 31, 1976 that she would not be reemployed because of unsatisfactory performance based upon supervisory observations and evaluations. Thereafter, she was given a written statement of reasons as she requested in April 1976, as well as a more detailed statement of reasons, which she later requested, on May 20, 1976. An informal appearance was conducted by the Board, and on June 11, 1976, the Board notified petitioner in writing of its final determination to affirm its prior decision not to reemploy her. (Superintendent's Affidavit) With the exception of a second, more detailed statement of reasons, the aforementioned actions are now required by law when a determination is made not to reemploy a nontenure teacher. *N.J.S.A.* 18A:27-10 *et seq.; N.J.S.A.* 18A:27-3.1 *et seq.; N.J.A.C.* 6:3-1.19 *et seq.* The Board argues, further, that the Petition herein was filed on June 15, 1977, more than a year following its final determination not to reemploy her, and that petitioner's determination to pursue the matter through arbitration cannot be used to establish a later date on which to claim her right to appeal to the Commissioner.

Petitioner contends that the Board's application before the Public Employ-

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ment Relations Commission (PERC) to enjoin her from proceeding with her grievance through arbitration was denied by PERC; therefore, she proceeded through arbitration in which the Board refused to participate, and that an award was made in her favor which the Board has refused to acknowledge. Petitioner asserts that, if the Board had abided by the arbitrator's ruling, there would have been no need to file the instant Petition of Appeal. (Petitioner's Letter, October 17, 1977)

The Commissioner has previously held that "the non-reemployment of nontenure teachers is not a proper subject for a grievance proceeding leading to arbitration.***" *Michele Lopez and the Madison Township Education Association v. Board of Education of the Township of Madison,* 1975 *S.L.D.* 996, 1002 The Commissioner knows of no authority which permits the non-reemployment of nontenure teachers to be pursued unilaterally through a grievance procedure leading to arbitration.

N.J.S.A. 18A:27-1 *et seq.* provides the basis for a board of education to enter into contractual relationships with teaching staff members and the conditions under which such teaching staff members may be terminated. The Commissioner observes further that it has been firmly established through court decisions that a board may not relinquish its rights and duties that are statutorily mandated. *Lullo v. International Association of Firefighters Local 1066,* 55 *N.J.* 409 (1970); *Board of Education of the Township of Rockaway v. Rockaway Township Education Association,* 120 *N.J. Super.* 564 (*Chan. Div.* 1972)

The Court in *Lullo* stated:

> "***It is crystal clear that in using the term 'collective negotiations' the Legislature intended to recognize inherent limitations on the bargaining power of public employer and employee. *** And undoubtedly they were conscious also that *public agencies,* departments, etc., *cannot abdicate or bargain away their continuing legislative or executive obligations or discretion. Consequently, absent some further changes in pertinent statutes public employers may not be able to make binding contractual commitments relating to certain subjects.****" *(Emphasis supplied.)* (at 440)

The authority for boards to promulgate rules for the employment of teachers is found in *N.J.S.A.* 18A:27-4 which reads as follows:

> "Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto."

Broad guidelines setting forth whether or not certain employment issues

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were negotiable or not were set forth by the New Jersey Supreme Court in a trilogy of cases: *Board of Education of Englewood v. Englewood Teachers Association*, 64 *N.J.* 1 (1973); *Burlington County College Faculty Association v. Board of Trustees, Burlington County College*, 64 *N.J.* 10 (1973) and *Dunellen Board of Education et al. v. Dunellen Education Association et al.*, 64 *N.J.* 17 (1973). In *Board of Education of the Township of North Bergen v. North Bergen Federation of Teachers*, 141 *N.J. Super.* 97 (*App. Div.* 1976) the Court examined this trilogy as follows:

> "***_Englewood_ held that hours and compensation were terms and conditions of employment and hence were negotiable and subject ultimately to arbitration. The *Burlington* case held that the fixing of the college calendar was not a proper subject of mandatory negotiation since it involved a major education determination. *Dunellen* held that the consolidation of the chairmanships of the social studies and English departments into a newly created humanities department was predominantly a matter of educational policy which had at most a remote and incidental effect on the terms and conditions of employment, and was therefore not a proper subject of either mandatory negotiation or arbitration.***" (at 101-102)

In the Matter of the Board of Education of the City of Englewood v. Englewood Teachers' Association, 150 *N.J. Super.* 265 (*App. Div.* 1977), *cert.* den. 75 *N.J.* 525 (1977) the Court stated:

> "***If there is a grievance charging arbitrariness by reason of discriminatory practices or other capricious considerations, the avenue of relief is by way of review under the School Laws by the Commissioner of Education.***" (at 270)

> "***Where the subject matter sought to be negotiated or arbitrated is left to the managerial discretion of the school board by legislative mandate, any agreement to the contrary and any directive to arbitrate *** is invalid and unenforceable.***" (at 271)

> "***The determination not to renew the contract of a nontenured teacher is a discretionary matter for the local board***." (at 270)

In *Porcelli et al. v. Titus et al.*, 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert.* den. 55 *N.J.* 310 (1970) the Court also stated:

> "***We endorse the principle, as did the Court in *Kemp v. Beasley*, 389 *F.2d* 178, 189 (8 *Cir.* 1968), that 'faculty selection must remain for the broad and sensitive expertise of the School Board and its officials,' and this we do notwithstanding an existing employment agreement where subsequent conditions make impossible a literal performance of all of its terms.***" (at 312)

In the Matter of Teaneck Board of Education v. Teaneck Teachers Association, Docket No. A-5211-76 New Jersey Superior Court, Appellate Division,

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July 5, 1978, the Court held that the filling of vacancies by a board of education is a matter of major educational policy on which boards may not be compelled to negotiate.

The legislative scheme regarding the employment and discharge of teachers is set forth in *N.J.S.A.* 18A:11-1 as follows:

"The board shall -

a. Adopt an official seal;

b. Enforce the rules of the state board;

c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11 Civil Service, of the Revised Statutes[1]; and

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

[1]Section 11:1-1 *et seq.*

See also *N.J.S.A.* 18A:16-1 which states in part:

"Each board of education, subject to the provisions of this title and or any other law, shall employ and may dismiss *** such principals, *teachers,* janitors and other officers and employees, as it shall determine, and fix and alter their compensation and the length of their terms of employment."
(*Emphasis supplied.*)

See also *N.J.S.A.* 18A:27-3.1 and 3.3 regarding the observation and evaluation of nontenure teachers and *N.J.A.C.* 6:3-1.19 on the same subject.

In *Union County Regional High School Board of Education v. Union County Teachers Association, Inc.: Cranford Board of Education v. Cranford Education Association,* 145 *N.J. Super.* 435 (*App. Div.* 1976), *cert.* den. 74 *N.J.* 248 (1977) the Court held that local boards of education may not be compelled to negotiate in regard to which nontenure teachers will not be reemployed.

In *Ridgefield Park Education Association v. Ridgefield Park Board of Education,* 78 *N.J.* 144 (1978) the Court held

"***that there are but two categories of subjects in public employment negotiation - mandatorily negotiable terms and conditions of employment and non-negotiable matters of governmental policy.***" (at 162)

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The Court went on to say, on the subject of teacher transfer, that a board of education would be in excess of its authority in negotiating a subject which is a managerial preogative. (slip opinion, at p. 21) See also *State of New Jersey v. State Supervisory Employees Association,* 78 *N.J.* 54 (1978).

Thus it is clear from a review of the pertinent statutes and the rulings of the Commissioner and the courts that the non-reemployment of nontenure teachers is not a subject for negotiation or arbitration, and that any rules and regulations pertaining thereto which have been established by agreement between a board of education and a local teachers' association are invalid and unenforceable.

It can be seen that petitioner was aware of the Court decision in *Union County Regional High School, supra,* which was rendered on December 10, 1976. Despite this ruling, she persisted in seeking relief through advisory arbitration. The arbitrator's award on February 28, 1977 was rejected by the Board on March 21, 1977. (Superintendent's Affidavit) This Petition of Appeal followed on June 15, 1977.

On October 6, 1976, new rules for filing controversies and disputes with the Commissioner were adopted by the State Board of Education. *N.J.A.C.* 6:24-1 *et seq.* These rules provide, *inter alia,* that a petition of appeal "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." *N.J.A.C.* 6:24-1.2 These rules were not in effect when petitioner received her notice of non-reemployment from the Board. Nevertheless, it should have been obvious to petitioner in December 1976, after the decision rendered by the Court, *ante,* and the rule changes codified in Title 6, Chapter 24, that administrative relief should be requested from the Commissioner.

The Commissioner determines, therefore, that petitioner had 90 days from December 10, 1976 in which to file her Petition of Appeal. The fact that she waited for an arbitrator's ruling and its subsequent rejection by the Board before appealing on June 15, 1977, more than six months later, clearly renders this matter out of time.

Even had petitioner prevailed in the instant matter, her prayer for costs and reasonable attorney fees would have to be denied, since there is no statutory authorization to make such payments. *Salvador R. Flores v. Board of Education of the City of Trenton,* 1974 *S.L.D.* 265, aff'd State Board 275, aff'd Docket No. A-960-74, New Jersey Superior Court, Appellate Division, March 2, 1976 (1976 *S.L.D.* 1137)

The Board's Motion is granted, and the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

November 3, 1978

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

Carol Moremen and the Middletown Township Administrators and Supervisors Association,

Petitioners,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioners, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

For the Respondent, Norton and Kalac (Peter P. Kalac, Esq., of Counsel)

Petitioner, a teaching staff member employed as a high school administrative assistant by the Board of Education of the Township of Middletown, Monmouth County, hereinafter, "Board," alleges that the Board improperly and illegally determined her salary for the 1973-74 and 1974-75 school years. Petitioner now seeks full monetary recovery and is joined in her Petition by the Middletown Township Administrators and Supervisors Association, hereinafter "Association," of which she is a member. The Board denies petitioner's allegations and asserts that its actions regarding petitioner's salary have been and are, in all respects, proper and legal. Subsequent to the joining ot issues in this matter, the Board filed a Notice of Motion to Dismiss the Petition on the grounds that the Commissioner of Education lacks jurisdiction over the issues raised herein.

Oral argument on the Board's Motion was heard by a representative of the Commissioner on June 16, 1975 at the State Department of Education, Trenton. The complete record of this matter, including the transcript of the oral argument, is before the Commissioner for his determination.

Initially, it is noticed that the adjudication of the instant matter has been delayed at the direction of the representative pending the resolution of an appeal taken on a prior determination of the Commissioner which has striking similarity to the issue controverted herein. See *William E. Schell v. Board of Education of Hazlet Township, Monmouth County,* decided on Motion, February 27, 1975 (unpubl). The State Board of Education affirmed that decision of the Commissioner on October 1, 1976, and no further appeal was taken.

Petitioner has been in the employ of the Board as an administrative assistant assigned to its high school since November 5, 1973. Petitioner is a member of the Association which entered into an Agreement (C-1) with the Board for the

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1973-74 and 1974-75 school years. The Commissioner notices that Article III of the Agreement sets forth the Board's ratio salary policy with respect to the various categories of employees who are members of the Association. The categories of employees are, *inter alia,* high school principal, junior high school principal, high school vice-principal, and high school administrative assistant. (C-1, Article III, at p. 2) Petitioner alleges that by the terms of the salary policy set forth in Article III of the Agreement, her salary for 1973-74 should have been $16,756 and that it should have been $18,905 for 1974-75. Instead, petitioner asserts that she received $12,857 for 1973-74 and $14,920 for 1974-75. Petitioner seeks to recover the difference in moneys between the amounts she received compared to the amounts she alleges she should have received for the years controverted herein.

The Board argues that the Commissioner has no jurisdiction in the matter because the verified Petition which gives rise to the dispute herein alleges a violation of the Agreement (C-1) entered into between it and the Association pursuant to the provisions of *N.J.S.A.* 34:13A-1 *et seq.,* the New Jersey Employer-Employee Relations Act. The Board contends that the Commissioner's authority to hear and determine controversies and disputes pursuant to *N.J.S.A* 18A:6-9 is limited to those disputes arising out of Title 18A, Education Law. The Board asserts that the gravamen of the matter herein is that the Agreement (C-1) has been violated. The Board further argues that if the salary schedule set forth therein at Article III was intended to be a Board policy, it would have adopted a resolution so stating. The Board asserts that it had not adopted such a resolution; therefore, the salary schedule is not Board policy.

The Board contends that since the passage of *c.* 303, *L.* 1968, codified as *N.J.S.A.* 34:13A-1 *et seq.,* the Commissioner's authority to assert jurisdiction has been limited to adjudicating tenure changes and disputes with respect to the withholding of salary increments and cites *Board of Education of the City of Englewood v. Englewood Teachers Association,* 64 *N.J.* 1 (1973); *Burlington County College Faculty Association v. Board of Trustees, Burlington County College,* 64 *N.J.* 10 (1973); and *Dunellen Board of Education et al. v. Dunellen Education Association et al.,* 64 *N.J.* 17 (1973).

The Commissioner notices that the Court held in *Burlington, supra,* that a college calendar is not negotiable. In *Dunellen, supra,* the Court held that the consolidation of two curricula departments into one unit was an educational issue requiring the expertise of the Commissioner. In the instant matter, the Board points out that the Court in *Englewood, supra,* held that:

> "***working hours and compensation are terms and conditions of employment within the contemplation of the Employer-Employee Relations Act. [*N.J.S.A.* 34:13A-1 *et seq.*]***" (64 *N.J.* at 6-7)

The Board asserts that because the Court held that compensation is a term and condition of employment pursuant to *N.J.S.A.* 34:13A-1 *et seq.,* the proper forum for the adjudication of the instant matter is within the framework of the agreed upon grievance procedure set forth at Article IX of the Agreement. (C-1)

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The Board also relies on *c.* 123, *L.* 1974, which amended portions of *N.J.S.A.* 34:13A-1 *et seq.*, in support of its position that the Commissioner's authority at *N.J.S.A.* 18A:6-9 does not extend to the instant matter. Specifically, the Board cites that amended portion of *N.J.S.A.* 34:13A-5.3 which provides:

> "***Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement."

Finally, the Board asserts that the Commissioner's prior rule in *Schell, supra,* is in error.

The Commissioner has reviewed the argument of the Board in support of its Motion to Dismiss and the statutory and case law it cites in support thereof. The Commissioner acknowledges the guidance of the Court in *Englewood, supra,* that compensation is a term and condition of employment within the contemplation of *N.J.S.A.* 34:13A-1 *et seq.* As such, the rates of compensation are a proper subject for negotiation between the Board and its employees. Once the Board and its respective negotiating units agree on the respective rates of compensation and the Board adopts the various salary scales, it does so only through its authority at *N.J.S.A.* 18A:29-4.1 which provides, in full, as follows:

> "A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year."

The Commissioner does not agree with the Board that it had to first adopt a resolution stating that the salary policy set forth in Article III of the Agreement (C-1) was, in fact, Board policy. This argument, carried to its logical conclusion, would result in a situation whereby a local board of education, after negotiating a salary policy as required by law, could disavow such policy as non-binding upon its determination of the salaries of affected teaching staff members merely because the board failed to formally vote the adoption of such salary policy. Given the statute, *N.J.S.A.* 18A:29-4.1, such a state of affairs would be intolerable. The Commissioner finds this argument of the Board inapposite.

The Commissioner has held on prior occasions that the rules and policy of a board of education governing its employment practices may be found in various

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places. In *Teamsters Local 102, International Brotherhood of Teamsters et al. v. Board of Education of the City of Linden, Union County,* 1974 *S.L.D.* 1349 the Commissioner noted that among the various places a board's rules and regulations may be found are "***a board's statement of policy in its official minutes, its employment contracts, and *its negotiated agreements.*****" (*Emphasis supplied.*) (at p. 1352) Thus, the salary schedule herein which is set forth at Article III of the Agreement is, in fact, the Board's salary policy adopted pursuant to its authority at *N.J.S.A.* 18A:29-4.1. The Commissioner so holds.

The Commissioner has reviewed the amending legislation *c.*123, *L.* 1974, and the cited amended portion thereof to *N.J.S.A.* 34:13A-5.3. In the Commissioner's view, that provision of the statute has no application herein. The dispute being considered is a challenge to the application of the Board's salary policy it adopted under *N.J.S.A.* 18A:29-4.1.

Notwithstanding the Board's assertion that the Commissioner's determination in *Schell, supra,* is erroneous, that holding has the force and effect of law until, and if, it is reversed by a court of higher jurisdiction.

In *Schell, supra,* the Commissioner held the following:

> "***The question here is whether the allegations set forth by petitioner constitute a controversy or dispute under school law, Title 18A Education, requiring a review by the Commissioner pursuant to *N.J.S.A.* 18A:6-9. The narrow issue raised by petitioner is whether or not the Board acted properly in applying the provisions of an existing policy to petitioner when he was promoted to the position of elementary vice-principal during the 1969-70 academic year. The issue is not concerned with wages and hours as described in *Englewood, supra.* There is no question that the Legislature vested boards of education with authority to adopt salary policies. *N.J.S.A.* 18A:29-4.1 In many previous instances the Commissioner has been called upon to determine whether a local board of education acted properly under an existing policy, adopted pursuant to law. For a detailed review of such cases see *James McCabe v. Board of Education of the Township of Brick, Ocean County,* 1974 *S.L.D.* [299] [aff'd State Board of Education 311; aff'd as *Board of Education of Brick Township v. James McCabe,* Docket No. A-3192-73, New Jersey Superior Court, Appellate Division, April 2, 1975]. In the judgment of the Commissioner, the instant matter arises under the school laws and is within the jurisdiction of the Commissioner.***"
>
> (unpubl)

A similar holding is applicable herein. The issue in the matter is whether the Board improperly established petitioner's salary for the years 1973-74 and/or 1974-75. *Brick Township Education Association and Donald Cook v. Board of Education of the Township of Brick, Ocean County,* 1975 *S.L.D.* 521, aff'd State Board of Education 524; *Alfred Zitani v. Board of Education of the Township of Willingboro, Burlington County,* 1975 *S.L.D.* 439

Accordingly, the Board's Motion to Dismiss is hereby denied. The Com-

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missioner of Education retains jurisdiction in the matter pursuant to *N.J.S.A.* 18A:6-9 and directs his representative to move the matter forthwith toward adjudication.

COMMISSIONER OF EDUCATION

January 11, 1977

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 11, 1977

For the Petitioners-Appellees, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

For the Respondent-Appellant, Norton and Kalac (Peter P. Kalac, Esq., of Counsel)

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

Mr. David Brandt and Mr. Bryant George dissented in the matter.

June 1, 1977

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

For the Respondent, Norton and Kalac (Peter P. Kalac, Esq., of Counsel)

Petitioner, a teaching staff member employed as a high school administrative assistant by the Board of Education of the Township of Middletown, hereinafter "Board," alleges that the Board improperly established her salary for

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the 1973-74, 1974-75, and 1975-76 school years. Petitioner seeks full monetary recovery and is joined in her Petition by the Middletown Township Administrators and Supervisors Association, hereinafter "Association," of which she is a member. The Board denies the allegations and asserts that its actions with respect to petitioner's salary have been in all respects proper and legal.

A hearing was conducted in the matter on August 30, 1977 at the office of the Monmouth County Superintendent of Schools by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

Subsequent to the joining of the pleadings, the Board moved to dismiss the matter on the grounds that the Commissioner was without jurisdiction over the issues raised herein. The Commissioner denied the Board's Motion to Dismiss and, simultaneously, did assert jurisdiction in the matter by virtue of his authority at *N.J.S.A.* 18A:6-9. (See *Carol Moremen et al. v. Board of Education of the Township of Middletown, Monmouth County,* decision on Motion, January 11, 1977, aff'd State Board of Education June 1, 1977.)

Petitioner originally complained that the Board improperly established her salary for the school years 1973-74 and 1974-75. Petitioner moved at the time of hearing to amend her Petition to include the allegation that her salary for the 1975-76 school year was also improperly established. Petitioner's application to amend her complaint was granted over the objection of the Board. (Tr. 7)

Petitioner was initially employed by the Board as a classroom teacher assigned to the science department for the 1968-69 academic year and continued in that assignment until the 1973-74 academic year.

At the commencement of the 1973-74 academic year, petitioner applied for and was subsequently appointed to the position of administrative assistant to the high school principal effective November 5, 1973. (Tr. 13)

The notice which announced the vacancy in the position of administrative assistant stated with respect to salary establishment for the successful candidate that:

> "***Salaries [will be established] in accordance with supervisory and administrative salary schedules.***" (P-1)

Petitioner testified that prior to her appointment as the administrative assistant she was interviewed for the position by the Assistant Superintendent in charge of personnel. Petitioner testified that the manner in which her salary would be established, should she be the successful candidate, was explained to her. Petitioner explained that a document was shown her entitled "Administrators Salary Scale for 1972-73," which set forth various rates of compensation for seven classifications of administrative personnel including her position of high school administrative assistant. (P-3) Three provisions of that policy are set forth in full as follows:

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"A. Master Degree plus five years experience required for administrators.

"B. Each year of Administrative experience will count as two (2) years [for purposes of initial salary placement on this scale].

"C. With ten (10) years teaching experience or five (5) years administrative experience [the newly appointed administrator is] to start at beginning ratio.

"If the experience is not qualifying for the beginning ratio on salary scale, Administrator[']s salaries will be based on the *proper teaching* step X the beginning ratio plus $500.00." *(Emphasis in text.)* (P-3)

The Board Secretary testified that this administrative salary policy (P-3) had been in effect since 1970 and that the three stated conditions continued until the 1975-76 school year when a major salary policy revision for administrators occurred. (Tr. 67-68)

The initial salary for an administrative assistant who met the experience requirements according to this policy for 1973-74 would have been $16,756. This figure is arrived at by taking the maximum amount of the master's scale (P-2) for teaching staff members for 1973-74 which was $15,808 and applying the ratio of 1.06 to that amount according to the administrators' salary scale then in effect.

Petitioner testified that her salary for 1973-74 as an administrative assistant was improperly established at $12,857. This figure was arrived at, petitioner explained, by applying the ratio of 1.06 to her then teaching salary of $11,658, which was the salary for a teacher with a master's degree and in the sixth year of experience, plus the $500 stated in the then existing salary policy. (P-3, *ante)*

Petitioner testified, notwithstanding her claims herein, that her initial salary was fully explained to her, that the administrative ratio of 1.06 would be applied to her appropriate step on the master's scale because she did not have ten years teaching experience, that she was aware of the stated requirement that the appointee must have five years administrative experience or ten years teaching experience to command the application of 1.06 to the then existing master's salary scale maximum, and that she accepted the salary of $12,857 which she now contests. (Tr. 52-54)

Petitioner testified that thereafter for each year of administrative experience, she was credited with two years experience on the master's scale for teachers according to the provisions of the administrators salary guide. (P-3) Thus, the salary base for 1974-75 against which the then existing ratio of 1.09 was applied was $13,230, the amount set forth at the eighth step of the teachers' master's scale. (P-4) Petitioner testified she also received the additional five hundred ollars as set forth in the administrators salary guide. (P-3) Petitioner's total salary for the 1974-75 was $14,921, not $18,399 she now alleges was her proper salary.

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Petitioner testified that her salary for 1975-76 should have been $19,730, and that her salary was improperly established at $17,904 which was determined by applying the then existing ratio of 1.12 (to the tenth step of the teacher's existing master's scale, plus five hundred dollars. (P-3, 6)

The hearing examiner observes that the Board did adjust petitioner's salary on February 1, 1976 so that the appropriate ratio was applied to the maximum amount of the teachers' master's salary scale. The Board asserts it took this action at that time because petitioner had then met the equivalency of five years experience as an administrator according to the provisions of the administrators' salary guide (P-3) under which she was initially employed.

Finally, petitioner asserts that the experience factor for salary purposes was not set forth in the Board's agreement with the Association for 1973-74 and 1974-75. (C-1) Consequently, she concludes that the experience factor was improperly considered with respect to her salary establishment for those years. The hearing examiner disagrees. Article III of the agreement for 1973-74 and 1974-75 (C-1, at p. 2) does provide, *inter alia,* that the Board and any new administrative employee will agree on the starting salary.

(C-1, at p. 2) That the experience requirements of ten years teaching or five years administrative experience are not set forth in the Agreement does not exclude the existence of the experience factor for salary purposes as Board policy. Petitioner sets forth no claim that she was discriminated against with respect to the application of the experience factor to establish her salary. Petitioner was informed of the policy with respect to the experience factor for salary purposes and she accepted that as policy. The Board Secretary testified that other newly appointed administrators since 1970 who lacked the necessary experience had their salaries established in the same fashion as did petitioner.

The hearing examiner has considered the testimony and evidence offered by petitioner in support of her allegations and finds no merit therein. Petitioner applied for the position of administrative assistant to the high school principal and, prior to her appointment, had full knowledge of the existing salary policy. Petitioner knew at the time of her acceptance of the appointment that her salary would be established by applying the appropriate yearly ratio set for her position on the salary scale she would otherwise command for her years of teaching experience on the teachers' master's scale. Petitioner fully understood that she did not have ten years teaching experience, nor did she have five years administrative experience.

Finally, *N.J.S.A.* 18A:29-2 provides boards of education with the authority to negotiate initial salaries with its employees. In the instant matter, the Board fully disclosed petitioner's initial salary as an administrative assistant and the process by which she would reach maximum salary.

Petitioner's salary was adjusted on February 1, 1976 so that the ratio was applied to the master's degree maximum salary. This change occurred, *ante,* because her experience finally met the experience factor necessary for such placement.

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It is noticed here that the Board abolished the experience factor for newly appointed administrators for 1975-76. Petitioner had been initially employed under the experience factor and continued thereunder until February 1, 1976. The abolition of experience as a factor for salary purposes for 1975-76 is applicable to those administrators appointed thereafter.

The hearing examiner finds that the Board did not improperly or illegally establish petitioner's salary for any of the years controverted herein. Accordingly, the hearing examiner recommends that the Petition be dismissed.

A final matter remains. The title of administrative assistant for the position petitioner is assigned is not a recognized title in the rules and regulations of the State Board of Educaction. The Board is reminded that *N.J.A.C.* 6:11-3.6, as revised on November 10, 1977, requires that the continuing use of such an unrecognized title shall be approved annually by the County Superintendent of Schools.

This concludes the report of the hearing examiner.

* * * *

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

Petitioner complains that the hearing examiner, in his findings in favor of the Board, ignored a basic principle in the area of employment contract law which, if applied to the facts herein, would cause a finding in her favor. Petitioner asserts that this principle provides that in instances whereby an employer and the recognized unit of employees are required to negotiate with respect to terms and conditions of employment, there can be no individual contracts between employer and employee and cites *N.J.S.A.* 34:13A-5.3. Petitioner contends that individual contracts, if executed between employer and employee, are not enforceable.

Petitioner asserts that the 1973-74 and 1974-75 Agreement (C-1) between the Association, of which she is a member, and the Board fails to state an experience factor for purposes of initial salary establishment. Petitioner states that it is of no moment that, prior to the time of her initial appointment as an administrative assistant, she was informed of the manner in which her initial salary would be determined. Petitioner asserts that when the Assistant Superintendent had explained the manner in which her salary guide would be established, relying upon the administrative salary guide (P-1) for 1972-73, she was not aware that the newly-negotiated Agreement (C-1), effective July 1, 1973, had been executed and that the salary policy therein did not specify the experience factor as a criterion for purposes of salary.

The Commissioner has considered petitioner's objections and finds no merit therein.

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It is recognized that *N.J.S.A.* 34:13A-5.3 requires, *inter alia,* that terms and conditions of employment are to be negotiated between the public employer and the majority representative of the specific employee unit. Here, the Board did negotiate with the Association which negotiation resulted in the Agreement. (C-1) The Agreement, with respect to salary, does specifically provide in Article III, Compensation that:

***

"A. The Board of Education and any new professional employee will agree on the starting step.***" (C-1, at p. 2)

This provision is clearly stated on the face of the salary policy set forth in the Agreement. (C-1) Consequently, the Commissioner must view that provisions as having been mutually agreed upon by the Board and the Association. The Commissioner had ruled earlier, in denying the Board's Motion to Dismiss, that:

"***The issue in the matter is whether the Board improperly established petitioner's salary for the years 1973-74 and/or 1974-75.***" (at) (See *Carol Moremen et al., supra.*)

The facts established herein are that the experience factor for initial salary placement as set forth in the 1972-73 administrators' salary guide (P-1) was Board policy from 1970 to 1976; that petitioner was made fully aware of the experience factor for purposes of salary establishment prior to her acceptance of the position; that other newly-appointed administrators since 1970 had their initial salaries established in the same manner as was petitioner's by applying the experience factor; and that petitioner was not subjected to discriminatory treatment.

Finally, the Commissioner finds no basis upon which to conclude that the Board violated its own salary policy set forth in the Agreement (C-1) with respect to petitioner's salary for any of the years controverted herein.

The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

November 9, 1978

Pending State Board of Education

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Dominick Di Nunzio,

Petitioner,

v.

Board of Education of the Township of Pemberton, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Darnell and Scott (Emerson L. Darnell, Esq., of Counsel)

For the Respondent, Sever and Hardt (Ernest N. Sever, Esq., of Counsel)

A decision of the Commissioner of Education was rendered in this matter on January 21, 1977. Petitioner seeks to reopen the litigation for the limited purposes of additional salary payments to which he claims an entitlement. The Board asserts that it has paid petitioner fully as directed by the Commissioner.

The matter is submitted to the Commissioner for further clarification in the form of a Summary Judgment. The litigants filed memoranda of law.

In his decision, the Commissioner issued the following award and directive to the Board of Education.:

> "***The Commissioner directs the Board, therefore, to pay petitioner the difference between the salaries he received for the 1973-74 and the 1974-75 school years and the salaries he would have received in those years if he were paid as a high school principal on the zero (0) and first (1) steps of the administrators' salary schedule. *If petitioner is serving now as an elementary school principal, he is entitled to placement on the third (3) step of the salary schedule for the 1976-77 school year in the elementary principal category, except that his salary of $18,800, as determined herein by the Commissioner, may not be reduced by the Board.* (P-2) *N.J.S.A.* 18A:29-4.1
>
> "*Except for the additional salary entitlement as set forth herein, there is no further relief to which petitioner is entitled,* therefore, in all other respects, the Petition of Appeal is dismissed."
> (*Emphasis added.*) (1977 *S.L.D.* at 33)

Petitioner's Memorandum of Law asserts that the Commissioner's decision did not deal with his base salary for the 1975-76 and 1976-77 school years. The

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Commissioner does not agree with this assertion. His directive is clear and unequivocal as emphasized, *ante*.

Accordingly, petitioner is entitled to placement on step two (2) of the salary schedule in effect in the elementary principal category for the 1975-76 school year and step three (3) for the 1976-77 school year.

Petitioner does not contend that he has been denied a salary increment. Rather, he argues that across-the-board raises for the 1975-76 and 1976-77 school years should have been added to his base salary for the 1974-75 school year thus giving him an entitlement to more salary. (Petitioner's Memorandum of Law) If petitioner believes that a salary increment has been improperly withheld, he must file a detailed Petition of Appeal and support that assertion. Such an appeal may not be decided summarily and would be subject to factual findings.

November 9, 1978 COMMISSIONER OF EDUCATION

Pending State Board of Education

Andrew J. Kriss,

Petitioner,

v.

Board of Education of the City of South Amboy, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Richard H. Greenstein, Esq., of Counsel)

For the Respondent, George J. Otlowski, Jr., Esq.

Petitioner, a tenured teacher in the employ since 1968 of the Board of Education of the City of South Amboy, hereinafter "Board," has taught science courses in the H.G. Hoffman High School. Petitioner protests the Board's withholding of his salary increment for the school year 1976-77 and pleads for its reinstatement with full retroactive effect. The Board alleges that its action was legal and proper and pleads for dismissal of the Petition.

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A hearing on the matter was held March 23, 1977 in the office of the Superintendent of Schools of Middlesex County, New Brunswick. The report of the hearing examiner follows:

Petitioner protests the Board's action to withhold his salary increment for the school year 1976-77 taken at its meeting of April 26, 1976. (J-7) Petitioner alleges that such action by the Board lacked the fundamental fairness required of such procedures as he had no notice or prior knowledge of the action and the reasons therefor. (Petitioner's Brief, at p. 2) Further, petitioner alleges that he did not receive written notice of such action within the required ten days of the Board's decision as required in *N.J.S.A.* 18A:29-14. (Petitioner's Brief, at p. 4)

Prior to the Board's action on April 26, 1976, the Superintendent of Schools sent petitioner a letter listing fourteen deficiencies of performance and setting December 2, 1975 as the date for a meeting between administration and petitioner to discuss these deficiencies, which meeting petitioner failed to attend. (J-1; Tr. 117) The Superintendent, on December 2, 1975, notified petitioner of his five-day suspension pursuant to *N.J.S.A.* 18A:25-6 and on December 3, 1975 petitioner met with the high school principal and Superintendent at which time a discussion was held. (J-2; Tr. 16, 53-54, 175, 179)

Subsequently the high school principal, by letter of April 21, 1976, advised petitioner that he would not recommend a salary increment for petitioner for the school year 1976-77. (J-4) The Board concurred in the recommendation and so voted on April 26, 1976 and the Superintendent notified petitioner of the Board's action by letter dated April 27, 1965. (J-6-7) The Board contends that, by oversight or inadvertence, the letter contained no statement of reasons as required by *N.J.S.A.* 18A:29-14. (Board's Brief, at p. 3)

By letter of August 6, 1976 the Superintendent notified petitioner of the Board's proposed action to withhold his salary increment and salary adjustment for the school year 1976-77 and offered August 12, 1976 as a proposed date for petitioner to confer with the Board which opportunity was refused by petitioner on advice of counsel. (J-10, 11, 12A; Tr. 27-28)

Subsequently, at a meeting of August 12, 1976, the Board adopted a resolution withholding petitioner's salary and adjustment increment. Petitioner was notified by the Superintendent by letter dated August 13, 1976 of the Board's action and the reasons therefor, which are as follows:

> "*** 1.Refusal to meet with a parent concerning her daughter's failure in science. You were directed to meet with the parent, principal, and guidance counselor by Mr. Bloodgood. 11/26/75
>
> "2. Reporting to your assigned duty late on 11/26/75.
>
> "3. Leaving the school building without notifying the office when you were supposed to be on duty. 11/26/75

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"4. Refusing to issue interim reports to students who are failing or receiving D's.

"5. Refusing to supply the guidance counselor with information on students who have failed their science course. 11/24/75

The information requested is as follows:

A - Test scores on each student.
B - Required homework assignments.
C - Class participation.
D - Any other criteria used for determining a student's grade.

"6. Creating a situation in your classes whereby students are fearful of seeking the help of their guidance counselor. The fear is that they will fail your course. An example of this is stating to your students who went to see Miss Bishop - 'I hope Miss Bishop hopes to give you higher than an E for Science'. 11/17/75

"7. Poor and ineffective teaching methods, and the failure to improve on them. These are indicated by:

A - Observations of 10/10/74; 11/15/74; 12/5/74; 2/21/75; and 10/8/75.

B - High Failure rate of your students -

35% of your 9A group received D's or E's.

82.7% of your 9B group received D's or E's.

30.7% of your 9G group received D's or E's.

22.2% of your 7C group received D's or E's.

Your total class percentage of markings as follows:

6.7% A's

6.7% received B's

36.4% received C's

28.3% received D's

21.6% received E's

"8. Poor rapport with students which is creating problems within your class and the student body.

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A - Principals observations indicating your inconsistancy (sic) in handling problem students. 9/27/74; 1/28/75.

B - Administrative assistant observations concerning the number of supposed discipline problems in your classes.

C - Guidance Counselor observations.

"9. Releasing a number of students from class at one time after being directed not to by the principal.

"10. Reporting off from school through a third party instead of using the established procedure which has been established to facilitate the use of substitutes which occurred on 2/11/75 of the last academic school year and again in 11/75.

"11. Lesson plans for substitutes are not adequate and not following the plan established for teachers manuals and brought to your attention by Mr. Bloodgood on June 6, 1975 and again on Sept. 8/75.

"12. Allowing students to engage in card playing during class after the principal directed the faculty verbally and by memo not to do so. 3/10/75.

"13. Leaving one of your classes unsupervised and as a result a hole was punched into a wall on 4/21/75.

"14. Having a class party without permission from the administration and as a result a disturbance broke out. 1/29/75.

"15. Failure to provide adequate lesson plans on March 25, 1976 for substitute teacher as directed by the principal. 3/26/76.

"16. Failure to properly supervise your assigned duty on May 5, 1976. 5/6/76.

"17. Failure to participate in the Arts and Science Fair of 1976. 4/22/76." (J-12A)

The hearing examiner observes that there is no refutation by petitioner of items 1-14 in the statement of his performance deficiencies. He contends that his failure to provide lesson plans on March 25, 1976 (item 15) was unintentional and that he rectified this by telephoning the plans to the school. (Tr. 29) Petitioner alleges that his failure to properly supervise an assigned duty area on Mary 5, 1976 (item 16) was because he was unaware of the altercation between pupils. (Tr. 30-33; J-14) Petitioner testified that, with respect to his failure to participate in the Arts and Science Fair on April 22, 1976 (item 17), "***I was under the impression that attendance was mandatory but helping out in displays was voluntary." (Tr. 58)

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Petitioner argues that the withholding of his increment should be set aside due to the Board's failure to comply with the requirements of *N.J.S.A.* 18A:29-14 which in pertinent part states:

> "***It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned.***"

Petitioner cites *Anna Gill v. Board of Education of the City of Clifton, Passaic County,* 1976 *S.L.D.* 661, aff'd State Board of Education 666 as an illustration of such procedural defect. Petitioner relies on several tenure hearing cases as examples of the necessity for strict procedural compliance by boards in making personnel decisions. *In the Matter of the Tenure Hearing of Steve Masone, School District of the Borough of Rutherford,* 1976 *S.L.D.* 902; *In the Matter of the Tenure Hearing of Charles F. Green, School District of the Warren County Vocational School,* 1976 *S.L.D.* 722.

Petitioner argues that the doctrine of election of remedies applies to this matter citing *Ray v. Beneficial Finance Co.*, 92 *N.J. Super.* 519 (*Chan. Div.* 1966) and *Raab v. Raab,* 99 *N.J. Super.* 265 (*Chan. Div.* 1968). Further, petitioner argues that the doctrine of double jeopardy bars the Board from the withholding of petitioner's increment in the light of his five-day suspension in December 1975. Petitioner relies on *U.S. ex rel Gibson v. Ziegele,* 479 *F.2d* 773 (3rd Cir. 1973), *cert.* den. 414 *U.S.* 1008, 94 *S.Ct.* 370, 38 *L.Ed.* 2*d* 246; *State v. Rechtshaffer,* 70 *N.J.* 395 (1976) and *State v. Cormier,* 46 *N.J.* 494 (1966); and various labor arbitration procedures, *Int'l. Harvester Co.* 16 *LA* 616 (1951), *Stauffer Chemical Co.*, 59 *LA* 415, 416 (1972) and *Abex Corp.*, 67 *LA* 1313 (1977).

Finally, petitioner argues for the exclusion of items 15, 16 and 17 in the list of charges as mere afterthought of the Board and its response to petitioner's filing the Petition of Appeal herein. (Petitioner's Brief, at pp. 19-20)

The Board admits that its decision in April to withhold petitioner's 1976-77 increment was deficient in that the requisite ten-day notice of reasons was not given. The Board argues that this deficiency does not forever bar the Board from taking action against petitioner and that the cases upon which he does rely are inapposite. (Board's Brief, at p. 6) The Board, in support of its position, contends that its curative actions were valid and cites *J. Michael Fitzpatrick v. Board of Education of the Borough of Montvale,* 1969 *S.L.D.* 4; *Mackler v. Board of Education of City of Camden,* 16 *N.J.* 362 (1954), and *Henry S. Cummings v. Stanley Leher et al.*, 1967 *S.L.D.* 105. The Board argues that if it were foreclosed from curing procedural defects in any of its actions, it would be forced to administer at its peril. (Board's Brief, at p. 10)

The hearing examiner finds the Board's arguments to have merit. The Board erred procedurally in its action of April 26, 1976 to withhold petitioner's 1976-77 salary increment. The Board moved in August 1976 to correct this mistake by initiating proper sequential and procedural steps to withhold petitioner's

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salary increment. During the period of April 26 to August 12, 1976 petitioner suffered no monetary harm because of the Board's admitted procedural error. The hearing officer determines that this error is not forever fatal. As the Commissioner said in *Fitzpattick, supra:*

> "***If the Board still desires to deny him such salary this may only be accomplished after the completion of procedures in accordance with the principles enunciated herein." (at 8)

The hearing examiner finds that the Board informed petitioner on August 6, 1976 of its proposed action to withhold his 1976-77 salary increment, afforded him an opportunity for a hearing and subsequent to its action on August 12, 1976, by letter of August 13, 1976, furnished petitioner with a copy of the reasons for its action. The fact that petitioner chose not to avail himself of the opportunity for a hearing with the Board is of no moment, because the statute, *N.J.S.A.* 18A:29-14, does not require a local board to hold such a hearing. The Board argues that its decision on August 12, 1976 comports with the requirements of *N.J.S.A.* 18A:29-14. The hearing examiner agrees.

The hearing examiner finds that neither the doctrine of election of remedies nor double jeopardy applies in the instant matter. Petitioner underwent a disciplinary suspension and subsequently was refused a salary increment and adjustment for the following school year. The hearing examiner finds the two actions compatible and complementary and not mutually exclusive.

The hearing examiner recommends that the Commissioner find that the Board's action on August 12, 1976 to withhold petitioner's 1976-77 salary increment was procedurally proper and in conformance with law and, accordingly, that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter including the report of the hearing examiner and the exceptions filed by petitioner pursuant to *N.J.A.C.* 6:24-1.17(b). The Commissioner has considered the report, conclusions, and recommendations of the hearing examiner as set forth above and adopts them as his own.

The Commissioner observes that petitioner's exceptions deal mainly with the procedural error made by the Board at its April 26, 1976 meeting. The Board admits the procedural error in its action of April 26, 1976 to withhold petitioner's 1976-77 salary increment. Realizing its mistake, the Board corrected it by proper subsequent action. Petitioner suffered no monetary harm in that interval of time. The Commissioner finds no merit in the argument that *N.J.S.A.* 18A:29-14 has been vitiated.

In support of his contention of the applicability of the doctrine of double

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jeopardy to the matter herein controverted, petitioner argues that "***[t]o permit the Board to impose this second penalty and disciplinary action, if carried to its logical conclusion, would also permit and authorize the same action to constitute basis for bringing tenure charges against Petitioner.***" (Petitioner's Exceptions, at p. 2)

The Commissioner does not agree. In the instant matter he observes that on December 1, 1975 the Superintendent sent petitioner a letter listing fourteen performance deficiencies, all of which remain unrefuted. (J-1) Three additional deficiencies were subsequently identified. The Superintendent set December 2, 1975 as the date for a meeting between administrative staff members and petitioner to discuss these deficiencies, which meeting petitioner failed to attend. Accordingly, because of this failure, the Superintendent, with the approval of the Board President found it necessary to suspend petitioner for five days. (J-2) Petitioner suffered no loss of pay because of the suspension. Petitioner's suspension was for a disciplinary purpose because of his failure to meet with the Superintendent on December, 2, 1975, as requested, to discuss his purported deficiencies. The subsequent action of the Board in August 1976, in initiating proper procedural steps to consider petitioner's recorded deficiencies and withhold his increment does not constitute double jeopardy. The Commissioner so holds. The Commissioner opines that it is the reasonable exercise of the Board of its discretion to grant or withhold increments. *Westwood Education Association v. Board of Education of the Westwood Regional School District,* Docket No. C-3373-72, New Jersey Superior Court, Chancery Division, August 22, 1973, aff'd Docket No. A-261-73, Appellate Division, June 21, 1974 (1974 *S.L.D.* 1436), *cert,* den. 66 *N.J.* 313 (1974); *Clifton Teachers Association v. Board of Education of Clifton,* 136 *N.J. Super.* 336 (*App. Div.* 1975)

In *Ralph Marshall v. Board of Education of the Southern Ocean County Regional High School District, Ocean County,* 1978 *S.L.D.* (decided July 10, 1978) the Commissioner stated the following, which is applicable to the instant matter:

> "***The Commissioner observes that petitioner was in receipt of the Superintendent's evaluation and was well aware that the Superintendent had recommended that the Board withhold his increment. Indeed, subsequent to the Superintendent's recommendation and prior to the Board's action to withhold petitioner's increment, he was afforded the opportunity to meet and discuss the matter, in private session, with the Board. *** To argue that the Board failed '***to give written notice of such action, together with the reasons therefor***' in the Commissioner's judgment places form over substance. Petitioner was aware '***of such action, together with the reasons***.' *N.J.S.A.* 18A:29-14 As the Commissioner stated in the matter of *Hillman, supra* [1977 *S.L.D.* 218]:
>
> > '***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)

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"***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.***

"The Commissioner is constrained to issue a caveat to this Board and all other local boards of education that the withholding of any salary or adjustment increment is to be accomplished in accordance with the provisions of *N.J.S.A.* 18A:29-14. Such compliance, even if considered redundant by a local board , will prevent allegations of improper procedures and litigation. In the judgment of the Commissioner, the instant matter might not have arisen if the Board had simply followed the directive set forth in the statute***." (at)

The Commissioner determines that there is no relief to which petitioner is entitled. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

November 14, 1978

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"C.C.", a minor by his temporary legal guardians, Ralph Ridge and Winifred Ridge,

Petitioners,

v.

Board of Education of the Township of Hamilton and Louis E. Triverio, Acting Superintendent, *Et Al.*, Mercer County,

Respondents,

COMMISSIONER OF EDUCATION

ORDER

For the Petitioners, Legal Aid Society of Mercer County (Gerald B. Schenkman, Esq., of Counsel)

For the Respondents, Henry F. Gill, Esq.

This matter having been opened before the Commissioner of Education by the filing of a Petition of Appeal on behalf of 'C.C.,'' an eleventh grade pupil, hereinafter "petitioner," enrolled in the Joseph Steinert High School operated by the Hamilton Township Board of Education; and

It appearing that during the evening of October 8, 1978 and the early morning hours of October 9 petitioner consumed a quantity of alcoholic beverages; and

It appearing that, when petitioner left his homeroom at the Steinert High School on the morning of October 9 to request of his physical education teacher that, because of feeling unwell, he be excused from his first period physical education class, petitioner was referred to the school nurse; and

It appearing that the school nurse reported that when petitioner entered her office "***[h]e appeared to be staggering, holding his abdomen and smelled of alcohol***" and requested that he be allowed to remain in the health office for the day (J-1); and

It appearing that petitioner was thereafter suspended from school for a ten day period pursuant to the Hamilton Township Board of Education policy on drug abuse which states, *inter alia,* that "***A STUDENT WHO APPEARS IN SCHOOL UNDER THE INFLUENCE OF ALCOHOL *** WILL BE SUSPENDED FROM ALL CLASSES FOR A PERIOD OF TWO WEEKS AND PLACED ON PROBATION FOR THE REMAINDER OF THE SCHOOL YEAR.***" (J-2); and

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It appearing that, after petitioner's guardians' initial appeals for a preliminary hearing on the reasons for his suspension were rejected by the Board's administrators, an informal hearing with the school personnel and counsel was arranged by the Board's attorney and held on October 16, 1978; and

It appearing that at the close of that hearing the principal reaffirmed that petitioner's ten day suspension would continue to be invoked, whereupon the within Verified Petition of Appeal was filed before the Commissioner on October 19; and

The Commissioner having considered petitioner's argument that he had not appeared at the school on October 10 in a condition properly characterized as under the influence of alcohol but that he was admittedly ill from a hangover; and

The Commissioner having considered petitioner's argument that he had not been afforded due process in the form of a preliminary hearing prior to his suspension (*R.R. v. Board of Education of Shore Regional High School District*, 109 *N.J. Super.* 337 (*Chan. Div.* 1970)); and

The Commissioner having also considered petitioner's further arguments wherein he contends, *inter alia,* that the Board's policy on alcoholic beverages (J-1) is overly broad, harsh, and in any event inapplicable to the circumstances here presented; and

The Commissioner having similarly considered the Board's contention that because petitioner was not in a condition on the morning of October 10 to speak coherently on his own behalf, a preliminary hearing was at that time inappropriate; and

The Board's further argument having been considered wherein it contends that delay in scheduling the preliminary hearing held on October 16 was attributable as much to petitioner as to the Board or its administrators; and

The Commissioner having also considered the Board's additional arguments contending, *inter alia,* that petitioner has failed to show that there is a strong probability that he will prevail, that restoration of petitioner to his classes prior to the conclusion of his suspension with expungement of the incident from his records is in the public interest, or that he will suffer irreparable harm; and

The Commissioner having observed that petitioner's ten day suspension expired on October 23; and

The Commissioner, after carefully considering and balancing of the arguments of law set forth by the parties, having determined that petitioner has failed to meet the criteria upon which interim relief may be granted and that expungement and an order directing the Board to revise its policy on alcoholic beverages would at this juncture by inappropriate, absent a more complete

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knowledge of the factual context here presented (*United States v. Pavenick,* 197 *F. Supp.* 257 (*D.N.J.* 1961)); and

The Commissioner having further determined not only that it would be premature for him to conduct a plenary hearing on the merits absent exhaustion of administrative review of the matter by the Board pursuant to *N.J.S.A.* 18A:37-2 but also that the "***review of a board's suspension of expulsion action takes the form of appellate review.***" (*O.P v. Board of Education of the City of Paterson,* 1976 *S.L.D.* 658 at 660); now therefore

It is Ordered that the interim relief sought by petitioner be and is denied; and

It is further Ordered that if petitioner wishes to pursue the allegations that the controverted policy is excessively harsh or injudicious, was inappropriately applied to him, or that the Board's administrators abused their discretionary authority, application shall be made to the Board which, on the basis of a full review of the matter including testimony of principal participants to the dispute, will render its determination which, with a record of the Board's proceedings, will then form a basis for appellate review by the Commissioner in the event that decision is appealed pursuant to *N.J.S.A.* 18A:6-9.

Entered this 15th day of November 1978.

COMMISSIONER OF EDUCATION

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George F. Bickford III and Elmwood Park Education Association,

Petitioners,

v.

Board of Education of the Borough of Elmwood Park, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., and Doane Regan, Esq., of Counsel)

For the Respondent, Bartlett & Turitz (Stanley Turitz, Esq., of Counsel)

George F. Bickford III, hereinafter "petitioner," a nontenured English teacher is joined by the Elmwood Park Education Association, hereinafter "Association," in appealing to the Commissioner of Education the decision by the Elmwood Park Board of Education, hereinafter "Board," not to reemploy him for the 1973-74 school year.

The Board admits that it had voted on May 11, 1973 to employ petitioner for the ensuing school year but states that its advisement to petitioner on July 3, 1973 that he would not be employed in September 1973 was a legal discretionary act in full compliance with the terms of his contract requiring sixty days' notice of termination. (J-1-2, 7)

The matter has long been delayed by severe illness of counsel, substitution of counsel by petitioners, a second conference of counsel, requested adjournments and extension of time for briefing which was completed May 18, 1978 subsequent to the hearing conducted by a hearing examiner on July 28, 1977 at the office of the Morris County Superintendent of Schools, Morris Plains. The factual context of the dispute, as set forth by counsel in a Stipulation of Facts (J-4), follows:

Petitioner was employed by the Board as a teacher from March 16, 1973 through June 30, 1973. By letter dated April 30, 1973 the Superintendent advised petitioner that on April 27 the Board had resolved that, pending further study of staffing and curriculum requirements, all nontenured teachers should be advised that their contracts would not be renewed. (J-5) Thereafter, on May 11 the Board adopted a resolution that contracts be offered for the 1973-74 school year to certain of its nontenured teachers, including petitioner. Petitioner, by certified letter dated May 25, notified the Board of his acceptance of the proffered employment. Petitioner was evaluated as satisfactory on June 8, 1973 and rec-

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ommended for reemployment by his evaluator. Subsequently, by letter dated July 3 and received by petitioner on or about July 8 he was notified by the Superintendent that the Board had decided not to employ him for the ensuing school year. (J-4)

Petitioner testified at the hearing that he and other teachers had engaged in a strike from May 24 through June 5 which culminated in a Statement of Accord wherein the Board agreed that it would "***not use the act of participation in the said job action as a basis for future prejudicial disciplinary, discriminatory or reprisal action.***." (J-3; Tr. 8)

He testified further that, when notified in July that he would not be reemployed in September, he pressed the Superintendent for a reason for the Board's withdrawal of its offer of reemployment. He related that the Superintendent advised him that the reason was that its head football coach had resigned and that the Board had determined to reassign a social studies teacher with English certification to the English department, thus rendering petitioner's services as an English teacher unnecessary. The Superintendent corroborated that the Board at a work session on July 2 had, on his recommendation, made such a determination. (Tr. 15-18, 28-29, 45)

The hearing examiner finds nothing within the record to validate petitioner's allegation that the Board's decision not to reemploy him was a retaliatory act contrary to provisions of the aforementioned Statement of Accord. Nor is there within the record evidence that the Board's decision was made for any other reason than to make a place on its teaching staff for the head coach it wished to employ. Accordingly, the narrow issue herein presented is whether the Board's decision at its private work session to notify petitioner that he would not be employed during the 1973-74 school year was a legal exercise of its discretion.

The hearing examiner perceives no imperfection in the Board's consideration of its staffing and personnel needs at a private work session. The record, however, is barren of evidence that the Board, thereafter, at any public session at which it could legally transact business, took action to notify petitioner that he would not be reemployed. Although no written contract had yet been signed by the parties, it is clear than an offer of employment was made at an official public meeting of the Board on May 11, 1973 and accepted by petitioner on May 25, 1973. (J-4, 7) The hearing examiner recommends that the Commissioner, in view of that offer and acceptance, determine that a contract, with the same termination clause as prevailed in the district, existed between petitioner and the Board. *Eleanor Cossaboon v. Board of Education of the Township of Greenwich,* 1974 *S.L.D.* 706, 709

The hearing examiner finds the record barren of evidence that the Board acted in official session at any time after its work session of July 2 to invoke the sixty-day termination clause which it routinely incorporated in nontenured teacher contracts.

In *James Docherty v. Board of Education of the Borough of West Paterson,* 1967 *S.L.D.* 297 the Commissioner stated:

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> "***An acquired right through the adoption of a resolution by a board of education cannot be invalidated by a rescinding of the resolution at a subsequent meeting.***" (at 300)

Thus, it is clear that the only avenue open to the Board to terminate petitioner's contract was to invoke the termination clause thereof. This was without doubt the intent of the Board, when it decided to terminate petitioner at its July 2 work session. The hearing examiner recommends, however, that the Commissioner determine that, absent official action by the Board at a public meeting, the termination clause of petitioner's contract, authorized at a public meeting, was not invoked. As was stated in *Paul J. McCormick v. Board of Education of the Hunterdon Central Regional High School District, Hunterdon County,* 1978 *S.L.D.* (decided February 28, 1978):

> "***A policy once adopted and spread on the minutes of a board of education may not be ***lightly disregarded.***" (at)

While an offer of employment which had been accepted and thus became a binding contract is not, strictly speaking, a policy, it is no less an action upon which reliance may be placed. *Agnes D. Galop v. Board of Education of the Township of Hanover,* 1975 *S.L.D.* 358

The hearing examiner recommends further that the Commissioner direct the Board to pay to petitioner the difference between his earnings during the 1973-74 school year and the amount which he would have received had the Board retained him as a member of its teaching staff for that school year.

Finally, it is recommended that the Commissioner, consistent with his past decisions, deny petitioner's request that he be awarded an amount for counsel fees required for litigating the matter. *Jack Noorigian v. Board of Education of Jersey City,* 1972 *S.L.D.* 266, aff'd in part/rev'd in part State Board of Education 1973 *S.L.D.* 777

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the hearing examiner's report and the entire record of the controverted matter. It is noticed that no exceptions to the findings of fact set forth therein were filed by either party pursuant to the provisions of *N.J.A.C.* 6:24-1.17(b). An examination of the record establishes the appropriateness of the hearing examiner's findings which the Commissioner, henceforth, holds as his own.

The Board herein, having entered into a contractual relationship with petitioner for his services as a teacher for the 1973-74 school years, took no official action at a duly constituted official public meeting to attempt to withdraw its offer. Nor did in invoke the termination clause of that contract. Accordingly, the Commissioner determines that petitioner had the right to rely upon the terms

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of that contract, which remained legally in effect for the duration of the 1973-74 school year. *Galop, supra; Docherty, supra.*

The Board is directed to compensate petitioner, forthwith, in the amount of his 1973-74 contractual salary less mitigation in the amount of his earnings in alternate employment during the period from September 1973 through June 1974. To this extent the relief sought by petitioner is granted. The remaining relief which he seeks in the form of counsel fees for litigating the matter is denied as being without the authority of the Commissioner in his quasi-judicial capacity as a determiner of controversies and disputes pursuant to *N.J.S.A.* 18A:6-9 *et seq. Noorigian, supra; Raymond Winter v. Board of Education of the Township of North Bergen,* 1975 *S.L.D.* 236.

COMMISSIONER OF EDUCATION

November 15, 1978

Carol Fahnestock,

Petitioner,

v.

Board of Education of the Borough of Madison, and Melindo A. Persi, Assistant Superintendent, Morris County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, James R. Heaney, Esq.

For the Respondents, Smith, Cook, Lambert and Miller (Thomas P. Cook, Esq., of Counsel)

Petitioner, a school bus driver employed by the Board of Education of the Borough of Madison, hereinafter "Board," alleges that her employment as a school bus driver was improperly and illegally terminated by the Board. She requests that the Commissioner of Education restore her to such employment. The Board avers that petitioner's contract was legally terminated, or expired by its terms, and there is no relief the Commissioner may afford. It has advanced a Motion for Summary Judgment.

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Oral argument on the Motion was conducted at the State Department of Education, Trenton, on February 28, 1978. Briefs have been filed. The basic relevant facts are not in dispute.

Petitioner had been employed as a bus driver by the Board by annual contracts of employment for a period of years prior to the 1976-77 academic year and was reemployed for that year by a contract which extended from the first day of September 1976 to the thirtieth day of June 1977. The contract provided, *inter alia,* for termination "by either party giving to the other thirty days' notice in writing of intention to terminate the same***." (Exhibit 19) On May 27, 1977 the Assistant Superintendent of Schools suspended petitioner from such employment and addressed the following letter to her:

> "As I had indicated to you today in my office, your services as a bus driver for the Madison Public Schools are no longer required effective today, May 26, 1977. This action has come about due to repeated infractions of our procedures, on your part. The most recent incident being this morning when you transported your infant child to a home on Dean Street with a school bus. The rules and regulations of the Madison Public Schools for bus drivers are clear with respect to this, and include in part:
>
> > 'No passengers other than those pupils assigned shall be transported'." (Exhibit 7)

There was no hearing afforded petitioner prior to this action of the Assistant Superintendent (see Tr. 2-3, 8) nor was one afforded at a later date by the Board. On June 21, 1977 the Board did consider a resolution to terminate the employment of petitioner effective May 30, 1977 but such resolution was tabled at that time (Exhibit 18) On July 19, 1977 this resolution was approved by a majority vote of the Board. (Exhibit 18) It is stipulated that petitioner was paid for the term of her contract through June 30, 1977.

Petitioner contests the reason afforded her for contract termination and avers that the Supervisor of Buildings and Grounds had on April 18, 1977 specifically authorized the presence of other than assigned pupils on school buses. She further avers that on the occasion when she did have her infant child on the bus she was "***in between school driving assignments *** [and] no school children were on the bus***." (Petition of Appeal, at p. 2) It is a principal contention of petitioner that on the basis of the authorization of the Supervisor of Buildings and Grounds, of reference *ante,* and in the context of "common knowledge" that other drivers had also relied on this authorization, that she has been denied equal protection of law. She requests reinstatement, *pendente lite,* an opportunity to present her views at a hearing and reimbursement for lost wages which resulted from the Board's action.

The Board, while admitting the action of its Assistant Superintendent to suspend petitioner may have been taken in haste, nevertheless avers that this was not an isolated instance of petitioner's unsatisfactory performance during her past periods of employment service. In this regard the Board advances a

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series of documents which comprise a record of prior incidents wherein petitioner's employment is alleged to be less than satisfactory. (Board's Brief, Exhibits 8-16) A review of these documents reveals that as early as June 7, 1974 petitioner was reprimanded by the Assistant Superintendent (Exhibit 14) after she had been reported by a principal (Exhibit 15) for excluding five pupils from boarding her school bus for the return trip to school following a field trip. The Assistant Superintendent charged petitioner, at that time, with having violated item #20 of the Board' rules and regulations pertaining to bus drivers. (Exhibit 1)

On November 12, 1975, petitioner reported that she had hit her own parked vehicle while attempting to park the school bus at the high school. (Exhibit 16) The Assistant Superintendent admonished petitioner on September 23, 1976 for allowing an unauthorized person to drive the school bus to which she was assigned. (Exhibit 13) Again, on October 7, 1976, petitioner was called to task by the Assistant Superintendent for changing the morning schedule at one of the bus stops where pupils boarded her bus. Such change in the time schedule by petitioner was determined to be without authorization. (Exhibit 12)

Additionally, on October 8, 1976 petitioner was reported to the Assistant Superintendent by a principal and two teachers for having used inappropriate language in front of pupils and parents during an October 5 field trip. At that time one group of pupils was unavoidably tardy in arriving at the location from which they were to be transported back to school (Exhibit 9) Petitioner defended her actions by way of a written report to the principal in which she stated that the late arrival of the pupils at the conclusion of the field trip caused her to miss her afternoon high school bus run. Thereafter, petitioner had left those pupils at an undesignated location near their school. (Exhibit 10)

The most recent incident which resulted in petitioner's suspension by the Assistant Superintendent and the subsequent termination of her employment by the Board occurred on May 26, 1977, when petitioner was charged with violating the Board's rules to the effect that no passengers other than pupils assigned to the school bus shall be transported. On that date petitioner was charged with transporting her child on the school bus without authorization to another person's home in the school district. (Exhibit 7)

Finally, the Board avers that:

> "***Whatever right she had must have been limited by her contract, and the Board simply made a determination later that they would not renew it.***" (Tr. 32)

All of the pertinent facts and arguments of the parties regarding the matter controverted herein have been reviewed. In the Commissioner's judgment the circumstances surrounding the Board's allegations with respect to petitioner's unsatisfactory performance on or about September 23, 1976 (Exhibit 13) and again on May 26, 1977 (Exhibit 7) appear to have been caused by either a misunderstanding of the Board's policies by petitioner or, on the latter occasion,

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by a misinterpretation of those policies to petitioner by the Supervisor of Buildings and Grounds. After considering all of the Board's allegations against petitioner with respect to her unsatisfactory performance, the Commissioner finds and determines the remaining allegations to be true in fact and sufficient to warrant the action taken by the Board to terminate her employment as of May 30, 1976, with full pay through the period of June 30, 1976.

It is further observed that while bus drivers who are contract vendors are entitled to a hearing before a local board of education for alleged contract violations as mandated in *N.J.A.C.* 6:21-16.3 (*Frances Finkle v. Board of Education of the City of Paterson,* 1976 *S.L.D.* 726), such is not the case herein inasmuch as the above-cited regulations do not apply to petitioner who was an employee of the Board and not a contracted vendor.

Moreover, the Commissioner finds and determines that the applicable provisions of *N.J.S.A.* 18A:27-10 *et seq.* and *N.J.A.C.* 6:3-1.20, pertaining to the rights of nontenured teaching staff members to request an informal appearance before a local board of education after they have been notified that their employment contracts will not be renewed for an ensuing academic year is not pertinent to employees whose employment status is not that of a teaching staff member. *N.J.S.A.* 18A:1-1

The Commissioner determines in this respect that while the Assistant Superintendent's action may have been hasty and without prior approval by the Board, as the official employer of petitioner, the Board's subsequent action constituted the requisite ratification. The Commissioner so holds.

The holding herein is that petitioner was not entitled to a hearing by the Board prior to contract termination for cause. Since full compensation has been furnished to petitioner pursuant to the provisions of the terms of her contract, there is no further relief the Commissioner may afford. The employment of school bus drivers, custodians, cafeteria workers and other employees pursuant to annual contracts for a fixed term is a matter solely within the jurisdiction of local boards of education. See *Luther McLean v. Board of Education of the Borough of Glen Ridge et al.,* 1973 *S.L.D.* 217, aff'd State Board 1974 *S.L.D.* 1411. When, as here, there are no allegations that a local board has engaged in proscribed employment practices (*i.e.*, practices grounded in racial or religious prejudice, etc.) there is no justification for an interposition of discretion by the Commissioner.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

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In the Matter of the Tenure Hearing of

Gordon Moore,

School District of the Township of Piscataway, Middlesex County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Frank J. Rubin, Esq.

For the Respondent, David M. Greene, Esq.

On October 24, 1977, pursuant to *N.J.S.A.* 18A:6-11, the Piscataway Board of Education, hereinafter "Board," certified before the Commissioner of Education a single charge of unbecoming conduct against respondent, as follows:

> "***The specific basis for this charge is that, although you did not possess the proper certification you did knowingly participate in the evaluation of principals during the 1975-76 and 1976-77 school year.***" (P-19)

Respondent, a tenured employee who has served the Board as a teacher and in various administrative capacities since 1963, admitted to the truth of the charge but reserved the right to appear on the question of appropriate penalty. (P-18)

A hearing was conducted on January 5, 1977 at the Middlesex County Court House by a hearing examiner appointed by the Commissioner.

Application to intervene was made at the opening of the hearing by Stephen A. Klausner, Esq., on behalf of a resident of Piscataway Township on grounds that the citizen feared the Board would neither adequately prosecute the charge nor protect her financial interests as a taxpayer. Intervention was denied both on the basis that the Board had readily certified the charge which had been preferred by its Superintendent and that respondent had admitted to the truth of the charge. (Tr. 5-18) The facutual context, being undisputed, is concisely set forth as follows:

Respondent, who had been serving in the Board's personnel office as administrative assistant for staff personnel, for which position the Board did not require a principal's certificate, was appointed in October 1975 to the newly created post of deputy superintendent. Such a position is equivalent to the position of assistant superintendent and requires that the individual so appointed possess at least a principal's certificate. (P-13) Respondent neither at that time nor on the date of the hearing possessed a principal's or administrator's certificate but was certified solely as a teacher of English and history. (Tr. 67)

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Respondent's duties as deputy superintendent included, *inter alia,* orientation of his successor in the personnel office, screening of employment applications, conducting negotiations for the Board with all organized employee groups, assisting with budget preparations, reporting to State and federal agencies, arranging for substitutes and acting as the Board's affirmative action officer. (Tr. 33-39) It is most significant in the instant proceeding that respondent also served with other administrators for approximately two weeks annually in joint preparation of the formal evaluations of principals. He similarly served with them in discussion of those formal evaluations with certain individual principals. (Tr. 53-55, 63-66)

During the summer of 1977 the Superintendent became aware that respondent had not procured a certificate from the New Jersey State Board of Examiners authorizing him to supervise principals. (P-1 through P-8) Respondent thereupon resigned his position as deputy superintendent with its salary of $32,500 and was reassigned by the Board to the position of acting administrative assistant for personnel in which position he has continued since September 27, 1977 at a prorated annual salary of $28,000. (P-9 through P-11)

The hearing examiner herewith summarizes and excerpts certain relevant testimony elicited at the hearing.

The Board and the Superintendent stated that they viewed with grave concern the impact of respondent's having served as a supervisor without the required certification. (Tr. 32, 42-46) The Superintendent testified that the negative impact of attendant unfavorable publicity caused him great concern and anguish. (Tr. 38-39) He testified however, that since that publicity abated he has observed neither negative impact nor reticence by principals or other teaching staff members to avail themselves of the valuable services which respondent now performs. (Tr. 32)

Similarly, the Board President, who had testified of his initial disappointment in respondent, confirmed that respondent's services are valued by the Board. In this regard he testified:

> "***[T]here's no difficulty with the Board accepting [respondent's] professionalism or the administrators that he deals with in the personnel area accepting [his professionalism].***
>
> "***I think that the decision that we reached to certify these charges was most reluctant. I think if I can give the consensus of the Board, that it is not seeking the dismissal of [respondent], it is seeking, if necessary, a further financial [penalty] *** within the Commissioner's area of responsibility***." (Tr. 47)

Respondent testified that he had applied for the position of deputy superintendent with full knowledge that the position required that he hold either a principal's or administrator's certificate. He testified that, although he knew that he did not possess such a certificate, he had already completed, with one ex-

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ception, all course work and an examination for a master's degree which would qualify him for the required certificate. That exception was a research paper for a three credit course which he had completed. He testified that he had twice submitted such papers but that the professor had returned them as unacceptable. (Tr. 55-59)

The hearing examiner finds this testimony of little relevance. The fact remains that respondent had not applied for or procured a certificate for the position of deputy superintendent although he was aware that the Board required that he hold such a certificate in order to be appointed to the position. It is also apparent that, pursuant to *N.J.S.A.* 18A:27-3.1 and *N.J.A.C.* 6:3-1.19, respondent was required to possess a certificate authorizing him to supervise principals. He was not, however, required by the laws of the State or the rules of the State Board of Education to hold that certificate to perform certain other duties such as negotiating on the Board's behalf with organized employees groups, arranging for substitutes and maintaining personnel records.

Respondent testified as follows regarding his actions:

> "***I, of course, find it very difficult to testify here. I am deeply sorry that my actions, my neglect have caused embarrassment for the school district as a whole, for the Board of Education as a whole, for the Board of Education as a body, for individual Board members, and individual administrators and other employees who work with me, and who were disappointed and embarrassed by what has occurred. I believe that I can be of service to the school district and it is my hope to be of service to the school district as a means of demonstrating my *** dedication to the district. It is the only place of professional employment that I have experienced, and it has become *** more of a home rather than simply a place for employment. I guess it's important for me to demonstrate that I can be of service to the district and that I can be a contributing administrator.***"
>
> (Tr. 66-67)

Respondent prays that, in consideration of his public embarrassment, demotion and corresponding substantial decrease in salary, and the small proportion of his time which was actually spent evaluating principals, no further disciplinary action be exacted. (Letter Memorandum dated January 25, 1978)

In summation the following findings of fact are set forth for consideration of the Commissioner:

1. Respondent, with full knowledge of his responsibility to procure an appropriate certificate from the State Board of Examiners, failed to so while serving for a period of two years as deputy superintendent.

2. The Board and the Superintendent were clearly deleterious in that they did not require respondent to produce evidence that he either possessed or was eligible to be issued the required certificate at the time he was appointed deputy superintendent or thereafter while he served in that position.

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3. Neither the Board nor the Superintendent complied with the provision of *N.J.A.C.* 6:11-10.5(a) which states that when an unrecognized title is considered necessary "***a job description should be formulated and submitted to the county superintendent in advance of the appointment, on the basis of which a determination will be made of the appropriate certificate for the position." It has been previously determined that "should" in this rule is to be interpreted as mandatory. *Samuel E. Appel v. Board of Education of the City of Camden et al.*, 1975 *S.L.D.* 562, 568 In regard to respondent's appointment the Superintendent had special responsibility since only he, pursuant to *N.J.S.A.* 18A:17-16, had authority to nominate an assistant superintendent. *N.J.S.A.* 18A:17-17 specifically precludes such appointment without proper certification.

4. The Board, placing high value on those negotiating skills and abilities which respondent has demonstrated in those duties to which he has now been reassigned, does not seek his dismissal.

5. The Board has taken no action other than reassignment of respondent to a position which does not require that he hold a certificate to supervise. That reassignment, although it resulted in a reduction of $4,000 in salary, may not be termed a penalty, since respondent could not legally continue to serve as deputy superintendent, a position for which he is not certified. *N.J.S.A.* 18A:27-2; *N.J.S.A.* 18A:28-14

The hearing examiner recommends that the Commissioner, in consideration of the above findings of fact, respondent's demonstrated abilities and service to the Board, his genuine show of contrition, and the Board's desire that he be allowed to continue to render service to the district, not direct that respondent be dismissed. It is further recommended that the Commissioner, at his discretion, determine and order a suitable financial penalty appropriate to respondent's violation of the education laws of this State.

The hearing examiner further recommends that the Commissioner direct the Board to submit to the County Superintendent a detailed job description for respondent's present position in order that the County Superintendent may determine the appropriate title and certification necessary for such position in accordance with the requirements of *N.J.A.C.* 6:11-3.6.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the matter and notes that neither party has filed exceptions to the hearing examiner report. The findings set forth in that report are consistent with the record and are adopted by the Commissioner as his own.

This matter provides a classic example of the underlying wisdom of the State Board of Education's requirement set forth in *N.J.A.C.* 6:11-3.6, *ante,* mandating that any unrecognized job title be submitted to the County Super-

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intendent together with a job description of duties to be performed. The purpose thereof is to determine the appropriate title and certificate required for the position. Had such been done in this instance, there would have been a determination that respondent was required to possess a proper certificate to supervise principals and other teaching staff members. A routine check of respondent's certification records on file in the County Superintendent's office at that time would have revealed that he did not possess that certificate. Thus, the anguish and embarrassment, as well as the responsibility for illegal service, which in this instance must be shared by respondent, the Board, and its administrators, would have been averted.

All boards of education are cautioned and directed to adopt recognized titles for teaching staff members. When it is deemed necessary to use other titles, boards must assiduously adhere to the directives of *N.J.A.C.* 6:11-3.6.

The Commissioner recognizes that when the Board became fully aware that respondent was performing assigned duties, part of which required a certificate which he did not hold, it took prompt action by assigning him to an alternate position for which be held an appropriate certificate. Similarly recognized is respondent's genuine show of contrition, as noted by the hearing examiner, and the high value which the Board places on his services in performing duties for which he is certified. In recognition thereof the Commissioner determines that, by contrast to the penalty of forfeiture of tenure as ordered *In the Matter of the Tenure Hearing of Peter J. Deer, School District of the Borough of Palisades Park,* 1975 *S.L.D.* 752, dismissal of respondent in the instant matter would be too harsh a penalty.

A teaching staff member, however, may not, with impunity, knowingly serve in a position for which he is not certified. Accordingly, it is determined that respondent shall forfeit a sum equal to one month's compensation at his present rate of salary which amount the Board is hereby directed to withhold from him. This penalty shall not extend to other attendant emoluments such as health care benefits which the Board provides its employees.

Finally, the Piscataway Board is directed to comply with *N.J.A.C.* 6:11-3.6 by submitting a job description of respondent's present position, the title of which is unrecognized and unapproved, and job descriptions of any other unrecognized titles of teaching staff members to the Middlesex County Superintendent of Schools in order that determination be made of the required certification and appropriate title.

COMMISSIONER OF EDUCATION

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Samuel E. Brown,

Petitioner,

v.

Board of Education of the Toms River Regional School District and John Bennett, Superintendent of Schools, Ocean County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Samuel E. Brown, *Pro Se*

For the Respondents, Hiering, Grasso, Gelzer & Kelaher (Vincent J. Grasso, Esq., of Counsel)

Petitioner, an instructor in piano in a program of adult education in the Toms River Community Adult School established and supervised by the Toms River Regional Board of Education, hereinafter "Board," alleges that his services were improperly terminated by the Board in violation of his basic constitutional rights. The Board avers that its action was a proper exercise of its discretionary authority and denies that it acted improperly. Petitioner pleads for reinstatement in the position of instructor of piano with back pay, a statement to him and his pupils exonerating him of any wrong-doing in this matter, and a statement of reasons from the Board for his termination.

A conference was held at the State Department of Education, Trenton, where it was agreed that if an amicable resolution of the matter could not be reached, oral argument on the Board's Motion to Dismiss would be held. Attempts to resolve the matter amicably having failed, oral argument was held at the State Department of Education, Trenton, on June 16, 1978 by a representative of the Commissioner of Education. The matter is presently before the Commissioner for adjudication based on the pleadings, exhibits, transcript and arguments of law as submitted. The facts of the matter are these:

By authority derived from *N.J.S.A.* 18A:50-1 the Board established and supervised a program of adult education designated as the Toms River Community Adult School. The program for the 1977 winter term scheduled a course in piano instruction. On or about February 1977 the director of the school interviewed candidates for the teaching of this course and petitioner, after an interview, was placed in the position by the director and taught piano classes on March 9 and 16, 1977. The director subsequently submitted the proposed list of instructors for the Adult School for approval by the Board, albeit after classes had actually started.

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The Board, in the interim, had agreed on an instructor of piano other than petitioner and the director, through the Superintendent of Schools, was notified to terminate petitioner's services with pay for his two piano instruction sessions. On May 16, 1977 petitioner filed his pleadings in the instant matter with the Commissioner. By letter dated July 1, 1977 the Board, through counsel, offered full restitution of petitioner's salary for the ten weeks' employment period at the rate fixed for such services. The Board indicated that the termination of petitioner was due to administrative delay and inadvertence as petitioner had commenced instruction prior to the review and final approval of instructors by the Board. (Board's Brief, at p. 3)

During oral argument petitioner relinquished his original pleadings for reinstatement as an instructor of piano in the Adult School. (Tr. 11-12) Petitioner claimed compensation for a second term alleging that such employment had been promised him. (Tr. 20-21) When questioned petitioner admitted he had no evidence to support this contention. (Tr. 22) Petitioner contended that he had been singled out for humiliation and hurt by respondents because of a previous political campaign and other reasons unknown to him. (Tr. 32-34) Petitioner alleged prejudice on the part of the Superintendent inasmuch as he had, over a period of years, refused to employ petitioner as a music teacher. (Petitioner's Letter of Law, at p. 2) No proof of the alleged prejudicial behavior of the Superintendent was offered. Petitioner alleges that because he had not been offered reasons for his dismissal, the Board's action in terminating his employment was illegal and based on hidden reasons. Petitioner pleads for exoneration and remuneration in the sum of $750. (Petitioner's Letter of Law, at p. 3)

The Board argues that, acting within its discretionary authority, it established a program for adult education as provided in *N.J.S.A.* 18A:50-1 which states in its entirety:

> "The board of education of any school district may maintain a program of adult education and utilize buildings, equipment, and other school facilities of the district for such purpose. The board shall determine the courses, which are to be offered, subject to the approval of the Commissioner with the consent of the state board."

The Board argues that whereas the employment of an instructor in the Adult School program is for a ten week period only, the statutory requirements of written notice and a statement of reasons for the non-reemployment of a non-tenured teacher are not applicable, citing *Eleanor Cossaboon v. Board of Education of the Township of Greenwich,* 1974 *S.L.D.* 706. The Board contends there is no express statutory authority which requires the Board to guarantee employment for an instructor in an adult school program. (Board's Brief, at p. 8) The Board in its Brief (at p. 10), refuting petitioner's claim that its action denying him employment was violative of his constitutional rights, asserts that as in *Long Branch Education Association and William Cook v. Board of Education of the City of Long Branch,* 1975 *S.L.D.* 1029, aff'd State Board of Education 1976 *S.L.D.* 1150, aff'd Docket No. A-3510-75 New Jersey Superior Court, Appellate Division, July 11, 1977:

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> "***[T]he bare assertion of generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions.***' *Winston v. Board of Education of South Plainfield,* 125 *N.J. Super.* 131, 144 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974)***"
>
> (at 1034)

The Commissioner agrees. No proof was offered by petitioner to support his allegations of constitutional rights' deprivation. Nothing in the record shows that the decision of the Board to discontinue petitioner's employment was motivated by political reasons. The Commissioner so holds.

Petitioner's insistence that the Board furnish him a written statement of reasons for its decision to discontinue his employment is in error. There is no statute, rule or regulation that requires the Board to do so. In a similar matter *Joseph A. Capella and Leonard D. Fitts v. Board of Education of the Camden County Vocational and Technical Schools,* 1975 *S.L.D.* 178, aff'd State Board of Education 186, aff'd 145 *N.J. Super.* 209 (*App. Div.* 1976) (1976 *S.L.D.* 1129) the Commissioner said:

> "***[P]etitioners herein served without written contract, were members of a staff drawn from numerous schools and fields of endeavor, which staff was separate and distinct from the Board's day school staff. They were not afforded benefits of health, protection or pension payments***.
>
> "The over-protection petitioners seek would be a disservice to the schools, in the Commissioner's judgment, and is not intended by the school laws.***" (at 186)

The Board admits its own administrative inadvertence and error in not receiving and approving the list of proposed adult school instructors in a timely manner. (Board's Brief, at p. 11) the Commissioner deplores such error and directs the Board in the future to take action necessary to ensure that proper administrative procedure allows the Board sufficient time to review and approve the employment of any prospective employees.

The Commissioner finds nothing in the record to sustain petitioner's claim for $750 compensation for the initial term during which he worked March 9 and 16, 1977, nor is there evidence that he was offered employment for another term of the Adult School. The Board, however, has offered to make full restitution in the amount of $600 for the initial term of ten weeks during which petitioner was employed and taught for two sessions. Accordingly, the Commissioner directs the Board to forward this amount to petitioner by the end of the next regularly scheduled pay period. The Commissioner finds no further relief to which petitioner is entitled and accordingly the Board's Motion to Dismiss is hereby granted.

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"R.S." and "A.S.," minor children by their parent and natural guardian, Blanca Santiago,

Petitioner,

v.

Board of Education of the Camden County Vocational School District, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Camden Regional Legal Services, Inc. (Herbert O. Brock, Jr., Esq., of Counsel)

For the Respondent, Hyland, Davis and Reberkenny (William C. Davis, Esq., of Counsel)

R.S. and A.S., pupils under the supervision of the Board of Education of the Vocational and Technical Schools in the County of Camden, hereinafter "Board," allege that their expulsion from school was illegal and improper and in violation of their constitutional rights. Petitioners pray for reinstatement in the Camden County Vocational and Technical School. The Board contends that its action was legal and proper in all respects.

At a conference of counsel held at the State Department of Education, Trenton, June 10, 1977, it was agreed that the name of R.S. would be withdrawn from the matter and subsequently a Stipulation of Dismissal with prejudice was so filed with the Commissioner of Education. A hearing was held July 6, 1977 in the office of the Superintendent of Schools of Camden County, Pennsauken, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

A.S., hereinafter "petitioner," a pupil in the Camden County Vocational and Technical Schools, (Pennsauken Campus), alleges that the Board's action in expelling him at its meeting of May 2, 1977 for smoking marijuana on school property was a contravention of his constitutional rights. He alleges, also, that the solicitation of testimony by the Board attorney at the meeting and hearing, and the attorney's subsequent attendance at the deliberative session of the Board, raised an unacceptable risk of bias resulting in his expulsion. Petitioner contends that the action of the Board was arbitrary, capricious and discriminatory as petitioner, an hispanic pupil, was expelled as one of five pupils accused of smoking marijuana on March 17, 1977 on school property, while S.C., a cau-

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casian pupil, was allowed to remain in school. Petitioner asserts that there are more appropriate remedies that the Board should have utilized before a decision to expel, namely, a referral to the child study team for appropriate analysis and recommendation. Petitioner argues further that expulsion based on his past record would subject him to double punishment and constitutes double jeopardy. Lastly, petitioner contends that Camden County Vocational and Technical Schools have acquired a reputation for expelling pupils at the end of the school year in violation of *N.J.A.C.* 6:8-2.1(c)7 and 6:8-3.5(a) 9.

The Board argues that the dual role of the Board attorney raises no presumption of bias that would invalidate its hearings in this matter. The Board attorney presented the case against petitioner at the May 2, 1977 hearing but the Board asserts that its attorney, while at the deliberative session following the hearing, gave advice on only one point, the effect of the Board's decision on the demission of petitioner. (Tr. 45-46) Accordingly, the Board asserts that there was no violation of petitioner's rights to due process and cites *Cardona v. Claflen et al.*, Civil Action No. 75-787, U.S.D.C. (D.N.J.) September 8, 1976 (unpublished opinion).

The Board contends that it did not act in a discriminatory manner. It asserts the record in the instant matter contains no reference to the race or status of other pupils and further contends that petitioner's expulsion was based on his entire record which contained ample evidence to support the Board's decision. There is no evidence to prove that the Board's action was based on petitioner's ethnic origin. The Board points to the record of A.S., which includes previous suspensions on February 4, 1977 for smoking a marijuana cigarette, on February 28, 1977 for throwing objects in shop and on March 17, 1977 for open defiance of a staff member. (J-3; Tr. 26) Although the assistant principal's testimony disclosed that A.S was suspended on March 17, 1977 for open defiance of authority, upon his return to school he was again suspended on April 1, 1977 for also smoking marijuana on March 17, 1977. (Tr. 35)

The Board argues that, in view of petitioner's entire record, it reasonably exercised its discretion under *N.J.S.A.* 18A:37-2 which allows for the suspension or expulsion of pupils for good cause. The Board argues further that *N.J.S.A.* 18A:37-2 authorizes the Board to expel "[a]ny pupil who is guilty of *continued* and willful disobedience***." (*Emphasis added.*) Consequently the entire record of the pupil must be considered which, accordingly, does not constitute double jeopardy. The Board denies that there is anything in the record that shows it has acquired a reputation for expelling pupils at the end of each school year. The Board asserts that Exhibit P-2 represents only the experiences of a vice-principal at Woodrow Wilson High School regarding exclusions from Camden County Vocational and Technical Schools wherein the vice-principal stated his belief that excessive suspensions from Camden County Vocational School occur after March 1st, and may also involve pupils in other school districts in the county. The Board asserts that such allegations are not dispositive of the actions of other school districts in Camden County. In conclusion the Board asserts that its action was not violative of *N.J.A.C.* 6:8-3.5(9) because A.S. was provided with an equal educational opportunity and his expulsion at the end of the school year

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took place because his disciplinary problems arose at that time. The Board, accordingly, respectfully requests that the Commissioner uphold its expulsion of petitioner.

The hearing examiner has reviewed the documents in evidence and the testimony of the hearing and finds that the evidence shows that the Board acted within its authority conferred by*N.J.S.A.* 18A:37-2. A.S. was accorded a hearing on May 2, 1977, wherein he was represented by counsel. The hearing examiner concludes that the role of the Board attorney in that hearing and the subsequent deliberative session of the Board was not violative of the constitutional rights of A.S. The wording in *Cardona, supra,* is directly on point:

> "***[W]e decline to require the Board, in the usual case, to undertake the expense and inconvenience of hiring two sets of counsel: one to prosecute termination cases and one to advise the Board. In so holding, we again emphasize that the present record evidences no prejudicial bias or unfairness emanating from the Board attorney's dual role. CF. *Simard v. Board of Education, supra,* 473 F.2d at 993.***" (Slip Opinion at 9)

The hearing examiner further finds that petitioner's allegation of discriminatory action against him by the Board is unsupported by any credible evidence in the record. Additionally, he finds petitioner's allegation of double jeopardy, because his expulsion was based on his total school record, to be without merit. In *W.S. v. Board of Education of the East Windsor Regional School District,* 1973 *S.L.D.* 652 the Commissioner held as follows:

> "***The Commissioner can find no basis to conclude that a board of education must refrain from considering prior pupil behavior precipitating an earlier suspension, which in its own right is a serious matter, when that board is considering an expulsion action instituted as the result of the pupil's subsequent behavior, or, as in this case, subsequent knowledge of a serious misdeed already committed.***" (at 655)

There is no evidence in the record before the Commissioner that the Board had its child study team evaluate A.S. Such a procedure is recommended for pupils who exhibit continuous refractory conduct. This type of procedure was urged by the Commissioner in *W.S., supra,* wherein the following was stated:

> "***Although the Commissioner is constrained to uphold the Board's expulsion action herein, he strongly urges this Board and all boards of education in New Jersey to utilize their own resources in arriving at solutions to behavioral problems prior to proceeding to this ultimate act.*** (at 656)

The hearing examiner also points out the impropriety of the wording used by the Board in Exhibit J-3, a letter from the principal to the mother of A.S.:

> "As you know, your sons *** are presently on *indefinite suspension* from the Camden County Vocational and Technical Schools***." (*Emphasis added.*)

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The hearing examiner recommends that the Commissioner determine that such language used by the administration in the suspension of pupils is improper as an "indefinite suspension" is tantamount to expulsion and contrary to *N.J.S.A.* 18A:37-5 which says:

> "No suspension of a pupil by a teacher or a principal shall be continued longer than the second regular meeting of the board of education of the district after such suspension unless the same is continued by action of the board, and the power to reinstate, continue any suspension reported to it or expel a pupil shall be vested in each board."

See also *N.J.S.A.* 18A:37-2.

For the reasons stated the hearing examiner recommends that the Commissioner uphold the action of the Board expelling petitioner.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter including the report of the hearing examiner and observes that no exceptions have been filed by either party pursuant to *N.J.A.C.* 6:24-1.17(b) The Commissioner adopts the findings of the hearing examiner as his own.

The Commissioner refers to *N.J.A.C.* 6:28-1.5(e) which states in its entirety:

> "A pupil shall be referred to the basic child study team to determine if the pupil is eligible for the services described in these regulations as a prerequisite to any board of education action on expulsion from the public schools."

The Commissioner directs the Board to utilize the full expertise of its professional staff including the child study team in the evaluation of the record of a pupil whose continuous refractory conduct causes the Board to consider expulsion of the pupil as an appropriate punishment. *W.S., supra; N.J.A.C.* 6:28-1.5(e)

The Commissioner has previously addressed problems with respect to the possession or use of drugs or marijuana on school grounds in *"J.W." v. Board of Education of the Town of Hammonton et al.*, 1975 *S.L.D.* 776 wherein he said:

> "***[T]he Commissioner holds that the use of marijuana or any drug abuse is a serious menace to the health and well-being of the pupils enrolled in the public schools of this State. Boards of education have the serious responsibility of providing for a thorough and efficient public school system for all pupils in at atmosphere free of the evils created by the use of drugs.

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"The possession and use of illicit drugs by pupils in our public schools must be dealt with swiftly in order to prevent their introduction to other pupils particularly those of younger years. *E.E. v. Board of Education of the Township of Ocean, Monmouth County,* 1971 *S.L.D.* 97; *W.G. v. Board of Education of the Township of Ocean, Monmouth County,* 1974 *S.L.D.* 780***" (at 781)

The Commissioner observes that in the instant matter the Board acted properly in expelling petitioner. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

November 15, 1978

In the Matter of the Petitions of the Boards of Education of the Boroughs of Runnemede and Bellmawr for Withdrawal from the Black Horse Pike Regional School District, Camden County,

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, M. Donald Forman, Esq.

For the Respondent Board of Education of the Black Horse Pike Regional School District, Maressa and Wade (John D. Wade, Esq., of Counsel)

For the Respondent Gloucester Township Council, Kmiec & Palumbo (Charles G. Palumbo, Esq., of Counsel)

This matter has been opened by the Boards of Education of Runnemede and Bellmawr, hereinafter "petitioning Boards," by the filing of a Petition for Declaratory Judgment seeking a determination of the Commissioner of Education that *N.J.A.C.* 6:3-3.3(b) should be construed that, when a majority of affirmative votes are cast in a deregionalization referendum by the voters in the entire regional district *and* in each of the two component municipalities which seek to withdraw from a three component regional district, the referendum proposal to deregionalize is approved. The Gloucester Township Council, hereinafter "Council," holds that an adverse interpretation to that recommended by the petitioning Boards must prevail. The Black Horse Pike Regional Board of Education takes a neutral view but has entered a Notice of Motion for an Early Determination in view of its intent to place before the electorate a referendum

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for additional classroom space to alleviate conditions necessitating double sessions in its two existing high schools. (Superintendent's Affidavit)

Oral argument was conducted at the State Department of Education, Trenton, by the Comissioner's representative on September 12, 1978. No relevant facts being in dispute, those facts are set forth succinctly as follows:

On February 16, 1978, a decision of the Board of Review, consisting of the Commissioner, the State Treasurer and the Director of the Division of Local Government Services, was promulgated pursuant to the provisions of *N.J.S.A.* 18A:13-56 in the above-entitled matter. (1978 *S.L.D.*) The entire text thereof is incorporated herein by reference. Therein, the Board of Review stated, *inter alia,* that:

> "***[T]he application for severance from the Regional District is a proposal which, if successful, will not place excessive burden on the electorate and warrants submission to the voters. This determination, however, is based on a contingent requirement that the question before the voters must clearly set forth the respective assumptions of existing debt hereinbefore delineated. The question to be placed on the ballot in Bellmawr and Runnemede must be so worded that an affirmative vote for the question not only supports withdrawal from the Black Horse Pike Regional, pursuant to *N.J.S.A.* 18A:13-51 *et seq.*, but also the formation of a new limited purpose regional high school district for grades 9 through 12 by Runnemede and Bellmawr, pursuant to *N.J.S.A.* 18A:13-34. This further contingent provision is deemed necessary to guarantee a viable educational plan for the withdrawing districts. Such requirement, of course, does not apply to the question to be placed before voters in Gloucester Township. Authorization to place such question before the voters is unanimously agreed upon by the members of the Board of Review with the further contingent understanding as set forth in the application of the petitioning Boards that pupils from Gloucester Township now attending Triton High School and those from Runnemede and Bellmawr currently attending Highland High School be allowed to continue to do so on a tuition basis until they graduate from their high schools or until other arrangements are mutually agreed upon by both Boards and approved by the Commissioner. Permission is likewise given with recognition that only by a majority of affirmative votes on the respective question placed before the voters in Gloucester Township and in each of the districts of Bellmawr and Runnemede will the proposed withdrawal from the Black Horse Regional District and the proposed formation by Bellmawr and Runnemede of a new limited purpose regional high school district be legally effected. *N.J.A.C.* 6:3-3.3 and 3.4***"
>
> (at)

The Camden County Superintendent of Schools fixed May 2, 1978 as the date upon which the approved referendum was held. The results of the balloting were as follows:

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	YES	NO
Bellmawr	1847	81
Runnemede	1481	95
Subtotal	3328	176
Gloucester Twp.	448	2511
Total	3776	2687

Thus, it is seen that the total of affirmative votes exceeded the total negative votes in the entire regional district *and* in each of the two municipalities seeking to withdraw from the regional district.

The petitioning Boards assert that the provisions of *N.J.A.C.* 6:3-3.3(b) should either be construed to be inapplicable to the aforementioned results of the referendum or in the alternative declared unconstitutional. (Tr. 6) They ground the argument of inapplicability on the fact that withdrawal of two constituents from a regional district with only three constituents would not leave a remaining regional district as, allegedly, contemplated by *N.J.A.C.* 6:3-3.3(b) which states:

> "To be effective the proposal must be adopted by a majority of the legal votes cast within the withdrawing constituent district, and in addition, a majority of the combined legal votes cast within the remainder of the regional district."

The petitioning Boards also argue that the predominantly negative stance of voters in the larger and faster growing Gloucester Township effectively precludes, to the detriment of pupils, their withdrawal from the Regional District and development of a program of education which would no longer require the present double sessions necessitated by increasing enrollments in the limited purpose Regional District. (Tr. 8-11)

Council argues, conversely, that the Petition is untimely in that the petitioning Boards should have contested the applicability of *N.J.A.C.* 6:3-3.3(b) prior to the referendum in which voters had been informed of and relied upon the interpretation of the Board of Review, *ante,* when casting their ballots. (Tr. 13-15) Accordingly, Council urges that a determination be rendered holding that the intepretation of election results as iterated by the Board of Review be held to be consistent with the legislative intent.

The Commissioner has carefully considered and balanced the arguments of law set forth by the parties of record in the light of applicable statutory provisions. *N.J.S.A.* 18A:13-57 provides that upon approval of a referendum by the Board of Review and the fixing of a date for such referendum by the county superintendent the question of the proposed withdrawal

> "***shall be submitted to the legal voters of the withdrawing district and to the legal voters within the remainder of the regional district."

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The only pertinent reference to the interpretations of election results in the deregionalization statutes is found in *N.J.S.A.* 18A:13-58 which states in pertinent part that:

> "***[S]aid election shall be conducted and the results thereof determined in the manner prescribed by law for special school elections in type II districts.***"

Every regional district is a type II district. *N.J.S.A.* 18A:9-3 A review of the election laws which apply to regional districts reveals that for the initial formation of such district a majority of affirmative votes is required in *each* constituent municipality of those proposing to form a regional district. *N.J.S.A.* 18A:9-3(a) It is also provided that a regional district, once formed, may be enlarged by a majority vote within the existing regional district *and* in each district which is proposed as an enlargement thereof. *N.J.S.A.* 18A:13-5(c) In other instances, except the election of regional district board members, a public question is validated only by a majority of votes cast in the entire regional school district. It is apparent that the statutes do not address precisely the interpretation of election results herein presented. Rather, it must be assumed, the Legislature left to the State Board of Education the promulgation of an appropriate rule to cover such eventuality.

As was stated by the Court in *Essex County Welfare Board v. Klein,* 149 *N.J. Super.* 241 (*App. Div.* 1977):

> "***It is, of course, axiomatic that a rule of an administrative agency is subject to the same canons of constructions and the same constitutional imperatives as is a statute. See, *e.g., Hoeganaes Corp. v. Dir. of Div. of Tax.,* 145 *N.J. Super,* 352, 359 (App. Div. 1976); *In re Plainfield-Union Water Co.,* 57 *N.J. Super.* 158, 177 (App. Div. 1959).***" (at 247)

This clear dicta on interpretation of an administrative agency's rule causes the Commissioner to conclude that the stated purpose of *N.J.A.C.* 6:3-3.3(b) must not be construed in such manner that its purpose would be defeated by evasion. *Grogan v. DeSapio,* 11 *N.J.* 308, 322 (1953) Nor should the rule be interpreted in such way as to reach a result other than the expressed intention. *Hoffman v. Hock,* 8 *N.J.* 397 (1952)

That the Legislature, and it must be assumed the State Board of Education, took cognizance that the remaining district of a regional district following withdrawal could be a single district is revealed by *N.J.S.A.* 18A:13-63 wherein it is recognized that "***such remaining constituent municipality shall thenceforth be constituted a separate local school district and governed by the laws applicable thereto.***" In the face of such clear recognition within the statutes which form the very basis of authority for the promulgation of State Board rules based thereon, the Commissioner rejects the petitioning Boards' argument that oversight prevailed when the State Board of Education promulgated *N.J.A.C.* 6:3-3.3(b). Statutes relating to the same subject matter are to be construed together

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in a manner which will give effect to the ordinary meaning of their words and to all their provisions. *State v. Green*, 62 *N.J.* 547, 554-5 (1973); *State v. Perry & Hutchinson Co.*, 23 *N.J.* 38 (1956) Rules of administrative agencies stemming therefrom must be similarly construed. Accordingly, the successful passage of the controverted withdrawal referendum required that there be a majority of affirmative votes cast in each of the districts of Runnemede and Bellmawr which proposed to withdraw *and* in the single remaining district, Gloucester Township. The Commissioner so holds.

The Commissioner has repeatedly held that he has no authority to rule on the constitutionality of a statute. *George B. Thorp v. Board of Trustees of Schools for Industrial Education-Newark College of Engineering*, 1949-50 *S.L.D.* 61, aff'd State Board of Education 1950-51 *S.L.D.* 70, aff'd 6 *N.J.* 498 (1951); *Frank Giandomenico v. Board of Education of the Township of Winslow*, 1975 *S.L.D.* 258, aff'd Docket No. A-2970-74 New Jersey Superior Court, Appellate Division, November 9, 1976 (1976 *S.L.D.* 1139) That is a function reserved for the courts. Nor does the Commissioner assume that he has authority to determine the constitutionality of a State Board of Education rule which was promulgated by the State agency pursuant to the enactment of the deregionalization statutes. Those who seek appropriate review of such rules should proceed before the Appellate Division of the Superior Court pursuant to *R.* 2.2-3(a)(2).

For the foregoing reasons the Commissioner declines to issue a judgment either that *N.J.A.C.* 6:-3-3.3(b) is or is not constitutional. The aforementioned statutory and rule provisions must be construed as set forth by the Board of Review, *ante*.

COMMISSIONER OF EDUCATION

November 15, 1978

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

Lillian A. McGovern,

Petitioner,

v.

Board of Education of the Borough of Elmwood Park, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Fontanella, Shashaty, Leonard & Harris (James M. Shashaty, Esq., of Counsel)

For the Respondent, Bartlett & Turitz (Stanley Tutitz, Esq., of Counsel)

Petitioner, a fully certificated teacher in the employ of the Board of Education of the Borough of Elmwood Park, hereinafter "Board," for three years in its Title I program, asserts that the Board's failure to reemploy her for a fourth year was arbitrary, capricious and in violation of her tenure rights and pleads for reinstatement with back salary. The Board contends that it acted within its legal authority in not renewing petitioner's contract and requests that petitioner's claim be dismissed.

A conference was held on April 12, 1977 at the State Department of Education, Trenton, wherein it was agreed that if a stipulation of facts could be reached by the parties the matter would be presented to the Commissioner of Education for Summary Judgment. The stipulation of facts was jointly filed with the Commissioner on August 10, 1977 with an addendum on April 27, 1978 and the matter is presently before the Commissioner for adjudication based on the pleadings, stipulation of facts, exhibits and Briefs.

Petitioner, a teaching staff member holding permanent certification to teach kindergarten through eighth grade, was employed by the Board to teach in its Title I program during the academic years 1973-74, 1974-75 and 1975-76 by contractual arrangement as follows:

November 19, 1973 - June 19, 1974 - 7 months
October 16, 1974 - May 15, 1975 - 7 months
November 17, 1975 - May 17, 1976 - 6½ months (J-1, 2, 3)

The aforementioned contracts were authorized by respective action of the Board at its regular meetings on November 13, 1973, October 15, 1974 and September 16, 1975. (J-7-9) Petitioner was usually assigned to teach pupils on a one-to-one basis, but occasionally she taught pupils on a two-to-one basis.

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(Addendum to Stipulation of Facts) Her responsibilities as a Title I teacher were to teach basic reading skills to assigned pupils and also

1. Administer pre-tests
2. Administer post-tests
3. Score above tests and prepare information required to insure a proper program and its evaluation
4. Prepare daily and long range plans for each pupil or group of pupils
5. Prepare diagnostic prescription for each pupil
6. Conduct parent-teacher conferences
7. Prepare for teacher-coordinator conferences. (J-6)

The Board did not offer petitioner a contract to teach during the 1976-77 academic year, but in November 1976 petitioner worked on a voluntary basis for two consecutive days performing testing duties and assessing needs for the Title I program. Petitioner was advised during the week of December 13, 1976 that she would not be offered employment in the 1976-77 Title I program. (Stipulation of Facts, at pp. 3-4) By letter dated December 21, 1976 (J-4), petitioner requested the reasons for her non-reemployment. She received a response under date of January 3, 1977, which in pertinent part stated:

> "***She was not offered a contract to teach under the Title I Program for 1976-77, because of the long term staffing problems in our District, vis-a-vis future tenure problems." (J-5)

Petitioner argues that the action of the Board in refusing to rehire her solely on the basis of her acquisition of tenure, if she were rehired, was unreasonable, arbitrary and capricious and entitles her to reinstatement. The Commissioner cannot agree. He has ruled previously in a similar matter in *Janet Conover and Barbara S. Priggemeier v. Board of Education of the Township of West Deptford, Gloucester County,* 1978 *S.L.D.* (decided February 8, 1978) wherein he said:

> "***The Commissioner has ruled previously that tenure accrues whenever the precise conditions of the statutes are met, irrespective of the source of funds obtained by a board of education. *Jack Noorigian v. Board of Education of Jersey City,* 1972 *S.L.D.* 226, aff'd State Board of Education 1973 *S.L.D.* 777; *Ruth Nearier et al. v. Board of Education of the City of Passaic,* 1975 *S.L.D.* 604 Petitioners have not met the precise conditions set forth in *N.J.S.A.* 18A:28-5 since they have not served the equivalent of more than three academic years within a period of four consecutive academic years. Had the Board offered reemployment, petitioners would have acquired a tenure status and seniority within the scope of the certificates held when they were initially employed. Petitioners hold standard certificates as teachers. (Exhibits C, G) Under these circumstances, had they acquired tenure, petitioners would be able to displace teachers with similar certificates but less seniority if a reduction of force were necessary. *N.J.S.A.* 18A:28-9 *et seq.*
>
> "The result of such a reduction might be that the Board would have to

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replace teachers who have successfully served probationary periods as regular elementary classroom teachers instructing all phases of pupil education by teachers who have taught reading only. Pursuant to *N.J.S.A.* 18A:28-13, categories of teaching services have been established and codified in *N.J.A.C.* 6:3-1.10(k). A category exists for elementary teachers; however, no category has been established for reading teachers which means that petitioners would acquire seniority as elementary teachers if they were reemployed.

"The Commissioner concludes that the Board acted properly and within its discretion when it decided not to reemploy petitioners.***"

(at)

In the judgment of the Commissioner, the above-cited reasoning is equally applicable to the instant matter.

Petitioner argues further that the Board's action was improper as she had acquired tenure under *N.J.S.A.* 18A:28-5 which in pertinent part provides:

"The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents and *** such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title,***after employment in such district or by such board for:

(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(c) the equivalent of more than three academic years within a period of any four consecutive academic years***."

Petitioner argues that she taught during three full, consecutive, Title I academic years which were shorter than the academic years for the general school program of regular studies, and subsequently was employed by the Board for two consecutive days in November of 1976. Petitioner in support of her argument cites *Ruth Nearier et al. v. Board of Education of the City of Passaic,* 1975 *S.L.D.* 604 and *Hazlet Township Teachers Association et al. v. Board of Education of the Township of Hazlet,* 1976 *S.L.D.*578.

The Board contends that its action was proper, that petitioner had not

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satisfied the requisite conditions prescribed by *N.J.S.A.* 18A:28-5 as the seven or eight month span of the Title I program was not an academic year and, further, that petitioner's service of two days in November 1976 was of a voluntary nature without contract between the Board and petitioner.

To acquire tenure the exact conditions prescribed in *N.J.S.A.* 18A:28-5 must be met. The principle applicable hereto is most succinctly stated in *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (*E.&A.* 1941) and again in *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962):

> ''***It is axiomatic that the right of tenure does not come into being until the precise condition laid down in the statute has been met.***''
> (126 *N.J.L.* at 544)

The Commissioner finds petitioner to be in error when she argues that there is a Title I academic year within a general program academic year which may be determinative of her tenure status. *N.J.S.A.* 18A:1-1 defines academic year as

> ''***the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation***.''

The Commissioner observes that in the aforementioned statute the phrase ''the time school opens'' refers to the opening of the general school program in the entire school district and does not permit an assumption that a program which is conducted at some later date within the regular academic year has its own academic year for the purpose of accrual of tenure. Petitioner did not serve the requisite three consecutive academic years, together with employment at the beginning of the next succeeding academic year, consequently her claim to tenure rights within the district is in error. Further, during her employment in the three consecutive academic years 1973-74, 1974-75 and 1975-76, petitioner was employed by the Board for a period of twenty and one-half months, less than the requisite amount to acquire tenure. *N.J.S.A.* 18A:28-5(c)

Petitioner contends that, assuming *arguendo* that she had not acquired tenure, she was still entitled to an offering of reemployment under the terms of *N.J.S.A.* 18A:27-10 which provide:

> ''On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it *since* the preceding September 30 either
>
> a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> b. A written notice that such employment will not be offered.''
> (*Emphasis supplied.*)

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Petitioner argues that the Board failed to give her notice as prescribed in the aforementioned statute stating, ''The only proper meaning *** is that all are included who have been in the continuous employ of the Board at any time after the preceding September 30***.'' (Petitioner's Brief, at p. 14)

The Board argues that it did not violate *N.J.S.A.* 18A:27-10 by notifying petitioner on December 13, 1976 that she would not be reemployed for the 1976-77 school year because she was not employed by the Board since September 30, as her contract specified dates of initial employment of November 19, 1973, October 16, 1974 and November 17, 1975.

The Commissioner agrees. As was stated in *Duke Power Co. v. Patten,* 20 *N.J.* 42, 49 (1955):

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

In the instant matter the key word is ''since'' the preceding September 30 not ''after'' as claimed by petitioner. The Commissioner finds that the Board's notice of non-reemployment of December 13, 1976 was within its discretionary authority and consequently petitioner has no claim under *N.J.S.A.* 18A:27-11.

Accordingly, the petition is dismissed.

COMMISSIONER OF EDUCATION

November 16, 1978

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In the Matter of the Tenure Hearing of

Helen Dolphin,

School District of the Township of Westampton, Burlington County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Dietz, Allen, Radcliffe & Sweeney (John A. Sweeney, Esq., of Counsel)

For the Respondent, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

Charges of insubordination were certified to the Commissioner of Education on November 14, 1977 by the Board of Education of the Township of Westampton, hereinafter "Board," against Helen Dolphin, hereinafter "respondent," a teaching staff member with a tenure status in its employ. The Board avers that the charges and the evidence in support of same are sufficient, if credited, to warrant dismissal or a reduction in salary of said employee. Respondent denies the charges of insubordination and requests the Commissioner to issue an order dismissing such charges.

A hearing was conducted on May 30, 1978 in the office of the Burlington County Superintendent of Schools, Mount Holly, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

Tenure charges of insubordination were brought against respondent for not signing contracts accepting extracurricular teaching duties, noncompliance with the return date for contracts and failure to appear before the Board as requested by the Superintendent.

The recitation of relevant uncontroverted facts begins with the deliverance of contracts to respondent in the school hallway by a teacher's aide on the afternoon of June 13, 1977. (Tr. 101) These contracts were for the extracurricular assignments of supervising girls' basketball and girls' softball. A covering letter with the contracts, addressed "Dear Staff Member," was dated June 10, 1977 and signed by the Superintendent of Schools. This letter included instructions to "review the contract, date, sign and return to the office of the Board of Education no later than 4:00 P.M., Wednesday, June 15, 1977." (P-2) Respondent returned the unsigned contracts to the principal with an explanation that "***I cannot handle these *** because of a family situation ***." (Tr. 102) The principal refused to accept them and directed respondent to personally return them to the Superintendent. (Tr. 102) Respondent returned the unsigned

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contracts to the Superintendent two days late on June 17, 1977 at which time a letter was given to her from and by the Superintendent calling her attention to the fact that she failed to execute the contracts and that such failure was regarded by him as an act of insubordination. (Tr. 110)

The summary of relevant testimony of witnesses which follows focuses on the basic reasons for the controversy.

There was an abundance of corroborative testimony relative to the past practice of scheduling staff members for extracurricular activities. All witnesses testified that staff members, prior to 1977-78 scheduling, had first volunteered for activities before being assigned to them. (Tr. 10, 91-92, 106) One witness, a staff member who had previously held the office of president of the Westampton Education Association, hereinafter "Association," testified that in the past a list of activities had been given to the president who then solicited volunteers. (Tr. 92) He testified that disinterested staff members had never been scheduled for extracurricular activities. (Tr. 10, 96-97, 106) One staff member, who had volunteered for and accepted the supervisory responsibilities for girls' basketball from 1971 until 1975, testified that he declined to volunteer to continue with that activity for personal reasons and was then not scheduled for it. (Tr. 96-97) He further testified that the Board or administrators had never previously scheduled disinterested teachers to extracurricular activities. (Tr. 99) The Superintendent testified that he had never assigned anyone to extracurricular activities prior to 1977-78. (Tr. 47) Both the principal and Superintendent testified that there had never been written contracts for extracurricular responsibilities prior to scheduling for the 1977-78 school year. (Tr. 38, 65)

Although the language relative to additional responsibilities in the negotiated agreement between the Association and the Board had not changed since 1973, the Superintendent testified that a change in process was initiated by him in June 1977 in scheduling staff members for extracurricular activities for 1977-78. (Tr. 33)

At the direction of the Superintendent, the principal hand-delivered a mimeographed survey sheet to each staff member. (Tr. 56) This sheet, dated June 10, 1977, listed the names of staff members and required each one to acknowledge it and indicate the activities for which he/she wished to volunteer. This survey was to be returned to the Superintendent by 8:30 A.M., Tuesday, June 14. (P-2) The principal testified that this was done on June 13, 1977. (Tr. 56)

A memorandum to all staff members from the Superintendent, also dated June 10, 1977, listed all activities and requested that "[p]ersons interested in volunteering for the above, please notify the Principal no later than Monday, June 13, 1977, 4:00 P.M." (R-1) The Superintendent testified that this document was placed in teacher mailboxes prior to June 10, 1977. (Tr. 28)

There is conflicting testimony relative to volunteering for supervising the activities of girls' basketball and girls' softball. The Superintendent and principal testified that there were no volunteers. (Tr. 12, 62) Mr. Mead, a staff member,

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testified that he did volunteer for both activities in June, September, and November of 1977. (Tr. 77-79) Mr. Branch, staff member, testified that he had volunteered for girls' softball in September 1977. (Tr. 93)

Respondent is a tenured teacher of physical education with ten years of service in the Westampton public schools. She testified that she assumed that her failure to sign the contracts would be understood by the administration to the extent that she was not interested in accepting extracurricular responsibilities and further that she believed she did not have to perform such duties due to the past practice of such duties being performed only by volunteers. (Tr. 105-106) She also testified, notwithstanding her personal and family reasons, that her decision not to execute the contracts and perform was predicated on her belief that the appointments were offerings and the contracts she was asked to sign signified that she agreed, when in fact she did not agree. (Tr. 108) The Superintendent, under cross-examination, testified in response as follows:

Q. "Did you think that someone reading that [contract] would think that they had the right not to agree?"

A. "I guess a person always has that right." (Tr. 40)

Respondent further testified that she probably would have performed the duties if the Superintendent had confronted her with his right and authority to assign or appoint her to perform them. (Tr. 112)

The negotiated agreement between the Board and the Association was introduced and marked in evidence. (P-1) Particular reference was made to page 23, section D, which was included under the sub-heading of "Salaries" and is reproduced as follows:

"D. Teachers who *are assigned* extra work, extra pay responsibilities shall be paid as follows:

1. Extra-curricular activities—$240.00 for each activity - Boys' football, basketball, softball and wrestling. Girls' softball, basketball, cheerleading, and field hockey. Chorus and Student Council, School Newspaper, Honor Society, combination girls/boys track, and soccer. One person per activity.

2. Duties of supervision as may occur at recess, lunch—cafeteria and detention time shall be compensated at the rate of $8.00 an hour."
(*Emphasis added.*) (P-1)

The Superintendent referred to the negotiated agreement as proving "the right and probably a duty" of the administration to assign staff members to extracurricular activities. (Tr. 8, 53-54)

A covering letter with the contracts was dated June 10, 1977, signed by the Superintendent and is reproduced here in full:

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"Dear Staff Member:

"Attached hereto is an extra activity contract for the 1977/78 school year.

"*The offer of this contract* is made following a review and analysis of extra activity programs and staff requirements. It is very important that you review the contract, date, sign and return to the office of the Board of Education no later than 4:00 P.M., Wednesday, June 15, 1977."

(*Emphasis added.*) (P-2)

Contracts for the extracurricular activites of girls' basketball and softball were delivered to respondent although there was conflicting testimony as to when this occurred. The Superintendent testified to deliverance on or about June 8, 1977, while respondent indicated she received them in the hallway from a teacher's aide on the afternoon of June 13, 1977. (Tr. 17, 101)

This concludes a summary recital of the testimony and evidence at the hearing. Briefs were waived by counsel. (Tr. 115)

The certification of charges against respondent was regularly moved and adopted at an executive session held by the Board on November 7, 1977. Such charges were not delineated in the Board's resolution, but were detailed in a hand-delivered letter to respondent from and by the Superintendent dated September 14, 1977 as follows:

"The Westampton Township Board of Education certifies the following charges:

1) That you did not comply with the date for returning your extracurricular contract

2) That you did not sign the contract accepting the extra-curricular teaching duties

3) That you did not appear before the Board of Education as requested in the letters of July 11 and August 2, 1977.***"

The Superintendent reiterates Charges Nos. 2 and 3 in his affidavit dated September 20, 1977, but does not include Charge No. 1.

The right of the Board to make appointments and assignments is vested by statute and case law.

N.J.S.A. 18A:11-1

"The board shall—

"***c. Make, amend and repeal rules, not inconsistent with this title or

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with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes[1]; and

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

[1]Section 11:1-1 *et seq.*

It has been pursuant to such authority that local boards of education have assigned teachers to perform extracurricular activities. The Court stated in *Board of Education of City of Asbury Park v. Asbury Park Education Association,* 145 *N.J. Super.* 495 (*Chan. Div.* 1976) as follows:

"***Teachers, therefore, in order to properly fulfill the responsibility they have undertaken to their profession, to their students, and to the community, must necessarily perform those activities deemed necessary and assigned to them by the board of education. For this court to require less would be to lend its hand to the subversion of the educational process.

"Of course, the touchstone for the exercise of such power is reasonableness. Assignments must be nondiscriminatory, related to a teacher's interests and expertise, and not require excessive hours. They need not, however, be compensated.

"Traditionally, boards of education have had the power to assign teachers to the supervision of extracurricular activities without compensation beyond the yearly contract schedule. Additional pay, customarily, has been awarded only for those assignments which require the expenditure of a great number of hours or those which involve a field unrelated to a teacher's certificate.***" (at 505-506)

It follows, therefore, that any interpretation of the negotiated agreement as the authoritative basis for extracurricular assignments is unnecessary. The Board determined the activities to be offered as educational policy. Remuneration for the supervisory services for these activities is properly included in the negotiated agreement.

The agreement between the Association and the Board speaks, *inter alia,* of compensation for extra work but is silent in regard to methods employed in making assignments. In the absence of local policy governing the *modus operandi* of extracurricular assignments, weight must be given to past administrative practice, which in effect had been accepted and understood to be policy. The hearing examiner finds that the policy of the Board with respect to the assignment of teaching staff members to cocurricular and extracurricular activities was clearly understood to be on the basis of selection from among those

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persons volunteering an interest in such assignments. This was the accepted practice, and no action by the Board established any other policy.

Petitioner obviously relied upon her understanding of the past practice, which she assumed to be the existing Board policy, and declined to volunteer for the cocurricular assignments. Petitioner was understandably confused by the Superintendent's interpretation of Board policy in this regard.

Accordingly, the hearing examiner recommends that the Board develop and adopt policy and publish clearly established procedures related to staff cocurricular and extracurricular assignments and further that the charges certified by the Board against respondent be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the entire record in the instant matter, including the report of the hearing examiner, and observes that no exceptions were filed to the hearing examiner report by either party. The Commissioner adopts the hearing examiner's findings as his own.

The Commissioner finds and determines that the Superintendent acted precipitously in bringing tenure charges against respondent in this instance. In the judgment of the Commissioner, a lack of established and effectively communicated policies and procedures in regard to cocurricular and extracurricular duties created the confusion and misunderstanding which became the basis for the tenure charges against respondent.

The Board is hereby directed to promulgate clear policies in regard to the assignment of extracurricular and cocurricular responsibilities to teaching staff members.

For the reasons previously stated the charges certified by the Board against respondent are hereby dismissed.

COMMISSIONER OF EDUCATION

November 24, 1978

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

Spring Valley PTO Committee on Alternatives to School Consolidation,

Petitioners,

v.

Board of Education of the Borough of Paramus, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Durkin and Foerst (Martin T. Durkin, Esq., of Counsel)

For the Respondent, Winne, Banta, Rizzi & Harrington (Joseph A. Rizzi, Esq., of Counsel; Donald A. Klein, Esq., on the Brief)

Petitioning parents of pupils enrolled in the Spring Valley Elementary School, both individually and as members of the Spring Valley Parent-Teachers Organization Committee on Alternatives to School Consolidation, allege that the action of the Paramus Board of Education, hereinafter "Board," closing the Spring Valley Elementary School was an act of bad faith, contrary to the constitutional and statutory requirement that a thorough and efficient educational program be maintained. Petitioners further allege that the November 10, 1977 meeting of the Board was illegal and contrary to the Open Public Meetings Law, *N.J.S.A.* 10:4-1 *et seq.* The Board, conversely, denies that its closing of Spring Valley Elementary School was illegal or other than a proper exercise of its discretionary authority.

On April 7, 1978 the Board filed before the Commissioner of Education, a Notice of Motion for Summary Judgment with supporting Brief, affidavit and exhibits. On May 24, 1978 petitioners filed a Brief with attached exhibits in opposition to the Board's Motion. Oral argument was conducted on the Motion at the office of the Bergen County Superintendent of Schools, Wood-Ridge, on June 29, 1978. The uncontroverted facts in the instant matter are these:

The Board presently operates one senior high school for grades nine through twelve, two middle schools for grades six through eight and seven elementary schools for grades kindergarten through five. The overall decline of pupil enrollment for all grades, kindergarten through twelve, from 1972 through 1977 was 1,707 pupils. For the same period, the elementary pupil enrollment in grades kindergarten through six declined by 1,086 pupils. (Board's Exhibits L, M, O, Q)

In August 1976, the Superintendent of Schools submitted a report to the

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Board entitled, "Budgetary and School Facility Implications of Declining Enrollments and Reorganization." (Board's Exhibit L) In October 1976, the Board appointed a Citizens Advisory Committee on Facilities Utilization charged with the responsibility to study the issue of declining enrollments and the future use of the Board's physical facilities. The Committee held meetings in November and December 1976 to hear presentations of individuals and groups, collected factual data and, subsequently, on January 31, 1977 made recommendations to the Board in the form of majority and minority reports with regard to future school facilities utilization in the district. (Board's Exhibits L, N(III,IV))

In May 1977 the Superintendent recommended to the Board a five-year consolidation program as follows:

> "Phase I - *Combining of the populations of the present Spring Valley School district with those of the Memorial School district to be housed in Memorial School - 1978.*
>
> "Phase II - Combining of the populations of the present Stony Lane School district with those of the Midland School district to be housed in Midland School - 1980.
>
> "Phase III - Combining of the populations of the present George W. Hodgins School district with those of the Ridge Ranch School district to be housed in the Ridge Ranch School - 1982."
>
> (*Emphasis supplied.*) (Exhibit O)

The Board entertained public comment with regard to the future use of its school facilities at meetings held on June 13, 27 and July 11, 1977. Subsequently, in its official house organ, "the PEN," a publication distributed to all residents of the school community, the Board published a scheduled timetable for the Board to receive comments from individuals or groups as follows:

> "September 19 through October 20
> Written reports accepted by Board***
>
> "October 6 and 20
> Public Participation Meetings - To receive input from those who may not wish to submit written input and/or receive amplification or explanation from those who have. *October 20 would mark the end of public input.*
>
> "October 24 and 31
> Board Discussion Meetings - Board would use these meetings to conduct its deliberation on the question of facilities utilization.
>
> "November 14
> Regular Board Meeting - Final opportunity for public to express its views on the direction the Board seems to be taking as shown by its deliberations on October 24 and 31.

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"November 21
Board to announce its decision.

(*Emphasis in text.*) (Exhibit Y)

The minutes of the Board meetings held on such dates reflects that it adhered to its announced schedule. (Board's Exhibits D, E, F, G, H, J, K) The Board was in receipt of written reports from the Stony Lane PTO on July 11, 1977 (Board's Exhibit C); the Midland PTO on October 6, 1977 (Board's Exhibit E); the Spring Valley PTO on October 20, 1977 (Board's Exhibit F). Subsequently, on November 21, 1977, the Board, *inter alia,* affirmatively passed three separate resolutions as follows:

"*RESOLUTION NO.* 1

"***WHEREAS, the Board of Education having listened to and considered the matters presented,

"NOW, THEREFORE, BE IT RESOLVED, that the Board determines that a school should be closed for regular day school attendance and used for alternative educational purposes.

***

"AYES: [8]

"NAYS: [1]

"*RESOLUTION NO.* 2

"***BE IT RESOLVED, that the Board of Education does hereby find and determine that the Spring Valley School shall be closed for regular day school attendance in the 1978-79 school year, and that the district lines as they are now determined for the Spring Valley School and the Memorial School, shall now be the district lines for the Memorial School and all students who would have attended Spring Valley School in September, 1978, shall be enrolled in the Memorial School.

***

"AYES: [7]

"NAYS: [2]

"*RESOLUTION NO.* 3

"***BE IT RESOLVED, that the Board does hereby determine that, effective with the 1978-79 school year, and until otherwise determined by the Board, the school building known as Spring Valley School shall be

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primarily utilized as an Adult Education School center and shall remain within the jurisdiction of the Paramus Board of Education.

***

"AYES: [7]

"NAYS: [2]" (Exhibit K)

Petitioners aver that the Board's action to close Spring Valley Elementary School was arbitrary, capricious and unreasonable. They cite the fact that the Board appointed a group of twenty-one citizens to study the problem of declining pupil enrollment in the school district and that it ignored the majority vote of the citizens' committee report submitted to the Board on January 31, 1977, that no public schools be closed for the 1977-78 school year. Petitioners contend that the Superintendent's five-year consolidation plan, *ante,* submitted to the Board in May 1977, was at complete odds with the recommendations of the citizens' committee report. (Petitioners' Brief, at pp. 13-14; Exhibits N, 0)

Petitioners contend that the affidavit of the School Business Administrator/Board Secretary in support of the Board's Motion for Summary Judgment lists all of the exhibits that went into the Board's process in closing the Spring Valley Elementary School, except a document dated November 9, 1977 from the Superintendent addressed to members of the Board, entitled "Analysis of Cost of Operation of Spring Valley as an Adult School Center," and also known as "Attachment 13." (Petitioners' Exhibit D) Petitioners assert that the contents of the document was the subject of the Board's discussion and consideration at its November 10, 1977 work session meeting, for which no minutes were kept or recorded. Petitioners claim that they and the public were denied the right to examine and comment upon the Superintendent's report which dealt with the use of Spring Valley Elementary School as an adult education center. They cite the matter of *American Beauty Home Corp. v. Lauriolle,* 379 *S.W.2d* 450 (*Ct. of App.*, Ky 1964), wherein the Court noted that proceedings that affect a party's right and which do not afford an opportunity to be heard can be classified as arbitrary. See also *Mazza v. Cavicchia,* 15 *N.J.* 498 (1954). (Petitioners' Brief, at pp. 14-15)

Petitioners argue that the Board on two occasions acted in an arbitrary, capricious and unreasonable manner; *i.e.,* its failure to alert the public about its November 10, 1977 work session meeting and its failure to disclose to the public the Superintendent's report of November 9, 1977 which was used as a basis to determine that the Spring Valley School be used as an adult education center. They contend also, that the minutes of the discussion of the Board on November 10, 1977 should be made available to the public. (Petitioners' Brief, at p. 15)

Petitioners argue extensively that the Board's failure to keep and record adequate minutes of its November 10, 1977 meeting violates the Open Public Meetings Law, specifically *N.J.S.A.* 10:4-14 and, further, that the Commissioner

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has the right and duty to consider such violations and set aside the action of the Board.

The Board argues that it is endowed with broad statutory authority to make determinations with regard to the operation of its schools. *N.J.S.A.* 18A:11-1 It contends that such authority has been uniformly recognized by the courts of this State and Commissioner. *Silverman v. Board of Education of the Township of Millburn,* 134 *N.J. Super.* 253, 259 (*Law Div.* 1975), aff'd 136 *N.J. Super.* 435 (*App. Div.* 1975); *Wassmer et al. v. Board of Education of the Borough of Wharton,* 1967 *S.L.D.* 125 The Board cites *Silverman* wherein the Court expressly recognized this broad discretionary authority for a local board of education to close a school when it stated:

> "***It is established law in this State that a local board of education may in the exercise of its discretionary powers discontinue the use of a public school within the boundaries of its jurisdiction. *Boult v. Passaic Bd. of Ed.,* 136 *N.J.L.* 521 (E.&A. 1948); *Schults v. Teaneck Bd. of Ed.,* 86 *N.J. Super.* 29 (App. Div. 1965), aff'd 45 *N.J.* 2 (1965).***"
>
> (134 *N.J. Super.* at 259)

The Board also relies upon the Commissioner's decision in the matter of *Green Village Road School Association et al. v. Board of Education of the Borough of Madison,* 1976 *S.L.D.* 700, aff'd State Board of Education 716, aff'd Docket No. A-1411-76 New Jersey Superior Court, Appellate Division, October 13, 1977 (1977 *S.L.D.* 1292), wherein the Commissioner held as follows:

> "***In respect to the Board's determination to close an entire school and its decision to close [Green Village Road School], the Commissioner finds no flaw that would justify the invalidation of the *exercise of discretionary authority vested in the Board by the Legislature. N.J.S.A.* 18A:11-1 *et seq.; Boult, supra****" (*Emphasis supplied.*) (at 715)

The Board contends that it met the standard of "reasoned judgment" as set forth in *Green Village, supra,* when it took action on November 21, 1977 to close its Spring Valley School commencing with the 1978-79 school year. It asserts that it undertook extensive studies through its administrative staff and the Citizens Advisory Committee and solicited input from the public with extensive discussion and consideration of alternatives before it made its final determination. The Bord argues that its actions challenged by petitioners cannot be adjudged arbitrary or capricious because it did not conduct a private engineering study, did not consider petitioners' alternative plan or that it failed to consider future school utilization prior to closing the Spring Valley School. The Board asserts that the record in the instant matter belies such allegations and should, therefore, be dismissed. (Board's Brief, at pp. 18-19, 24-25, 27, 29, 31-32)

Finally, the Board argues that petitioner's allegation with regard to a violation of the Open Public Meetings Law *N.J.S.A.* 10:4-1 *et seq.,* is without

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merit. It admits that on November 10, 1977 it conducted a work session to prepare the agenda for its regular monthly meeting of November 14, 1977. The Board asserts that its November 10, 1977 agenda work session was properly noticed in accordance with *N.J.S.A.* 10:4-1 *et seq.* and that it was open to the public. It admits that the subject of school closings was not an agenda item but, rather, in its consideration of an agenda item with regard to a future adult school, reference was made to the possible use of Spring Valley Elementary School for such a purpose. (Tr. 11-12)

The Board admits that it closed a portion of its November 10, 1977 meeting from public scrutiny to discuss specific offers to rent the Spring Valley Elementary School. It asserts that this action was entirely proper and was within the expressed exceptions as set forth in *N.J.S.A.* 10:4-1 *et seq.* It further asserts that it took no official action and that its discussion in this regard was revealed at its public meeting on November 14, 1977 and was reflected in its official minutes of that meeting. (Tr. 12-13; Exhibit J)

The Board argues that the allegation of a violation of the Open Public Meetings Law was not properly before the Commissioner and, therefore, should be dismissed. (Tr. 5, 12)

The Commissioner cannot agree with petitioners' assertion that he has jurisdiction to consider and decide matters which allege to be violations of the Open Public Meetings Law. *N.J.S.A.* 10:4-15(a) specifically provides as follows:

> ''*Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public;* provided, however, that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section***.''
>
> (*Emphasis supplied.*)

In a similar matter, *Committee to Save Bayard School, Elba Zeledon et al. v. Board of Education of the City of New Brunswick and Frank Reen, Superintendent of Schools of the City of New Brunswick, Middlesex County,* 1978 *S.L.D.* (decided May 1, 1978), the Commissioner observes as follows:

> ''***Having exceeded the statutory time constraint of filing before a court within 45 days of the complained of action, petitioners now improperly seek a ruling declaring the meeting illegal from *the Commissioner who was not clothed by the Legislature with jurisdictional authority over matters arising from the Open Public Meetings Act.****''
>
> (*Emphasis supplied*) (at)

Notwithstanding petitioners' arguments to the contrary, the Commissioner finds and determines that they failed to avail themselves of their legal right to

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challenge the Board's actions of November 10, 1977 in a court of competent jurisdiction and, further, that the Commissioner has no right, either implied or expressed, to intervene in such alleged violations of the Open Public Meetings Law.

The Commissioner observes that the Legislature of this State has bestowed broad discretionary authority upon local boards of education with regard to the operation and management of their schools. *N.J.S.A.* 18A:11-1 This authority has been recognized by the Commissioner and the courts in the determination of a local board of education to close a school under its jurisdiction. *Silverman, supra*

The facts and documents set forth by the parties in the instant matter are, in the Commissioner's judgment, credible evidence that the Board's action to close Spring Valley Elementary School was not without a rational basis. Additionally, the Board provided ample opportunity for the public and school employees to express their opinions before its final action. Indeed, the record is clear that petitioners availed themselves of such an opportunity and filed a proposal with the Board on October 20, 1977. (Petitioners' Exhibit A, Petition of Appeal)

The Commissioner finds that petitioners' arguments that the Board failed to adopt the report of the Citizens Advisory Committee on Facilities Utilization, failed to conduct engineering studies and failed to adopt its proposal of October 20, 1977, are without merit. Petitioners, on the other hand, failed to set forth a preponderance of credible evidence that the Board's decision was reached as the result of illegality, bad faith, abuse of discretion or was arbitrary, capricious or unreasonable. Absent such a finding the Board's determination to close Spring Valley Elementary School must be upheld. *Schinck v. Board of Education of Westwood Consolidated School District,* 60 *N.J. Super.* 448 (*App. Div.* 1960); *Boult, supra; Silverman, supra; Green Village Road School Association, supra* Accordingly, the Petition of Appeal is dismissed and Summary Judgment is entered for the Board of Education of the Borough of Paramus.

COMMISSIONER OF EDUCATION

November 24, 1978

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"B.K.," a minor by his parent and guardian *ad litem*,

Petitioner,

v.

Board of Education of Margate City School District, Margate City Child Study Team and John R. Reed, Superintendent, Atlantic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Valore, McAllister, DeBrier, Aron & Westmoreland (Thomas J. Vesper, Esq., of Counsel)

For the Respondent, Horn, Weinstein, Kaplan & Goldberg (Jack Gorny, Esq., of Counsel)

Petitioner, parent of a minor boy, hereinafter identified as "B.K.," avers that the Board of Education of Margate City School District, hereinafter "Board," has refused to place B.K. in a residential school for multiply handicapped pupils and continued to refuse to reimburse her for tuition costs borne by her for the education of her son from April 7, 1975 until the present. Petitioner requests that the Commissioner of Education determine that such reimbursement is properly and legally due her. The Board denies such liability and maintains its actions in this matter are, and have been, in full accord with the applicable statutes and rules of the State Board of Education.

A hearing in this matter was conducted on September 1 and 21, 1976 at the office of the Atlantic County Superintendent of Schools, Mays Landing, by a hearing examiner appointed by the Commissioner. Subsequently, the parties filed Briefs. The report of the hearing examiner is as follows:

Petitioner testified that B.K. was evaluated during the 1971-72 school year and placed in a special reading class while he was enrolled in the first grade in the North Wildwood School District. In the second grade he was placed in a learning resource class by the school authorities of North Wildwood for the 1972-73 school year.

Subsequently, B.K. was enrolled in the Margate City School District for the 1973-74 school year and petitioner testified that in September 1973 he was placed in the Granville Avenue School. B.K. was evaluated by the district's Child Study Team and transferred to the Union Avenue School in January 1974. She testified that she attended an open house at the Union Avenue School in the fall of 1973 at which time she was made aware of the district's "main-

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streaming'' program. She was advised that B.K. was assigned to the learning resource center for approximately two and one-half hours per day and the remainder of the school day was assigned or ''mainstreamed'' into his proper grade placement with his peers.

Petitioner testified that she had a conference with school authorities in February 1974, subsequent to B.K.'s transfer to the Union Avenue School, because she was not pleased with B.K.'s educational progress or his behavior at home. She testified that she informed the school authorities that B.K's father had left the family residence.

Petitioner testified that between October 1974 and January 1975 she attended a number of meetings and conferences with school authorities to discuss B.K.'s progress and to express her displeasure that he had become more disturbed. She told the school authorities that she would make her own arrangements to have an independent evaluation.

In January 1975, petitioner met with the school principal, B.K.'s teacher and members of the Child Study Team and informed them regarding the independent evaluations she had obtained from a reading-learning disabilities specialist in private practice, who had evaluated B.K. on two previous occasions. (PR-3, 10, 20) She testified that she stated her objections to the school authorities present at the meeting with regard to the educational program provided for B.K., based upon her observations that he had not progressed but rather had exhibited emotional and intellectual deterioration. She therefore stated that placement of B.K. in a residential program would produce better results than those of the educational program of the school district.

Petitioner testified that she subsequently met with the district's school psychologist to seek his advice as to B.K.'s placement in an alternative educational program. She contends that the school psychologist informed her that she would be entitled to some tuition reimbursement in the event B.K. was placed in an alternative program. She stated that the school psychologist indicated that he would contact the Board's school social worker with regard to an alternative educational setting. She asserted that on February 14, 1975, the school social worker sent her a letter which contained a computer print-out which listed acceptable facilities for residential placement in Pennsylvania for male ten-year-old pupils who are perceptually impaired. (P-11) Petitioner testified that she assumed that the computer print-out was offered to provide her a list of acceptable schools and that, following B.K.'s enrollment in such a school, funding for B.K.'s educational program would be a matter of formality.

Petitioner asserted that she personally investigated the schools listed on the computer print-out. She met with an official of the Pathway School in February 1975 who subsequently arranged to have B.K. tested. In March 1975, petitioner met with the principal of the Pathway School and thereafter received notice that B.K. had been accepted by the school. (P-3) Subsequently, petitioner met with the Board's Child Study Team with her estranged husband in attendance and announced that B.K. had been accepted by the Pathway School. She asserted that she wanted B.K. to begin at Pathway immediately following the Board's

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spring vacation in April 1975 and further asked the Child Study Team for guidance and assistance to obtain tuition reimbursement. She testified that the members of the Team informed her that they would reevaluate B.K. in September 1975 and if the desired placement was necessary, it would be forwarded through the proper channels and funding would be awarded.

Petitioner asserts that she was not advised of the proper procedures to apply for a reimbursement of funds. She testified that the members of the Child Study Team advised her of her right to remove B.K. from the Union Avenue School; however, they counseled against such action. She subsequently met with the Superintendent who advised her not to remove B.K. from the Margate Public Schools until after the Child Study Team had the opportunity to reevaluate him in September 1975 and to determine what reimbursement could be made available for the 1975-76 school year. Petitioner informed the Superintendent of the independent evaluation and the Pathway School evaluation and stated that she could not and would not wait for B.K.'s educational improvement. Petitioner subsequently removed B.K. from the Margate City Schools and enrolled him in the Pathway School in April 1975.

The Board asserts that it acknowledged B.K.'s prior classification made by the North Wildwood Child Study Team, the independent evaluations conducted by a reading-learning disabilities specialist and continued such a program upon his entry into the Margate school system in September 1973. (P-1, PR-1, 2, 3, 5, 6, 8) Subsequently, the Board's learning disabilities consultant prepared a program of instruction for B.K. which was approved by the Board's Child Study Team. B.K. was placed in a resource room in January 1974. (PR-11) A mid-year learning evaluation in February 1974 acknowledged B.K.'s prior learning deficiencies and described his present strengths and weaknesses. (PR-13) The Board's Child Study Team meeting minutes of April 23, 1974 reported that B.K. was progressing satisfactorily at that time. (PR-14) On June 13, 1974 the Board's Child Study Team recommended that B.K. be continued in the classification of perceptually impaired and that he be "mainstreamed" in the fourth grade for the 1974-75 school year. (PR-16) This recommendation was carried out by the Board. (PR-17, 18, 19)

The meeting of March 12, 1975 of the Child Study Team with petitioner and her estranged husband was reported as follows:

***

"1. Mrs. [K] shall discuss the decision with her husband about [B.K.'s] remaining at Union [school] for the remainder of the school year or placing him in a residential setting.

"2. The Child Study Team offered [B.K.] the following program if he is to remain in our school system.

   a. Modifying his present daily schedule so he spends more time in the Resource Room.

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b. Counseling with the school psychologist.

c. Parent conselling with the school social worker.

d. The Child Study Team recommends [B.K.] be seen privately in counselling to deal with the many problems of daily living enumerated by the parents.

e. If a Learning Resource Center opens at Granville Avenue School, [B.K.] would be transferred back to his own school.

f. Re-evaluation of [B.K.] shall take place in May.

g. While [B.K.] has been in public schools four years, the two years in Margate has shown a two year academic improvement in reading.***'' (PR-22)

The Board avers that B.K. was removed from the Margate Public Schools in April 1975 by petitioner. At two subsequent meetings of the Board's Child Study Team it recommended the following:

''The record of [B.K.] was re-examined today. A report from Pathway dated June 1975 was also reviewed. It is the unanimous opinion of this group that a program exists in the Margate School system for this student. Should [B.K.] return he can be scheduled into a Resource Room at either Granville or Union Avenue School.'' (PR-23, September 2, 1975)

And,

''1. [B.K.'s] folder was examined and contains all of the required forms and examinations in compliance with the law.

''2. The Child Study Team continues to recommend an educational program in the Margate School System.***''

(PR-24, November 17, 1975)

The Board contends that it did not indeed inform petitioner with regard to the proper procedure to follow in order to obtain tuition reimbursement for B.K.'s placement in an alternative educational program outside the Margate Public Schools. It further asserts that petitioner was made aware of the fact that funding would not be available if she unilaterally placed B.K. in a private educational institution. (Tr. II-22-49)

The school social worker, the principal and the Superintendent testified that they informed petitioner that she would not be eligible for tuition reimbursement unless she followed the prescribed procedure and that, if she removed B.K. from the Margate School system, she did so at her own risk. (Tr. II-64-160; P-5) The Board contends, therefore, that petitioner unilaterally removed B.K. from its schools and, consequently, the Board is not responsible for tuition reimbursement payments.

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The hearing examiner having examined the evidence adduced at the hearing and having reviewed the testimony offered by the parties makes the following findings:

1. B.K. was originally enrolled in the North Wildwood Public Schools for the 1971-72 and 1972-73 school years and was identified and assigned for supplemental instruction. (P-1, 4)

2. B.K. was enrolled in the Margate City Public Schools in September 1973, evaluated by its Child Study Team, found to be perceptually impaired and provided an educational program pursuant to *N.J.S.A.* 18A:46-1 *et seq.* and *N.J.A.C.* 6:28-1.1 *et seq.* (PR-11, 13, 14, 16)

3. Petitioner, B.K.'s mother, withdrew him from the Margate Public School on or about April 1975, enrolled him in a private residential school and requested tuition reimbursement from the Board.

4. The Margate Child Study Team did not recommend residential placement for B.K. and it afforded an appropriate educational program for him. (PR-23, 24)

The hearing examiner has reviewed petitioner's arguments in the context of all the facts of this matter and finds an absence of any violation of law or abuse of discretion by the Board. Petitioner chose to enroll B.K. in a private school and, while she was free to make such choice, she is not entitled to reimbursement of such enrollment costs from public finds. *"K.K." v. Board of Education of the Town of Westfield,* 1971 *S.L.D.* 234, rem. State Board of Education 240, decision on remand 1973 *S.L.D.* 30, aff'd State Board 34, aff'd Docket No. A-1125-73 New Jersey Superior Court, Appellate Division, February 13, 1975 (1975 *S.L.D.* 1086) The hearing examiner recommends dismissal of this Petition of Appeal and its prayers for relief.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter and the report of the hearing examiner and observes that neither party has filed exceptions thereto as provided by *N.J.A.C.* 6:24-1.17(b).

It is clearly shown, in the instant matter, that the Board's Child Study Team acknowledged B.K.'s prior classification made by the North Wildwood Board of Education Child Study Team upon his entry into the Margate school system. The minutes of the Board's Child Study Team reflect that it conducted subsequent evaluations of B.K., classified him as perceptually impaired, and provided him with an appropriate program of instruction. When such judgment is properly exercised, the Commissioner will not, and may not, substitute his own discretion for that of the qualified child study team. In the matter of *"E.K." and "M.K.", parents and guardians ad litem of "G.K.," a minor v. Board of Education of the Township of Woodbridge,* 1974 *S.L.D.* 1141, 1144 the Commissioner quoted

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from *In the Matter of "D" by her parent v. Board of Education of the Borough of Scotch Plains-Fanwood et al.*, 1971 *S.L.D.* 509, as follows:

> "***Personnel of such child study teams are specifically empowered to make just such judgments as that made therein. Admittedly, it is a difficult task, but as the Commissioner observed in *The Parents of K.K. v. Board of Education of the Town of Westfield, Union County,* decided by the Commissioner June 1, 1971: [1971 *S.L.D.* 234, 239]
>
> > '***the State Board of Education has required each district to employ highly-qualified personnel representing many disciplines. The certification standards for these team members are high. When, as in this instance, such a team makes a judgment it is qualified and mandated to make *** *that judgment will not be determined to be faulty* or incorrect by the Commissioner, *absent* a clear showing of procedural fault or an arbitrary exercise of discretion without proper diagnostic information.' (*Emphasis supplied.*)***" (at 511)

The Commissioner finds no such "fault" or an "arbitrary exercise of discretion" in the instant matter. Moreover, the Commissioner determines that petitioner, parent of B.K., without the sanction of the Board, elected to voluntarily withdraw B.K. from the Margate public schools and to enroll him in the Pathway School on April 7, 1975. Accordingly, it is petitioner's responsibility to bear the cost of tuition in such private school placement as she deemed advisable for the continuing education of her child.

Petitioner is free at any time to enroll her child as a pupil in Margate City School District, but the Board's Child Study Team must recommend, through its school administrators, an appropriate placement for B.K., with the final determination for such placement approved by the Board.

Absent a finding of arbitrary or capricious action, abuse of discretion, or statutory violation by the Board of Education of Margate City, the Commissioner determines that the Petition has no merit. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

November 27, 1978

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Eddie Jones *et al.*,

Petitioners,

v.

Board of Education of the City of Englewood, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Gutfleish & Poller (Allan S. Gutfleish, Esq., of Counsel)

Petitioners, nontenured teaching staff members in the employ of the Board of Education of the City of Englewood, hereinafter "Board," in the 1976-77 academic year, aver that the reasons afforded them by the Board for non-reemployment for the 1977-78 academic year were insufficient and arbitrary. They demand judgment to this effect by the Commissioner of Education and immediate reinstatement. The Board maintains its statement of reasons for non-reemployment is a valid reflection of the Board's determination and that the Petition of Appeal should be dismissed.

An oral argument pertinent to an Order to Show Cause why the relief requested in the Petition should not be granted was conducted on August 2, 1977 at the State Department of Education, Trenton. The record of this argument, supplemented by Briefs, and certain documents of pertinence are now before the Commissioner for consideration. The principal facts are not in contest and may be concisely stated.

Each of the petitioners was employed as a teaching staff member by the Board for service within the scope of his/her certificate during the 1976-77 academic year and received the following notice from the Board on or about April 19, 1977:

> "It is with regret that I must inform you that the Board of Education, of the City of Englewood, is not offering you a contract of employment for the 1977-78 school year. This notice is given pursuant to the provisions of New Jersey Statutes 18A:27-10 and the applicable agreement between the Englewood Aides Association and the Board.

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> "This letter is being sent pursuant to a resolution passed by the Board of Education at its meeting on Monday, April 18, 1977." (P-1)

Subsequent to receipt of such notice, petitioners requested reasons for the Board's action to non-renew their contracts and received the following response from the Board under date of May 3, 1977:

> "This is in response to your letter requesting a reason for termination. Please be advised that because of budget considerations, and/or efficiency of our operations and the high standards required of our personnel, we are terminating you." (P-2)

Petitioners aver that such reasons for non-reemployment are inadequate in the context of the statutory prescription *(N.J.S.A.* 18A:27-3.3) and prior decisions of the Commissioner and the courts. They aver that the Commissioner has reviewed the sufficiency of such reasons on many occasions and has jurisdiction herein. They cite a number of decisions in support of such avowals: *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974); *Margaret Pelose v. Board of Education of the Township of South Brunswick, Middlesex County,* 1977 *S.L.D.* 232, aff'd in part/rev'd in part State Board of Education 240; *Donald Banchik v. Board of Education of the City of New Brunswick,* 1976 *S.L.D.*78; *Barbara Hicks v. Board of Education of the Township of Pemberton,* 1975 *S.L.D.* 332 Petitioners further aver that such decisions set forth the principle that a statement of reasons for non-reemployment must be individualized for the personal benefit of the teaching staff member and that the letter sent to petitioners (P-2) does not suffice in this regard. Petitioners also maintain that such individualized statements are a necessary prerequisite to the preparation for "appearances" before the Board and without the statements the appearances would be a futile and useless exercise. They categorize the reasons afforded them for their non-reemployment as vague and conclusionary and without an underlying basis in fact.

The Board maintains that it has not violated the statutory requirements herein, that it has properly afforded a statement of reasons to petitioners and that its right not to reemploy nontenured teachers has recently been reaffirmed by the courts. It cites *Union County Regional High School Board of Education v. Union County Regional High School Teachers Association: Cranford Board of Education v. Cranford Education Association,* 145 *N.J. Super.* 435 (*App. Div.* 1976), *cert.* denied 74 *N.J.* 248 (1977) and *In re the Board of Education of the City of Englewood,* 150 *N.J. Super.* 265 (*App. Div.* 1977). The Board avers that *Donaldson, supra,* clearly stated that a reason for non-reemployment could be subjective and that such a decision is proper, provided it is communicated to the teacher. (Board's Brief, at p. 3) It maintains that, at the time the notice was given the petitioners, the Board was uncertain of its budgetary situation, was in the process of reorganizing its schools and "***desired to see if it was possible to find better teachers than the ones presently employed.***" (Board's Brief, at p. 4) It avers this latter reason was one the Commissioner had upheld in *Mary Ann McCormack, Robert R. Yundzel and Elwyn F. Spangler v. Boards of Education of Northern Highlands Regional High School District*

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or the Borough of Fair Lawn, Bergen County, 1976 *S.L.D.* 754, aff'd State Board of Education January 5, 1977. The Board now maintains that "***the budget problem has been alleviated and to date some 68 of the 92 nontenured teaching staff members have been reemployed.***" (Board's Brief, at p. 3) The Board also avers, *arguendo,* that if its statement of reasons controverted herein is found to be confusing, the appropriate remedy is an order to provide more specific reasons and not an order to reemploy petitioners.

The Commissioner has reviewed all such arguments in the context of the identical notices of non-reemployment which were given to petitioners. It is observed that such notices were forwarded to petitioners pursuant to law prior to April 30, 1977 *(N.J.S.A.* 18A:27-10) and that thereafter the Board did furnish petitioners three reasons for its action. These reasons were "***budget considerations, and/or efficiency of our operations and the high standards required of our personnel***." (P-2) Such reasons, it is clear, were imprecise with respect to individual teachers and, at the time, were speculative at least in part. The Board was uncertain of budget allocations. A reorganization of its schools was contemplated. The reasons afforded petitioners were intended to be, and were, general in nature. (Tr. 18 *et seq.*) There is no contention herein that the Board's quandary was other than a real one. (See Tr. 21.) It is contended that budget or planning considerations may not impede the statutory mandate that nontenured teachers shall be given notice of their employment status for an ensuing year on or before April 30 (*N.J.S.A.* 18A:27-10) and a statement of valid reasons pertinent thereto designed to be of assistance to the employee if employment is not offered. *N.J.S.A.* 18A:27-3.2

The Commissioner determines that this latter argument has merit in the context of the clear statutory plan with respect to the employment of nontenure teachers but he finds no basis to hold that reasons for non-reemployment may not be revised to conform to changing circumstance. Thus, in the instant matter the Board was free to act in April in good faith because of budgeting or planning considerations to notify nontenured teaching staff members that such reasons required notice of non-reemployment. When the specific considerations were removed, however, and many teachers were reemployed, those who were not reemployed were and are entitled to a final statement which more clearly defines the reasons for the Board's action. A vague reference to "high standards" may not suffice as a substitute. The Commissioner so holds.

There remains the matter of an appropriate remedy at this juncture. The Commissioner finds no reason in this regard, absent a finding that the Board acted deliberately in bad faith, to direct reinstatement of petitioners or to order monetary restitution. He directs instead that the Board now delineate the reasons for the actions it took with respect to each of the individual petitioners and to set forth such reasons more precisely if the reasons are concerned with teacher effectiveness or competency.

This concludes the report of the hearing examiner.

* * * *

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The Commissioner has read the report of the hearing examiner and the exceptions filed thereto by petitioners pursuant to *N.J.A.C.* 6:24-1.17(b).

Petitioners state that the relief suggested in the report is entirely inappropriate because of undue delay in this matter caused by the Commissioner's office. Petitioners argue that the relief might have accomplished something if offered in August 1977 rather than February 1978, reasoning that the earlier date would have provided them an opportunity to seek alternate employment or to persuade the Board that its reasons were without merit. Petitioners contend also that they are entitled to compensatory damages even absent a showing of bad faith, since the hearing examiner determined that the Board's reasons were imprecise and, at the time, speculative because of budget considerations; therefore, they argue, the *reasons* do not comply with statutory directives. The Commissioner does not agree.

The Commissioner has previously held that:

> "***The enactment of *N.J.S.A.* 18A:27-10 *et seq.*, *** now provide for automatic renewal of nontenured teacher contracts where notice in writing is not given on or before April 30.
>
> "The primary purpose of these statutes is to provide teachers with timely notice when they are not going to be reemployed so that they may seek employment elsewhere. When local boards of education waited until the months of May or June, or later, to notify teaching staff members that they would not be reemployed, this late action created a hardship for those employees. The new statutes remedied that situation by providing for notice by April 30 of each academic year, sixty days prior to the expiration of standard teacher contracts on June 30.***" *Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park,* 1975 *S.L.D.* 93, 95, aff'd State Board of Education 98, aff'd Docket No. A-3214-74 New Jersey Superior Court, Appellate Division, April 21, 1976 (1976 *S.L.D.* 1122)

There is no question that the Board met the statutory requirements for notice since the record shows that petitioners were notified prior to April 30 that they would not be reemployed. *N.J.S.A.* 18A:27-10 Petitioners were not lulled into believing they would be granted employment. Quite the contrary; they were told they would not be reemployed and the record shows that when budgetary constraints were modified, 68 of the 92 teachers given non-reemployment notices were reemployed.

The Board also included in its reasons for non-reemployment "efficiency of our operations and the high standards required of our personnel." The Board argued in its Brief that at the time notice was given to its teachers, in addition to budgetary considerations, it was reorganizing its schools and "***desired to see if it was possible to find better teachers than the ones presently employed.***" (Board's Brief, at p. 4)

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The hearing examiner correctly determined that these latter reasons lacked the specificity required to enable the teachers to appear before the Board in an attempt to advance their chances of reemployment. There was no finding of bad faith; therefore, when the budgetary constraints were modified the teachers were entitled to more specific reasons. The Commissioner so holds. Although the specific reasons, to which the teachers may react at a subsequent appearance before the Board, may have no bearing on their employment in Englewood in 1977-78 or 1978-79, they may be of prospective value to the teacher. In *Donaldson, supra,* the Court held that:

> "***Perhaps the statement of reasons will disclose correctible deficiencies and be of service in guiding his future conduct; perhaps it will disclose that the nonretention was due to factors unrelated to his professional or classroom performance and its availability may aid him in obtaining future teaching employment; perhaps it will serve other purposes fairly helpful to him as suggested in *Drown* (435 *F.2d* at 1184-1185); and perhaps the very requirement that reasons be stated would, as suggested in *Monks* (58 *N.J.* at 249), serve as a significant discipline on the board itself against arbitrary or abusive exercise of its broad discretionary powers.***"
>
> (65 *N.J.* at 245)

The Commissioner determines, therefore, that the Board has met its statutory obligation to petitioners by giving the specific reasons of budget considerations. Nevertheless, when its budget permitted the reemployment of nearly three fourths of the teachers previously notified, those not reemployed were and are entitled to a more specific statement of reasons than the statement given by the Board setting forth "***efficiency of our operations and the high standards required of our personnel***."

The Commissioner directs that the Board now delineate the reasons for the actions it took with respect to each of the individual petitioners not reemployed. *Hazlet Township Teachers Association et al. v. Board of Education of the Township of Hazlet,* decision on Motion June 29, 1976, aff'd State Board December 1, 1976, rev'd Docket No. A-1583-76, New Jersey Superior Court, Appellate Division February 6, 1978. Except for this directive, there is no further relief to which petitioners are entitled. Therefore, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

November 28, 1978

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Newark Teachers Union, Local 481, on Behalf of Mary Archibald and others Similarly Situated,

Petitioners,

v.

Board of Education of the City of Newark, Essex County,

Respondent,

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Liss & Meisenbacher (Raymond Meisenbacher, Esq., of Counsel)

For the Respondent, Marvin W. Wyche, Jr., Esq.

Petitioner Mary Archibald seeks back salary for a period of approximately two months' duration when her employment terminated because of a reduction in force. She was later reinstated by the Board of Education of the City of Newark, hereinafter "Board." Responsent filed a notice of motion to dismiss the Petition of Appeal relying on a letter memorandum attached thereto. A conference between the litigants and a representative of the Commissioner of Education was subsequently held to determine procedural steps necessary to resolve this dispute. Briefs were filed thereafter.

The salient facts in this matter are not in dispute. Petitioner was employed beginning September 19, 1972 to teach speech. (Exhibit A) At the time of her employment she held or was eligible to hold two certificates, "Classroom Teacher of the Handicapped" and "Speech Correctionist," actually issued by the State Board of Examiners in May and November 1972, respectively. (Board's Brief, at p. 2) For economic reasons, petitioner was notified on or about April 26, 1976 that her employment would terminate on June 24, 1976. (Exhibit B) She was thereafter notified by letter dated October 29, 1976 that she would be reinstated. (Exhibit C) It is conceded that she held a tenure status at the time she was terminated.

Although she alleged in the Petition of Appeal that there were no economic reasons for her termination, petitioner proffered no proofs in that regard; neither did she pursue the subject in her Brief. Petitioner's bare allegation of bad faith in this regard must be rejected and the Commissioner accepts as fact the Board's contention that it faced an economic situation which forced petitioner's termination pursuant to *N.J.S.A.* 18A:28-9 which reads as follows:

"Nothing in this title or any other law relating to tenure of service shall

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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."

Petitioner's demand for back salary is grounded in her contention that she enjoys seniority in both areas covered by her certificates and that the Board considered her seniority in the area of speech alone when it retained other teachers of the handicapped who were not tenure teachers. She concludes that her termination was illegal.

The Board asserts that petitioner was awarded a contract initially as a teacher of speech and that all of her experience as such and her seniority may be properly applied to that area alone.

In support of her argument, petitioner cites *Seidel v. Board of Education of Ventnor City*, 110 *N.J.L.* 31 (*Sup. Ct.* 1933); *Vincent P. Horan et al. v. Board of Education of the Town of Kearny*, 1938 *S.L.D.* 532 (1933), aff'd State Board of Education 535, aff'd New Jersey Supreme Court 537. (Petitioner's Memorandum, at pp. 1-2)

The pertinent statutes and rules of the State Board of Education applicable to a reduction in force are set forth as follows:

N.J.S.A. 18A:28-10 provides that:

"***[S]uch reduction shall *** be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board."

N.J.S.A. 18A:28-13 provides that:

"The commissioner in establishing such standards shall classify insofar as practical the fields or categories of administrative, supervisory, teaching or other educational services *** and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both."

N.J.A.C. 6:3-1.10, in pertinent part provides:

***

"(b) Seniority, pursuant to N.J.S.A. 18A:28-9 *et seq.*, shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific

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categories as hereinafter provided. Seniority status shall not be affected by occasional absences and leaves of absences.

"(c) Employment in the district prior to the adoption of these standards shall be counted in determining seniority.

***

"(h) Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him.

***

"(k) The following shall be deemed to be specific categories but not necessarily numbered in order of precedence:

***

"27. Secondary. The word 'secondary' shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction. *Any person holding a secondary certificate shall have seniority in all subjects or fields covered by this certificate, except those subjects or fields for which a special certificate has been or shall be required by the State Board of Education*. However, if a person has held employment in the school district in any special subject or field endorsed on his secondary certificate, such special subject or field shall, for the purposes of these regulations, be regarded as any other subject or field endorsed upon his certificate;

"28. Elementary. The word 'elementary' shall include Kindergarten, grades 1-6 and grades 7-8 with or without departmental instruction, including grades 7-8 in junior high schools;

***

"30. *Additional categories of specific certificates issued by the State Board of Examiners and listed in the State Board rules dealing with Teacher Certification.*" *(Emphasis supplied.)*

The Commissioner reiterates portions of his decision in *Frances Dullea v. Board of Education of the Borough of Northvale, Bergen County*, 1978 *S.L.D.* (decided July 19, 1978) wherein he states that it is observed that the Legislature, pursuant to *N.J.S.A.* 18A:28-10, first directed the Commissioner

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with approval of the State Board of Education to promulgate categories of teaching staff members in 1942. Thus it is clear that no such categories existed when the Supreme Court and the Commissioner issued opinions in *Seidel, supra,* and *Horan, supra.* See *Maurice J. O'Sullivan v. Board of Education of Jersey City,* 1961-62 *S.L.D.* 118. The Legislature, recognizing in 1942 the growing complexities of school systems in the State, directed the establishment of seniority standards for administrative, supervisory, teaching and other educational services. When promulgated, they stated that teaching staff members should attain seniority only in those categories of their employment with boards of education, regardless of the number of certificates held. *N.J.A.C.* 6:3-1.10(b) and (h) Thus, a certified teacher of secondary mathematics who also holds an elementary teacher's certificate but who never served in the category of elementary teacher may not, by seniority, claim the right to replace an experienced teacher of elementary subjects. Nor may an elementary school teacher who also holds a secondary science certificate, but who has never served in the category of secondary school teacher, replace an experienced chemistry teacher. The wisdom of establishment of seniority categories is self evident in the interests of a thorough and efficient system of education.

The record does not disclose whether petitioner taught secondary or elementary pupils; nevertheless, at all times during petitioner's employment a specific certificate issued by the State Board of Examiners was required for her to teach speech to which discipline she was assigned. Accordingly, it must be concluded that petitioner's employment was in the category of a teacher of speech and not a teacher of the handicapped.

Horan, supra, and *Seidel, supra,* are neither controlling nor applicable to the instant matter for the reason that statutory regulations for tenure and the State Board of Education rules authorized under their authority superseded and now control the factual context as herein controverted. The Commissioner so holds. See *Doris Berkhout v. Board of Education of the Borough of Roseland, Essex County,* 1978 *S.L.D.* (decided June 6, 1978).

Petitioner's assertion of entitlement to displace a teacher of the handicapped with fewer years of service in the Board's employ is without sound legal basis. Petitioner has failed to show that, aside from her seniority entitlement as a teacher of speech, she has earned seniority entitlement in any other category. Accordingly, her prayer for back salary may not be granted and the Petition of Appeal is dismissed.

The title of this matter refers to petitioner and "others similarly situated." Obviously no determination is possible on a group basis where each individual's certification and experience must be examined in order to determine seniority. Accordingly, the entire Petition of Appeal is dismissed without prejudice to the other teachers to file individual petitions of appeal if they believe they have been improperly denied seniority rights and salary.

COMMISSIONER OF EDUCATION

November 28, 1978

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In the Matter of the Tenure Hearing of

Stanley Greenberg,

School District of the City of Englewood, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Gutfleish and Poller (Kenneth G. Poller, Esq., of Counsel)

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

On April 15, 1975, the Board of Education of the City of Englewood, hereinafter "Board," certified to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, a single charge against respondent, a tenured teacher in its employ. The charge may be categorized as conduct unbecoming a teaching staff member which the Board avers, if proven true, would warrant respondent's dismissal. Respondent denies the charge and asserts that the instant matter was resolved with prejudice between counsel for respondent and counsel for the Board.

A hearing was conducted in this matter on November 23 and December 14, 1977 at the offices of the Bergen County Superintendent of Schools, Wood-Ridge, by a hearing examiner appointed by the Commissioner. Thereafter, the parties filed written summarizations and Briefs. The report of the hearing examiner is as follows:

The time lapse between the certification of the charges by the Board, April 15, 1975, and the dates of hearing, November 23 and December 14, 1977, is attributable to the following:

1. The conference of counsel originally scheduled for July 16, 1975 was adjourned until October 6, 1975 due to a medical emergency of a family member of respondent's counsel.

2. The hearing date scheduled for June 8, 1976 was adjourned until June 30, 1976 due to a substitution of attorney for the Board.

3. On June 30, 1976, by order of the New Jersey Supreme Court, the public schools in the State were declared closed and in operation only for emergency purposes.

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4. Respondent requested and was granted permission to take the deposition of two witnesses who had moved from the state. The deposition of Charles Levine was taken at his home in Seville, Florida, on July 18, 1977 and the deposition of James F. Handel was taken at the White Law Offices, Iowa City, Iowa, on July 20, 1977.

The uncontroverted facts in the instant matter are these:

1. On or before September 1974 respondent, without proper authorization, removed from a schoolhouse a baby grand piano which was the Board's property.

2. On or about October 18, 1974, respondent voluntarily informed his immediate supervisor and the principal of the school that he had removed the piano. (P-1)

3. Respondent offered to return the piano or, in the alternative, compensate the Board for its value. (P-1; R-1)

4. The Superintendent of Schools authorized the withholding of respondent's semimonthly salary check immediately preceding the annual convention of the New Jersey Education Association in November 1974, unless and/or until respondent returned the Board's piano.

5. On or before December 2, 1974, respondent returned the piano to the school premises. (R-2)

6. Subsequently, on April 15, 1975, the Superintendent recommended, and the Board adopted, a resolution to certify charges against respondent to the Commissioner.

Respondent admits that he removed a baby grand piano from the Board's premises between June and September 1974. He further admits that he removed the piano without authorization from the Board. He testified that the piano had been vandalized by the pupils of the school and was not operative as a musical instrument. He testified that when he removed it from the school it had been placed in a storage room used by the Board for discarded objects. He stated that he believed that the Board had discarded the piano because it was a piece of junk and that it was not going to be used by the school in the future. (Tr. I-67-69, 75-77, 89)

Respondent testified that when he removed the piano from the storage room it was lying on its side with the legs removed, the harp was off, different parts of the pedals were near the piano, some strings were broken, there was a crack in the sounding board and the top was removed. (Tr. I-68-71) He testified that he had the piano in his possession for several months during which time he had made some repairs and that it was in a limited operating condition. He testified that when he informed his immediate supervisor that he had taken the piano the supervisor instructed respondent to inform the Board's music coordinator, who

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instructed respondent to inform the principal. Respondent testified that on October 18, 1974 he informed the principal that he had taken the piano and that the principal told him to write a memorandum explaining the facts of the matter. (Tr. I-77-80)) Subsequently, on the same date, respondent wrote the following:

> ''This letter is to acquaint you with the facts concerning a school piano, discarded, which I am using for my own purposes. Last year, one of the pianos in the downstairs music suite, was completely broken, taken apart and put into the storage area, apparently discarded. After asking a number of people as to what was going to be done to the piano and feeling reasonably certain that it had been discarded, I took it upon myself to restore the piano to some workable order (at my own expense and labor), and move it out to use for myself. (Also at my own efforts and expense). The piano has a cracked soundboard, an extremely difficult action and numerous problems, some of which I have partially restored. At present, the piano is at a friend's house, whose ex-husband has threatened to blackmail me, through his former wife, by revealing that the instrument is no longer at the school. I feel compelled to tell the entire story because I want to inform you of all the facts as well as preventing this certain party from intimidation and extortion. I will be glad to return the instrument or hopefully, you will allow me to compensate the school district for the instrument and put an end to this matter.'' (P-1)

Respondent testified that he did not receive any instructions from the principal with regard to his memorandum of October 18, 1974. (Tr. I-81) Subsequently, on November 20, 1974, respondent sent a second memorandum to the principal as follows:

> ''I have been in constant contact with your office in the hope that the matter of the piano can be resolved without further delay. I am writing this memo because I have been unable to secure an answer from you as [to] how to proceed. As I have stated on numerous occasions, including the original letter I wrote to you some weeks ago, I am ready to return the piano or reimburse the school district a reasonable fee for the instrument. I will await your answer on how to finally close this matter.***'' (R-1)

Subsequent to the second memorandum (R-1), respondent testified that he then received instructions from the principal to return the piano and that late in November 1974 the Superintendent authorized the withholding of his salary payment pending its return. He testified that he informed the president of the Englewood Teachers' Association of the Superintendent's action and a subsequent meeting was held with respondent, the president of the Association, the Association's chief negotiator and the Superintendent. Respondent stated that the president informed the Superintendent that his action to withhold respondent's salary payment was illegal. (Tr. I-82, 84-88) Respondent testified that the Superintendent stated, *inter alia,* ''***return the piano, we'll give you the check and let's forget the incident.***'' (Tr. I-88) He testified that the parties agreed, the Superintendent and respondent shook hands, and the meeting concluded.

Respondent testified that he received his salary payment on the following

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Monday. On December 2, 1974 he addressed a third memorandum to the principal to inform him that the piano had been returned to the storage room at the rear of the music suite and that he hoped that this action would close the matter. (Tr. I-88-89; R-2)

The president and the chief negotiator of the Association both testified that they attended the meeting with respondent and the Superintendent. They also testified that it was their understanding that when respondent returned the piano to the school the matter would be closed and not pursued further. (Tr. II-10-18, 23-27)

The principal and respondent's immediate supervisor testified that they had no knowledge that the piano was missing from the school until respondent informed them of the fact in October 1974. (Tr. I-11-13, 33, 49-50, 60) The principal testified that he could not recall where the piano was located prior to its removal nor did he know whether or not it was in a condition to be used. (Tr. I-16-19) The principal testified that respondent volunteered to return the piano and that he did not personally inspect the piano when it had been returned to the school. He testified that he relied upon the inspection of the supervisor who reported that it had indeed been returned and, further, that respondent had made some repairs to the instrument. He testified that he informed the Superintendent by telephone subsequent to its return. (Tr. I-37-39, 42-45)

The principal and supervisor both testified that they did not know whether the controverted piano was still in existence at the date of the hearing. (Tr. I-20, 61) The supervisor testified that the instrument was not in working condition when respondent removed it from the school. He testified that the piano was last used in 1972 but had subsequently been vandalized to the extent that the keys, hammers and left pedal would not function. He testified that to his knowledge the piano was not in a working condition when respondent returned it to the school. He stated that he observed that some repairs had been made; however, he did not confirm his observation but rather just looked at the instrument in the storage room subsequent to its return. He further testified that the piano had not been repaired by the Board. (Tr. I-51)

The former Superintendent testified that he authorized the withholding of respondent's semimonthly salary payment in November 1974. He acknowledged the meeting with respondent and the president of the Association and the subsequent release of respondent's salary payment. He testified that he had learned from his subordinates that the piano was returned to the school but did not personally inspect the instrument. He testified that he could not recall that he had filed tenure charges of conduct unbecoming a teacher against respondent with the Board on April 14, 1975. (Tr. II-29-30, 35-37) Nor could he recall why he filed the tenure charges with the Board in April 1975 with regard to an incident that occurred during the months of October through December 1974. (Tr. II-37-38)

Counsel for respondent requested leave to testify in regard to the First Affirmative Defense that the instant matter was resolved with prejudice. (Tr. I-4-6; Respondent's Verified Answer) Respondent's attorney was duly sworn

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and was examined by the hearing examiner. (Tr. II-2-10) He testified that on the Wednesday before the 1974 NJEA convention he received a telephone call from the president of the Association with regard to the withholding of respondent's salary payment. He testified that he advised the president that while the Board might be able to sue respondent for the return of the piano, it would not withhold his money as *quid pro quo* for the piano. He testified that he subsequently telephoned the then attorney for the Board and represented that the Board was interested in the return of the piano and upon its return "***the whole matter will be forgotten.***" (Tr. II-6)

The former attorney for the Board testified that at the time respondent's attorney telephoned him with regard to the withholding of respondent's salary payment, there were no criminal or tenure charges pending against respondent. He testified that there was no settlement or agreement to settlement with regard to charges against respondent. (Tr. II-53-54)

It is obvious by the record that the instant matter was brought to the attention and considered by the Board. There is no evidence in the record that the Board considered the matter was settled with prejudice.

The hearing examiner, upon a complete review of the record, makes the following findings of fact:

1. Respondent did in fact remove a baby grand piano from the Board's premises without proper or legal authorization with the intent to convert it to his own use.

2. The piano had been vandalized and was in such a condition of disrepair that it could not be used as a musical instrument at the time respondent appropriated it, nor had it been in use for at least two years.

3. Members of the school's supervisory and administrative staff had no knowledge that the piano was missing from the school building until respondent voluntarily revealed that he had removed it.

4. Respondent offered to return the instrument or, in the alternative, reimburse the Board an appropriate sum of money for a discarded piano.

5. Respondent subsequently returned the piano and as of the date of the hearing, it has not been put to use as a musical instrument in the school.

6. The Board considered the allegations against respondent and subsequently certified tenure charges against him based upon those allegations.

7. There was no evidence whatsoever that the instant matter was settled between the parties with or without prejudice.

The hearing examiner finds that the charge is true in fact. It is his considered judgment, however, that the circumstances in the instant matter are mitigated

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by respondent's voluntary admission to the removal and his subsequent return of the Board's property. He recommends, therefore, that a lesser penalty than that of dismissal of respondent be considered by the Commissioner.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter, including the report of the hearing examiner and considered the findings contained therein. It is noted that no exceptions to the report have been filed.

The Commissioner accepts and holds for his own the findings of fact of the hearing examiner and determines that the Board's charge that respondent without permission or authority removed a piano from the Board's premises for the purpose of converting it to his own use is true in fact. He further determines that such conversion of Board owned property was an improper act and conduct unbecoming a teaching staff member. Moreover, ''conversion'' as defined in *Black's Law Dictionary* 402 (rev. 4th ed. 1968) is a criminal matter; however, the Commissioner observes that the Board filed no such criminal charges against respondent in the instant matter.

Notwithstanding the absence of the criminal complaint against respondent, the Commissioner has consistently held that teachers are public employees who hold positions demanding public trust and when a teacher deliberately or willfully violates that public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner. *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson,* 1974 *S.L.D.* 97, 98-99 The import of personal example incumbent upon public school teachers was stated succinctly by the Commissioner *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional,* 1972 *S.L.D.* 302 wherein he said:

> ''***[Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attemd the public schools, the teacher is an enormous force for improving the public weal.***''
>
> (at 321)

The Commissioner finds that respondent failed to exercise ''self-restraint and controlled behavior'' when he removed Board owned property from its premises, without authority, for his own use and, thus, is guilty of conduct unbecoming a teacher.

The admission of the principal that he had no knowledge that a grand piano

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was missing from the school until such time that respondent reported he had removed it from the Board's premises is, under the circumstances in the instant matter, understandable. The testimony of respondent and his immediate supervisor showed that the controverted piano had been vandalized to such an extent that it was not operative as a musical instrument and that it had been placed in a storage area used for discarded objects owned by the Board. The further admission by the principal that he failed to personally inspect and verify the return of the piano to the school and that he had no knowledge of its present existence demonstrated, in the Commissioner's considered judgment, an attitude not to be condoned. This is particularly so inasmuch as the evidence clearly shows that respondent returned the piano on December 2, 1974 and that it was fully four and one-half months later, on April 15, 1975, that the Board certified its charge against respondent. The Commissioner is constrained to observe that a school principal is responsible not only for the conduct of the instructional program in his school but also for the contents assigned thereto by the board of education. He may delegate or assign the allocation and use of instructional equipment to subordinates. He may not, however, abrogate the ultimate responsiblity to account to the Board for the existence, use, or subsequent discard of no longer useful equipment.

The Commissioner views respondent's unbecoming conduct in the instant matter within the context of the uncontroverted facts and an otherwise unblemished record of exemplary service to the Board. The Commissioner concludes after a careful study of this matter that respondent's action, although regrettable, does not rise to the level to warrant dismissal. As the Commissioner stated in an order on remand from the Superior Court *In the Matter of the Tenure Hearing of David Fulcomer,* 1967 *S.L.D.* 215:

> "***Although unfitness may be demonstrated by a single incident (see *Redcay v. State Board of Education,* 130 *N.J.L.* 369 (*Sup. Ct.* 1943), affirmed *o.b.,* 131 *N.J.L.* 326 (*E.&A.* 1944)), the Commissioner does not consider the single episode herein sufficiently flagrant to warrant such a finding. In the Commissioner's judgment, a less severe punishment will serve the necesary purposes of correction and deterrent.***" (at 219)

It is the Commissioner's judgment, moreover, that respondent has suffered mental anguish, a hearing which could have resulted in the loss of his tenured teaching position, damage to his professional reputation, and he will be required to exert himself to reestablish his reputation and standing because of his error. *In the Matter of the Tenure Hearing of William H. Kittell, School District of the Borough of Little Silver,* 1972 *S.L.D.* 535, 542

Accordingly, the Commissioner orders that the Board's charge of conduct unbecoming a teaching staff member be entered upon respondent's employment record, together with this decision. In addition, respondent shall forfeit the sum equal to two months' salary at his current rate of pay.

COMMISSIONER OF EDUCATION

November 29, 1978

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Delores Shokey,

Petitioner,

v.

Board of Education of the Township of Cinnaminson, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Joel S. Selikoff, Esq. (Steven R. Cohen, Esq., on the Brief)

For the Respondent, Brown, Connery, Kulp, Wille, Purnell & Greene (George Purnell, Esq., of Counsel)

Petitioner, a teaching staff member with a tenure status in the employ of the Board of Education of the Township of Cinnaminson, hereinafter "Board," alleges that the Board denied her the use of her annual and accumulated sick leave days during the period she was disabled due to pregnancy and that such action was violative of *N.J.S.A.* 18A:6-6; *N.J.S.A.* 18A:29-2; *N.J.S.A.* 18A:30-1; *N.J.S.A.* 18A:30-2; *N.J.S.A.* 10:5-12(a) and seeks an order from the Commissioner of Education granting her use of her annual and accumulated sick leave days for the period she was disabled due to pregnancy. The Board avers that petitioner was not entitled to sick leave under *N.J.S.A.* 18A:30-1 for the period in which she was absent because of disability due to maternity and that its action to deny such leave was not violative of *N.J.S.A.* 10:5-12(a) or sections of Title 18A. The Board asserts further that the Petition of Appeal should be dismissed grounded upon petitioner's failure to file her Petition before the Commissioner within ninety days subsequent to the Board's action to deny her the use of her sick leave days for maternity and as provided by *N.J.A.C.* 6:24-1.2. In the alternative, the Board requests that the Commissioner hold the instant proceeding in abeyance pending the resolution by the State Board of Education of a matter identical in all respects, *Board of Education of Cinnaminson v Laurie Silver,* 1976 *S.L.D.* 738.

The chronology of relevant events is recited in summary form as follows:

On October 20, 1977, the Commissioner was in receipt of the Petition of Appeal and the Board's Answer was filed on November 7, 1977. Subsequently, on November 23, 1977 petitioner filed an Amended Petition of Appeal and a Reply to the Board's Answer. On December 28, 1977, a conference of counsel

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was conducted by a representative of the Commissioner. The issues having been set forth, the Board was granted leave to propound and file a Motion to Dismiss the instant matter and for submission for Summary Judgment. The Board filed its Memorandum of Law thereto on January 26, 1978. On February 28, 1978, petitioner filed a Brief in Opposition on the Board's Motion to Dismiss and on April 12, 1978, the Board filed a Reply Brief. Oral argument was heard on the Motion to Dismiss on April 27, 1978 by a hearing examiner appointed by the Commissioner.

The uncontested facts are set forth as follows in summary form as recited by petitioner and the Board.

Petitioner has been employed since September 1973 as a teaching staff member by the Board and has acquired a tenure status. *N.J.S.A.* 18A:28-5 On June 15, 1977, petitioner forwarded a letter to the Board's Assistant Superintendent of Schools to inform him that she intended to use her accrued sick days for a disablity due to maternity effective September 6, 1977. On June 27, 1977 the Assistant Superintendent replied by letter that the Board's maternity policy did not permit the use of accumulated sick leave due to pregnancy or maternity and, therefore, it would not allow her to use such a reason for absence at the beginning of the 1977-78 school year. On June 30, 1977, petitioner again informed the Assistant Superintendent by letter of her intention to use her accrued sick days and further stated that her absence would be effective from September 6 until September 16 and that she intended to return to her duties on September 19, 1977. On July 11, 1977 the Assistant Superintendent informed petitioner by letter that the Board's legal counsel had informed him that the present state of law did not authorize the Board to allow accumulated sick leave for disability due to maternity and, as a consequence, the Board would not allow petitioner to use such sick leave days for the period of September 6 until September 16, 1977. Subsequently, on September 9 and October 1, 1977, petitioner forwarded letters to the Assistant Superintendent reporting her request and he responded on October 6, 1977, repeating the Board's denial of her use of sick leave for maternity purposes. (Petitioner's Exhibit A, C-1, 2, 3, 4)

The Board contends that petitioner was out of time when she filed her Petition of Appeal before the Commissioner on October 20, 1977 and relies upon *N.J.A.C.* 6:24-1.2 which reads in pertinent part as follows:

> "To initiate a proceeding before the Commissioner to determine a controversy or dispute arising under the school laws, a petitioner shall file with the Commissioner the original copy of the petition, together with proof of service of a copy thereof on the respondent or respondents. Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested.***"

The Board argues that the tolling of time with regard to the instant matter commenced upon petitioner's receipt of the June 27, 1977 letter addressed to her from the Assistant Superintendent. Although the record is silent with respect

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to the date petitioner received the June 27, 1977 letter, the Board fixed the date of June 30, 1977 as the date of receipt. The Board asserts that pursuant to *N.J.A.C.* 6:24-1.2, petitioner was permitted until September 28, 1977 in which to file her Petition to remain within the ninety day time constraint.

The Board contends that petitioner acknowledged that she did not file in a timely fashion wherein she admitted that "***the petition of appeal was filed more than 90 days after respondent's initial refusal to grant petitioner the requested leave***." (Reply of Petitioner, at pp. 1-2) The Board argues that petitioner may not cure such a default by merely restating her claim in her letters of September 9 and October 1, 1977 and thus, create a new beginning date for computing the ninety day limitation. It asserts that it would be novel indeed if a limitation rule of this sort could be tolled by the defaulting party repeating her request for that which had already been denied. The Board argues that by such means a party could keep alive forever a right to proceed, simply by watching the calendar and submit another request before the time ran out. The Board, therefore, seeks to have the matter dismissed grounded on petitioner's failure to file her Petition in a timely fashion. *De Bow v. Lakewood Hotel & Land Association,* 52 *N.J. Super.* 288, 291 (*App. Div.* 1958); *Ash v. Cohn,* 121 *N.J.L.* 412, 413 (*Sup. Ct.* 1938); *Carolyn Schnurer, Inc. v. Stein,* 29 *N.J.* 498, 503 (1959); 5 *Moore, Federal Practice,* 718, 719 (1951); *Lutz v. Township of Gloucester,* 153 *N.J. Super.* 461, 466, 468-469 (*App. Div.*1977) (Board's Memorandum of Law, at pp. 1-7)

Petitioner argues that the instant Petition of Appeal does not address itself to a single incident or action, but rather, is grounded upon violations of several provisions of the school laws and *N.J.S.A.* 10:5-12(a) due to a continuous refusal by the Board to accord petitioner the use of her annual and accumulated sick leave days during the period she was disabled due to pregnancy. She admits that her original Petition of Appeal was filed more than ninety days subsequent to the Board's initial refusal to grant her such a leave. She argues, however, that in the context of the Board's continous refusal to grant her sick leave as requested, that her Petition was filed well within the time constraint with the submission of her letters of September 9 and October 1, 1977.

Petitioner asserts that the Board's letter of July 11, 1977, wherein it stated that it relied upon "***the present state of the law***" as the basis for its refusal to allow her the use of her accumulated sick leave, was, in fact, contrary to the Commissioner's decision in *Cinnaminson, supra.* She argues that the concept of a "continuing violation" is one well founded in law and when such violation is found to exist, the applicable statute of limitations will not bar her from bringing a cause of action during the existence of such violations. Petitioner asserts that she has complied with the provisions of *N.J.A.C.* 6:24-1.2 and requests that the Commissioner dismiss the Board's Motion to Dismiss. (Petitioner's Brief, at pp. 1-4)

Petitioner argues further that the Board has refused to comply with the Commissioner's decision in *Cinnaminson, supra,* and as the party petitioner in that matter, the Board has failed to make an application for a stay during the

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pendency of its appeal before the State Board of Education pursuant to *N.J.A.C.* 6:2-1.6. Petitioner argues that it is not within the Board's discretion to pick and choose those provisions of the New Jersey Administrative Code with which it will comply. *In re Hoboken Teachers' Association,* 147 *N.J. Super.* 240 (*App. Div.* 1977)

The Commissioner rejects the Board's argument that the instant Petition of Appeal should be dismissed on a procedural technicality. *N.J.A.C.* 6:24-1.2 He observes, moreover, that he has the discretionary authority to relax such rules as provided by *N.J.A.C.* 6:24-1.19 which states, *inter alia,* as follows:

> "***[*The rules*] *may be relaxed or dispensed with by the Commissioner,* in his discretion, in any case *where a strict adherence* thereto may be deemed inappropriate or unnecessary or *may result in injustice.*"
> *(Emphasis supplied.)*

The Commissioner finds that while petitioner should have filed her Petition of Appeal within ninety days subsequent to her receipt of the Board's letter of June 27, 1977, such a failure in the instant matter would place form over substance. He, therefore, accepts her Petition of Appeal for a final determination herein.

The Commissioner similarly rejects the Board's request to hold the instant matter in abeyance until such time as the State Board of Education renders its determination of the Board's appeal in the matter of *Cinnaminson, supra.* The Commissioner has not arrived at this determination lightly. Quite the contraty, he has thoroughly researched the controverted matter and observes that the courts of this State have determined that the use of sick leave benefits for pregnancy related disability is *stare decisis.* Indeed, in the matter of *Castellano v. Linden Board of Education,* 158 *N.J. Super.* 350 (*App. Div.* 1978), the Court said:

> "***We are convinced that to deprive a pregnant employee of sick leave benefits for an absence occasioned by childbirth does indeed constitute discrimination on account of sex. We must 'be mindful of the clear and positive policy of our State against discrimination as embodied in *N.J. Const., Art.* I, *par.* 5.' *Levitt & Sons, Inc. v. Div. Against Discrimination, etc.,* 31 *N.J.* 514, 524 (1960) 'Effectuation of that mandate calls for liberal interpretation of any legislative enactment designed to implement it.' *Id.*
>
> "The Board's concept that pregnancy is not an illness or injury in the usual sense of those words and thus must be excluded from sick leave benefits is far too restrictive and literal and not in accord with the clearly enunciated policy of this State against discrimination on account of sex. Sick leave benefits are intended to alleviate economic losses resulting from inability to work because of disability. This salutary purpose would not be furthered by excluding pregnancy-related absences merely because the condition may not be an illness by strict definition. In this regard, it is worthy of comment that the Temporary Disability Benefits Law, *N.J.S.A.* 43:21-29, as amended by *L.*1961, *c.*43, in providing compensation for disability resulting from

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accident or sickness not compensable under Workers' Compensation Law, deems pregnancy 'to be a sickness during the 4 weeks immediately preceding the expected birth of child and the 4 weeks immediately following the termination of pregnancy.' See *N.J. Bell Tel. Co. v. Board of Review*, 78 *N.J. Super.* 144 (App. Div. 1963), aff'd 41 *N.J.* 64 (1963).***''
(at 361-362)

The Commissioner observes that the Court, in the matter of *Castellano, supra*, upheld his determination in the matter of *Cinnaminson, supra*, when it stated:

''***It is also significant that the Commissioner of Education has refused to give to *N.J.S.A.* 18A:30-1 the narrow interpretation urged by the board, taking the position that there is no impediment against construing the statute in favor of a tenured teacher who sought, but was denied, sick leave benefits during a period of absence for maternity reasons. [*Cinnaminson*, cited *ante*] While an appellate tribunal is in no way bound by an agency's interpretation of a statute, *Service Armament Co. v. Hyland*, 70 *N.J.* 550, 561 (1976), the Commissioner's construction of this statute coincides with our own view thereof.***'' (at 362)

Accordingly, and commensurate with the reason set forth, *ante*, the Commissioner dismisses the Board's Motion to Dismiss the Petition of Appeal. He further directs the Cinnaminson Board of Education to afford sick leave credit to Petitioner Shokey for the period of absence from September 6 until and including September 16, 1977. The Commissioner so holds and enters Summary Judgment on behalf of Petitioner Delores Shokey.

COMMISSIONER OF EDUCATION

November 29, 1978

Pending State Board of Education

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

Weehawken Education Association,

Petitioner,

v.

Board of Education of the Township of Weehawken, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, LeRoy D. Safro, Esq.

Petitioner, the Weehawken Education Association, hereinafter "Association," appeals from the action of the Board of Education of the Township of Weehawken, hereinafter "Board," in filling cocurricular pupil activities with persons not certificated to perform such duties when duly certificated employees of the Board were available to do so. The Board admits that it made use of certain noncertificated and student teacher personnel, under the direction and supervision of fully certified administrators in its employ, to aid and asssist in pupil cocurricular activities. It denies that certificated teaching staff members in its employ were available and asserts that such personnel refused to volunteer to supervise the Board's pupil cocurricular activities.

On March 29, 1976, the return date of petitioner's Notice of Motion to Show Cause with Temporary Restraints, *pendente lite,* to restrain the Board from utilizing non-members of the Board's teaching staff to plan, guide, direct, evaluate and supervise pupil cocurricular activities, oral argument was heard and the Commissioner of Education, by decision under date of April 27, 1976, denied the requested relief.

The parties filed Cross-Motions for Summary Judgment with accompanying Briefs. On January 12, 1978, petitioner filed a subsequent Memorandum of Law and the matter is now before the Commissioner for final determination.

The Association asserts, and the Board concurs, that on or about April 2, 1976, a senior class play was performed by forty to fifty pupils enrolled in the school district. It alleges that the director of the senior class play was a thespian in a professional theatrical group who did not possess a valid teaching certificate issued under the laws of the State of New Jersey and that he was not employed as a teaching staff member by the Board nor any other board of education. The Association alleges that the Board failed to provide appropriate supervision by

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a certificated teaching staff member for the pupils during the rehearsal and subsequent performance.

The Association further asserts that during 1975-76 school year the Board engaged two noncertificated persons to coach and instruct pupil cheerleaders who were otherwise not employed as teaching staff members. It contends that teaching staff members in the Board's employ were available for the positions as drama and cheerleader coaches.

The Board admits the allegation that the senior class play was directed by noncertificated community resource persons but asserts that administrative personnel of its high school were at all times present for the senior class play rehearsals and the subsequent performance held on April 2, 1976. It further admits that noncertificated personnel directed pupil cheerleaders during the 1975-76 school year and asserts, moreover, that these were student teachers assigned to its schools who were at all times under the direction and supervision of the director of athletics, a fully certificated teaching staff member in its employ.

The Board asserts that there are no noncertificated pesonnel now acting as senior class play advisor or cheerleader coach nor has there been since the conclusion of the 1975-76 school year. The Board argues that the issue before the Commissioner is, therefore, moot and that there is no relief which can be granted the Association.

The Commissioner agrees and finds no need herein to make specific determinations with respect to these primary claims since it is well established that the Commissioner does not decide moot issues. *R. McAllister v. Board of Education of Lawnside et al.*, 1951-52 *S.L.D.* 39; *Patrick E. Tedesco v. Board of Education of the Borough of Lodi,* 1955-56 *S.L.D.* 69; *Robert M. Rodgers v. Board of Education of the City of Orange,* 1956-57 *S.L.D.* 50; *Sharon Ann Pinkham v. Board of Education of South River et al.*, 1974 *S.L.D.* 1103, aff'd State Board of Education 1975 *S.L.D.* 1119 In *Moss Estate, Inc. v. Metal & Thermit Corporation,* 73 *N.J. Super.* 56 (*Chan. Div.* 1962), the Court stated:

> "***It is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally functioning in the abstract, and 'to decide only concrete contested issues conclusively affecting adversary parties in interest.' *Borchard, Declaratory Judgments* (2*d ed.* 1941), *pp.* 34-35***." (at 67)

The Commissioner is constrained by the controversial nature of this case, however, to offer some comments with respect to the use of noncertificated personnel in pupil cocurricular activities which, while not specifically required herein, may have a more general application. Such dicta in the circumstances is not inappropriate. *Kennedy Memorial Hospital v. Heston,* 58 *N.J.* 576 (1971)

The principal question for consideration is concerned with the authority to employ personnel to fulfill the constitutional and legislative mandate to provide a thorough and efficient education.

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It is clear that local boards of education in this State are responsible for the "government and management" of their respective school districts (*N.J.S.A.* 18A:11-1) and that such responsibility embraces the employment and the services to be performed by such school employees. As the Court said in *Michael A. Fiore v. Board of Education of the City of Jersey City,* 1965 *S.L.D.* 177:

> "***The Legislature has committed the operation of local schools to district boards of education. *** The powers of boards of education in the management and control of school districts are broad. *Downs v. Board of Education, Hoboken,* 12 *N.J. Misc.* 345, 171 *A.* 528 (*Sup. Ct.* 1934), aff'd *sub nomine Flechtner v. Board of Education of Hoboken, 113 N.J.L* 401 (*E.&A.* 1934). Subject to statutes relating to tenure, they are vested with wide discretion in determining the number of employees necessary to carry out the program, the services to be rendered by each and the compensation to be paid for such services. Where a board, in the exercise of its discretion, acts within the authority conferred upon it by law, the courts will not interfere absent a showing of clear abuse. 78 *C.J.S., Schools and School Districts,* §128, *p.* 920; *Boult v. Board of Education of Passaic,* 135 *N.J.L.* 331 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1948). Where, however, the board's action is patently arbitrary, without rational basis, or induced by improper motives, the rule is otherwise. *Kopera v. West Orange Bd. of Education,* 60 *N.J. Super.* 228, 294 (*App. Div.* 1960); *East Paterson v. Civil Service Dept. of N.J.,* 47 *N.J. Super.* 55, 65 (*App. Div.* 1957); *cf. Moore v. Haddonfield,* 62 *N.J.L.* 386, 391 (*E.&A.* 1898); *Peter's Garage, Inc. v. Burlington,* 121 *N.J.L.* 523, 527 (*Sup. Ct.*1939).***" (at 178)

The powers of a local board of education are thus "broad" and encompass the authority to determine the "services to be rendered" by staff employees. Such authority must include also the entitlement of local boards to assign teaching staff members to positions they are certificated to fill. *N.J.S.A.* 18A:1-1 Such authority and its exercise thereof is, however, not without limitation. The Commissioner observes that *N.J.S.A.* 18A:26-2 and 18A:27-2 expressly prohibit a board of education to enter into contract or engage a teaching staff member who is not the holder of an appropriate certificate for such employment.

The Commissioner has held that under certain circumstances noncertificated personnel may contribute to the educational process in the public schools as in the matter of *Arthur Jones et al. v. Board of Education of the Borough of Leonia et al.,* 1976 *S.L.D.* 495, modified by the State Board July 6, 1978, wherein he said:

> "***The Commissioner is not unmindful of the great effort that has been expended by community resource persons who, possessing recognizable knowledge and expertise, have unselfishly shared their talents and enthusiasm with the youth of Leonia. This they have done gratuitously, their only recompense being that intangible, satisfying recognition imparted by a pupil to one who teaches, which is perhaps the ultimate reward to one who gives of himself in the educational process.***" (at 506)

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And;

> "***The concept of a visiting lecturer who is not necessarily a certificated teacher gratuitously bringing to the classroom a dimension that cannot be provided by a teaching staff member is not new. It has been successfully used in both the traditional and alternative schools of our State for many decades. There is need in our programs of education for such added dimension. In this instance, the Leonia Board has evolved a program where community resource persons have in certain instances replaced, rather than supplemented, the teaching expertise of the certificated instructor. Such is violative of *N.J.S.A.* 18A:26-2 and *N.J.A.C.* 6:11-3.4. A harmonious reading of the statutes and the rules of the State Board supports the conclusion that a person who assumes the *full responsibility* for instructing a class of pupils for a designated course of study for credit must be the holder of a teaching certificate from the State Board of Examiners. The Commissioner so holds.***" (*Emphasis in text.*) (at 507)

Thus, the Commissioner has held that noncertificated community resource persons may gratuitously contribute to the educational process under the direct supervision of a certificated teaching staff member.

The Commissioner and the courts have recognized the value and importance of cocurricular programs for the pupils of this State and the authority of local boards of education to assign teachers to perform such duties. The Court stated in *Board of Education of the City of Asbury Park v. Asbury Park Education Association,* 145 *N.J. Super.* 495 (*Chan. Div.* 1976) as follows:

> "***Teachers, therefore, in order to properly fulfill the responsibility they have undertaken to their profession, to their students, and to the community, must necessarily perform those activities deemed necessary and assigned to them by the board of education. For this court to require less would be to lend its hand to the subversion of the educational process.
>
> "Of course, the touchstone for the exercise of such power is reasonableness. Assignments must be nondiscriminatory, related to a teacher's interests and expertise, and not require excessive hours. They need not, however, be compensated.
>
> "Traditionally, boards of education have had the power to assign teachers to the supervision of extracurricular activities without compensation beyond the yearly contract schedule. Additional pay, customarily, has been awarded only for those assignments which require the expenditure of a great number of hours or those which involve a field unrelated to a teacher's certificate.***" (at 505-506)

In certain instances, the contributions of noncertificated personnel to cocurricular programs have also been recognized, and as the Commissioner stated in the matter of *Clinton F. Smith et al. v. Board of Education of the Borough*

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of Paramus et al., 1968 *S.L.D.* 62, aff'd State Board of Education 69, as follows:

> "***Such [cocurricular] pupil activities require leadership, participation, and supervision by members of the professional staff. While lay persons with particular skills or knowledge may be called upon to contribute, it is properly the duty of professionally trained and licensed teachers to plan, guide, direct, evaluate and supervise the extracurricular activities of pupils. These are functions of teachers which cannot be delegated. If, therefore, there is to be an effective extracurricular program, it must be staffed by teachers.*** (at 66)

In summation, the Commissioner holds that the contributions of noncertificated community resource persons to the curricular and cocurricular programs advanced by local boards of education may provide a level of expertise not held by the teaching staff members in their employ. He is constrained, however, to issue the caveat that such contributions are to be gratuitous, without contract or compensation in any manner, and under the direct supervision of a teaching staff member who holds an appropriate certificate issued by the State Board of Examiners.

The Petition herein has been rendered moot by circumstance and is hereby dismissed.

COMMISSIONER OF EDUCATION

November 29, 1978

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In the Matter of the Tenure Hearing of

Madeleine Ribacka,

School District of Sussex-Wantage Regional, Sussex County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Dolan & Dolan (Robert H. Lee, Esq., of Counsel)

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

The Board of Education of the Sussex-Wantage Regional School District, hereinafter "Board," certified a single charge of unbecoming conduct to the Commissioner of Education against Madeleine Ribacka, hereinafter "respondent," a teaching staff member with a tenure status in its employ. Respondent, who was not suspended from her teaching position pending a determination of the charge, denies the allegations set forth and seeks their dismissal.

A hearing was conducted in the matter on February 28, 1978 at the office of the Sussex County Superintendent of Schools by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

On December 20, 1976 the mother of pupil G.VM., hereinafter "G," filed a letter complaint with the Board and alleged six charges against respondent. Pursuant to *N.J.S.A.* 18A:6-11 the Board found probable cause to credit the evidence in support of one charge and on June 17, 1977 certified to the Commissioner the following:

> "That at various times during the school year 1975-76, the said Madeleine Ribacka by her unbecoming conduct toward [G], a pupil in her sixth grade class, caused said pupil to be subjected to mental and physical harassment by ridiculing him in the presence of his peers and otherwise treating him in a manner inimical to his mental and physical well-being."

The mother testified that she left G's father when G was three months old and subsequently obtained a divorce in 1967 or 1968. She testified that she remarried and that her second husband died in 1973. Other children in the family include a brother and sister. (Tr. 72-74)

The mother testified that the problem began with respondent approximately two weeks after the 1975-76 school year began when respondent telephoned the

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parent to inquire if G were diabetic. G's mother tesitifed that she was not aware of such a problem. She testified that respondent informed her that she believed that something was wrong and that G should be checked. The mother testified that respondent informed her that G had involuntary motions, was fidgety and could not sit still in the classroom and tended to leave the classroom frequently to go to the lavatory. The mother testified that she explained to respondent that her son found it necessary to urinate frequently and tended to do so more often when he was nervous or upset. (Tr. 74-77)

G's mother testified that respondent also informed her that she had referred G. to the school district's Child Study Team, hereinafter "C.S.T." The mother testified that as the school year progressed her son complained more frequently about stomachaches, loss of appetite, urinating more frequently and vomiting in the morning before going to school. G would ask not to be sent to school but his mother testified that she usually sent him. (Tr. 75-76, 78)

The mother testified that as a result of respondent's inquiry with regard to G's health, he was examined by a physician who determined that G had low blood sugar (hypoglycemia) and also that he had an ulcer. The physician prescribed a mild sedative and diet. (Tr. 78-80; J-4)

G's mother testified that she had many conferences with respondent with regard to her son's health during which she requested that respondent be understanding of her son's problem; she asserted that respondent replied that she made no exceptions and that she ran a "stiff" ship. The mother testified that when she informed respondent that her son had an ulcer, respondent replied that she also had ulcers—thirty-one of them to contend with every day. (Tr. 81-82)

The mother testified that G cried a great deal, was depressed, had stomach pains, was nauseous and had frequent headaches. She testified that her son reported to her that when he did not understand an assignment he was afraid to ask questions in the classroom for fear of ridicule or that he would be called stupid for lack of understanding. Her son also reported to her that respondent would make remarks to the classroom when he asked permission to go to the lavatory. (Tr. 82-85)

G's mother testified that in October 1975 she spoke to the school guidance personnel with regard to respondent's referral of her son to the C.S.T. She stated that she made no effort at that time to have G transferred from respondent's classroom. She testified that approximately one month before the close of the 1975-76 school year, she was called to the school to review the findings of the C.S.T. She asserts that it was at that time that she requested a transfer of her son from respondent's classroom. She testified, however, that the C.S.T. believed that such a transfer would be inappropriate since there was only one month of school remaining for the year. (Tr. 98-100)

The mother testified that she complained to respondent with regard to the treatment of her son. She testified that respondent denied that there was a personality clash between teacher and pupil until twelve days before the end of

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the 1975-76 school year. She testified that it was not until eleven days before the close of the school year that she registered a complaint against respondent with the school principal. She testified that she reported to the principal that it was unfair that certain pupils were treated in different ways and requested his help. (Tr. 86, 94-95, 99, 104-107)

Subsequent to the close of the 1975-76 school year and G's promotion to the seventh grade, his mother testified that she made a number of charges against respondent to the Superintendent and the Board. (Tr. 95-96, 98, 109, 111-118) The then Superintendent wrote a letter to G's mother dated September 20, 1976 and stated, *inter alia,* as follows:

> "***As I made you aware the charges are of a very serious nature and must be supported by evidence, not hearsay or opinion.
>
> "I have investigated this matter carefully since your conference with me. As a result of extensive research I find no evidence supporting your charges, I do find, however, clear indication of good, sound teaching.***" (R-1)

G's mother testified that she subsequently contacted the Board through her attorney. (Tr. 110-111)

The complainant pupil testified that he did not get along well with respondent when he was assigned to her sixth grade class. He testified that respondent called him clumsy and stupid and made him feel that he was not normal. He admitted that he had a physical problem and that he had to urinate frequently. He testified that respondent never denied him permission to leave the classroom to go to the lavatory; however, permission was granted "***with a lot of harassment***" and he testified that respondent gave him "***a hard time about it and embarrassed [him] in front of the class." (Tr. 12-15)

G testified that he had urination problems before he entered respondent's classroom; however, it was not as pronounced and did not require that he leave the classroom every day. He testified that when he was assigned to respondent's classroom it was necessary for him to leave his class two or three times a day. He testified further that he also had to leave the classroom for periods of ten to fifteen minutes each day to treat hypoglycemia. (Tr. 20-25, 30-31)

G testified that respondent's remarks upset him and that he reported her treatment of him to his mother. He testified that respondent stated to him "***why don't you go home and tell your mother I'm picking on you***." (Tr. 18-19)

Complainant pupil asserted that he volunteered to perform classroom chores during the school year, but respondent denied him such opportunities. G subsequently testified that respondent permitted him to wash the classroom chalkboards after school hours when he volunteered to do so. (Tr. 12, 20-22)

Two pupils, sixth grade classmates of complainant, testified that G and

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respondent did not get along well during the 1975-76 school year. Pupil D testified that G left the classroom two or three times a day and that respondent would state to G that "***You've gone enough" or "You've gone your turn." Pupil D could not recall that respondent embarrassed or made fun of G. (Tr. 41-44, 47) Pupil W testified that respondent called G stupid and clumsy and would harass complainant when it was necessary for him to go to the lavatory or the nurse's office. (Tr. 49-55)

The school psychologist testified that G was referred to the C.S.T. prior to his employment and that he did not know the complainant pupil nor did he have any personal knowledge of the instant controverted matter. He testified that he had reviewed the pupil's records and psychological evaluations of March 24, 1976 but that at the present time he could not draw any conclusions with respect to those evaluations. (Tr. 62-63, 69-70; J-2-4)

On October 15, 1976 respondent filed a C.S.T. Referral Form with regard to G. (J-3) Subsequently, on March 24, 1976 a psychological evaluation of G was filed by the then school psychologist which stated, *inter alia,* as follows:

> "***Projectives indicate considerable anxiety in regard to intrapersonal relationships and dependency needs. An approach-avoid conflict seems to be present as well. G. is afraid of making mistakes and lacks confidence. He needs direction and goals.
>
> "In summary, G. is seen as an individual with a present level of intellectual functioning in the average + range, however, functioning is influenced by lack of confidence. Suggestions: (1) discuss findings with parent(s) and teacher(s); (2) needs: (a) male relationship, (b) build confidence, (c) reduce anxiety by lessening fear of making mistakes." (J-4)

The present Superintendent testified that he was respondent's school principal and immediate supervisor in the 1975-76 school year. He testified that he had had some professional difficulties with respondent in the past and that he had received complaints from parents over the years to request a change of pupil assignments from respondent's classroom. (Tr. 119, 124-126, 130, 140) He testified that his general evaluation of respondent for the 1975-76 school year was "***always *** one of a good individual when she's in the confines of the classroom working with children.***" (Tr. 123) He further testified that he had no direct recollection of any gross mistreatment of pupils. (Tr. 123-124; J-6-9)

The Superintendent testified that the only complaint he received from G's mother with regard to respondent occurred eleven days before the end of the 1975-76 school year. He testified that the nature of the mother's complaint was her concern over the possible exclusion of G from a class trip. (Tr. 126, 142) He testified that he informed respondent that she was not to deny G the opportunity to participate in a class field trip as a method of discipline. He further testified that he informed respondent that G's mother appeared to be very upset and it was his interpretation that it was the result of a telephone conversation which occurred on the previous day between respondent and the parent. (Tr. 126-127, 142-143)

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The Superintendent testified that he was aware that G was the subject of C.S.T. evaluation and recommendations in the 1975-76 school year. He testified that the guidance counselor had not informed him that G's mother had ever requested that he be transferred from respondent's classroom. (Tr. 127-128, 141, 144-145; J-3-4)

The Superintendent testified that he was aware that G's mother pursued the complaint against respondent subsequent to the close of the 1975-76 school year. He testified that he filed a memorandum to the then Superintendent with regard to the mother's complaint. His memorandum dated September 10, 1976 stated, *inter alia,* as follows:

> "***In response to the letter from Mrs. D [G's mother], dated September 6, 1976, I offer the following.
>
> "My only recollection of a conference with Mrs. D. was one that took place in late May or early June of this year. At that time G., Mrs. D.'s son, was a student in Miss Ribacka's sixth grade class. At said conference Mrs. D. addressed herself primarily to obtaining assurance from me that G. would be allowed to go on an upcoming class trip. Mrs. D. was fearful that her son would be punished, and said punishment would be in the form of not allowing him to go on the class trip.
>
> "I assured her that excluding a student from participation in a class trip was not a decision to be made by a teacher alone, such a decision would have to have my approval.
>
> "In paragraph four, Mrs. D. makes reference to Miss Ribacka having sent G. to the office unnecessarily. I do recall having seen G. in my office on occasion, however any record of his visits to me for disciplinary action were (sic) discarded at the close of the school year. If at the time G. was sent to my office I felt the reason for his being sent was unfounded, I would have spoken to Miss Ribacka regarding said matter. I do not recall that such action was taken by me." (R-2)

He testified that when he became Superintendent in December 1976, G's mother registered her complaint against respondent at public board meetings. He testified that it was his impression that the Board had not been completely apprised of the matter nor of the correspondence that took place between G's mother and the former Superintendent. (Tr. 144)

Respondent testified that at the beginning of the 1975-76 school year she observed G engage in a great deal of involuntary body movements and actions. She testified that the pupil had to leave the classroom frequently to go to the lavatory. She testified that she suspected that G might be subject to hypoglycemia and called his mother to inquire about his pysical condition. She testified further that G was not doing well in school and requested permission to refer him to the C.S.T. Respondent filed a C.S.T. Referral Form on October 15, 1975. She testified that there were no school records to indicate that G had an urinary problem. (Tr. 146-147, 149-150, 157, 160; R-3)

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Subsequently, G's mother informed respondent that G. was to take physical tests on October 29, 1975. Respondent testified that the results of the tests revealed that G was severely hypoglycemic and also that he had ulcers. Respondent testified that she subsequently had a telephone conversation with the mother with regard to G's health and academic problems and the mother thanked respondent for detecting G's physical problems. (Tr. 151-152, 155, 161)

Respondent testified that G's mother did not register any complaints about her attitude or behavior toward G in October 1975. She testified that in May 1976 she called the mother to inform her that G's grades had gone down in the fourth marking period and that his behavior was not desirable. She testified that she called his mother to seek her cooperation to improve the situation. Respondent testified that G's mother stated that the would not cooperate with the teacher any longer. Respondent testified that she informed the mother that she would not treat G any differently than she treated any other pupil and that she ran a "tight ship." Respondent testified that she had no further conversations with G's mother subsequent to the telephone conversation in May. (Tr. 154, 162, 176-177)

Respondent testified that G was never rude or impolite. She stated that the pupil would abuse the privilege to leave the classroom and would not return immediately when the classroom activity did not interest him. She testified that he also abused the locker privilege and became a problem toward the end of the school year. (Tr. 155-156, 163-168)

Respondent denied that she ever called G stupid or clumsy and that she did not call attention to his urinary problem to the pupils in the classroom. She testified that she may have reported to his mother that his behavior was impossible. Respondent also testified that she may have stated in the presence of other pupils that, "***I'm not allowed to pick on G." and, "Go home and tell your mother I'm picking on you.***" (Tr. 155, 161-162)

Respondent stated that she believed that a personality clash developed between the teacher and parent rather than between the teacher and pupil. (Tr. 177-178)

Upon a thorough review of the relevant testimony before him, the hearing examiner finds the following to be true:

1. The complainant parent failed to inform the school personnel, in a timely fashion, that pupil G had a physical problem which required that he leave the classroom frequently.

2. Absent such information, respondent nonetheless permitted the pupil to leave her classroom and did not deny such permission with regard to the physical problem.

3. Respondent's continued observations of the pupil led her to suspect other physical problems and so informed the parent. Subsequent tests revealed that the pupil was indeed hypoglycemic and suffered from an ulcer.

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4. There was no evidence that the pupil's physical problems were directly related to his assignment to respondent's classroom.

5. The complainant pupil indicated considerable anxiety in regard to intrapersonal relationships, was afraid of making mistakes and lacked self-confidence. (J-4)

6. Respondent conducted a rigid classroom and expected complainant pupil to perform as other pupils. (Tr. 167)

The hearing examiner finds that the Board failed to sustain the charge of improper conduct on the part of respondent which contributed in any fashion in a manner inimical to the mental and physical well-being of complainant pupil.

Accordingly, the hearing examiner recommends that the tenure charge against respondent be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter and observes that no exceptions were filed to the report of the hearing examiner pursuant to *N.J.A.C.* 6:24-1.17(b). The question that remains for determination is whether or not the Board and petitioner complainant (G's mother) have set forth credible proofs to cause respondent to forfeit the protection which tenure affords to teaching staff members who have otherwise complied with the statutory prescription. *N.J.S.A.* 18A:28

The standard to be employed in weighing proofs similar to those herein has been enunciated on many occasions by the Commissioner and the courts. The Commissioner has always been mindful that the testimony of school pupils must be examined with great care. Thus, *In the Matter of the Tenure Hearing of Sally Williams, School District of Union Township,* 1973 *S.L.D.* 464, aff'd State Board of Education 1974 *S.L.D.* 1437, aff'd as *Sally Williams v. Board of Education of Union Township, Union County,* Docket No. A-1789-73, New Jersey Superior Court, Appellate Division, January 15, 1975 (1975 *S.L.D.* 1162), *cert.* den. New Jersey Supreme Court, March 11, 1975, *cert.* den. Docket No. 74-1534 Supreme Court of the United States, October 6, 1975 the Commissioner quoted *In re Fulcomer,* 1961-62 *S.L.D.* 160, rem. State Board of Education 1963 *S.L.D.* 251, decision on remand 1964 *S.L.D.* 142, aff'd State Board of Education 1966 *S.L.D.* 225, rev'd and rem. 93 *N.J. Super.* 404 (*App. Div.* 1967) with respect to the testimony of children who are pupils in school:

> "***'It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the

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children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children.' *Palmer v. Board of Education of Audubon,* 1939-49 *S.L.D.* 183, 188.***''

(1973 *S.L.D.* at 484)

The Commissioner observes that although the pupils who testified in the instant matter agreed that G and respondent ''did not get along well,'' there was conflicting testimony with regard to respondent's alleged harassment of G during the 1975-76 school year. (Tr. 12-15, 41-44, 47, 49-55)

The Commissioner further observes that G's parent failed to register a complaint with the school administration until eleven days before the close of the 1975-76 school year. Even then, such parental complaint was not grounded upon an alleged harassment of her son but, rather, that the parent feared respondent would deny her son the opportunity to participate in a school sponsored field trip. The evidence clearly shows that the school policy did not permit such exclusion as a form of imposing discipline upon its pupils. (Tr. 86, 94-95, 99, 104-107, 126, 142)

The quantum of proof required with regard to tenure charges against a teaching staff member is found, *inter alia, In the Matter of the Tenure Hearing of Fred Brown, School District of the City of Bayonne,* 1970 *S.L.D.* 239, wherein the Commissioner held that:

''***It should also be noted that in an action such as this before the Commissioner of Education, it is not necessary to prove the charge beyond the existence of a reasonable doubt as in a criminal matter. The quantum of proof required herein does not extend beyond a preponderance of the credible evidence. After careful examination and study of all the testimony, the Commissioner concludes that the credible evidence is insufficient to support the charge against the teacher.***'' (at 242)

The Commissioner is also impressed by the fact that it was respondent's astute observation that brought G's physical infirmity to the attention of his parent. The subsequent physical examination and physician's diagnosis of the pupil proved respondent to be alert to pupil behavior. Such skill of observation is the product of the dedicated and experienced classroom teacher, one who is able to recognize and understand the unique problems of the pupils under his/her care and make the appropriate recommendations for remediation.

The Commissioner, therefore, accepts as his own the findings of the hearing examiner that the Board and petitioner complainant failed to carry the burden of proof to sustain the charge of unbecoming conduct as a teacher against Madeleine Ribacka. Accordingly, the charge is dismissed.

COMMISSIONER OF EDUCATION

December 4, 1978

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Betty Babicz,

Petitioner,

v.

State Board of Examiners,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Sam Magnes, Esq.

For the Respondent, John J. Degnan, Attorney General (Susan P. Gifis, Deputy Attorney General, of Counsel)

Petitioner, an employee of the Bloomfield Public Library since 1957, contests determinations in May 1976 and December 1977 by the New Jersey State Board of Examiners rejecting her request for the issuance of a professional librarian's certificate.

The matter is jointly submitted for summary judgment to the Commissioner of Education in the form of the pleadings, exhibits, and memoranda of law. The relevant facts are not in dispute and are succinctly set forth as follows:

N.J.A.C. 6:11-12.7(a) requires a professional librarian's certificate "***for employment as a professional librarian in libraries supported in whole or in part by public funds, serving communities of 10,000 population or above." The Bloomfield Public Library serves such a community. The pertinent rule, *N.J.A.C.* 6:11-12.7(b). required, at the time of petitioner's applications to the Board of Examiners, that the issuance of a professional librarian's certificate be limited to the holder of a bachelor's degree who had successfully completed a program of library studies totaling at least thirty semester hours.

Petitioner's academic transcripts in the Commissioner's files reveal that she has never been the recipient of a bachelor's degree but that she has successfully completed a total of sixty-four semester hours of college credits including approximately thirty semester hours' credit in library science.

Petitioner twice appealed to the Board of Examiners, pursuant to the provisions of *N.J.A.C.* 6:11-3.31, asking waiver of the requirement of a bachelor's degree and a determination that the alternative experience which she offered was equivalent to the degree requirement. In connection with her application for waiver of the degree requirement, petitioner caused to be presented to the Board, in addition to numerous testimonials of her competency, favorable recommen-

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dations from the library director, the assistant library director of the Bloomfield Public Library, members of the public and others among her associates engaged in library services.

In 1977 the Bloomfield Public Library, an area reference library, listed petitioner, for salary purposes, as a supervising librarian's assistant which is designated as a non-professional position on its scale of salaries. Her maximum salary, excluding longevity payments, at that time was $11,077, a lesser amount than that accorded to any professional librarian except librarian trainees. (Exhibit A) It is stipulated that petitioner, in fact, has served since 1971 as assistant head of the Bloomfield Public Library's reference department which serves the town of Bloomfield and eleven other member libraries. Petitioner asserts that, in the absence of her department head (the supervising librarian), she performs the duties required of that position. (Petitioner's Affidavit) It is further stipulated that as of May 1976 petitioner "***exercised supervisory responsibilities over 17 staff members.***" (Affidavit of Secretary to the State Board of Examiners) This concludes the recitation of the factual context of the dispute.

Petitioner seeks to substitute her twenty years of admittedly commendable and competent service in lieu of the bachelor's degree which the State Board of Education required in 1976 for issuance of the professional librarian's certificate, *ante*. Since July 1978 a more stringent requirement of successful completion of a master's degree in library or informational science has been required. The master's degree was not required at the time of petitioner's application, however, and need not enter retrospectively into consideration of the herein controverted matter.

Petitioner argues that her demonstrated competence, skills and abilities in library science are no less valuable than they would have been had they been attained by earning a bachelor's degree. (Petitioner's Brief) Thus, she argues that the Board of Examiners erred when it refused to issue her a librarian's certificate. She cites in this regard *Irwin Stoolmacher v. State Board of Examiners,* 1975 *S.L.D.* 951. Therein the Board of Examiners in recognition of alternate studies and experiences, had waived the requirement of courses required for a business administrator's certificate in areas of school business administration, school buildings and school finance. The Commissioner further determined that Stoolmacher, a school business manager with both a bachelor's and master's degree and extensive experience in New Jersey's second largest school district, had sufficient education and experience on which to grant a further waiver of a required course in accounting. Both the Board and the Commissioner, however, denied Stoolmacher's request for waiver of courses in Public School Curriculum Organization, Administration of Public Education, and School Law. Rather, it was determined that his experience and/or alternate education did not present the equivalent of the required courses in those fields of formal studies. Accordingly, Stoolmacher was *not* then awarded a certificate as a school business administrator.

The Commissioner finds the instant matter importantly distinguishable from *Stoolmacher, supra,* in that petitioner had attained only one half the number of

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college credits ordinarily required for a college degree. This contrasts sharply with Stoolmacher's extensive studies which earned him not only a bachelor's but also a master's degree.

Petitioner's lack of the bachelor's degree and the deficiency of one half of the course credits normally associated therewith were predominant factors which prompted the Board to deny her the certificate. (Affidavit of Secretary to the State Board of Examiners)

The Commissioner, while in no way demeaning petitioner's valuable services performed in exemplary fashion as attested in the exhibits, concurs with the determination of the State Board of Examiners. The State Board of Education pursuant to its statutory authority promulgated a rule which in 1976 reasonably required that a professional librarian be holder of a baccalaureate degree. As was stated in *Board of Education of Plainfield v. Plainfield Eduation Association,* 144 *N.J. Super.* 521 (*App. Div.* 1976)

> "***It is elementary that a grant of authority to an administrative agency is to be liberally construed so as to enable the agency to discharge its statutory responsibilities. *In re Promulgation of Rules of Practice,* 132 *N.J. Super.*45, 48-49 (App. Div. 1974). In short, the authority delegated to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent. *Cammarata v. Essex City. Park Comm'n,* 26 *N.J.* 404, 411 (1958). Moreover, when construing a statutory enactment it is fundamental that the general intention of the act controls the interpretation of its parts. *Hackensack Water Co. v. Ruta,* 3 *N.J.* 139, 147 (1949). All statutory provisions are to be related and effect given to each if such be reasonably possible. *Jamouneau v. Harner,* 16 *N.J.* 500, 513 (1954).***" (at 524)

It was similarly stated by the Court in *Essex County Welfare Board v. Klein,* 149 *N.J. Super.* 241 (*App. Div.* 1977) that:

> "***It is, of course, axiomatic that a rule of an administrative agency is subject to the same canons of construction and the same constitutional imperatives as is a statute.***" (at 247)

The Commissioner finds in the record insufficient reason to arrive at a conclusion contrary to the Board's holding. Rather it is concluded that the lack of any degree coupled with a depth of deficiency of sixty semester hour credits is good and sufficient reason for the denial of the requested certificate. The experience gained by petitioner in excess of twenty years of service is recognized by the prevailing salary scale and longevity payments. However, on-the-job experience cannot be presumed to supplant in such large measure the discipline of formal academic studies which broaden the perspectives and abilities of those who successfully complete approved degree programs. The Commissioner so holds.

Absent a showing of sufficient reasons to conclude that the State Board of

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Examiner's determinations in May 1976 and December 1977 were other than a reasoned exercise of the discretionary authority conferred by law, the Commissioner hereby affirms such determinations. Acccordingly, the Petition of Appeal is denied.

COMMISSIONER OF EDUCATION

December 11, 1978

Pending State Board of Education

Board of Education of the Town of Belleville,

Petitioner,

v.

Mayor and Board of Commissioners of the Town of Belleville, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Gaccione, Pomaco, Patton & Beck (Frank Pomaco, Esq., of Counsel)

For the Respondent, John R. Scott, Esq.

Petitioner, the Board of Education of the Town of Belleville, hereinafter "Board," appeals from an action of the Board of Commissioners of the Town of Belleville, hereinafter "Board of Commissioners," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Essex County Board of Taxation a lesser amount of appropriations for school purposes for the 1978-79 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on October 12, 1978 at the office of the Union County Superintendent of Schools, Westfield, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held February 14, 1978, the Board submitted to the electorate proposals to raise $6,715,966 by local taxation for current expense and $124,913 for capital outlay costs of the school district. These items

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were rejected by the voters and, subsequent to the rejection, the Board submitted its budget to the Board of Commissioners for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Town of Belleville for the 1978-79 school year, pursuant to the mandatory obligation imposed on the Board of Commissioners by *N.J.S.A.* 18A:22-37.

After consultation with the Board, the Board of Commissioners made its determination and certified to the Essex County Board of Taxation an amount of $6,500,966 for current expenses and $124,913 for capital outlay. The pertinent amount in dispute is shown as follows:

	CURRENT EXPENSE
Board's Proposal	$6,715,966
Board of Commissioners' Proposal	6,500,966
Amount Reduced	$ 215,000

The Board contends that the Board of Commissioners' action was arbitrary, unreasonable and capricious and documents its need for restoration of the reduction recommended by the Board of Commissioners with written testimony and a further oral exposition at the time of the hearing. The Board of Commissioners maintains that it acted properly and after due deliberation and that the items reduced by its actions are not only those which are not necessary for a thorough and efficient educational system. The Board of Commissioners also supports its position with written and oral testimony. As part of its determination, the Board of Commissioners suggested specific line items of the budget in which it believed economies could be effected as follows:

CHART I

ACCOUNT NUMBER	ITEM	BOARD'S BUDGET	BD. OF COMMs.' PROPOSAL	AMOUNT OF REDUCTION
CURRENT EXPENSE:				
J130A	Bd. Mem. Exps.	$ 10,313	$ 8,313	$ 2,000
J130D	Sch. Elect.	3,918	1,918	2,000
J212	Sal., Supvrs.			
J213	Sal., Tchrs.	4,944,033	4,894,033	50,000
J520	Trans.	264,209	204,209	60,000
J630	Heat	193,172	173,172	20,000
J640	Utilities	179,400	160,400	19,000
J650	Supls. Plant Oper.	49,000	44,000	5,000
J710	Sal., Plant Maint.	163,096	158,096	5,000
J720	Contr. Servs.	203,550	151,550	52,000
	TOTAL			$215,000

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The hearing examiner will deal *seriatim* with the Board of Commissioners' proposed reductions in line items of the Board's budget and to make recommendations thereto to the Commissioner.

J130A Expenses, Board Members *Reduction $2,000*

The Board of Commissioners asserts that the items included herein are not absolutely essential and should be eliminated.

The Board maintains that its expenditures for 1977-78 totaled $11,932.55 and that it budgeted $10,313 for the 1978-79 school year. It admits that the dues for State and County Associations were assessed at $6,411 for 1978-79 and that the remainder of $3,902 was appropriated to allow its members to attend county, state and national association meetings and workshops. (P-1, 5-6)

The hearing examiner recognizes the benefit of board of education members' participation in such workshops and meetings; however, he failes to find sufficient compelling reasons, either by written documentation or oral testimony, to overturn the Board of Commissioners' reduction. He finds that those dues mandated by statute can be met with such a reduction. It is recommended, therefore, that the reduction be sustained.

J130D Expenses, School Elections *Reduction $2,000*

The Board of Commissioners asserts that the additional anticipated expenses herein can be eliminated or, in the alternative, an additional capital improvement referendum should be held at the same time the annual school election is conducted. (Tr. 32)

The Board asserts that it has made application for emergency school building aid to the New Jersey Department of Education for the purpose of constructing an addition to its high school. It contends that the present functional pupil capacity of its high school has been determined to be 1,031 while its present pupil enrollment on September 30, 1978 was 1,408 pupils. (P-8, 10) The Board agrees that it could conduct a building referendum at the same time as the annual school election. It argues, however, that inasmuch as its annual school budgets are traditionally defeated, it chooses not to combine the two issues at one election.

The hearing examiner finds the Board's arguments convincing. He observes that planning, scheduling and implementing of a building referendum to meet the statutory mandated timetable of the annual school election would be restrictive and deny the Board the flexibility and opportunity to present is proposition to the electorate on its own merits. He recommends, therefore, that the Board of Commissioners' proposed reduction of $2,000 be restored.

J212 Salaries, Supervisors of Instruction
J213 Salaries, Teachers *Reduction $50,000*

The Board of Commissioners argues that a number of teachers retired from

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the Board's employ at the end of the 1977-78 school year and that their replacements would be employed at a lower rate of pay on the salary guide which would provide such a reduction. It further contends that one administrative position was not filled by the Board.

With regard to line item J212, the Board asserts that for the 1978-79 school year it has added the position of director of federal grants to its administrative staff rather than eliminate an administrative position as proposed by the Board of Commissioners. The Board admits that the annual salary for this position was set at $26,681 and that the position was not included in its proposed 1978-79 budget. It avers, however, that it has made application to the New Jersey Department of Education, ESEA Title I program to absorb $10,000 of the salary for the position. (Tr. 8-9, 13-15, 29-30; P-6-7)

The Board admits that six teaching staff members retired from its employ at the conclusion of the 1977-78 school year. It contends that at the time it prepared its proposed budget it reduced its J213 account in the amount of $64,000 as the difference between the salaries of the retired teachers and the salaries paid to their replacements. The Board admits that its replacements and additional staff members resulted in a net loss of one half teaching position from 1977-78 to 1978-79. (Tr. 5-7, 12-13, 24-26, 28, 53, 59; P-7)

The Board further avers in support of this line item increase that it budgeted for a three percent increase in teachers' salaries and that the final negotiated agreement represented a six percent increase in salaries. It further asserts that it lost approximately $19,000 in state aid that was anticipated in the preparation for its 1978-79 budget. The Board contends that the loss of anticipated state aid coupled with a six percent salary increase for teachers, twice the amount budgeted, mitigates against the Board of Commissioners' reduction of $50,000. (Tr. 16-19, 21, 51-52, 54, 59-60)

The hearing examiner, after a careful review of the written and oral testimony and the documents in evidence, finds the following to be true in fact:

1. The Board, subsequent to the adoption of its 1978-79 annual school budget, approved and appointed a director of federal grants at an annual salary of $26,681 in its J212 line item.

2. The Board appropriated an amount of $4,574,680 in its J213 line item for the 1977-78 budget. (P-1, 6)

3. The Board's actual expenditure amounted to $4,513,669.30 for the 1977-78 budget. (P-1)

4. The Board's 1978-79 budget shows an appropriation of $4,806,810 in its J213 line item. (P-6)

5. Contrary to the Board's testimony that it budgeted only a three percent salary increase in its J213 line item, the difference between its 1977-78 budget appropriation of $4,574,680 and its 1978-79 budget of $4,806,810 represents

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a five percent increase. Additionally, the difference between its actual expenditure of $4,513,699.30 in 1977-78 and its 1978-79 budget of $4,806,810 represents a six percent increase for teachers' salaries.(P-1, 6)

In consideration of the above facts bearing on line items J212 and J213, the hearing examiner recommends that the reduction of the director of federal grants' salary in the amount of $26,681 in line item J213 be sustained and that $23,319 be restored in consideration of the Board's loss of $19,000 in anticipated state aid.

J520 Pupil Transportation *Reduction $60,000*

The Board of Commissioners contends that the standards mandated by the State with regard to pupil transportation are adequate and that the Board's transportation of non-aided pupils should be eliminated.

The Board asserts that the Town of Belleville lacks adequate public carrier service and that pupils who are not "remote" from their assigned schoolhouse have no means of transportation to their school. It avers that it petitioned the Transport of New Jersey company to reroute bus route number 15 to accommodate pupils from the western part of town to be transported to its junior and senior high schools. The petition was denied and the Board has subsequently appealed the denial to the New Jersey Department of Transportation. It admits that the cost for non-aided pupil transportation for the 1977-78 school year amounted to $55,558.92 and that it has contracted for the 1978-79 school year an amount of $59,794.85 for non-aided pupil transportation. (Tr. 30, 41-42, 46-47)

The hearing examiner finds only $250.15 of the Board of Commissioner's recommended reduction of $60,000 not firmly committed at the time of hearing. Accordingly, he recommends restoration of the full amount for use by the Board in 1978-79.

J630 Heat *Reduction $20,000*
J640 Utilities (except heat) *Reduction $19,000*

The Board of Commissioners believes that the items reflected in these line item accounts were overbudgeted and were inappropriate in light of past and present experience with regard to heating and utility costs.

Notwithstanding its contention that heating and utility costs have escalated in the recent past, the Board admits that these line item accounts were overbudgeted by approximately $35,000 and $40,000, respectively. It argues that it had not reached salary agreements with its employee organizations, other than teachers, and that the overbudgeted amount of approximately $75,000 was to be used to offset salary increases negotiated beyond the three percent budgeted in the various salary accounts. (Tr. 47-50, 55-57)

The hearing examiner observes *N.J.S.A.* 18A:29-4.1 which provides as follows:

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> "A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members***. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the Commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year."

The hearing examiner recognizes the fact that the Board, subsequent to its submission of its 1978-79 budget, ratified a salary agreement with the teachers for the 1978-79 school year at the rate of six percent above the 1977-78 salary guide on September 25, 1978. (Tr. 16) He finds, therefore, that the approximately $75,000 overbudgeted in line items J630 and J640 will be required for its negotiations with its other employee organizations. He recommends that the Commissioner restore the amounts of $20,000 to the J630 line item and $19,000 to the J640 line item.

In making such a recommendation the hearing examiner relies, *inter alia,* upon the matter of *Board of Education of the Township of South Brunswick v. Township Committee of the Township of South Brunswick,* 1968 *S.L.D.* 168, wherein the Commissioner said:

> "***It is clear that the funds necessary to the implementation of salary policies adopted by a board of education must be provided and are not subject to curtailment. *N.J.S.* 18A:29-4.1 See also *Board of Education of Cliffside Park v. Mayor and Council of Cliffside Park,* 1967 *S.L.D.* 117***." (at 172)

J650 Supplies, Operation of Plant — *Reduction $5,000*

The Board of Commissioners believes that such a reduction would not create any problems for a thorough and efficient educational system.

The hearing examiner observes that the Board neither advanced oral nor written argument with respect to this line item; therefore he recommends that the $5,000 reduction be sustained.

J710 Salaries, Maintenance (Overtime) — *Reduction $5,000*

The Board of Commissioners believes that this is a minimal amount which can be reduced and that the Board should revamp its work procedures to prevent the use of overtime to the extent the Board has previously permitted.

The Board contends that its maintenance personnel are efficiently and effectively utilized. It argues that its small maintenance staff work with eleven school physical plants, nine of which were built before 1929.

The hearing examiner observes that the Board employs ten maintenance personnel and further that its 1978-79 budget appropriated $10,000 for overtime. This is equal to $1,000 a person per year. The hearing examiner agrees with

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the Board of Commissioners' contention that the Board should look to ways to reorganize its maintenance program to reduce the necessity for overtime. The hearing examiner recommends that the reduction of $5,000 be sustained.

J720 Contracted Services *Reduction $52,000*

The Board of Commissioners contends that the expenditure of $35,000 for the repair and/or replacement of the high school gymnasium divider door is excessive and unnecessary. It further contends that $7,000 can be reduced from the line item through more efficient management of the Board's contracted services account. It avers that a more efficient and effective use of the Board's pesonnel could also sustain a reduction of $10,000 for minor repairs.

The Board asserts that it has corrected the high school gymnasium divider door at a cost of $7,000, but argues its need for the remainder of its budget for contracted services. (Tr. 11)

The hearing examiner finds that the Board is no longer in need of the $35,000 to replace and/or repair the high school gymnasium divider door. Inasmuch as this has been accomplished for $7,000, the hearing examiner recommends that a reduction of $28,000 be sustained for this item. The hearing examiner finds that the Board can sustain an additional reduction of $7,000 in this line item as recommended by the Board of Commissioners. The hearing examiner cannot agree that an additional $10,000 be reduced from this line item with regard to minor repairs. The service contracts for typewriters, business machines, audiovisual equipment, pianos, musical instruments, sewing machines, etc., need expert attention and should not be serviced or repaired by school personnel. Therefore, the hearing examiner recommends that a reduction of $35,000 be sustained with regard to the J720 line item. This will provide an amount of $168,550 to the Board for the 1978-79 school year.

In summary, the hearing examiner recommends that the combined line items discussed, *ante,* be determined as follows:

CHART II

ACCOUNT NUMBER	ITEM	AMOUNT OF REDUCTION	AMOUNT RESTORED	AMOUNT NOT RESTORED
CURRENT EXPENSE:				
J130A	Bd. Mem. Exps.	$ 2,000	$ -0-	$ 2,000
J130D	Sch. Elect.	2,000	2,000	$ -0-
J212	Sal., Supvrs.			
J213	Sal., Tchrs.	50,000	23,319	26,681
J520	Trans.	60,000	60,000	-0-
J630	Heat	20,000	20,000	-0-
J640	Utilities	19,000	19,000	-0-
J650	Supls., Plant Oper.	5,000	-0-	5,000

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J710	Sal., Plant Maint.	5,000	-0-	5,000
J720	Contr. Servs.	52,000	17,000	35,000
	TOTALS	$215,000	$141,319	$73,681

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter, the hearing examiner's report and observes that the parties agreed to waive receipt of the hearing examiner's report pursuant to *N.J.A.C.* 6:24-1.17(b). (Tr. 3)

The Commissioner concurs in all points with the findings and recommendations of the hearing examiner. Accordingly, it is found and determined that in addition to the amounts previously certified to the Essex County Board of Taxation, the amount of $141,319 for current expenses is required for the thorough and efficient operation of the school district during the 1978-79 school year. Accordingly, the Commissioner hereby certifies to the Essex County Board of Taxation the amount of $141,319 to be raised by public taxation, in addition to the amount previously certified, for the current expenses of the Belleville School District for the 1978-79 school year.

COMMISSIONER OF EDUCATION

December 14, 1978

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Robert A. Larsen,

Petitioner,

v.

Board of Education of the East Windsor Regional School District, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

For the Respondent, Turp, Coates, Essl and Driggers (Henry G. P. Coates, Esq., of Counsel)

Petitioner, a teaching staff member employed by the Board of Education of the East Windsor Regional School District, hereinafter "Board," alleges that the Board improperly, illegally and in violation of the employment agreement between the parties reduced petitioner's salary in the amount of $400 commencing on April 14, 1976. Petitioner prays that the Commissioner of Education direct the Board to reimburse all sums deducted from his salary and to order the Board to refrain from further deductions of salary, which would result in his receiving less than that amount provided by the employment agreement between him and the Board. The Board admits that it withheld certain moneys from petitioner. It asserts, however, that these were legal and reasonable acts taken to correct an error which resulted in fixing petitioner's salary at a higher level than that to which he was entitled.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton, on January 24, 1977. Briefs were subsequently submitted by respective counsel. The report of the hearing examiner is as follows:

The following facts are not in dispute. Petitioner was employed by the Board as a substitute teacher in September 1974. Subsequently, In October he was employed as a teacher's assistant and performed such duties as required until March 1975 at which time he was employed as a teacher of English on a full-time basis at the annual salary of $10,329, prorated, which represented step one at the MA + 30 credits level on the Board's salary guide for 1974-75. (C-1,2) Petitioner was thereafter employed as a teaching staff member by the Board under contract for the period from September 1, 1975 to June 30, 1976 at the annual salary of $10,894, which was determined as step two of the MA + 30

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level as set forth in the Board's salary policy in Article XI of the agreement between the Board and the Hightstown Education Association. (P-1; R-1, 2)

Petitioner testified that he had received a Bachelor of Arts degree in philosophy from Bemidji State College, subsequently earned a Master of Divinity degree from Princeton Theological Seminary and was currently enrolled as a part-time student in a master's program in theology at Princeton Theological Seminary. He stated that he had earned eighty-two credits beyond the bachelor's degree which consisted of seventy-six credits for the Master of Divinity degree and six credits toward a Master of Theology degree. (Tr. 9-11)

Petitioner testified that in February 1975 the Assistant Superintendent for Personnel and Training interviewed him for a full-time teaching position to commence in March 1975. He testified that the Assistant Superintendent prepared a contract which placed him at the first step of the MA degree level of the Board's salary guide for 1974-75. Subsequent to a discussion that he had with a teaching staff member in the school system, petitioner discussed his salary status with the Assistant Superintendent. He testified that he informed the Assistant Superintendent that the Master of Divinity degree was a three year program and that it required over seventy credits to complete. Additionally, he stated that he had earned six additional credits and that he was not certain what pay scale was appropriate for him. (Tr. 10-14) He testified that while a Master of Divinity degree required over seventy graduate credits and that other master degree programs entailed thirty or forty-five credits at the most, he believed that he had more than enough credits to be placed at the MA + 30 level on the Board's salary guide. (Tr. 15)

Petitioner testified that the Assistant Superintendent prepared a new contract, which was subsequently approved by the Board, and placed him at step one of the MA + 30 level of the adopted salary schedule. (Tr. 14-15; C-1,2) He also testified that the Assistant Superintendent requested that he submit an official transcript of his graduate credits. (Tr. 20)

Petitioner denied that he told the Assistant Superintendent that he had thirty credits beyond the Master of Divinity degree. (Tr. 14, 34)

At the conclusion of petitioner's testimony, the Board advanced a Motion to Dismiss the Petition grounded on petitioner's testimony that he did not possess thirty credits beyond the master's degree and that he either misrepresented or there was misunderstanding as to his true status with regard to his graduate credits. The hearing examiner, after hearing arguments of counsel, recommended that the Board's Motion be held in abeyance until the completion of the Board's affirmative defense. (Tr. 20-27)

The Assistant Superintendent testified that the Board had a vacancy in the area of English in February 1975 and that she interviewed petitioner for the full-time teaching position. She testified that in the course of the interview she asked petitioner if he had credits beyond the master's degree, to which he answered, "Oh, yes, quite a few." She testified that she then asked him if he had more

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than thirty credits beyond the master's degree and he responded. "Oh, yes, many more than 30." (Tr. 37-38, 41) She testified that petitioner's transcript was not in his personnel file at the time of the interview; however, based upon his representation she prepared a contract between the Board and petitioner at step one of the MA + 30 level. (Tr. 38-40, 50)

The Assistant Superintendent testified that she was bound by the Board's policy in regard to the placement of personnel on the degree level of the adopted salary guide and that she had no discretionary authority to modity or alter the terms. (Tr. 39, 53) She asserted that the number of credits required to attain a particular master's degree was of no consequence; the Board's policy required only that an employee possess a master's degree and thirty credits beyond to be eligible for placement at that level on its salary guide. (Tr. 40-41)

The Assistant Superintendent was not certain when petitioner's transcript of graduate credits was forwarded to the Board; however, when it came to her attention she determined that he had earned six credits beyond the master's degree. (PR-1) She testified that she arranged for an appointment with petitioner, presented the transcript to him and asked for evidence that he had earned thirty credits beyond the master's degree. She asserted that petitioner stated that there was a misunderstanding, that if he had taken another master's program it would not have required as many credits as his Master of Divinity degree; therefore, he thought that he was entitled to the placement on the salary guide at the MA + 30 level. She testified that, in the event petitioner could not produce a transcript to verify the additional thirty credits beyond the master's degree in accordance with the Board's policy, she would be required to recommend an appropriate reduction in his salary. She stated that she discussed the matter with the Superintendent and subsequently drafted a memorandum for the Board Secretary to place on the Board's agenda the reduction in salary and the reason therefor. (Tr. 43-44) The Board stipulated that it reduced petitioner's salary in the amount of $400 on April 14, 1976 and made monthly prorata deductions from his salary for the remainder of the 1975-76 school year. (Tr. 18; Board's Answer to Petition of Appeal)

The salary policy negotiated between the Association and the Board for the 1975-76 school year is silent with respect to a definition of the MA + 30 salary scale. Article XI, Salary Schedule A, as found in the agreement for July 1, 1976 through June 30, 1979 states, *inter alia,*

> "***In addition the current 1975-76 relationship between the East Windsor BA and BA + 30 ($400), the East Windsor MA and MA + 30 ($400) and the East Windsor MA and Doctorate ($1,050) would be continued.***" (R-2)

Thus, in the instant matter, the differential between a master's degree and a master's degree plus thirty credits equals an amount of $400, or the amount deducted from petitioner's salary by the Board subsequent to its review of his transcript of graduate credits.

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The hearing examiner has considered the documentation and testimony presented at the hearing relative to petitioner's graduate credits and the Board's action to employ him at the MA + 30 level on its salary guide and observes that the instant matter differs substantially from the Commissioner's determination of *Agnes D. Galop v. Board of Education of the Township of Hanover,* 1975 *S.L.D.* 358, aff'd State Board of Education 366. In *Galop* the Commissioner held that petitioner was in no way responsible for the board's error of salary payments which did not meet its requirements for forty-five graduate level credits. The Commissioner further determined that the Board in *Galop* was not entitled to recover any portion of the salary paid to petitioner, nor reduce her monthly rate of pay during the period of her contract.

The Commissioner's determination in *Galop, supra,* was founded, in part, upon the finding that, "***Petitioner was in no way responsible for this unfortunate error***." (at 364) In the instant matter the hearing examiner finds that petitioner was indeed responsible for the error. Petitioner testified that when the Assistant Superintendent prepared a contract at the master's degree level, he informed her that it was a mistake. (Tr. 14) He continued to testify with regard to his previous graduate studies as follows:

> "***the Masters of Divinity Degree is three years of graduate work, where other Masters Degrees are one year of graduate work, and it entails seventy some graduate credits, where other Master Degrees entail 30 graduate credits, or at the most, 45. *So I thought it was more than enough credits.*" *(Emphasis supplied.)* (Tr. 15)

In summary, the hearing examiner finds that petitioner misrepresented the number of credits he had acquired beyond the master's degree. The hearing examiner also finds that, although there existed a written contract in effect between petitioner and the Board, petitioner's academic credits did not satisfy the requirement of the Board's salary policy for thirty credits beyond the master's degree and, therefore, he was not entitled to placement on that level of the salary scale. The hearing examiner finds that because petitioner gave misleading information to the Assistant Superintendent, he was primarily responsible for his incorrect placement on the salary schedule. The hearing examiner is constrained to point out that the Assistant Superintendent erred in preparing a contract of employment of petitioner, for formal approval by the Board, without first having official transcripts of academic credits submitted by petitioner. If this procedure had been properly followed, the Assistant Superintendent would have discovered the true facts with respect to petitioner's academic credentials and, notwithstanding petitioner's representations, would not have made an incorrect recommendation to the Board.

The hearing examiner further finds that, given all the circumstances recited above, the Board acted properly in correcting petitioner's placement on the salary schedule. Accordingly, he recommends that the Petition be dismissed.

This concludes the report of the hearing examiner.

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* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto filed by petitioner in accordance with *N.J.A.C.* 6:24-1.17(b).

Petitioner objects to the conclusion set forth by the hearing examiner and avers that such conclusion was based upon the belief that the testimony of the Board's Assistant Superintendent outweighed the testimony of petitioner. Petitioner asserts that his testimony clearly showed no misrepresentation was made by him but, rather, that the Assistant Superintendent was fully aware of his correct academic status. In support of his objection to the hearing examiner's report, petitioner recites, in full, the admonition wherein the hearing examiner stated that the Assistant Superintendent erred in the preparation and execution of the employment contract prior to the Board's receipt of petitioner's official transcript of earned graduate credits. Petitioner argues, therefore, that he was in no way responsible for the unfortunate error and cannot be held responsible for an administrative error made by the Board.

The Commissioner cannot agree with petitioner's contention. The Commissioner observes that the record clearly shows that petitioner rejected an offer of employment which placed him at the first step of the master's degree level of the Board's salary guide. It was petitioner who raised the issue of his salary status with the Assistant Superintendent and testified that it was his belief that he had more than enough credits to be placed at the MA + 30 level on the Board's salary guide. (Tr. 15) This, coupled with the testimony of the Assistant Superintendent that petitioner represented to her that he had "***many more than 30***" credits beyond the master's degree, is credible. The Commissioner does not question petitioner's assertion that he earned eighty-two credits beyond the baccalaureate degree and takes notice that petitioner testified that he acquired seventy-six graduate credits which earned him a Master of Divinity degree and, subsequent thereto, he earned six graduate credits toward a degree of Master of Theology. (Tr. 9-11) Notwithstanding petitioner's argument that a Master of Divinity degree required more than seventy graduate credits while other master's degree programs required a minimum of thirty to forty-five graduate credits, the Commissioner finds and determines that petitioner caused the misunderstanding with regard to his earned graduate credits beyond the master's degree which subsequently resulted in the Board executing a contract at the MA + 30 level of its salary guide. Accordingly, the Commissioner rejects petitioner's objection to the hearing examiner's report and accepts the finding that petitioner did indeed misrepresent the number of graduate credits earned beyond the master's degree.

Petitioner further contends that the Board attempted to show fraud which may not be shown by a mere preponderance of evidence but must be based upon a certainty of error. Petitioner argues that the Board has the burden of proof in such an allegation and submits that it failed to meet this burden. *Fortunel v. Martin,* 114 *N.J. Eq.* 235 (1933)

The Commissioner, having carefully reviewed the record, does not find

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that the Board accused petitioner of fraud but, rather, of a misrepresentation of his graduate credits beyond the award of his master's degree. The Commissioner observes that *Black's Law Dictionary* (rev. 4th ed. 1968) in its definitions makes a distinction between fraud and misrepresentation as follows:

> "*Fraud*. Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury."*** (at 789)

> "*Misrepresentation*. An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists.***" (at 1152)

The Commissioner does not find that petitioner engaged in "some deceitful practice" but determines instead that he set forth "an incorrect or false representation" of the facts with regard to the status of his graduate credits. Accordingly, the Commissioner rejects petitioner's contention that the Board failed to carry the burden of proof with regard to petitioner's misrepresentation.

Petitioner now attempts, through his objections and exceptions to the hearing examiner's report, to place upon the record arguments which were not set forth in the pleadings or through testimony at the hearing. In petitioner's third exception he argues, *inter alia,* that the Assistant Superintendent was "experienced" and "knowledgeable" in contract negotiations and therefore should have known the number of graduate credits required for degrees in he Master of Divinity and Master of Theology programs. The Commissioner dismisses such arguments as to whether or not the Assistant Superintendent knew or should have known the number of credits required for such graduate degrees. He observes that the record is silent with regard to such arguments, therefore, it will not be entertained at this juncture.

Similarly, petitioner advances a new argument not brought forth at the hearing to take exception to the Board's interpretation of MA + 30 as defined by *N.J.S.A.* 18A:29-6 as follows:

> "'Master's degree or the equivalent' shall mean a master's degree conferred by a college or university whose courses for such degree are acceptable to the state board of examiners for certification purposes or proof of the satisfactory completion of 30 additional semester hours in graduate courses beyond the course requirements for the bachelor's degree in any college or university, or colleges or universities, whose graduate courses for the master's degree are acceptable to the state board of examiners for certification purposes***."

Petitioner argues that subsequent to the completion of the first thirty hours of the Master of Divinity program he met the master's degree or equivalent status as set forth by statute, *ante*. Petitioner asserts that equity would demand, in the absence of expressed agreement to the contrary, that he be credited with

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all graduate credits earned subsequent to the original thirty toward the Board's MA + 30 salary guide.

The Commissioner observes that the Board's policy as articulated by the Assistant Superintendent required that an employee possess a master's degree and thirty credits beyond to be eligible for placement at the MA + 30 level of its salary guide. (Tr. 40-41) The Commissioner observes further that where such a Board policy exists the matter of MA + 30 credits has been rendered *stare decisis In the Matter of the Tenure Hearing of Michael A. Pitch, School District of the Borough of South Bound Brook,* 1974 *S.L.D.* 1176, aff'd State Board of Education 1975 *S.L.D.* 763, rem. New Jersey Superior Court, Appellate Division, September 11, 1975, decision on remand 1975 *S.L.D.* 764, aff'd Docket No. A-2671-74 Appellate Division, April 2, 1976 (1976 *S.L.D.* 1159) as follows:

> ''***[R]espondent '***misrepresented his credentials and academic credits for salary purposes.'*** Respondent, to this day, has not completed a master's degree plus thirty graduate level credits. *Respondent's contention that any credits completed after the awarding of a baccalaureate degree are properly termed graduate credits is completely without merit.****
>
> ''The Commissioner in rendering his decision *** did so in consideration of the factual context which prevailed***. 'Graduate credit' has a commonly understood meaning *** throughout the State. This meaning is in no way altered by the fact that on various salary scales and guides, in articulated or unarticulated fashion, the several school districts of this State apply varying criteria to the admissibility of graduate, undergraduate and other credits. *In the instant matter, as in all such controversies, it is the criteria which pertains to the local Board's negotiated agreement and policy which must control.****'' *(Emphasis supplied.)* (at 773)

The Commissioner, therefore, dismisses petitioner's exception and argument with respect to the Board's interpretation of *N.J.S.A.* 18A:29-6, ''Master's degree or equivalent.''

In the instant matter, the Commissioner accepts the hearing examiner's report as his own and finds and determines that petitioner did indeed misrepresent his status with regard to the Board's MA + 30 salary guide. The Commissioner observes that the Court held that moneys mistakenly paid are recoverable in the matter of *Board of Education of Passaic v. Board of Education of Township of Wayne,* 120 *N.J. Super.* 155 (*Law Div.* 1972) wherein it stated:

> ''***The general rule is that such payments made by municipal corporations or agents thereof under mistake of law are recoverable.
>
> ***
>
> ''In dealing with the issue of whether the government could recover erroneous refunds, the court in *United States v. Hart,* 12 *F.Supp.* 596, 597 (*E.D. Pa.* 1935), aff'd 90 *F.2d* 987 (3 *Cir.* 1937), held that 'it is well

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settled that in case of the government, states, and even municipalities, money paid by mistake may be recovered.' ***

"***The reasoning behind such a decision is that this court does not feel that municipality or subdivision therof, as the instrument of the people, should be bound by a misinterpretation of the law by the authorities in charge.***" (at 163-164)

The Commissioner, for the aforestated reason, denies petitioner's requested relief. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 22, 1978

George Kondak,

Petitioner,

v.

Board of Education of the Township of Bernards, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris and Oxfeld (Doane Regan, Esq., of Counsel)

For the Respondent, Young, Rose & Millspaugh (Michael E. Rodgers, Esq., of Counsel)

Petitioner, a nontenured teacher in the employ of the Board of Education of Bernards Township, hereinafter "Board," avers that the Board's stated reasons for his termination effective April 30, 1976 were not the true reasons and that the Board's action was arbitrary and in violation of his constitutional and statutory rights. He requests reinstatement with back salary and all emoluments. The Board argues that the termination of the contract of employment of a nontenured teaching staff member is a matter of educational policy lying solely within its discretionary authority and pleads for dismissal of the matter.

A conference was held on October 27, 1976 at the State Department of

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Education, Trenton, at which time certain facts were stipulated and the Board subsequently filed for Summary Judgment with a Cross-Motion in opposition filed by petitioner. Briefs, Memoranda of Law, affidavits and exhibits were submitted and the matter is presently before the Commissioner of Education for adjudication.

The relevant facts are as follows:

Petitioner was initially employed by the Board as a teacher of social studies for the period May 1 to June 30, 1973. Thereafter, he was employed for three academic years pursuant to employment contracts effective the first day of September through June 30 for 1973, 1974 and 1975. Each of the aforesaid contracts contained the following provision:

> "It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other sixty days' notice in writing of intention to terminate the same***."

By letter dated February 18, 1976 petitioner was advised that the Board chose to exercise the sixty day notice in his contract and that his employment would be terminated April 30, 1976. (Board's Brief, Ex. B) Petitioner, under date of February 25, 1976 requested a written statement of reasons for his termination which was provided by the Superintendent of Schools on March 10, 1976. (Board's Brief, Exs. C, D, E) The reasons, in pertinent part, are as follows:

> "1. Dissatisfaction with the uneven quality of Mr. Kondak's performance as a classroom teacher, including problems with dealing with students, in constructing and following lesson plans for each class and in overall classroom management.
>
> "2. Mr. Kondak's failure to demonstrate the requisite potential for professional growth as a classroom teacher." (Board's Brief, Ex. E)

Petitioner requested an appearance before the Board which was granted on April 5, 1976. (Board's Brief, Exs. F, G, H) He was notified on April 7, 1976 that the Board has reaffirmed its decision to terminate his employment. (Board's Brief, Ex. I) During his employment by the Board from May 1, 1973 to April 30, 1976 petitioner was evaluated twice in the academic year 1972-73, five times in the academic year 1973-74, four times in the academic year 1974-75 and three times in the academic year 1975-76 for a total of fourteen evaluations.

This concludes the recitation of uncontested relevant facts in the instant matter.

The Board contends that is has broad discretion with respect to the termination or non-reemployment of nontenure teachers and its exercise of that discretion should not be overturned unless shown to be arbitrary, capricious,

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unreasonable or based upon proscribed considerations such as race or religion. In support of this contention the Board cites, *inter alia, Linda Wachstein v. Board of Education of the Township of Medford,* 1976 *S.L.D.* 928; *David Hochman v. Board of Education of the City of Newark et al.,* 1977 *S.L.D.* 11, aff'd State Board of Education 15, aff'd Docket No. A-3719-76 New Jersey Superior Court, Appellate Division, March 1, 1978; *Donald Banchik v. Board of Education of the City of New Brunswick,* 1976 *S.L.D.* 78 and *Dee Foster et al. v. Board of Education of the Township of Neptune,* 1976 *S.L.D.* 693.

The Board relies in particular on *Wachstein, supra,* and *Hochman, supra,* wherein in the latter case the Commissioner said:

> "***The Commissioner does not agree with petitioner's argument that due process requires charges to be proven against a nontenured teacher prior to the Board's exercise of a termination clause of an employment contract. It has been consistently held that employment contracts may be terminated according to their stated terms for any reason or no reason. [citations omitted] To hold, as petitioner urges, would be to extend the protection of tenure to nontenured teaching staff members. Such is not the intention of the Legislature.***" (1977 S.L.D. at 14)

The Board also cites *Banchik, supra,* wherein a nontenured principal sought a full adversary proceeding to prove that the board's stated reasons for non-reemployment were intended to conceal its actual unstated motivations. Therein the Commissioner stated:

> "***A review of the Petition of Appeal and the Amended Petition of Appeal reveals no detailed, specific instances of unreasonableness, arbitrariness or capriciousness on the part of the Board. Absent such detailed instances in support of petitioner's allegations, the Commissioner finds no reason to require that the matter proceed to a plenary hearing.***" (1976 *S.L.D.* at 82)

The Board argues that the remaining allegations in the Petition of Appeal fail to raise any real factual issues whereas:

1. The Board did properly conduct a prescribed number of evaluations as required by *N.J.S.A.* 18A:27-3.1.

2. A local board has no legal obligation to give a nontenured teacher notice of its intent to terminate employment other than the notice specified in the employment contract.

3. The Board denies that petitioner was not accorded an opportunity to be heard since, in fact, he appeared before the Board in excess of an hour, spoke personally, and presented two witnesses.

4. Lastly, the Board denies that it conducted a meaningless and perfunctory proceeding when petitioner appeared before it inasmuch as the criteria for the

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conduct of such a proceeding were met and therefore petitioner is not entittled to a full adversary hearing. (Board's Brief, at pp. 9-12)

Petitioner relies on *Foster, supra,* as cited by the Board, alleging that the exhibits attached to petitioner's Memorandum of Law provide adequate, detailed, specific instances of capriciousness and abuse of discretion by the Board.

The Commissioner observes that Exs. B1-B3 consist of statements extracted from petitioner's evaluation reports and are generally favorable in nature and Exs. C1-C3 are examples of petitioner's lesson plans. The Commissioner also observes that Ex. D, as submitted, consists of testimonial letters from pupils in petitioner's classes expressing favorable comments about him. Finally, the Commissioner observes that Ex. E consists of communications from petitioner's department head and the chairman of the school ski club to petitioner and are generally laudatory of his performance while in the employ of the Board.

Petitioner alleges that the foregoing exhibits demonstrate the capriciousness and abuse of discretion (*Foster, supra*) of the Board, prove fitness of petitioner for his position, and conclusively demonstrate that he is entitled to a full hearing and that a Summary Judgment would be a miscarriage of justice. (Petitioner's Memorandum of Law, at p. 2)

The Commissioner has on previous occasions pointed out that the rights of nontenure teachers who are not reemployed are clearly set forth in *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974) wherein the Court mandated that nontenure teachers be provided a statement of reasons for non-reemployment when requested. Therein the Court said:

> ''***Perhaps the statement of reasons will disclose correctible deficiencies and be of service in guiding his future conduct; perhaps it will disclose that the nonretention was due to factors unrelated to his professional or classroom performance and its availability may aid him in obtaining future teaching employment; perhaps it will serve other purposes fairly helpful to him as suggested in *Drown* (435 *F.2d* at 1184-1185); and perhaps the very requirement that reasons be stated would, as suggested in *Monks* (58 *N.J.* at 249), serve as a significant discipline on the board itself against arbitrary or abusive exercise of its broad discretionary powers.***''
>
> (65 *N.J.* at 245)

Also in *Donaldson,* the Court cited *George Ruch v. Board of Education of Greater Egg Harbor,* 1968 *S.L.D.* 7, dis. State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, March 24, 1969 (1969 *S.L.D.* 202) in support of an argument that ''***the fears of tenure impairment and undue burden expressed by those who have thus far insisted on the withholding of reasons***'' (at 248) was an indication of how negligible such fears were.

The Commissioner also commented in *Ruch, supra,* as follows:

''***A board of education's discretionary authority is not unlimited, how-

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ever, and it may not act in ways which are arbitrary, unreasonable, capricious or otherwise improper. *Cullum v. North Bergen Board of Education,* 15 *N.J.* 285 (1954***.'' (1968 *S.L.D.* at 9)

The Commissioner has previously held that nontenure teaching staff members are entitled to an appearance before local boards of education, on request, after receipt of a notice of non-reemployment. *Barbara Hicks v. Board of Education of Pemberton,* 1975 *S.L.D.* 332 See also *N.J.A.C.* 6:3-1.20. In the matter herein controverted petitioner was faced with termination of employment as specified by the terms of his contract, rather than nonrenewal of his contract. *Hochman, supra* The Commissioner finds and holds that such a circumstance does not abrogate the principles laid down in *Donaldson, supra,* and *Hicks.* Petitioner was entitled to a statement of reasons and an opportunity to appear before the Board, both of which were afforded him.

Petitioner contends that his constitutional rights were violated but fails to detail in his Petition of Appeal or Brief a single instance supportive of a conclusion that such violation may have occurred. *South Plainfield Education Association and Marilyn Winston v. Board of Education of the Borough of South Plainfield,* 1972 *S.L.D.* 323, aff'd State Board of Education 327, rev'd and rem. 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974) The Appellate Division of the Superior Court stated in *Winston* that:

''***It may be acknowledged that the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. Cf. *Trap Rock Industries, Inc. v. Kohl,* 63 *N.J.* 1 (1973)***'' (125 *N.J. Super.* at 144)

In the instant matter petitioner has failed to offer detailed instances which would lend credence to his generalized allegation that his constitutional rights were violated. Nor is there a showing either that his due process rights were denied or that the statutes were violated. The Commissioner determines that such bare assertion provides no cause of action.

The Commissioner has commented previously on teachers' claims that their constitutional rights have been violated or that a board was arbitrary and capricious or abused its discretion in *Foster, supra,* wherein the following was stated:

''***When a teaching staff member alleges that a local board of education has refused reemployment for proscribed reasons (*e.i.* race, color, religion, etc.) or in violation of constitutional rights such as free speech, or that the board was arbitrary and capricious or abused its discretion, *and is able to provide adequately detailed specific instances of such allegations,* then the teaching staff member may file a Petition of Appeal before the Commissioner which will result in a full adversary proceeding.***''
(Emphasis in text.) (1976 *S.L.D.* at 697)

He has examined petitioner's aforementioned exhibits and finds that they do not

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meet the criteria set forth in *Foster* of "***adequately detailed specific instances of such allegations***." The submission by petitioner of praiseworthy comments extracted from his evaluations, three sample lesson plans prepared by him, notes from pupils in his classes affirming their affection for him and the laudatory comments of two fellow employees, considered together, are not sufficient to support an allegation of arbitrary or capricious action on the part of the Board nor show that the Board's action in terminating the employment of petitioner was an abuse of its discretionary powers. The Commissioner observes that, although all fourteen evaluations are not totally negative, expressions of concern about petitioner's classroom presentations and planning are clearly evident.

Accordingly, the Commissioner finds and determines that petitioner has been afforded due process in accord with statutory and constitutional guarantees and that no further relief can be granted him. The Board's Motion for Summary Judgment is granted and the Petition of Appeal is herewith dismissed.

COMMISSIONER OF EDUCATION

December 22, 1978

Freehold Regional High School Education Association and Walter Holcomb,

Petitioners,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Murray, Meagher & Granello (Robert J. Hrebek, Esq., of Counsel)

Petitioner Walter Holcomb, a teaching staff member in the employ of the Board of Education of Freehold Regional High School District, hereinafter

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"Board," challenges an action of the Board by which it reorganized its plan for the supervision of instruction in its schools. Petitioner specifically challenges the Board's action by which it abolished certain positions with respect to the supervision of instruction and, in their stead, created new positions to carry out its reorganized supervisory plan. Petitioner alleges that the Board failed to comply with the provisions of *N.J.A.C.* 6:11-3.6, as amended, and prior decisions of the Commissioner of Education with respect to the creation of new professional staff positions. Petitioner seeks an Order setting aside the Board's action creating the new positions and directing the Board to recreate and continue the former positions it has abolished. The Board denies the allegations and asserts that its action with respect to the whole of its reorganized plan for the supervision of instruction is proper and legal. The Board seeks dismissal of the Petition.

The matter is referred directly to the Commissioner for adjudication on the parties' Cross-Motions for Summary Judgment, with exhibits and Briefs in support of their respective positions.

The Board asserts that the Petition must be dismissed for failure of petitioner to have proper standing to bring the action. The Commissioner observes in this regard that petitioner not only is employed by the Board as a teaching staff member, but also is president of the Freehold Regional Education Association and, further, is a resident of the Borough of Freehold, a constituent municipality of the Board's school district. The Board avers that petitioner lacks standing on the premise that he has failed to demonstrate he suffered direct injury as a result of the Board's controverted action as a citizen of a constituent district or as a teaching staff member and that as president of the Association he has failed to demonstrate that any member thereof suffered direct injury. The Board cites several cases in support of its premise that petitioner lacks standing, none of which, in the Commissioner's judgment are applicable herein.

Boards of education are required to operate the public schools in a manner consistent with *Title* 18A, *Education* and *N.J.A.C.* 6:1-1 *et seq.*, the rules and regulations of the State Board of Education. *Trenton Board of Education v. State Board of Education,* 125 *N.J.L.* 611 (*Sup. Ct.* 1941) A citizen of a board's municipality suffers injury if an action taken by the board is found to be illegal or beyond its discretionary authority. If it is established that the Board created improper positions to implement its reorganized plan for the supervision of instruction, petitioner's performance would be subject to evaluation by personnel appointed to such positions. Similarly petitioner has standing to bring the action as the president of the Association on behalf of the membership who, if the allegations are proven to be true, would be subject to evaluation by teaching staff members holding improper positions. Accordingly, the Commissioner determines that petitioner does have standing in the instant matter.

The essential facts necessary for determination of the matter by way of Summary Judgment are as follows:

At a meeting conducted on December 20, 1976 the Board adopted a res-

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olution approving a reorganization plan for the supervision of instruction and the controverted professional staff positions. (C-2) The Board also acted to abolish the then existing positions of district coordinator and building liaison as of June 30, 1977. In their stead the Board created the positions of building department supervisor, lead supervisor, district supervisor, and two administrative assistants, each position effective July 1, 1977. The Board also authorized the Superintendent to

> "***notify the people concerned [those who occupied the positions to be abolished], to negotiate any impact with any bargaining unit as required by law, to advertise new positions, establish timetables for implementation of the above, and to make recommendations to the Board of Education for employment of people for positions established." (C-2)

Petitioner avers that the titles of building department supervisor, lead supervisor, district supervisor, and administrative assistants are not titles for professional staff positions recognized in *Title* 18A, *Education* or in *N.J.A.C.* 6:1-1 *et seq.*, the rules and regulations of the State Board of Education. Consequently, petitioner avers that for the Board to have created such titles, it was required to adhere to the provisions of *N.J.A.C.* 6:11-3.6, which were in effect prior to amendment on November 9, 1977, effective November 10, 1977.

Petitioner contends that because the Board failed to submit a written request to the Monmouth County Superintendent of Schools for permission to use the titles which are allegedly not recognized and because the Board failed to adopt job descriptions for those controverted positions, the Board has acted contrary to *N.J.A.C.* 6:11-3.6 and the Commissioner's prior ruling in *Herbert J. Buehler v. Board of Education of the Township of Ocean,* 1970 *S.L.D.* 436, aff'd State Board of Education 1971 *S.L.D.* 660, aff'd Docket No. A-2297-70 New Jersey Superior Court, Appellate Division, November 2, 1972 (1972 *S.L.D.* 664).

The Board maintains that *N.J.A.C.* 6:11-3.6, prior to amendment on November 9, 1977, is advisory in nature and that prior approval of the County Superintendent of Schools is not mandatory prior to the creation of job titles not recognized in the State Board rules and regulations. The Board contends that it is not required to adopt job descriptions for the positions controverted herein and that it may properly delegate that task to its Superintendent. The Commissioner notices that the Superintendent did devise job descriptions for each of the positions and they shall be addressed, *post*. The Board argues that its responsibility is limited to creating, through its formal approval, the specific positions each of which, it avers, is "***expressly supervisory***" in nature. (Board's Brief, at p. 11)

The Commissioner observes that of the four controverted titles of district supervisor, building department supervisor, lead supervisor and administrative assistant, only the title of administrative assistant is not recognized in the rules and regulations of the State Board of Education, *N.J.A.C.* 6:1-1 *et seq*. The other three titles, although employing different adjectives, are titles of supervisors. *N.J.A.C.* 6:11-10.4(c) specifically provides, *inter alia,* as follows:

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"(c) Supervisor: This endorsement is required for supervisors of instruction who do not hold a school administrator's or principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel.***"

Thus, of the four titles controverted herein three are appropriate for the position of supervisor. The position entitled administrative assistant is not recognized and, therefore, has no specific certification requirement.

The Commissioner shall next address the responsibility of a local board of education which desires to use position titles not recognized in the rules for certification adopted by the State Board of Education.

N.J.A.C. 6:11-3.6, prior to its amendment, was accompanied by a similar rule, *N.J.A.C.* 6:11-10.5(a). Both rules, as they then existed, are reproduced here in full:

N.J.A.C. 6:11-3.6

"(a) School districts are urged to assign to personnel, titles which are recognized in these regulations.

"(b) If use of unrecognized titles is necessary, a job description should be formulated and submitted to the county superintendent of schools, in advance of the appointment, on the basis of which determination may be made of the appropriate certificate for the position."

N.J.A.C. 6:11-10.5(a)

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

The State Board of Education's action in amending *N.J.A.C.* 6:11-3.6 on November 9, 1977 also resulted in the repeal of *N.J.A.C.* 6:11-10.5(a).

N.J.A.C. 6:11-3.6 now provides as follows:

"(a) School districts shall assign position titles to teaching staff members which are recognized in these regulations.

"(b) If a local board of education determines that the use of an unrecognized position title is desirable, or if a previously-established unrecognized title exists, such board shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such

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appointment. Such request shall include a detailed job description. The county superintendent shall exercise his/her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year.''

In either case, it was and is now mandatory for local boards of education to secure the prior approval of the county superintendent of schools for the use of titles not recognized in the State Board rules. In order for county superintendents to arrive at informed judgments with respect to such requests, it is mandatory for a board to specify the duties and responsibilities assigned to the unrecognized title so that the county superintendent may designate the type of certificate necessary for appointment to that position, and, if necessary, the appropriate title for the position.

In the Commissioner's judgment, *N.J.A.C.* 6:11-3.6 is clear on its face that prior approval of the county superintendent of schools is mandatory for both the unrecognized title and the accompanying job description by the explicit direction that the board ''shall'' submit a written request which ''shall'' be accompanied by a job description. *N.J.A.C.* 6:11-10.5(a) contained the word ''should'' with respect to the formulation of a job description, which, by determination is a prior decision, means ''required.'' In *Samuel E. Appel v. Board of Education of the City of Camden et al.*, 1975 *S.L.D.* 562, the Commissioner held that

> ''****should** in the context of its use in the rule [*N.J.A.C.* 6:11-10.5(a)] must be interpreted as mandatory whenever an 'unrecognized' title is considered for adoption.***'' (*Emphasis in text.*) (at 568)

In the instant matter, the Board failed to submit a request to the Monmouth County Superintendent of Schools for the creation of the position entitled administrative assistant, together with a job description for each such position purportedly created by it. Such failure on the part of the Board constitutes a violation of the provisions of *N.J.A.C.* 6:11-3.6 and *N.J.A.C.* 6:11-10.5(a) as adjudicated by the Commissioner in *Appel, supra.*

It is observed that the Board delegated its responsibilities to the Superintendent to create job descriptions for each of the four controverted positions herein. As was previously stated, the titles of district supervisor, building supervisor, and lead supervisor are, in fact, titles of supervisor as recognized in *N.J.A.C.* 6:11-10.4(c). The Superintendent may, of course, prepare the necessary job descriptions for these proposed positions. It is the Board, however, which must formally adopt these job descriptions for each of the proposed supervisory positions. This responsibility of the Board derives from *N.J.S.A.* 18A:27-4 which provides as follows:

> ''Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of

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payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto.''

Notwithstanding the determination herein that the Board failed to comply with the referenced State Board rules and regulations, *ante,* such failure is not a basis upon which to grant the total requested relief of petitioner. The Commissioner shall not direct the Board to recreate the positions of district coordinator and building liaison which were properly abolished. Furthermore, those titles are not recognized in the State Board rules, and both would required the prior approval of the County Superintendent. The matter of a policy to be adopted for the supervision of instruction is wholly within the discretionary authority of the Board at *N.J.S.A.* 18A:11-1 to ''***make rules and regulations for the operation of its schools***'' in conjunction with *N.J.S.A.* 18A:27-4. (See *Buehler, supra.)*

The Commissioner observes that *N.J.A.C.* 6:3-1.19 requires boards of education to adopt a policy for the supervision of instruction by which the board sets forth procedures ''***for the observation and evaluation of nontenured teaching staff members.***'' Furthermore, *N.J.A.C.* 6:3-1.21, adopted by the State Board of Education on July 6, 1978, requires boards of education to, *inter alia:*

> ''***adopt policies and procedures requiring the annual evaluation of all tenured teaching staff members *by appropriately certified personnel*****.'' *(Emphasis supplied.)*

The Commissioner has reviewed the job descriptions developed by the Superintendent, not adopted by the Board, for the positions of district supervisor (C-4), building supervisor (C-5), lead supervisor (C-6), and administrative assistant (C-7-8) and finds that each position requires duties of supervision of professional personnel. Each person employed in such supervisory positions must be in possession, as a minimum, of either a supervisor's or principal's certificate. The job description requirements prepared by the Superintendent for the positions of lead supervisor (C-6) and administrative assistant (C-7-8) do not specify minimal possession of a supervisor's or principal's certificate. Further, petitioner asserts that seven persons have been appointed to several of these supervisory positions who do not hold a supervisor's or principal's certificate. (Petitioners' Brief, at p. 8) The Commissioner reminds the Board that the minimum of either a supervisor's or principal's certificate must be held by an individual assigned to supervise the performance of teaching staff members. Any supervisory appointment by the Board which does not meet this requirement is *ultra vires. Buehler, supra; In the Matter of the Tenure Hearing of John Martz, School District of the Township of Franklin,* 1976 *S.L.D.* 773, aff'd State Board of Education 791

The Commissioner hereby directs the Board of Education of the Freehold

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Regional High School District, should it desire to continue the controverted position of administrative assistant, to formally apply to the Monmouth County Superintendent of Schools for approval to use such unrecognized title and submit to him a job description for that position. The Commissioner also directs the Board to adopt job descriptions for the remaining three controverted positions, submit them to the Monmouth County Superintendent of Schools to verify that the three positions are in fact positions for the supervision of instruction.

Finally, should the Board fail to comply with these directives within thirty days from the date of this decision, petitioner may file a formal application to the Commissioner for an Order directing the Board to cease and desist from employing persons in the controverted positions for the purpose of the supervision of instruction, including the evaluation of the performance of teaching staff members.

COMMISSIONER OF EDUCATION

December 26, 1978

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

In the Matter of the Application of the Board of Education of the Township of Branchburg for the Termination of the Sending-Receiving Relationship with the Board of Education of the Borough of Somerville, Somerset County.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 31, 1977

Decided by the State Board of Education, November 9, 1977 and December 7, 1977

For the Petitioner-Appellant, Blumberg, Rosenberg, Mullen & Blackman (William B. Rosenberg, Esq., of Counsel)

For the Respondent-Appellee, Richard J. Murray, Esq.

For the Intervenor, Thomas H. Dilts, Esq.

The State Board affirms the decision of the Commissioner with the follqwing modification: that the State Board of Education disapproves the position taken by the Commissioner on pages 36-37 of his decision wherein he states that a high school with less than 800 students is not desirable. (1977 *S.L.D.* 680-681) Unless or until this Board has adopted a policy or regulation on the subject, the criterion of adequacy of a proposed high school should be whether the particular community has the capacity and resources to provide its high school students with a thorough and efficient educational program.

In order to further the purposes and philosophy of the Public School Education Act that there should be a maximum of citizen involvement and determination in educational matters, the State Board hereby directs that the Commissioner explore further with the Boards of Education of Branchburg and Somerville, respectively, the factors bearing upon the desirability of all-purpose or limited-purpose regionalization of the two districts, and to order regionalization, in whole or in part, if the Commissioner finds such action to be necessary for the conduct of a thorough and efficient educational program in both Branchburg and Somerville.

An opinion of the State Board reflecting this determination will be issued in a week to ten days.

October 4, 1978

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

Board of Education of the Township of Branchburg, Somerset County,

Petitioner-Appellant,

v.

Board of Education of the Borough of Somerville, Somerset County,

Respondent-Appellee,

and Borough of Somerville, Intervenor.

STATE BOARD OF EDUCATION

OPINION

Decided by the Commissioner of Education, May 31, 1977

Decided by the State Board of Education, October 4, 1978

For the Petitioner-Appellant, Blumberg, Rosenberg, Mullen & Blackman (William B. Rosenberg, Esq., of Counsel)

For the Respondent-Appellee, Richard J. Murray, Esq.

For the Intervenor, Thomas H. Dilts, Esq.

The Branchburg Board of Education sought approval from the Commissioner for severing its sending-receiving relationship with the Board of Education of Somerville because of overcrowding at Somerville's High School and a desire to establish a K-12 system for Branchburg. The Commissioner denied the application, and this appeal followed.

The extensive testimony and exhibits were thoroughly reviewed in the Commissioner's decision and need not be detailed here; a brief summary will suffice for the purposes of this appeal.

Because of population pressures, Somerville notified Branchburg in late 1969 that it wished to terminate the sending-receiving relationship, and the Boards subsequently agreed to such termination beginning with the 1975-76 school year. Before that academic year arrived, however, new pupil projections caused Somerville to review its previous position and oppose the severance which it previously sought.

The case for Branchburg included the following points:

1. Branchburg now has no voice in decisions concerning the educa-

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tional program at Somerville High School, contrary to the mandate of the Public School Education Act of 1975 (*N.J.S.A.* 18A:7A-1 *et seq.*).

2. This situation results in such disadvantages to Branchburg as lack of a coordinated K-12 program for its pupils, and the necessity of paying (indirectly through tuition costs) for the many courses not taken by Branchburg students (these amount to about 21 per cent of the total course offerings).

3. For the 1975-76 school year, Somerville provided a high school program for 1253 full-time and 45 shared-time pupils, while the functional capacity of the schoolhouse was 1095. If the Branchburg students do not withdraw from Somerville High School, its enrollment will continue to exceed the school's functional capacity for the foreseeable future, and there will be no relief from the present problems of overcrowding and staggered sessions. These and other considerations were countered by Somerville's points, which included:

1. Severance of the Branchburg pupils would be deleterious to Somerville High School as a result of increased costs, reduced educational program, or both.

2. While overcrowding at Somerville High School will persist, it will not get worse; increases in the number attending from Branchburg will be offset by declines in the enrollment from the Borough of Somerville.

3. If Branchburg were to have withdrawn in 1976, the non-white population in the high school would have jumped from 10.79 per cent to 18.42 per cent; the Branchburg student population is 99 per cent white.

Conflicting opinion evidence and argument were presented on such key factors as the effect of Branchburg's proposed withdrawal on the finances of the Somerville community, and whether the high school population of either district would be sufficient to provide high quality educational programs therein at reasonable cost.

The Hearing Officer attached the most importance to "the fact that severance would result in the substitution of two small high schools for a good, almost ideally sized high school wherein, on the record of this hearing, there is a well established, fine educational program." He concluded with finding that the positive benefits which would accrue if severance were granted were outweighed on balance by serious and compelling reasons of educational and financial importance, and that Branchburg had not met the burden of proof required for approval of the requested change.

The Commissioner accepted the Hearing Examiner's findings and recommendations and denied the application for the severance.

The State Board of Education affirms the Commissioner's decision essen-

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tially for the reasons stated therein, but with one qualification as hereinafter set forth. We agree with the Hearing Officer and with the Commissioner that the application comes prematurely; that the severance would be deleterious to Somerville's high school as a result of increased costs and reduced educational program; and that on balance the factors in favor of termination of the sending-receiving relationship are outweighed by the negative factors.

Where one school district desires to withdraw its pupils from another district, the burden is on the withdrawing district to justify such a move and to establish "good and sufficient reason" for the application. *N.J.S.A.* 18A:38-13; *Application of Boonton Board of Education for Termination of Sending-Receiving Relationship with Board of Education of Lincoln Park*, 1974 *S.L.D.* 1023, 1032. Branchburg has not carried this burden.

The one respect in which we qualify our affirmance of the Commissioner's decision is our disagreement with the Commissioner's treatment of high school size as a key element in the outcome. The Commissioner admitted the absence of any definitive and convincing studies regarding cost efficiency—optimum size for a high school. He also noted that the State Board of Education had not adopted a policy or regulation on high school size. He went on to express the opinion, nevertheless, that a student population below 800 was not desirable, and that this figure would not be reached in Branchburg for at least several years.

We believe that the Commissioner should not have taken the position that a high school with less than 800 students is undesirable. Until or unless the State Board of Education has adopted a policy or regulation on the subject, it seems better to us that no minimum or maximum figure should play a dominant role in cases like the present. Rather, the question should be whether the particular community has the capacity and resources to provide its high school students with a thorough and efficient educational program. In this connection breadth of curriculum may not be as important as thorough training in basic subjects.

There is one factor in this case which we regard as of the utmost importance, and that is the effect which the severance would have on the racial composition of Somerville High School and the proposed Branchburg High School. According to the uncontradicted evidence, if Branchburg built its own high school and withdrew its pupils from Somerville, the black population of the latter high school would jump immediately from approximately 11% to over 18%, while the student population of Branchburg would be 99% white. On the other hand, if Branchburg stays, the racial composition of the Somerville High School should remain stable for many more years.

The public policy of this State strongly favors racial balance in all of our schools to the extent this is feasible. The constitutional prohibition against segregation in the public schools (N.J. Constitution, Art. 1 par. 5) has been unrelentingly applied by our courts. *Booker v. Board of Education of Plainfield*, 45 *N.J.* 161 (1965); *Jenkins v. Township of Morris School District*, 58 *N.J.* 183 (1971) But this is only part of the policy. We have gone further and taken the

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view that a pluralistic learning environment has in itself great educational value; that children learn through personal contact with those of other races or creeds; and that therefore the mixing of children of different backgrounds in a school should be encouraged as an educational benefit. Indeed, the petitioner's own expert witness, Dr. Ramsay, admitted that "if the Branchburg children did not have the opportunity to participate with some of the minority children from Somerville, that would be a disadvantage."

Our State policy has recently been reenforced by the U.S. Supreme Court in *Regents of the University of California v. Bakke*, U.S. (1978), in which the opinion of Mr. Justice Powell, with the concurrence of several other Justices, cited with approval the Harvard Admissions Program, which takes race into account in deciding whom to admit. The Court approved of ethnic diversity as a desirable feature of an educational environment, citing the statement in the Harvard Program that "a black student can usually bring something that a white person cannot offer."

We therefore oppose the withdrawal of Branchburg High School students from Somerville at this juncture, not only because of the sudden large increase it would produce in the black ratio at Somerville, but also because it would create a virtually all white high school in Branchburg.

In many cases it is not feasible to provide a white community school with a cross-section of our State's population. Here, however, we can at least prevent the creation of a new school which would suffer this deficiency from the outset. Where we have a racially balanced school of high quality, we should preserve it unless other reasons for dismembering it are far stronger that they are here.

Finally, we look with favor upon regionalization as a solution for the problem of how to give the citizens of Branchburg a voice in the education of their high school children, and therefore believe that the Commissioner should continue to explore the possibility with the parties. However, there is no need to continue this litigation in the meantime.

For all of the foregoing reasons we affirm the Commissioner's decision and dismiss the petition.

October 25, 1978

Pending New Jersey Superior Court

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

Board of Education of the Township of Brick,

Petitioner-Respondent,

v.

Ronald Heinzman, John Hickman and Brick Township Education Association,

Respondents-Appellants.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, November 15, 1976

Decided by the State Board of Education, March 2, 1977

Submitted: December 20, 1977. Decided: January 11, 1978

Before Judges Halpern, Larner and King.

On appeal from New Jersey State Board of Education.

Mr. Joseph N. Dempsey, attorney for respondents-appellants.

Mr. Martin B. Anton, attorney for petitioner-respondent.

Mr. William F. Hyland, Attorney General, attorney for New Jersey State Board of Education, filed a statement in lieu of brief (Mr. Alfred E. Ramey, Jr., of counsel and on the statement).

PER CURIAM:

This is an appeal from the decision of the State Board of Education affirming the determination of the Commissioner of Education relating to the claims of two nontenured teachers against the Board of Education of Brick Township.

Appellants were notified in May 1971 that they would not be reemployed for the ensuing school year. As a result of grievances filed by them, the dispute as to the Board's failure to renew their contracts was submitted to arbitration, with the Board contending that the issue was not arbitrable under the collective negotiation agreement.

The arbitrator found that the Board's notices of nonrenewal on May 10 and May 14 were not in conformity with the contractual requirement of May 1, and

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proceeded to award the grievants the rights and benefits which they would have received if their contract had been renewed for 1971-1972.

The Board thereupon filed a complaint in the Chancery Division alleging that the subject matter of the retention of the teachers was not arbitrable and seeking to restrain the enforcement of the arbitrator's award. This litigation resulted in a judgment dated June 6, 1973 permanently enjoining the enforcement of the award of the arbitrator as beyond his jurisdiction, dismissing a counterclaim seeking such enforcement, and directing that the teachers proceed to exhaust their administrative remedies.

No appeal was taken from this order, and the parties submitted the dispute to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9.

The State Board found that the local Board of Education failed to give timely notice as required by the agreement with the Association representing the teachers and directed that the aggrieved parties be compensated in the "amount of 60 days' salary and attendant emoluments." It further held that the lack of timely notice did not entitle the teachers to tenure, reinstatement, or salary for the full year of 1971-1972.

The appellants belatedly argue that the State Board of Education or the Commissioner had no jurisdiction to make a determination contrary to the arbitrator's award. This contention is manifestly without merit, for the arbitrator's decision was nullified by the unappealed judgment of the Chancery Division. As a consequence, the arbitration award has no further viability and cannot serve to impede the jurisdiction of the State Board to determine the controversy.

Moreover, we do not construe the final judgment of the Chancery Division as one in which the court retained jurisdiction for the disposition of any further issues.

We consider the appellate arguments to be clearly without merit, and affirm substantially for the reasons set forth in the written decision of the Commissioner of Education as affirmed by the State Board of Education.

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Ciro D'Ambrosio,

Appellant,

v.

Board of Education of the Borough of Palisades Park and George Iannacone, Superintendent, Bergen County,

Respondents.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, July 27, 1976

Decided by the State Board of Education, March 2, 1977

Argued October 4, 1978—Decided October 13, 1978

Before Judges Allcorn and Botter.

On appeal from New Jersey State Board of Education.

Edward R. Schutzer argued the cause for appellant (Osterweil, Wind & Loccke, attorneys).

John H. Anlian argued the cause for respondent, Board of Education of the Borough of Palisades Park (Patrick J. Tansey, attorney).

John J. Degnan, Attorney General of New Jersey, filed a Statement in Lieu of Brief for respondent, New Jersey State Board of Education (Mary Ann Burgess, Deputy Attorney General, on the Statement).

PER CURIAM.

Appellant, a nontenured teacher, requested and received reasons for not receiving a new employment contract for the next school year. See *Donaldson v. Board of Education of No. Wildwood,* 65 *N.J.* 236 (1974). Appellant filed a petition with the Commissioner of Education, challenging the accuracy of the reasons given. The Commissioner agreed with the hearing examiner who found that the "written reasons afforded petitioner for his nonrehire contain no mention of teaching deficiency," and that the "validity" of the reasons given were amply supported by the evidence. The Commissioner concluded that the local board of education "properly exercised its discretion to reorganize and reduce its teaching staff in 1974, communicated this decision to [appellant] in a timely manner and afforded him all the due process rights to which he was entitled."

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On appeal to it, the State Board of Education affirmed the Commissioner's decision.

We find no merit to appellant's contentions on this appeal and no basis for a remand for a further hearing. *R.* 2:11-3(e) (1) (D) and (E).

Affirmed.
Cert. denied New Jersey Supreme Court

Deal Education Association, Kathleen Chokov and Sandra Layton,

Petitioners-Appellants,

v.

Board of Education of the Borough of Deal, Monmouth County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 11, 1977

Decided by the State Board of Education, December 7, 1977

For the Petitioners-Appellants, Morgan and Falvo (Peter S. Falvo, Jr., Esq., of Counsel)

For the Respondent-Appellee, Mirne, Nowels, Tumen, Magee & Kirschner (Michael B. Kirschner, Esq., of Counsel)

The basic facts in this case have been established without dispute and are stated clearly in the hearing examiner's report. The Commissioner has analyzed those facts and reached conclusions which we feel are simply not supported by the facts themselves.

In essence, the Commissioner concluded that the original decision of the School Board not to renew the contracts of five nontenured teachers was not made in good faith when the decision was made in March 1976. At the time the decision was made not to renew the five teachers, it is undisputed that there was significant decreasing pupil enrollment and a budget reduction of $100,000 fixed by the governing body following defeat of the Board's budget proposal.

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It is further undisputed that in March 1976 the Board planned to redistribute the work of the two petitioners among other teachers remaining in the school system.

Subsequently, the Board determined that the plan to redistribute the work was not feasible. The record shows that efforts were, in fact, made to implement the original plan. However, when the plan would not work, the Board determined that it was necessary to employ two half-time teachers, one in art and one in mathematics, and did, in fact, employ two such teachers not including the petitioners who had previously taught those subjects on a full-time basis.

In essence, the Commissioner has determined that the reduction in force which occurred in March 1976 was not made in good faith and was arbitrary and capricious because the Board's original plan did not work out.

On the contrary, we determine that the record supported the conclusion that the actions of the Board of Education in March 1976 were made in good faith even though subsequent facts may have shown the original judgment to have been in error. This conclusion is supported by the fact that the Board later only found it necessary to employ two half-time teachers to replace five full-time teachers. It should be further remembered that the Board was acting under the April 30, 1976 deadline necessary to give notice of nonrenewal to nontenured teachers.

We cannot impute bad faith to the Board's March actions from the subsequent independent decision in June to employ two part-time teachers. There is nothing in the record that ties together those two independent actions so as to justify any inference of bad faith. Similarly, we cannot conclude that the reason given for non-reemployment in March of 1976 was either "invalid" or "spurious." The record does indicate that the principal may have failed to investigate sufficiently the feasibility of the plan which he subsequently recommended and the Board adopted. However, such failure on the principal's part cannot be equated with bad faith.

We therefore reverse the decision of the Commissioner, and we adopt the recommendation of the hearing examiner as the decision of this Board for the reasons stated in the hearing examiner's report.

One aspect of this controversy, however, requires further comment. We note that on June 9, 1977, while the petitioners were still in the service of the local Board, the latter made a new determination to rescind the abolition of the positions then held by the two petitioners and to reinstate such positions on a half-time basis. At the same time the Board determined not to offer the petitioners an opportunity to apply for the two half-time positions, but instead the Board appointed two other individuals who had previously served in the District. It was obvious at that point that the Board must have had some reason for preferring the new appointees over the petitioners; the original reason of reduction in force no longer sufficed to explain the Board's actions. Under these special circumstances, we believe that the philosophy expounded by the Supreme Court in *Donaldson v. Board of Education of North Wildwood*, 65 *N.J.* 236 (1974) and

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further incorporated in *N.J.S.A.* 18A:27-3.2, would apply to the June 9 action of the Board, and that if petitioners had promptly requested a further statement of the reason or reasons why they were not given the opportunity to reemployment on a half-time basis, the Board would have been obligated to furnish it. (This is not to imply that the petitioners were to be afforded any priority or preference by the Board in selecting the half-time appointees.)

However, the record does not indicate that petitioners ever requested such a statement with respect to the June 9 action, and many months have now passed since the end of their employment relationship with the respondent. We have accordingly concluded that petitioners should be deemed to have waived this right to any additional statement of reasons from the Board.

For the foregoing reasons the petition is dismissed.

July 6, 1978

Pending New Jersey Superior Court

George Delli Santi,

Petitioner-Appellant,

v.

Board of Education of the City of Newark, Essex County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 18, 1977

For the Petitioner-Appellant, John Cervase, Esq.

For the Respondent-Appellee, Cecil Banks, Esq.

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

June 7, 1978

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Larry Dennis and Arline Dennis, on behalf of Scott Dennis,

Petitioners-Appellants,

v.

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

Respondent-Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, April 11, 1977

Decided by the State Board of Education, July 6, 1977

Submitted November 6, 1978—Decided December 8, 1978

Before Judges Fritz and Morgan.

On appeal from New Jersey Department of Education, State Board of Education.

Messrs. Goldzweig, Reilly & Grossman, attorneys for appellants (Mr. Lawrence S. Grossman, on the brief).

Messrs. Russell, Fasano, Nicosia & Goodall, attorneys for respondent (Mr. William L. Russell, Jr., on the brief).

PER CURIAM

Petitioners, who are appellants here, brought a petition before the Commissioner of Education, alleging that their son had been wrongfully dismissed from his high school football team and deprived of a varsity athletic letter. They also complained that he and they were "deprived of a hearing without good reason." They sought an order directing the award of a varsity letter and other equitable relief. The respondent Board of Education of Holmdel filed an answer joining issue which included the assertion that "[p]etitioner and his parents were given hearings and were afforded all due process required by law."

A hearing on the petition was held before a hearing examiner in the Division of Disputes and Controversies of the Department of Education. The hearing took two days resulting in a transcript of 335 pages.

The hearing officer reported in writing, with extensive documented findings and his conclusions. In essence he determined that the youth's admitted drinking

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of alcoholic beverages was a knowing violation of the team's training rules fully justifying the school action. He also related the meetings which the mother and father were accorded by the school officials and noted that the same sanctions were imposed for the same reasons on nine other players. He concluded there was no due process problem involved. He recommended the petition be dismissed and the Commissioner of Education (Commissioner) adopted the recommendation.

An appeal to the State Board of Education (State Board) resulted in an affirmance of the Commissioner's action for the reasons given there. At petitioners' request for reconsideration, the State Board refused to reconsider its determination. This appeal followed.

Here petitioners argue that the Commissioner erred "in not giving the proper weight as to whether the [drinking] took place before or after [their son's] injury." They also insist that "appellant [*sic*] should have been afforded a fair and impartial hearing prior to being deprived of the award that he had earned." Our review of the record satisfies us that these issues are clearly without merit, and that the findings below were reasonably reached on the basis of ample credible evidence in the record as a whole. *R.* 2:11-3(e) (1) (D) and (E).

Affirmed.

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Alan De Old and the Verona Education Association,

Petitioners-Appellants,

v.

Board of Education of the Borough of Verona, Essex County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 5, 1977

For the Petitioners-Appellants, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Jack Wysoker, Esq., of Counsel)

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

In his decision of October 5, 1977, the Commissioner held that petitioner used poor judgment in his dealings with a pupil and affirmed the action of the Board. In the light of the excellent record of petitioner, the Commissioner suggested that the Board review the penalty imposed.

The basic facts in this case are stated clearly in the Hearing Examiner's report. The Commissioner has reviewed those facts and reached a conclusion with which we do not agree.

The Commissioner has affirmed the Board's action in withholding permanently one year's increment from petitioner who is concluding his third year as Industrial Arts teacher and advisor to the Coin Club; the alternative was loss of his job, since he was not under tenure.

Commissioner comments on and recognizes the laudatory description of petitioner's excellence as a teacher. The principal of Verona High School evaluated petitioner in March of 1975 and testified that petitioner is always first to volunteer his services; that his loyalty and interest cannot be matched; that he shows mature good judgment and amicably resolves problems in his department of which he is chairman. The principal (now supervisor of instruction) further testified that his opinion of petitioner has not changed and that he considers him a superior teacher.

As advisor to the Coin Club, petitioner, after several requests, reluctantly agreed to find buyers for a total of 25 coin sets brought to him at intervals by a student, G.D., not a member of the Coin Club. Petitioner received $13.20

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over what he paid for the sets to cover costs of his time, telephone calls to other dealers and use of his car for delivery.

Shortly after delivery of the final sets to petitioner, G.D. requested the return of all coin sets stating the man from whom G.D. had purchased them wanted them back. Subsequently, petitioner was called at home by G.D.'s mother and she said the coin sets were hers and she wanted them back.

Within two and one-half weeks after the parent complained to the principal, petitioner had all sets back in the hands of his principal (January 31, 1975). Due to some confusion, parent never picked up the sets and sued petitioner. No judgment was made against petitioner and the court directed that the sets be returned to G.D.'s mother and petitioner be reimbursed $80.50, the amount he paid G.D.

As a result of this activity, the Board decided not to renew petitioner's contract. Petitioner requested and was given an audience before the Board and was successful in dissuading the Board from terminating his employment.

From a review of the record and the testimony it is evident that petitioner, in his efforts to assist a student, became involved in a confusing situation. It is also clear that petitioner made every effort to resolve the situation to the satisfaction of the parent, the student, his principal and Superintendent. Nothing in the record indicates petitioner was not open, honest and forthright in his dealings with all parties concerned. At the very most, his involvement might be considered poor judgment, and if it were, it is not poor judgment in the academic area.

We find that the action of the petitioner described herein does not constitute "other good cause" within the meaning of *N.J.S.A.* 18A:29-14, which provides that:

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both,***."

We also believe that the penalty imposed by the Board was harsh and excessive.

We therefore reverse the decision of the Commissioner and direct that petitioner be restored to his proper step on the salary scale and that any increments withheld be repaid.

April 5, 1978

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Board of Education of the Township of Ewing,

Petitioner-Appellee,

v.

Township Committee of the Township of Ewing, Mercer County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 16, 1977

For the Petitioner-Appellee, Abbotts and Abbotts (John Abbotts, Esq., of Counsel)

For the Respondent-Appellant, Dietrich, Allen and St. John (Charles P. Allen, Jr., Esq., of Counsel)

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

August 2, 1978

Pending New Jersey Superior Court

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William and Genevieve Fitzgibbon,

Petitioners-Appellants,

v.

Board of Education of the Township of Jefferson, Morris County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 14, 1977

For the Petitioners-Appellants, Dolan and Dolan (Francis E. Bright, Esq., of Counsel)

For the Respondent-Appellee, Murray, Meagher & Granello (James P. Granello, Esq., of Counsel)

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

January 11, 1978

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Argued October 24, 1978—Decided October 31, 1978

Before Judges Halpern, Ard and Antell.

On appeal from the State Board of Education.

Francis E. Bright argued the cause for petitioners-appellants (Dolan and Dolan, attorneys).

James P. Granello argued the cause for respondent-appellee (Murray, Granello & Kenney, attorneys).

John J. Degnan, Attorney General of New Jersey filed a statement in lieu

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of brief on behalf of the State Board of Education (Mark Schorr, Deputy Attorney General, of counsel and on the statement).

PER CURIAM.

William and Genevieve Fitzgibbon, teachers in the Jefferson Township school system, appeal from a decision of the State Board of Education affirming the decision of the Commissioner of Education and the action of the Township's Board of Education in deducting two days pay from appellants' salaries because of their unexcused absences on September 1 and 5, 1972, and in placing letters of reprimand in their personnel files.

We concur in the conclusions reached by the State Board and find sufficient credible evidence in the record to warrant the findings that appellants' unexcused absences were in deliberate violation of the school superintendent's denial of their request for leave and established school policy and, therefore, justified the imposition of the penalties and the reprimand placed in their personnel files. The penalties imposed were not an abuse of discretion, and there is no reason to disturb the findings below. *In re Suspension of Heller*, 73 *N.J.* 292, 309 (1977); *In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13 (App. Div. 1974), certif. den. 65 *N.J.* 292 (1974); *R.* 2:11-3(e) (1) (D) and (E).

Affirmed.

Kathryn R. Fox,

Petitioner-Appellant,

v.

Board of Education of the Watchung Hills Regional High School District, Somerset County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 11, 1977

For the Petitioner-Appellant, Rothbard, Harris & Oxfeld (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Appellee, Buttermore and Mooney (Robert J. T. Mooney, Esq., and William S. Jeremiah, Esq., of Counsel)

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The State Board remands this case to the Commissioner for plenary hearing. In deciding this matter, the Commissioner shall set out the standard of review applied in his review of the action of the Board.

February 1, 1978

Richard R. Gearing,

Petitioner-Appellant,

v.

Board of Education of the Borough of Manasquan, Monmouth County,

Respondent-Appellee.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, June 23, 1977

Decided by the State Board of Education, October 12, 1977

Argued October 4, 1978—Decided October 30, 1978

Before Judges Fritz, Bischoff and Morgan.

On appeal from the State Board of Education.

Mr. Michael D. Schottland argued the cause for appellant (Messrs. Chamlin, Schottland, Rosen & Cavanagh, attorneys).

Mr. Joseph N. Dempsey argued the cause for respondent Board of Education of the Borough of Manasquan.

Mr. John J. Degnan, Attorney General of New Jersey, filed a Statement in Lieu of Brief for respondent New Jersey State Board of Education (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel and on the Statement).

The Opinion of the Court was delivered by BISCHOFF, J. A. D.

Petitioner Richard R. Gearing, formerly a nontenured elementary school principal employed by respondent Board of Education of the Borough of Man-

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asquan (Board), appeals from a decision of the State Board of Education affirming a decision of the Commissioner of Education, which dismissed petitioner's petition of appeal wherein he claimed that the procedure by which his contract was not renewed deprived him of due process.

Petitioner was employed as an elementary school principal by the Board from February 7, 1975 to June 30, 1976. He did not have tenure. A new Superintendent of Schools was employed by the Board in November 1975, and petitioner received his first evaluation from the Superintendent on January 29, 1976. Of the nine areas covered in the evaluation, petitioner was rated unsatisfactory in five. The evaluation was five pages in length and in each of the nine categories evaluated petitioner's performance was discussed in detail. The report concluded with a summary in which the Superintendent stated that if he had to make a decision at that time on retention of the petitioner, he would be asked to leave.

A second formal evaluation was prepared on April 6, 1976. The summary of that detailed evaluation included the statement that it was the opinion of the Superintendent that petitioner was "not the person to provide educational administrative leadership needed at the school," and that he would not recommend him for a contract for the coming years.

In both evaluations there was a discussion of the specific areas wherein the Superintendent found petitioner's performance to be inadequate and needing improvement.

Petitioner requested and was granted a predecision hearing by the Board. At this hearing, held April 13, 1976, petitioner presented a lengthy argument supported by documents in an attempt to rebut the negative points contained in the two evaluation reports. At the regular Board meeting of April 23, after a three hour discussion involving interested citizens, the Board and the Superintendent, the Board voted not to renew petitioner's contract and notice confirming the nonrenewal, effective June 30, 1976, was mailed to petitioner on April 26, 1976. Petitioner requested a statement of reasons for the nonrenewal and was informed by letter dated April 30, 1976 that the reasons for nonrenewal were:

> Based upon an assessment of your evaluations by the Superintendent of Schools, we did not feel that you met the standards for administrators in the school district.

On May 5, 1976 petitioner suffered a heart attack which prevented him from completing the school year. Accordingly a third evaluation, planned for May, never occurred.

Petitioner sought an informal appearance before the Board which offered to meet with him on July 19, 1976 but requested a doctor's certificate indicating that petitioner was physically able to attend. Petitioner refused to provide such a certificate and the meeting never occurred. The Board offered a subsequent

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informal appearance in September but petitioner declined the offer because (1) the Board had replaced petitioner, and (2) the Board had not furnished a more detailed statement of the reasons for nonrenewal.

Petitioner filed an appeal with the Commissioner of Education on June 26, 1976, who issued a written decision and dismissed the appeal. An appeal to the Board of Education resulted in an affirmance of the decision of the Commissioner for the reasons expressed by him.

In this appeal petitioner contends (as he did before the Commissioner) that there were five deficiencies in the nonrenewal process:

(1) the statement of reasons was inadequate;

(2) only two evaluations were made, rather than the three required by *N.J.S.A.* 18A:27-3.1;

(3) respondent did not offer petitioner a timely hearing on the reasons for nonrenewal;

(4) respondent had not adopted the supervisory policy mandated by *N.J.A.C.* 6:3-1.19(c); and

(5) petitioner's nonrenewal was prompted by his exercise of first amendment rights, an allegation entitling him to a plenary hearing before the Commissioner of Education.

I

WAS THERE COMPLIANCE WITH THE REQUIREMENT THAT A STATEMENT OF REASONS FOR NONRENEWAL BE FURNISHED?

On this record it is clear that petitioner, as an elementary school principal, was "an employee at will unprotected by any statutory tenure, contractual commitment or collective negotiations." *Nicoletta v. North Jersey District Water Supply Commission*, 77 *N.J.* 145, 150 (1978). Nor did he enjoy the tenure afforded employees of boards of education which follows employment for three consecutive years, *N.J.S.A.* 18A:28-5, civil service tenure or other protection. "In such circumstances under the common law the employer, even though a public employer, has the right to discharge such employee with or without cause." *Id.* at 150. *English v. College of Medicine and Dentistry*, 73 *N.J.* 20, 23 (1977).

In *Donaldson v. Bd. of Ed. of No. Wildwood*, 65 *N.J.* 236 (1974), the Supreme Court held that a nontenured teacher, while not entitled to re-employment, is nonetheless entitled to a statement of the reasons for nonrenewal as a matter of elemental fairness and justice. *Id.* at 245. The Court rested its decision

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upon the teacher's interest in correcting deficiencies for the future and in safeguarding him against arbitrary action.

The Commissioner of Education here commented that while the statement of reasons given petitioner by the Board was conclusionary in nature and not informative, since the reasons did incorporate by reference the "evaluations by the Superintendent of Schools" which were detailed and informative, the test of *Donaldson* had been met and an adequate statement of reasons furnished.

We disagree. The decision to renew a contract or not renew it rests solely in the discretion of the Board. *N.J.S.A.* 18A:27-1 *et seq*. And, while the Board members undoubtedly rely in part upon the recommendations of the Superintendent, the ultimate determination is theirs to make. Petitioner was entitled to a statement from the Board of its reasons for nonrenewal. Incorporation by reference may be appropriate in some cases, but here it is clear the Board based its decision upon its own assessment of the Superintendent's evaluations. Petitioner is entitled to receive the benefit of that assessment if, in fact, that assessment constitutes the reasons for nonrenewal.

We therefore hold that should petitioner still desire to receive a statement of the reasons for nonrenewal of his contract from the Board and make a request for them, the Board is directed to furnish petitioner with a detailed statement of its reasons without incorporating by reference the evaluations of the Superintendent.

II

WERE THREE EVALUATIONS REQUIRED?

The Superintendent's evaluations were made pursuant to *N.J.S.A.* 18A:27-3.1 which at that time provided:

> Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of his duties at least 3 times during each school year but not less than once during each semester ***. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence.

Petitioner argues that the three evaluations required by the statute should have been performed prior to April 30, so as to better inform the Board on its decision whether to renew his contract. He further contends that the subsequent amendment to the statute requiring the three evaluations to be performed prior to April 30 (L.1977, c.161, §1) indicates a legislative intent that all evaluations of his performance should have been performed prior to April 30 and the failure of the Board to so provide renders the decision not to renew his contract illegal, as resting on a denial of procedural due process.

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We do not read such a requirement into the statute as it existed prior to the 1977 amendment. In fact, a contrary intent is suggested by the need for the 1977 amendment. Here petitioner received one evaluation in each semester and a third one was scheduled for May. Petitioner's illness prevented its accomplishment.

The statutory requirements for the conduct of evaluations were fully met.

III

WAS THERE A TIMELY HEARING ON THE REASONS FOR NONRENEWAL?

The Court in *Donaldson v. Bd. of Ed. of No. Wildwood, supra* at 246, held that if requested, a nontenured teacher should be given an informal hearing before the Board. Petitioner contends that his request for an informal hearing was not timely granted because such a hearing should follow completion of the required three evaluations and his receipt of an adequate statement of reasons so he could appear before the Board prepared in his attempt to persuade the members to change their minds.

Two evaluations were conducted prior to April 30 with copies furnished to petitioner, and he was afforded a predecision hearing. We conclude that under the circumstances here present, the informal hearing mandated by *Donaldson* was granted petitioner. In any event, in conformity with *N.J.A.C.* 6:3-1.20, the Board did offer petitioner several opportunities for a post-decision hearing which were rejected by petitioner because (1) he was unwilling to produce a medical certificate concerning his physical ability to appear before the Board; (2) the Board had filled the position of principal; and (3) petitioner had appealed the Board's nonrenewal determination. Petitioner was not deprived of any of his rights to a hearing on the reasons for nonrenewal of his contract of employment.

IV

DID THE FAILURE OF THE BOARD TO PROMULGATE A SUPERVISORY POLICY PURSUANT TO THE REQUIREMENTS OF *N.J.A.C.* 6:3-1.19(c) INVALIDATE ITS DECISION OF NONRENEWAL OF PETITIONER'S CONTRACT?

Petitioner contends that respondent had not adopted the supervisory policy required by *N.J.A.C.* 6:3-1.19(c), which provides:

> Each local board of education shall adopt a policy for the supervision of instruction, setting forth procedures for the observation and evaluation of nontenured teaching staff members, including those assigned to regular classroom teaching duties and those not assigned to regular classroom teaching duties. Such policy shall be distributed to each teaching staff member at the beginning of his/her employment,

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and its failure to do so invalidated its nonrenewal decision.

It is undisputed that at the time the events involved herein occurred the Board had not adopted any policy pursuant to that regulation. The Commissioner recognized that omission and, in his written opinion, directed the Board to "promulgate such policy . . . forthwith." Noncompliance with that regulation cannot invalidate the Superintendent's evaluations, which were made in compliance with *N.J.S.A.* 18A:27-31. In this regard, statutory as well as due process requirements were met.

THE CONSTITUTIONAL ISSUE

Petitioner argues he is entitled to a plenary hearing before the Commissioner on his claim that his nonrenewal was prompted by his solicitation of public support for his renewal and constituted a denial of his constitutionally protected right of free speech. The Commissioner disposed of this claim by finding that it was "insufficiently detailed."

A well-settled limit on the school board's discretion is that a nonrenewal cannot be predicated solely upon the exercise of constitutional rights, especially the First Amendment, freedom of speech. *Nicoletta v. North Jersey District Water Supply Commission, supra* at 155; *Perry v. Sindermann*, 408 *U.S.* 593, 598 (1972); *Pickering v. Board of Education*, 391 *U.S.* 563, 574-575 (1968); *Endress v. Brookdale Community College*, 144 *N.J. Super.* 109, 130 (App. Div. 1976); *Katz v. Bd. of Trustees, Gloucester Cty. Col.*, 125 *N.J. Super.* 248, 250 (App. Div. 1973). A hearing is required where:

> *** the employee alleges that the agency's failure to renew his employment contract resulted from certain activities by him, which activities are within the area protected by the State or Federal Constitutions, or both, and the employee has made some showing that the activities were such that they may have been a significant element in the decision of the agency not to renew or not to retain ***. [*Katz v. Bd. of Trustees, Gloucester Cty. Co., id.* at 250.]

However where, as here, there is a "bare assertion or generalized allegation of an infringement of a constitutional right," a claim of constitutional dimension is not created. *Winston v. Bd. Ed. So. Plainfield*, 125 *N.J. Super.* 131, 144 (App. Div. 1973), aff'd 64 *N.J.* 582 (1974). Viewing this record as a whole and considering the nature of the bare assertions made, unsupported by any specific allegations, we conclude petitioner has not established a claim of infringement of any constitutional right. The holding of the Commissioner on that issue is affirmed.

We hold that petitioner is entitled to a statement of the reasons for the nonrenewal of his employment contract from the Board should he request it. In

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all other respects, the decision and order of the State Board of Education is affirmed.

Cert. denied New Jersey Supreme Court

Ernest E. Gilbert,

Petitioner-Appellant,

v.

New Jersey State Board of Examiners, Bureau of Teacher Education and Academic Credentials, Division of Field Services, New Jersey Department of Education,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 9, 1977

Decided by the State Board of Education, December 7, 1977

For the Petitioner-Appellant, Dennis J. Quinn, Esq.

For the Respondent-Appellee, William F. Hyland, Attorney General of New Jersey (Mark Schorr, Esq., Deputy Attorney General)

Pursuant to *R.*2:5-5(a) and (b), appellant makes Motion to Supplement the Administrative Record in the Appellate Division and/or to Reopen the Hearing before the State Board of Education in *Ernest E. Gilbert v. New Jersey State Board of Examiners, Bureau of Teacher Education and Academic Credentials, Division of Field Services, New Jersey Department of Education.* Although appellant styles his motion as one to supplement the record, it appears that under the circumstances to be described, its proper designation should be a motion to settle the record. We will regard as such.

Appellant alleges that it is unclear whether the State Board of Education had before it all of the evidence, including affidavits, bearing on the issue of laches. Appellant's concern over the content of the record before the State Board arises because the Statement of Items Comprising the Record on Appeal filed by respondent's attorney did not list certain documents or papers which had

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been filed with the State Board. The missing items of particular concern to appellant are listed as follows:

1. Correspondence between appellant, Ernest E. Gilbert and the Director of the Office of Equal Educational Opportunity (O.E.E.O.). (Exhibit 1)

2. Correspondence between appellant and the Division on Civil Rights. (Exhibit 2)

3. Correspondence between appellant and the office of Equal Employment Opportunity Commission. (Exhibit 3)

4. Correspondence, minutes and affidavits of former Board members. (Exhibit 4)

5. Correspondence between the appellant and the State Board of Examiners. (Exhibit 5)

6. Statement in Support of petition and claims upon which relief can be granted, response to answer by petitioner, and arguments in opposition to motion to be filed on behalf of the respondent.

7. Brief in Response to Answer to Points of Appeal.

Appellant's inference is that since the above items were not listed in the filed Statement of Items, they may not have been considered by the State Board. If such were the case, appellant would deem it appropriate to reopen the matter for proper consideration of the missing items.

Appellant's inference and concerns are unfounded. All matters listed were presented to and considered by the State Board when deliberations were conducted on his appeal.

The letter memorandum submitted on behalf of respondent indicates that circumstances were present which made it difficult for respondent's attorney to discern exactly what items of record to list in the Statement of Items Comprising the Record on Appeal to be filed with the Appellate Division. This amounted to nothing but clerical error. Respondent's papers indicate that it has communicated with appellant and has consented to filing an amended Statement of Items which would include any papers filed with the Commissioner and State Board.

In view of the fact that all of the items in question were properly considered by the State Board, appellant's motion to reopen the hearing is denied. With respect to items 1 through and including 5, appellant's motion to settle the record is granted. The motion is denied with respect to items 6 and 7 since these matters

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are briefs or papers containing strictly legal argument and not customarily considered a part of the record to be transmitted to the appellate courts.

May 3, 1978

Pending New Jersey Superior Court

In the Matter of the Tenure Hearing of

Thomas Healy,

School District of the Borough of Paulsboro, Gloucester County.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 29, 1977

For the Petitioner-Appellant, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

For the Respondent-Appellee, Chell and Camp (Eugene P. Chell, Esq., of Counsel)

The State Board of Education adopts the written Report of the Legal Committee as its own, with the following modification: that the Commissioner's decision be further modified to direct that termination be for reasons of physical and mental incapacity. Attorney replies are noted.

March 1, 1978

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David Hochman,

Appellant,

v.

Board of Education of the City of Newark; Stanley Taylor, Superintendent of Schools; Theresa David, Assistant Superintendent of Schools, and James Vasselli, Principal of Broadway Junior High School,

Respondents.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, January 6, 1977

Decided by the State Board of Education, May 4, 1977

Argued: February 15, 1978—Decided: March 1, 1978

Before Judges Lynch, Kole and Petrella.

On appeal from decision of the State Board of Education.

Mr. David Hochman argued the cause *pro se*.

Mr. Robert T. Pickett argued the cause for respondents.

Mr. Mark Schorr, Deputy Attorney General, submitted a Statement in Lieu of Brief on behalf of the State Board of Education (Mr. John J. Degnan, Attorney General, attorney; Mr. William F. Hyland, former Attorney General, of counsel).

PER CURIAM

We have thoroughly considered the contentions of appellant and find them without merit. The finding by the Newark Board of Education that appellant was guilty of insubordination by willful violation of Board rules is amply supported by credible evidence in the record. The decision of the State Board of Education in affirming the decision of the Commissioner of Education is affirmed substantially for the reasons stated by the Commissioner in his decision of January 6, 1977.

Cert. denied 77 *N.J.* 487 (1978)

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"J.B." and "B.B.", as guardians and natural parents of "P.B." and "J.B.",

Petitioners-Appellants,

v.

Board of Education of the Borough of Dumont, Bergen County,

Respondent-Appellee,

and

New Jersey Catholic Conference, Amicus.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 27, 1977

For the Petitioners-Appellants, Olson and Donohue (Richard J. Donohue, Esq., of Counsel)

For the Respondent-Appellee, Aronsohn, Kahn & Springstead (Harold N. Springstead, Esq., of Counsel)

For the Amicus, New Jersey Catholic Conference, Edward J. Leadem, Esq.

The State Board affirms the decision of the Commissioner of Education.

Mr. Colon abstained in the matter.
July 6, 1978

Pending New Jersey Superior Court

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Arthur Jones *et al.*,

Petitioners-Appellees,

v.

Board of Education of the Borough of Leonia, Bergen County,

Respondent,

and

Alan Alda *et al.*, Intervenors-Appellants,

Respondents.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 14, 1974 and May 4, 1976

Decided by the State Board of Education, December 7, 1977

For the Petitioners-Appellees, Ruhlman & Butrym (Edward Butrym, Esq., of Counsel)

For the Intervenors-Appellants, Paul L. Tractenberg, Esq. and Stephen Eisdorfer, Esq.

Intervenors-Appellants appeal from the decision of the Commissioner of Education in *Arthur Jones et al. v. Board of Education of the Borough of Leonia, Bergen County and Alan Alda et al., Intervenors*, 1976 *S.L.D.* 495. Therein, the Commissioner directed the Board of Education of Leonia, hereinafter "Board," to take steps to "***revise the operational plan of the Alternative High School to insure the following:

"1. Certificated teachers shall be in charge of the instruction of all courses offered for credit at the Alternative High School with community resource persons serving as supplemental resource persons for specific periods of time.

"2. Administrative and supervisory personnel shall provide the same thorough supervisory and evaluative services for all courses at the Alternative High School as they provide at the Leonia High School."
(at 508)

The Respondent Board did not appeal the Commissioner's decision. Ac-

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cordingly, when oral argument was ordered on the points of appeal, appearances and Briefs were entered only by intervenors-appellants and petitioners-appellees. Oral argument was conducted before the Legal Committee of the State Board of Education on December 17, 1976 at the New Jersey State Department of Education. The Legal Committee thereupon prepared a Report of Oral Argument, copies of which were submitted to the two parties to this appeal, pursuant to *N.J.A.C.* 6:2-1.5. Each party filed comments or exceptions to the Report, as a result of which the Legal Committee modified its earlier Report. The modified document was submitted to the parties and further commented upon.

Intervenors-Appellants in June 1976 moved to join additional parties as intervenors-appellants in a show of community support of the position taken by intervenors-appellants. It is noted, however, that no additional or diverse arguments are offered by this group. (Tr. 3-11) Accordingly, in the belief that the mere weight of numbers could add no new dimension to the record, the Legal Committee recommends that the State Board deny the Motion to Join Additional Parties.

Intervenors-Appellants amplify that which is advanced in their written Brief by arguing that the Legislature never "***intended to prevent people from carrying out teachers' functions unless they had a certificate and that could have been done so by very explicit language.***" (Tr. 13) Contending that the Commissioner's interpretation of the statutes is unduly restrictive, intervenors-appellants assert that the prohibitions enunciated by the Legislature merely preclude the payment of salary and acquisition of tenure by non-certified persons. It is argued, however, that it is within the discretionary power of a board of education to allow unpaid persons to teach. (Tr. 13-19)

It is further argued that, pursuant to the thorough and efficient requirement of the State Constitution and *N.J.S.A.* 18A:7A-1 *et seq.*, it is incumbent upon the Board to provide alternative educational offerings to such pupils as may profit therefrom. (Tr. 16)

Petitioners-Appellees argue, conversely, that a harmonious reading and interpretation of the statutes and rules of the State Board of Education can result only in the conclusion that the Board of Education of Leonia conducted its alternative school in disregard of and contrary to the requirements that only certificated teaching staff members teach, supervise and evaluate in the public schools. It is further contended that the departure from such requirements has resulted in "***espousing some sort of educational anarchy rather than a system of thorough and efficient education.***" (Tr. 33)

The State Board has carefully considered the entire record of this controversy, the Commissioner's decision of May 4, 1976, the arguments of law set forth in the Briefs and oral argument by the parties, and the exceptions and comments filed subsequent to the oral argument. The Commissioner's decision should be modified in accordance with the following views.

We have concluded that, as a matter of policy, the development of Alter-

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native Schools should be vigorously encouraged to meet the great variety of needs of the State school population. We have further concluded that the Alternative School of the Leonia District was properly conceived but that there were certain deficiencies in the operation of the system. However, the operational deficiencies should not render the system itself invalid or illegal.

The various statutes referred to by the parties do lead to the following conclusions under the policies of the District Board of Education and implementing rules and regulations of the Administration:

1. Certified teachers must be assigned responsibility for the instruction of all courses offered by community resource personnel for credit at the Alternative School.

2. Utilization in the instructional process of community resource persons is permissible and should be encouraged.

3. Community resource persons must submit to the responsible certified teacher a syllabus of each class offering and a standard evaluation procedure, each of which shall be approved in advance in writing by the certified teacher (subject to applicable statutes).

4. In discharging their ultimate responsibility, certified teachers shall regularly monitor classroom activities, shall confer regularly with the community resource persons, shall retain the ultimate authority to recommend the removal of community resource persons and thereby resume direct teaching responsibilities and shall, with the advice of the appropriate community resource persons, grant course credit and grades.

5. Administrative and supervisory personnel shall provide thorough supervision of all courses at the Alternative School.

The foregoing enumerated conditions should be administered in such a manner as to minimize the required paper work and to recognize and utilize the expertise of community resource persons in the various subjects taught.

It is our view that, upon compliance with the foregoing operational directives, the Alternative High School in Leonia would comply with *N.J.S.A.* 18A:26-2, *N.J.A.C.* 6:11-3.1 *et seq.* or *N.J.A.C.* 6:20-1.3 (g).

The State Board directs that the Commissioner's decision be modified as required to conform to the conclusions and conditions set forth in this decision.

Attorney exceptions are noted.

July 6, 1978

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Lorraine E. Laing,

Petitioner-Appellant,

v.

Board of Education of the Township of Edison, Middlesex County,

Respondent-Appellee.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, April 11, 1977

Decided by the State Board of Education, August 3, 1977

Argued September 12, 1978—Decided September 22, 1978

Before Judges Halpern, Ard and Antell.

On appeal from the State Board of Education.

Mr. Harvey Levine argued the cause for appellant.

Mr. R. Joseph Ferenczi argued the cause for respondent.

Mr. John J. Degnan, Attorney General of New Jersey, filed a statement in lieu of brief for the State Board of Education (Mr. Stephen Skillman, Assistant Attorney General, of counsel; Ms. Mary Ann Burgess, Deputy Attorney General, on the statement.

PER CURIAM.

The Commissioner of Education denied petitioner's application for retroactive restoration to her status as a tenured teacher in the Edison Township school system and the incidents thereof, including back pay, reinstatement of her medical-hospitalization insurance coverage, and resumption of contributions on her behalf to the Teachers' Pension and Annuity Fund. The Commissioner found that petitioner had terminated her employment by submitting a voluntary application for retirement with the Teachers' Pension and Annuity Fund notwithstanding that her retirement was later rescinded by the Fund at petitioner's request. The State Board of Education affirmed the Commissioner's decision and petitioner thereupon appealed to this court.

Taking into account all of the relevant facts, including petitioner's submission of her voluntary application for disability retirement, her failure to

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request a leave of absence from the local Board of Education, her failure to report to work or communicate with the Board, and her claim of total incapacity which has never been modified, we are entirely satisfied that the factual finding of the Commissioner that petitioner intended to retire was supported by sufficient credible evidence present in the record, considering the proofs as a whole. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 598-599 (1965); *In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13, 22-23 (App. Div.), certif. den. 65 *N.J.* 292 (1974).

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

Affirmed.

In the Matter of the Tenure Hearing of

Lillian H. Levine,

School District of the City of Paterson, Passaic County.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 27, 1977

For the Petitioner-Appellant, Robert P. Swartz, Esq.

For the Respondent-Appellee, Saul R. Alexander, Esq.

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

January 11, 1978

Pending New Jersey Superior Court

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In the Matter of the Tenure Hearing of

Stephen Levitt,

School District of the City of Newark, Essex County.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 6, 1977

For the Petitioner-Appellant, Cecil Banks, Esq.

For the Respondent-Appellee, Liss & Meisenbacher (Raymond Meisenbacher, Esq., of Counsel)

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

February 1, 1978

Pending New Jersey Superior Court

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Mary Ann McCormack, Robert R. Yundzel and Elwyn F. Spangler,

Appellants,

v.

Boards of Education of the Northern Highlands Regional High School District and the Borough of Fair Lawn School District,

Respondents.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, August 20, 1976

Decided by the State Board of Education, January 5, 1977

Argued: March 7, 1978—Decided: April 7, 1978

Before Judges Lynch, Kole and Petrella.

On appeal from Decision of State Board of Education.

Mr. Theodore M. Simon argued the cause for appellants (Messrs. Goldberg & Simon, attorneys; Messrs. Simon and Louis P. Bucceri, on the brief).

Messrs. Scafuro and Gianni submitted a brief on behalf of respondent Northern Highlands Regional High School Board of Education (Mr. Albert O. Scafuro, on the brief).

Mr. Reginald F. Hopkinson argued the cause for respondent Fair Lawn Board of Education (Messrs. Jeffer, Walter, Tierney, Hopkinson & Vogel, attorneys).

Mr. John J. Degnan, Attorney General, submitted a Statement in Lieu of Brief on behalf of the New Jersey State Board of Education (Mr. William F. Hyland, former Attorney General, and Mr. Mark Schorr, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

The decision of the State Board of Education of January 5, 1977, in affirming the decision of the Commissioner of Education of August 20, 1976, is affirmed substantially for the reasons stated in the Commissioner's decision.

Cert. denied New Jersey Supreme Court

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Peter Marshall,

Petitioner-Appellee,

v.

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

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 13, 1977

For the Petitioner-Appellee, Goldberg and Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent-Appellant, Frank Piscatella, Esq.

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

May 3, 1978

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Charles Martin,

Petitioner-Appellant,

v.

Board of Education of the Borough of Keyport, Monmouth County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 30, 1977

For the Petitioner-Appellant, Chamlin, Schottland, Rosen & Cavanagh (Thomas W. Cavanagh, Jr., Esq., of Counsel)

For the Respondent-Appellee, Norton & Kalac (Peter P. Kalac, Esq., of Counsel)

The appeal from the decision of the Commissioner of Education is remanded back to the Commissioner for a full Plenary Hearing.

May 3, 1978

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James Martin,

Petitioner-Appellee,

v.

Board of Education of the Northern Highlands Regional School District, Bergen County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 29, 1977

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

For the Respondent-Appellant, Scafuro & Gianni (Albert O. Scafuro, Esq., of Counsel)

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

January 11, 1978

Pending New Jersey Superior Court

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Board of Education of the Borough of Oakland,

Respondent,

v.

Mayor and Council of the Borough of Oakland, Bergen County,

Appellant.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, February 17, 1977

Decided by the State Board of Education, July 6, 1977

Argued September 26, 1978; Decided October 12, 1978

Before Judges Lynch, Crane and Horn.

On appeal from Decision of State Board of Education.

Mr. Edward J. Buzak argued the cause for appellant (Messrs. Villoresi & Buzak, attorneys).

Mr. Irving C. Evers argued the cause for respondent.

Mr. John J. Degnan, Attorney General, filed a Statement in Lieu of Brief on behalf of State Board of Education (Mr. Mark Schorr, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

This is an appeal from a final determination of the State Board of Education dismissing the appeal of the Mayor and Council of the Borough of Oakland from a decision of the Commissioner of Education.

Appellant contends that the dismissal was arbitrary and capricious, that the sanction of dismissal was too severe and that the failure of the State Board to reinstate the appeal was an abuse of discretion.

The record indicates that the notice of appeal from the Commissioner's determination was filed on March 21, 1977. In accordance with the rules of the State Board, appellant was required to file its "Points of Appeal" within 20 days or on or before April 11, 1977. *N.J.A.C.* 6:2-1.3. On May 9, 1977, counsel was notified that unless objection was "made known to the office of the Assistant

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Commissioner . . . by June 10, 1977, the matter will be listed for dismissal at the meeting of the State Board of Education, July 6, 1977." Counsel replied by letter dated June 9, 1977 requesting that the appeal not be dismissed and promising to "have the necessary papers to you by the middle of next week." (June 13 to 17, 1977) On June 22, 1977 counsel mailed 15 copies of his "Points of Appeal" to the State Board; they were received on June 24, 1977, 72 days after they were due to be filed. Nothing in the record indicates that counsel advanced any reason or explanation to the State Board to justify the delay. On July 6, 1977 the State Board dismissed the appeal. Subsequently, counsel filed a Petition for Reconsideration in which he advanced for the first time as the essential reason for not filing the "Points of Appeal" on time, the fact that his law partner ran for the assembly leaving additional cases for him to handle. The petition was denied.

We find appellant's contentions to be entirely without merit. We are persuaded that the State Board acted properly within its statutorily delegated authority, *N.J.S.A.* 18A:4-15, and that its dismissal of the appeal was neither arbitrary nor capricious. See *Elmora Sav. & Loan Ass'n. v. D'Augustino, et al.*, 103 *N.J. Super.* 301, 304 (App. Div. 1968); *Mestice v. Bd. of Adjustment of Neptune City*, 35 *N.J. Super.* 313 (App. Div. 1955). Moreover, the reasons advanced by counsel to excuse the delay are palpably inadequate. Cf. Notice to Appellate Bar, 102 *N.J.L.J.* 201 (Aug. 31, 1978).

Affirmed.

Parsippany-Troy Hills Board of Education,

Petitioner-Appellee,

v.

Parsippany-Troy Hills Education Association, Morris County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 5, 1977

For the Petitioner-Appellee, Murray, Meagher & Granello (Robert J. Hrebek and Malachi J. Kenney, Esq., of Counsel)

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For the Respondent-Appellant, Goldberg & Simon (Jeffrey S. Laden, Esq. and Theodore M. Simon, Esq., of Counsel)

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

March 1, 1978

Pending New Jersey Superior Court

Margaret Pelose,

Petitioner-Appellant,

v.

Board of Education of the Township of South Brunswick, Middlesex County,

Respondent-Appellee.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, March 10, 1977

Decided by the State Board of Education, August 3, 1977

Argued May 2, 1978—Decided June 29, 1978

Before Judges Matthews, Crane and Antell.

On appeal from New Jersey State Board of Education.

Mr. Jack Wysoker argued the cause for appellant (Messrs. Mandel, Wysoker, Sherman, Glassner & Weingartner, attorneys).

Mr. Willard Geller argued the cause for respondent (Messrs. Picone and Geller, attorneys).

Mr. John J. Degnan, Attorney General of New Jersey, filed statement in lieu of brief on behalf of New Jersey State Board of Education (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel and on the statement).

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PER CURIAM

Petitioner was a nontenured teacher in respondent's school district who received notice dated April 27, 1976 that she would not be reappointed. On May 3 she requested reasons for nonreappointment, pursuant to *N.J.S.A.* 18A:27-3.2, and by letter dated May 26 was advised that she was not reappointed for the reason that she was not "recommended for reappointment." She requested a "hearing" which was thereafter scheduled for June 21, and then later adjourned to July 6 by letter of July 1. The July 1 letter expanded on the reasons for her nonreappointment by making reference to an evaluation report of March 11, 1976 of which the petitioner had prior notice, and the contents of which were set out in the July 1 letter. Her position on this appeal is that because the Board failed to supply her with a statement of reasons within 30 days, as required by statute, she is entitled to broad relief including reinstatement and payment of back wages. The Commissioner denied reinstatement but ordered back pay. The State Board of Education affirmed his denial of reinstatement but reversed his ruling on back pay. We affirm the State Board.

Plaintiff received the essentials of fair play and due process. She voluntarily refrained from appearing at the July 6 hearing for the reason that she did not think she would be treated fairly and because she had not been given a statement of reasons within 30 days. The Board's statement, through the letter of July 1, was late by only a few days. We find no evidence of prejudice to her. She was fully informed of the reasons for her nonreappointment and had all the information she needed in order to appear before the Board on July 6. Her argument that the Board had prejudged her has no merit. *N.J.S.A.* 18A:27-3.2 presupposes that a board of education has already formed a judgment that it will not reappoint a particular teacher, and the purpose of the hearing is to give the nontenured teacher an opportunity to convince the board otherwise.

While we are here dealing with the decision of the State Board of Education, we note that there is no provision, either expressed or fairly to be implied, in *N.J.S.A.* 18A:27-3.2 which provides a basis for penalizing a board of education for failure to comply with its terms. We agree with the conclusion of the State Board that the Commissioner erroneously awarded petitioner back pay.

Affirmed.

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Piscataway Township Board of Education,

Appellant,

v.

Fred G. Burke, Commissioner of Education of the State of New Jersey,

Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Argued March 21, 1978—Decided April 17, 1978

Before Judges Lora, Seidman and Milmed.

On appeal from the State Department of Education.

Mr. David B. Rubin argued the cause for appellant (Messrs. Rubin & Lerner attorneys; Mr. Frank J. Rubin, of counsel; Mr. David B. Rubin, on the brief).

Ms. Susan P. Gifis, Deputy Attorney General, argued the cause for respondent (Mr. John J. Degnan, Attorney General of New Jersey, attorney; Mr. William F. Hyland, former Attorney General of New Jersey, Mr. Stephen Skillman, Assistant Attorney General and Ms. Gifis, on the brief).

The opinion of the court was delivered by MILMED, J. A. D.

The Piscataway Township Board of Education (local Board) appeals: (1) from the action of the Commissioner of Education (Commissioner) requiring it to submit, by August 1, 1977, "an approved plan for racial balance" in the Piscataway public schools; and (2) "from a January, 1970, rule of the Commissioner defining racial imbalance." The Board's single overall contention is that "[c]ompulsory racial balance as defined by respondent [Commissioner] is contrary to the Fourteenth Amendment of the United States Constitution."

It appears that in January, 1970, the State Department of Education (Department) promulgated the following definition of "Racial Imbalance":

> Our working definition is that each district strive to establish school attendance areas that make possible wherever feasible a student body that represents a cross section of the population of the entire district.
>
> If in the elementary grades, for example, the minority population is 25 percent, then each building and each class should try to reflect this percentage as is feasible.

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The 1976-77 minority pupil enrollment in the Piscataway school system was about 21% of total enrollment. During the same period, the minority student percentage of total school enrollment at three of the elementary schools was: Arbor school, about 46%; New Market school, about 5%; and Grandview school, about 10%.[1]

In June, 1976, the local Board submitted to the Commissioner "A Plan for Desegregating the Piscataway Township Schools" which included "a voluntary 'Magnet School' program for academically talented fourth and fifth graders" at the Arbor School during the school year 1976-77. Students from outside the attendance area of the school were encouraged but not required to enroll. Similar programs were contemplated for the New Market and Grandview schools during the next two school years. However, voluntary participation in the program at the Arbor school was less than anticipated. The Commissioner then wrote to the Superintendent of schools in Piscataway stating, in part, that in order for his office to complete the review of the Piscataway school desegregation plan "to determine its acceptability," it would be necessary that there be forwarded:

> A pupil mobility plan that could be implemented for September 1977 in the event that the selected voluntary Magnet school plan for gifted children at Arbor School is not feasible in its design to correct racial imbalance.

The date fixed for submission of this "pupil mobility plan"[2] was April 30, 1977. However, the Magnet school project was not continued for the 1977-1978 school year[3] and, on February 22, 1977, the local Board rescinded its June, 1976 "policy on Racial Desegregation" and directed its Superintendent "not to submit a 'pupil mobility plan' until such time as the Board has an opportunity to discuss the matter with the Commissioner."

The Piscataway school district was then required by the Commissioner to submit, by August 1, 1977:

1. A Board of Education approved policy on equal educational opportunity and school desegregation.

2. A Board of Education approved desegregation plan which will correct racial imbalance in Arbor, New Market and Grandview Schools.

3. A program to prevent further racial imbalance in the schools. The program must include activities to sensitize the Board, staff, students, parents and other citizens to the district's desegregation responsibilities and efforts to provide racial balance.

Instead of submitting the required policy statement, desegregation plan and program, the Piscataway Township Board of Education, on July 5, 1977, filed a complaint in the Chancery Division seeking declaratory and injunctive relief, essentially to free it from compliance with the Commissioner's directive. The trial judge dismissed the complaint for lack of jurisdiction indicating that the matter properly belonged in the Appellate Division pursuant to *R.* 2:2-3(a) (2). This appeal followed.

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As the Court pointed out in *Booker v. Board of Education, Plainfield*, 45 *N.J.* 161 (1965):

> Whether or not the federal constitution compels action to eliminate or reduce *de facto* segregation in the public schools, it does not preclude such action by state school authorities in furtherance of state law and state educational policies. [at 170].

The State Department of Education, through its state board and commissioner, has broad powers and responsibilities to supervise public education in the State and effectuate constitutional and legislative policies concerning it. See *N.J.S.A.* 18A:4-10; *N.J.S.A.* 18A:4-22 *et seq.*; *N.J.S.A.* 18A:6-9; *Jenkins v. Tp. of Morris School District and Bd. of Ed.*, 58 *N.J.* 483 (1971); *Robinson v. Cahill*, 118 *N.J. Super.* 223 (Law Div. 1972), mod. and aff'd as mod., 62 *N.J.* 473 (1973), *cert.* den. 414 *U.S.* 976, 94 *S. Ct.* 292, 38 *L.Ed.*2d 219 (1973); *Laba v. Newark Board of Education*, 23 *N.J.* 364, 382 (1957). The "rule" and "action" of the Commissioner complained of are merely suitable steps taken by him designed to avoid racial imbalance in the local public school system, see *N.J. Const.* (1947), Art. I, par. 5, and *Jenkins* and *Booker, supra*, and in no way conflict with any provision of the Fourteenth Amendment to the Federal Constitution.

The actions of the Commissioner and Department under review, being well within the ambit of their authority, are

> *** entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision[s] *** [were] arbitrary, capricious or unreasonable. ***
> [*Thomas v. Bd. of Ed. of Morris Tp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), aff'd 46 *N.J.* 581 (1966)].

See also *Chappell v. Comm'r of Education of N.J.*, 135 *N.J. Super.* 565, 571-572 (App. Div.), certif. den. 69 *N.J.* 84 (1975). From our review of the record submitted on this appeal, we are satisfied that no such showing has been made. The actions complained of are entirely reasonable. We discern no reason or justification for disturbing them.

The local Board should, without further delay, comply with the Commissioner's directive and submit the required statement of policy, desegregation plan and program for review by his office to determine their feasibility and acceptability. See *Elliot v. Bd. of Ed. of Tp. of Neptune*, 94 *N.J. Super.* 400, 403 (App. Div. 1967).

The appeal is dismissed.

Cert. denied New Jersey Supreme Court

[1]There are twelve public schools in the Township school system.

The Attorney General notes in his brief that "current enrollment data suggest that *** [Grandview] school has achieved a tolerable level of racial balance, its concentration of minority students being over 14%."

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[2]Appellant's brief notes that "The Board members were disturbed by this euphemistic term for what is commonly known as busing."

[3]The Superintendent of Schools pointed out that he "could not recommend to the Board that they expend upwards of $100,000 for [Magnet School] programs which appear to have minimal effect on the numerical aspects of racial imbalance."

William C. Poole, A.I.A., t/a Flatt & Poole, Architects,

Petitioners-Appellants,

v.

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

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 10, 1977

For the Petitioners-Appellants, Allan P. Dzwilewski, Esq.

For the Respondent-Appellee, Francis R. Giardiello, Esq.

This is an appeal from a decision of the Commissioner which upheld in part and denied in part a claim by an architect for compensation for services rendered by him to the respondent Board of Education. The Commissioner determined that no definitive contract had been entered into between the architect and the Board, but only a tentative, conditional agreement; that the petitioner architect had performed services pursuant to the tentative agreement for which he should be compensated on the theory of quasi-contract; and that portions of the bills submitted by petitioner were sufficiently itemized and documented so as to be payable, while other alleged services were not sufficiently supported by documentation so as to warrant compensation.

At the outset we encounter the question of jurisdiction of the Commissioner and the State Board of Education to consider this controversy. The question turns upon the proper construction of *N.J.S.A.* 18A:6-9, which provides that "the commissioner shall have jurisdiction to hear and determine *** all controversies and disputes arising under the school laws***."

It is well settled that the Commissioner's jurisdiction does not extend to controversies arising under other laws, as for example pension or taxation acts, even though a school district may be a party to the controversy. *Reilly v. Board of Education of Camden*, 127 *N.J.L.* 490 (*Sup. Ct.* 1941); *Board of Education*

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of Fair Lawn v. Mayor and Council of Fair Lawn, 143 *N.J. Super.* 259 (*Law Div.* 1976). Furthermore, where questions purely of law are involved, the initial jurisdiction of the education authorities is not exclusive, but concurrent with that of the courts. *Borough of Matawan v. County Board of Taxation*, 51 *N.J.* 291 (1968); *Silverman v. Board of Education of Millburn*, 134 *N.J. Super.* 253 (*Law Div.* 1975).

In *Rainier's Dairies v. Board of Education of Collingswood*, 1967 *S.L.D.* 260, petitioner protested the cancellation by the respondent Board of its contract to supply milk to respondent's schools during the 1964-65 school year, and it sought to have the resolution of cancellation set aside and the contract renewed. When respondent challenged the Commissioner's jurisdiction to decide the controversy as one not arising under the school law, the Commissioner determined that the dispute arose out of its operation of cafeterias pursuant to the school law (*R.S.* 18:11-14), so that the Commissioner did have jurisdiction over the matter. On appeal of this ruling, the State Board reversed and dismissed the petition. Asserting that if the Commissioner's view were correct he would be obliged to take jurisdiction over negligence claims arising out of food consumed in school cafeterias, the State Board opinion said:

> "It is the opinion of the State Board of Education that the Commissioner has no jurisdiction in commercial matters of the kind involved in this case. It would certainly not be conducive to the expeditious determination of disputes to have part of the case determined by the Commissioner and the rest by the courts. We believe that the traditional jurisdiction of the courts in matters involving contracts, breach, damages and specific performance should not be disturbed except in cases arising directly under the school laws. This is not such a case. The decision of the Commissioner is reversed and the petitions are dismissed."

Similarly, we believe that in instances like the present, where the essential issues involve a determination as to the existence of a contract between petitioner and the Board and petitioner's entitlement to compensation thereon, the Commissioner is without jurisdiction to consider such matters. These matters do not arise under the school laws.

The Legislature vested the Commissioner with authority to decide controversies arising under the school laws in order that he might better meet his "overriding responsibility to make certain that the terms and policies of the school laws are being faithfully effectuated." *Booker v. Board of Education of Plainfield*, 45 *N.J.* 161, 175 (1965); *Laba v. Newark Board of Education*, 23 *N.J.* 364, 381-384 (1957); *In re Masiello*, 25 *N.J.* 590, 605-607 (1958). There are no terms and policies of the school laws involved here, only matters of contract law.

In view of the Commissioner's improper assumption of jurisdiction in this matter, the State Board directs that the Commissioner's decision be vacated and petitioner's petition dismissed for lack of jurisdiction.

October 4, 1978

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"S.W." and "D.W.,"

Petitioners-Appellants,

v.

Board of Education of the Town of Westfield, Union County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 10, 1977

Decided by the State Board of Education, September 7, 1977

For the Petitioners-Appellants, Schechner & Targan (David Schechner, Esq., of Counsel)

For the Respondent-Appellee, Nichols, Thomson & Peek (William D. Peek, Esq., of Counsel)

In reviewing the *"S.W."* case record, the State Board of Education finds that the appropriate hearing was held. However, in light of the Appellate Division's remand and the State Board's decision in *"H.D." v. Board of Education of Roxbury*, the State Board remands this case back to a Hearing Examiner for a *de novo* determination of the classification of "S.W.", based on the evidence previously presented.

March 1, 1978

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John A. Smith, III,

Petitioner-Appellant,

v.

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

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 10, 1977

For the Petitioner-Appellant, John A. Smith, *Pro Se*

For the Respondent-Appellee, Louis Serterides, Esq.

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

April 5, 1978

Pending New Jersey Superior Court

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Marilyn Van Hassel,

Petitioner-Appellant,

v.

Board of Education of the Northern Highlands Regional High School District, Bergen County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 29, 1977

For the Petitioner-Appellant, Goldberg and Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent-Appellee, Scafuro & Gianni (Albert O. Scafuro, Esq., of Counsel)

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

April 5, 1978

Pending New Jersey Superior Court

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Edgar Van Houten,

Petitioner-Appellant,

v.

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

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 12, 1977

For the Petitioner-Appellant, Greenberg and Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Appellee, Norton and Kalac (Peter P. Kalac, Esq., of Counsel)

The appeal from the decision of the Commissioner of Education is remanded back to the Commissioner for a full Plenary Hearing.

Ruth Mancuso, David Brandt and Katherine Neuberger dissented in the matter.

May 3, 1978

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Weehawken Education Association and John J. Corbett,

Respondents,

v.

Board of Education of the Township of Weehawken,

Appellant.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, June 30, 1975

Decided by the State Board of Education, December 3, 1975.

Argued: January 4, 1978—Decided: January 24, 1978

Before Judges Halpern, Larner and King.

On appeal from New Jersey State Board of Education.

Mr. Le Roy D. Safro argued the cause for appellant Board of Education of the Township of Weehawken.

Mr. Doane Regan argued the cause for respondents Weehawken Education Association and John J. Corbett (Messrs. Rothbard, Harris & Oxfeld, attorneys).

Mr. William F. Hyland, Attorney General, attorney for New Jersey State Board of Education filed a statement in lieu of brief (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel and on the statement).

PER CURIAM:

The Board of Education of Weehawken appeals from the decision of the State Board of Education granting tenure to respondent John J. Corbett and awarding him retroactive salary benefits as of September 1, 1973.

This decision was rendered prior to the filing of our opinion in *Biancardi v. Waldwick Board of Education*, 139 *N.J. Super.* 175 (App. Div. 1976), aff'd o.b. 73 *N.J.* 37 (1977). The holding in *Biancardi* is dispositive of the issues in the pending case and dictates the conclusion that Corbett is not entitled to tenure or back salary. See also *Schulz v. State Bd. of Education*, 132 *N.J.L.* 345 (*E. & A.* 1945). Respondent's belated suggestion of bad faith is frivolous.

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Jersey City Bd. of Education v. Wall, 119 *N.J.L.* 308 (*Sup. Ct.* 1938), is clearly distinguishable.

Accordingly, the determination of the State Board of Education is reversed in all respects.

Susan Welch and Long Branch Education Association,

Petitioner-Appellant,

v.

Board of Education of the City of Long Branch, Monmouth County,

Respondent-Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, February 16, 1977

Decided by the State Board of Education, May 4, 1977

Argued April 4, 1978—Decided April 20, 1978

Before Judges Matthews, Crane and Antell.

On appeal from the New Jersey State Board of Education.

Mr. Michael D. Schottland argued the cause for appellant (Messrs. Chamlin, Schottland, Rosen & Cavanagh, attorneys; Messrs. Michael D. Schottland and Thomas W. Cavanagh, Jr., on the brief).

Mr. Richard D McOmber argued the cause for respondent.

Mr. John J. Degnan, Attorney General, filed a statement in lieu of brief on behalf of the New Jersey State Board of Education (Mr. William F. Hyland, former Attorney General, and Ms. Susan P. Gifis, Deputy Attorney General, of counsel).

PER CURIAM

The sole issue presented by this appeal is whether a board of education

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may resolve not to renew a nontenured teacher's contract in a private conference session, rather than in a public meeting.

The essential facts were undisputed. Petitioner, a nontenured teacher, was notified by letter dated March 25, 1975 that the board of education had decided not to renew her contract for the following year. It was stipulated that this decision was made at a private conference of the board and was not formally ratified at a public meeting. The State Board of Education adopted the Commissioner's findings that such decisions may be made in private session without subsequent ratification at a public meeting.

In notifying petitioner of the nonrenewal, the board complied with the procedure mandated in 1972 by *N.J.S.A.* 18A:27-10:

> On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either
>
> a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> b. A written notice that such employment will not be offered.

Petitioner concedes that the statute does not expressly require that the decision not to renew be taken only in public meeting. She points out, however, that prior to 1972 boards of education were not required to give any notice of nonrenewal to nontenured teachers. By mandating affirmative action via *N.J.S.A.* 18A:27-10, she argues, the legislature intended that the action be taken at public meeting, citing the principle that municipalities can take official action only at public meetings.

But school boards are not identical to municipalities, and are not subject to the same constraints. *Atlantic Comm. College v. Civil Service Commission*, 59 *N.J.* 102, 110 (1971); *Gulano v. Bd. of Estimate of Elizabeth School Dist.*, 39 *N.J.* 300, 303 (1963).

Neither *N.J.S.A.* 18A:27-10 nor any other provision of the education law requires that nonrenewals be resolved at public meetings. *Trenton Times Corp. v. Bd. of Ed. of Trenton*, 138 *N.J. Super.* 357 (App. Div. 1976), relied upon by petitioner, is not to the contrary. In that case the court simply noted in passing that the board had announced the nonrenewal at a public meeting. It expressed no opinion on the necessity of such action, as that issue was not presented.

The issue here was one of law, therefore we are not precluded from assessing the correctness of the administrative determination. *Mayflower Securities v. Bureau of Securities*, 64 *N.J.* 85, 93 (1973); *Biancardi v. Waldwick Bd. of Ed.*, 139 *N.J. Super.* 175, 177 (App. Div. 1976), aff'd o.b. 73 *N.J.* 37 (1977). We

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conclude that the State Board's decision correctly interpreted the law. In addition we acknowledge the Commissioner's view, expressed in his opinion below, that there are cogent policy reasons for permitting nonrenewal decisions to be made in private: the teacher's right to privacy, the interest in preserving the teacher's reputation, and the desire to avoid discouraging the exercise of a teacher's right to a statement of reasons and a hearing. *Cf. Trenton Times*, above, 138 *N.J. Super.* at 363.

Affirmed.

Joan White,

Petitioner-Appellant,

v.

Board of Education of the Township of Galloway, Atlantic County,

Respondent-Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, August 2, 1977

Decided by the State Board of Education, December 7, 1977

Argued September 26, 1978—Decided October 11, 1978

Before Judges Matthews, Kole and Milmed.

On appeal from the New Jersey State Board of Education.

Mr. Steven R. Cohen argued the cause for appellant (Mr. Joel S. Selikoff, attorney).

Mr. John Paul Dizzia argued the cause for respondent (Messrs. Murray, Granello & Kenney, attorneys; Mr. James P. Granello, of counsel).

PER CURIAM

Petitioner, a nontenured employee of respondent Board of Education, ap-

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peals from a decision of the State Board of Education denying her a statement of reasons for her dismissal and a hearing thereon.

Petitioner was employed by respondent as a school secretary during the 1974-75 school year. She was informed verbally on May 23, 1975 by the principal of the school to which she was assigned that the Board of Education had determined not to reemploy her for the 1975-1976 academic year. Two particular reasons for her non-reemployment were given to her orally at that time. By letter dated May 31, 1975, petitioner requested a written statement of reasons for her non-reemployment and a hearing thereon. That request was denied.

Thereafter, petitioner appealed to the Commissioner of Education who determined that the requirement for the board to provide a statement of reasons and subsequent hearing was limited to nontenure teaching staff members and, therefore, that she was not entitled to the same. He also determined that petitioner should be permitted to review her entire personnel file in the presence of a person of her choosing.

On appeal to the State Board of Education the Board affirmed the commissioner's decision. On this appeal, petitioner maintains that the State Board erred in holding that local boards of education are not required to provide a statement of reasons for dismissal and a subsequent informal hearing thereon to those in her position.

Petitioner concedes that she is not a teaching staff member, *N.J.S.A.* 18A:1-1, and therefore does not fall within the mandates of *N.J.S.A.* 18A:27-3.2.

We affirm the decision of the State Board of Education substantially for the reasons expressed in the decision of the Acting Commissioner of Education dated August 2, 1977.

Petitioner maintains here that there are more deeply rooted considerations for requiring the local board to give a statement of reasons. She cites *Monks v. N.J. State Parole Board*, 58 *N.J.* 238 (1971), where the court noted, [after referring to the proposition that a nontenured teacher's rights for knowing the reasons were "substantial" and could not be outweighed by the slight administrative burden, *Drown v. Portsmouth School District*, 435 *F.*2d 1182 (1 Cir. 1970)] that:

> The need for fairness is as urgent in the parole process as elsewhere in the law and it is evident to us that, as a general matter, the furnishing of reasons for denial would be the much fairer course; not only much fairer but much better designed towards the goal of rehabilitation. ***
>
> (58 *N.J.* at 246)

There is no doubt that the court in *Monks*, and also in *Leonardis*, 71 *N.J.* 85 (1976), considered the fairness involved in giving notice of reasons and also curtailment of broad discretionary powers of the administrative bodies con-

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cerned. However, we do not find that the facts in those cases are analogous to the facts presently before us. There was a substantial state interest in *Monks* and *Leonardis* relating to our criminal justice system. We do not regard them as forming a logical analogy which supports the conclusion that one whose personal liberty is at stake is comparable to one whose interest is to retain status as a clerical employee.

In addition, petitioner concedes that oral notice of particular reasons was given and she in no way suggests that the action not to reemploy her was arbitrary or motivated by some illegal purpose. If this was her contention, she would not be without a remedy.

We do not find *Williams v. Civil Service Commission*, 66 *N.J.* 152 (1974), and *Nicoletta v. No. Jersey District Water Supply Commission*, 77 *N.J.* 145 (1978), cited by respondent in its supplemental letter, to be apposite.

Affirmed.

Cert. denied New Jersey Supreme Court

Stuart Williams,

Petitioner-Appellant,

v.

Board of Education of the Township of Teaneck, Bergen County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 20, 1977

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

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

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

February 1, 1978

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Susan Zink,

Petitioner-Appellant,

v.

Board of Education of the City of Salem, Salem County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 11, 1977

For the Petitioner-Appellant, Joel S. Selikoff, Esq.

For the Respondent-Appellee, William C. Horner, Esq.

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

May 3, 1978

Pending New Jersey Superior Court

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

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