NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1987 to December 31, 1987

VOLUME 3

PAGES 1835-2765

Saul Cooperman
Commissioner of Education

NEW JERSEY

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 466-87
AGENCY DKT. NO. 412-12/86

BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,
Petitioner,
v.
L.C. and S.R.,
Respondents.

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

Stanley J. Kaczorowski, Esq., for respondents
(Mitzner & Kaczorowski, attorneys)

Record Closed: June 5, 1987 Decided: July 13, 1987

BEFORE EDITH KLINGER, ALJ:

K.C., son of respondent L.C. and grandson of respondent S.R., has been a student in the Scotch Plains-Fanwood School System continuously since January 1983. He is presently attending the Terrill Middle School in the district. The petitioner has denied

K.C. a free public education in the district under N.J.S.A. 18A:38-1 and seeks to collect tuition for the 1986-1987 school year at the rate $28.98 per day.

The district filed a petition with the Bureau of Controversies and Disputes of the Department of Education on December 18, 1986 and the matter was transmitted to the Office of Administrative Law on January 21, 1987 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was conducted on March 13, 1987. A hearing was held on May 4, 1987 but the record was held open to allow the parties to submit briefs. The record closed on June 5, 1987.

The issue to be decided is whether K.C. is entitled to attend school within the Scotch Plains-Fanwood School District free of charge under N.J.S.A. 18A:38-1.

Based upon the testimony and the evidence, I **FIND** the following facts.

K.C. is the son of L.C. and E.B. S.R. is the mother of L.C. and the grandmother of K.C.

K.C. was born out of wedlock in April 1974 and raised by his mother for his first six years. L.C. visited E.B. but did not live with her or with the boy. E.B. was the mother of six other children.

When E.B. became unable to take care of the child, L.C., distressed by the conditions under which his son was living, confided his concern to his mother. He suggested that S.R. raise the boy. She volunteered to take the child into her home and bring him up as if he were her own son.

L.C. has a job which requires that he travel a great deal. His assignments frequently take him to other states. In 1982, he was sent to Orlando, Florida, where he

remained for one year. In the year prior to the hearing, he made 15 major business trips. In addition, he is presently unmarried and leading an active social life. In short, it would be impossible for him to provide a home for K.C. under the present circumstances.

L.C. does not live with S.R. He did stay with her temporarily between January 1984 and July 1984 and occasionally at other times, but he usually has his own residence. He uses his mother's address on his driver's license and automobile registration.

In January 1983, K.C. was enrolled in the public schools of the Scotch Plains-Fanwood School District. When he was enrolled, S.R. signed papers accepting full legal responsibility for his education. No one at the time asked her to sign an affidavit of any kind.

There is no question that K.C. lives with his grandmother. On the weekends, he is the quarterback for the B team of the Junior Raiders football team. He also participates in a basketball league and on a baseball team. During the summer, he attends an arts and crafts program and plays on the softball team. Lee Bilcher, the coach of the baseball team, has, on occasion, had to speak to S.R. He has called her home during the evenings and on weekends and has always found K.C. there with her.

S.R. has three children, none of whom live with her. She, her husband and K.C. are the only occupants of her home. K.C. has his own room, which photographs reveal to be unmistakably the room of a young boy.

In 1986, at the request of the district, S.R. signed an affidavit that she was raising the child and was his sole support, receiving nothing in exchange for this. L.C. was asked to provide an affidavit that he was not supporting K.C. but refused when he was told that any gifts or vacations which he provided for his son would be counted as support. He admits that K.C. spent part of his vacation with him and that he takes K.C. on trips and buys him presents. If these things are considered partial support of his son then, according to L.C., to sign an affidavit of nonsupport would be lying.

L.C. uses his mother's address in Fanwood as his present address. Although he seldom stays there for any length of time, he always returns. Her address is the one he used on his 1986 tax return. In 1984 and 1985, L.C. listed K.C. as a dependent on his federal income tax return, because, he explained, he lived in his mother's house for a while during those years and paid some of the expenses. In 1986, K.C. was claimed as a dependent only by S.R. on her tax return.

This case is governed by N.J.S.A. 18A:38-1 which provides in relevant part as follows:

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

We will consider briefly the domicile of K.C. as required for a free public education under section (a) of the statute. The common law provides that a child born out of wedlock has the domicile of its mother until acknowledged by its father. It is clear that K.C. now has the domicile of his father. Although the record is insufficient to make a finding, it may well be from the evidence presented that L.C. is domiciled in the district and, therefore, K.C. is entitled to be educated there free of charge under N.J.S.A. 18A:38-1(a).

In any case, section (b) requires a sworn statement from S.R. that she is domiciled within the district and is supporting the child gratis, will assume all personal

obligations for the child relative to school requirements, and further that she intends to keep the child gratuitously for a time longer than the school term. S.R. has provided such an affidavit. The board may also require a sworn statement from the child's parent that he is not supporting the child accompanied by documentation to support the validity of his sworn statement. L.C. has provided a copy of his 1986 income tax return showing that he did not claim his son as a dependent in 1986. He has refused to execute a sworn statement of nonsupport. However, his refusal is based on the board's representation that any contribution in the form of gift or vacation constitutes support.

This is a misstatement of the meaning of support. "Support" generally imports the provision of the necessaries of life and the means of livelihood, including food, shelter and clothing. Ricci v. Ricci, 90 N.J. Super. 214 (J&D.R. Ct. 1967) See also, Ballard v. Ballard, 164 N.J. Super. 560, 562 (Ch. Div., 1978). I **FIND** that any gifts or vacations provided to K.C. by his father during 1986 do not constitute support. I further **FIND** that L.C. reasonably refused to provide a sworn statement to the school board where his refusal was based upon the erroneous definition of support presented to him by the board and the fact that furnishing such a sworn statement might expose him to prosecution as a disorderly person under N.J.S.A. 18A:38-1(c). He has given his sworn statement at this hearing and presented documentation that he did not support K.C. in 1986 in the form of his 1986 tax return. S.R.'s testimony that she claimed K.C. as a dependent in 1986 confirms this testimony.

I therefore **CONCLUDE** that respondents have proved by a preponderance of the evidence that K.C. was eligible for a free public education for the school year 1986-1987 in the Scotch Plains-Fanwood School District under N.J.S.A. 18A-38-1(b). Therefore, under the statute, the school district is not entitled to tuition for K.C. for the 1986-1987 school year.

There is no basis for any claim by the school district for tuition for any prior year. Under N.J.S.A. 18A:38-1(b), tuition may only be assessed for a student pro rata to the time of the board's request for a sworn statement from the resident. No statement was required from S.R. or L.C. by the district prior to 1986.

This is not a case of abuse of the "affidavit" statute, N.J.S.A. 18A:38-1. This is not a child coming into a school district for the purpose of attending school in the district. It is a case of a child who is living with and being raised by a loving grandmother in her home as her own because he has nowhere else to go. There is no hint here of the fraud or abuse that the statute was designed to prevent.

It is therefore **ORDERED** that K.C. be eligible to attend school free of charge in the Scotch Plains-Fanwood Regional School District and it is further **ORDERED** that petitioner's claim against respondents for tuition for the school year 1986-1987 be and hereby is **DISMISSED.**

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

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

July 14, 1987
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

JUL 16 1987
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 16 1987
DATE

Ronald J. Tabak /A.S.
FOR OFFICE OF ADMINISTRATIVE LAW

PAR/e

BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
L.C. AND S.R.,	:	
RESPONDENTS.	:	

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

Upon review of the record, the Commissioner is in agreement with the findings and conclusions of the Administrative Law Judge and adopts the initial decision as the final decision in this matter for the reasons expressed therein. Accordingly, the Petition of Appeal is dismissed with prejudice.

Further, it is determined that the record in this matter shall be sealed as it contains not only personally identifiable information regarding the pupil, but also information proscribed by N.J.A.C. 6:3-2.1 et seq.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 12, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 7596-86
AGENCY DKT. NO. 348-10/86

CHARLES ENGLAND,
Petitioner,
v.
LENAPE VALLEY REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

Nancy Iris Oxfeld, Esq., for petitioner
(Klausner, Hunter & Oxfeld, attorneys)

Ellen S. Bass, Esq., for respondent
(Rand, Algeier, Tosti, Woodruff & Frieze, attorneys)

Record Closed: June 29, 1987 Decided: July 16, 1987

BEFORE **PHILIP B. CUMMIS**, ALJ:

Charles England contends that the Board of Education of the Lenape Valley Regional High School District acted in an arbitrary, capricious and unreasonable manner in withholding his salary increment for the school year 1986-87, under N.J.S.A.

18A:29-14. On October 21, 1986, a petition of appeal was filed with the Commissioner of Education. On November 7, 1986, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on November 21, 1986, at which time the matter was placed on the inactive list for a period of three months; the order was signed to that effect on December 3, 1986. Petitioner at that time was unable to proceed with the action because he was suffering from a very serious health problem and was under intensive treatment. The case was thereafter listed for trial on June 29 and 30, 1987, at the Morris County Courthouse, Morristown, New Jersey, and the hearing commenced on June 29, 1987. The petitioner was the only witness who testified, and the exhibits marked into evidence are set forth in the attached Appendix. The record was closed on June 29, 1987, on a motion for summary decision at the end of petitioner's case.

Prior to the taking of testimony, the parties submitted a joint stipulation of facts (including all documentary evidence) which is annexed and made a part of this decision.

In addition to the joint stipulation of facts R-1 through R-17, I make these additional findings of fact.

1. Petitioner teaches business courses to students assigned to work in a field study program. The courses include both classroom and outside work.

2. Part of petitioner's assignment is to visit students outside of school at their work stations. Petitioner performs these visitations after lunch hour and during free periods.

3. On a number of observations of the petitioner in his classroom by his supervisor and administrators, a recommendation was made to

withhold the petitioner's increments for the 1986-87 school year.

4. In the classroom observation by Deborah Hay dated December 9, 1985, the petitioner was noted to need improvement in a number of areas (R-9). In the categories, "classroom management, discipline and control, evidence of successful learning activity and appropriateness of class activity," his overall rating was "needs improvement." Petitioner was also observed in his classroom on January 14, 1986 (R-11) by James Riccobono, the principal of petitioner's school. The principal found that the petitioner needed improvement in "classroom management, discipline and control, evidence of teacher preparation and evidence of successful learning activity," and also gave an overall rating for this observation of "needs improvement."

On direct examination, the petitioner admitted that his students moved about the classroom while he was teaching in order for them to do certain filing. He further admitted that he did not know if this affected the other students in the class; it did not affect him. Petitioner also testified that students did other work while he was teaching (such as homework assignments), which he stated was not to be done in class but outside the class after class time. The petitioner further agreed that students prepared themselves to leave the classroom before the end of the teaching period. No teaching occurred during the last three minutes of each class.

I **FIND** all of the above to be factual and incorporate them in my **FINDINGS OF FACT.**

DISCUSSION AND FINDINGS

The legal issue to be considered in this case is whether the respondent acted properly in withholding the petitioner employment increment based upon the observations of the petitioner's supervisors and administrators in the petitioner's classroom on a

number of occasions. In order to resolve this issue, it is first necessary to establish the respondent's authority in this matter and to articulate the proper standard for reviewing respondent's actions. In this regard, N.J.S.A. 18A:29-14 provides:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment. . .of any member in any year by a recorded roll call majority vote of the full membership of the board of education.

It is further noted that

> The decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the Legislature to the Board. Board of Education of Bernards Tp. v. Bernards Tp. Education Association, 79 N.J. 311, 321 (1979).

Thus, a board's decision to withhold an increment will not be overturned unless patently arbitrary, without rational basis or induced by improper motives. See, Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1960).

The burden of proving the reasonableness of the Board's action is on the challenging party. Id. at 297.

The petitioner in the present case has totally failed to prove that the Board's action was in any way unreasonable. In fact, the petitioner admits students moved about the room during teaching time. He further admits that the students were ready to leave class three minutes early and that he stopped teaching in order to accomodate this. He also admits that the students did homework in class. I therefore FIND that the Board acted within its administrative power in a reasonable manner and was not arbitrary or induced by improper motives.

I therefore **CONCLUDE** that the action of the Board being within its prerogative should be **AFFIRMED** and I therefore **ORDER** that the increment of the petitioner be withheld for the school year 1986-1987.

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

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

7/16/87
DATE

PHILIP B. CUMMIS, ALJ

JUL 20 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 21 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

par/e

CHARLES ENGLAND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE VALLEY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the record, the Commissioner is in full agreement with and adopts as his own the findings and determination of the Administrative Law Judge that petitioner has failed to demonstrate that the Board's action to withhold his 1986-87 salary increment was arbitrary, capricious, unreasonable or otherwise violative of N.J.S.A. 18A:29-14.

Accordingly, the Petition of Appeal is hereby dismissed with prejudice for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

August 18, 1987

PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

PETITIONER,

V.

NJSIAA,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Robert E. Sulyma, Ed.D., Superintendent of Schools

For the Respondent, Sterns, Herbert, Weinroth & Petrino (Michael J. Herbert, Esq., of Counsel)

This matter was opened before the Commissioner of Education upon filing of a letter of appeal seeking an order of the Commissioner to set aside the determination of the New Jersey State Interscholastic Athletic Association's (NJSIAA) Executive Committee denying petitioner's request to permit a student from Pascack Valley High School, where there is currently no such team due to lack of student interest, to compete on the gymnastics team which does exist at Pascack Hills High School, in contravention of Article V, Section 1 of the NJSIAA bylaws. By letter dated July 16, 1987 the Commissioner granted the parties permission to file briefs or memoranda to supplement the record before the Executive Committee of NJSIAA. Both parties replied. Petitioner's supplemental letter was received on July 28, 1987 and NJSIAA's letter brief was filed on July 27, 1987.

The aforesaid Article V, Section 1, Eligibility of Athletes, provides that:

> A student, to be eligible for participation in the interscholastic athletic program of a member school, must be enrolled in that school and must meet all the eligibility requirements of the Constitution, Bylaws, and Rules and Regulations, of the NJSIAA. (emphasis supplied)
>
> (Handbook, at p. 36)

Petitioner seeks reversal of the NJSIAA Executive Committee's letter decision dated June 11, 1987 denying a waiver of Article V, Section 1. Petitioner's letter supplement dated July 25, 1987 states:

> ***I have nothing additional to supply in the way of argument for our position. I believe that

> everything has been said that can be said in support of our position; nor can I cite any cases which might strengthen our argument.
>
> Our position is one of what appears in the best interest of the one student from Pascack Valley High School who would like to participate in gymnastics. (Supplemental Letter, signed by Dr. Robert E. Sulyma)

The issue posited to NJSIAA is expressed in petitioner's letter to Robert F. Kanaby, Executive Director, NJSIAA, dated May 21, 1987:

> ***[W]e are looking ahead to the time when, despite our group 3 classification, our gymnastics situation will become even more acute due to low subscription in both schools. Will students -- 2-3 in each school -- then be denied the opportunity to join together in a worthwhile extracurricular activity without transferring from one school to the other?

FINDINGS OF FACT

1. The Pascack Valley Regional High School District is a two high school district.

2. Both schools are classified as Group III schools, within the NJSIAA classification system, each high school having a population of approximately 700 pupils in grades 10-12. (NJSIAA Supplemental Brief, at p. 1)

3. Pascack Hills High School in Montvale has a gymnastics team.

4. Pascack Valley High School in Hillsdale does not have a gymnastics team.

5. In September 1986 a 9th grade student at Pascack Valley High School was permitted to be coached and to practice gymnastics at Pascack Hills High School, although said student did not compete in any meets with the Pascack Hills team as a member of their team. Rather, coached by the Pascack Hills coach, said student constituted a team of one in competition from Pascack Valley High School. (Tr. 12-13)[1]

6. On May 5, 1987 petitioner wrote to NJSIAA asking "if there is anyway (sic) for the gymnastics teams to be combined on a trial basis since there are so few kids involved from both schools."

---

[1] The Commissioner notes that, in all instances, transcript page references are made to pages numbered within the actual transcript, not as numbered within NJSIAA's Appendix.

7. On May 15, 1987, NJSIAA Executive Director, Robert Kanaby, replied that such an accommodation would be at variance with Article V, Section 1 of the NJSIAA bylaws, but suggested two alternatives through the board of education: 1) transfer or reassign the pupil for attendance at Pascack Hills High School or 2) provide a separate coach for her.

8. On May 21, 1987 petitioner replied to NJSIAA's letter dated May 15, 1987 stating that the Board of Education had rejected NJSIAA's suggestions and asking to appear before the NJSIAA Executive Committee on June 10, 1987 to seek a waiver of Article V, Section 1.

9. On June 10, 1987, said appeal was denied by a vote of 27-2. (Tr. 32) Said appeal was denied on the following basis, as expressed by Mr. Kanaby in letter to petitioner dated June 11, 1987:

> ***[T]he issue could be resolved at the local level by the assignment of the student in question to the appropriate school in the district which sponsors the program. This procedure is similar to other situations that sometimes occur in the academic sector of the school's curriculum. In fact, it was indicated that the school system would be willing to assign the student/athlete to meet her needs.
>
> The obstacle to such a solution rests with the request of the student and parents to permit the student to remain in attendance at one school, but compete athletically at another school, thereby coming into conflict with the expressed purposes of the membership's rules prohibiting such arrangements.***

10. The instant appeal followed, by letter from petitioner which was filed on July 8, 1987. (N.J.S.A. 18A:11-3)

11. On July 27, 1987 NJSIAA filed both its Answer and the accompanying relevant records of the matter, including a transcript of the Executive Committee meeting held on June 10, 1987.

POSITIONS OF THE PARTIES

Petitioner asks for a waiver of Article V, Section 1 which would then permit a Pascack Valley High School student to participate as a member of the gymnastics team at Pascack Hills High School without having physically to transfer to Pascack Hills. "***We'd like to do this as a one-year experiment***. ***We're not looking for this, for this move as a permanent solution, but we realize our enrollments will continue to shrink and the matter may resolve itself.***" (Tr. 14)

Petitioner concedes knowledge of the fact that while special permission was granted by NJSIAA to Group I and II schools for such practice, it was denied to Group III and IV schools because "[w]e represent mergers which could result in powerful teams in particular sports." (Tr. 15) However, petitioner argues he seeks "no such action for the numbers participating in gymnastics. Our situation is minimal and threatens to become even more so. We seek only to provide an excellent learning opportunity for justice due to athletes involved in gymnastics.***" (Tr. 15)

Petitioner suggests that the alternatives proffered by NJSIAA in its letter of May 15, 1987, are

> options and they have been considered by the Board, the administration, the girl's parents and, of course, the girl herself. One must remember, however, that as I said earlier, our students have strong allegiances to their assigned high schools. We're talking about providing an opportunity which doesn't exist in her assigned school. (Tr. 15)

Petitioner's supplemental letter dated July 25, 1987 adds, "Our position is one of what appears in the best interest of the one student from Pascack Valley High School who would like to participate in gymnastics."

NJSIAA's brief and appendix dated July 27, 1987 argues that the Commissioner should affirm the decision of the NJSIAA denying a waiver of Article V, Section 1 of its bylaws because the rule in question is "a valid rule which has strong policy reasons for its existence." (Brief, at p. 8) NJSIAA avers that:

> In addition to engendering loyalty among high school students for the school that they are attending, it has particular application to the twenty-eight multi-school districts in this State by preventing those districts from creating only one sports team in selected schools for superior athletes for competitive purposes, thereby eliminating the teams in other schools and concomitantly, reducing athletic opportunities for youngsters who may not be as athletically gifted or skilled. (Id.)

It summarizes the instant circumstances by stating:

> In this particular case, the student and her parents have chosen to ask for the best of both worlds irrespective of the consequences to overall State policy. This student wishes to attend Pascack Valley High School but yet be a member of the Pascack Hills gymnastics team

> simply because of convenience and her "loyalty" to her friends. (Id.)

Relying on Burnside v. NJSIAA (unpublished decision of the Appellate Division, Docket No. A-625-84T7, decided November 15, 1984) for the proposition that a student does not have a right to participate in interscholastic sports, NJSIAA contends that it has attempted to accommodate the one student involved in this appeal, notwithstanding a recent decision by its membership excluding Group III schools, such as the two in question, from participating in a program available to Group I and II schools to allow cooperative sports programs or combined teams among small schools with declining enrollments. "Larger schools, ***including the two Pascack Valley Regional High Schools, were precluded from participation, because of the belief that these schools had sufficient resources and enrollment to have full sports programs." (Brief, at p. 6)

Among other cases, NJSIAA cites D.S. v. NJSIAA, decided by the Commissioner January 30, 1987; Gordon Van Note v. NJSIAA, 1983 S.L.D. _____; and R.S.R. et al. v. NJSIAA, decided by the Commissioner November 13, 1986, as standing for the proposition that the "Commissioner *** will not substitute his judgment for that of the NJSIAA where the Association has followed rules promulgated pursuant to N.J.S.A. 18A:11-3, et seq., and where procedural due process has been afforded to the appellant." (Brief, at p. 7) "Indeed the Commissioner has held that he will not reverse a decision of the NJSIAA and grant eligibility unless 'compelling reasons' are given for him to do so." (Brief, at p. 7) NJSIAA cites R.S.R. et al. v. NJSIAA for this proposition.

Stating that the policy is a valid one with a history that dates back "to the very origins of the NJSIAA almost seventy years ago" (Brief, at p. 4), NJSIAA urges that the Commissioner dismiss the appeal of the Pascack Valley Regional High School District, from the waiver denial of Article V, Section 1 of the NJSIAA bylaws.

The Commissioner, upon a careful review of the record, including the transcript of the hearing before the NJSIAA Executive Committee and the arguments of the parties, finds that there is no compelling reason advanced by petitioner to reverse the decision reached by NJSIAA denying a waiver of Article V, Section 1.

The Commissioner notes from the transcript of the hearing before the Executive Committee, the following testimony of Mr. Herbert, Dr. Sulyma and Dr. Poli, principal at Pascack Valley High School:

> MR. HERBERT: The point I'm getting to is the only thing at least I heard why you did not just allow for a reassignment or transfer of the youngster to attend Hills which has the team is a problem of loyalty?

DR. SULYMA: As a factor.

MR. HERBERT: As a factor. Wouldn't that same factor be evident if we were to grant that request?

DR. POLI: Can we clarify one thing? It's not a question of whether the Board or Superintendent is allowing the student. We would allow the student. The student and the family thinks it's an inappropriate thing for her to go to a new school that is not the district school, that is for the district that she resides in. We would have no objection. We're holding --

MR. HERBERT: The reason why the youngster is not being reassigned is solely because the parents don't want that to happen?

DR. POLI: That's correct. (Tr. 18-19)

The Commissioner further notes from the transcript the testimony of Robert Kanaby, Executive Director of NJSIAA, concerning the reason for the rule in question:

MR. KANABY: Right. In your support data we summarize the rule essentially that a youngster must be enrolled. The membership, obviously, has this rule in place for one very basic reason. The basic reason essentially is that school districts with multiple high schools obviously then could field the limited numbers of teams taking the better athletes in a given sport and sponsoring them all out of one particular high school, for example, and using the Union County Regional School System or better yet the Toms River School District, which is made up of IIIs and IVs, might essentially decide to have only one ice hockey team or one specific team and taking the best athletes of all. That, of course, would not be in the fair competitive spirit under which the association was founded. So, that's essentially the reasoning behind it.
(Tr. 10-11)

Finally, the Commissioner notes the explanation proffered by counsel for NJSIAA as to why Group III and IV and Parochial A schools were excluded from the NJSIAA program allowing Group I and II and Parochial B classification schools to combine teams among small schools with declining enrollments in a "cooperative sports program" (Brief, at p. 5): "[b]ecause of the belief that these schools had sufficient resources and enrollments to have full sports programs." (Brief, at p. 6)

In light of the above testimony and evidence, the Commissioner agrees with the NJSIAA that notwithstanding suggestions from it as to how the situation might be resolved without violation of its rules, "[i]n this particular case, the student and her parents have chosen to ask for the best of both worlds irrespective of the consequences to overall State policy." (Brief, at p. 8) The student could be assigned to Pascack Hills, the school which sponsors a gymnastics program. Under such circumstances, to permit a waiver of Article V, Section 1 of the bylaws would, in the Commissioner's opinion, be substituting his judgment for that of NJSIAA. The rule was promulgated in a manner consistent with N.J.S.A. 18A:11-3 and due process was provided to petitioner in the prescribed manner. See Van Note, supra. As such, the Commissioner will not substitute his judgment unless compelling reasons are provided in the record for him to do so. See R.S.R. et al. v. NJSIAA, supra. Where the only obstacle to a resolution to this matter lies in the refusal of the student and parent to avail themselves of the option readily agreed to by the local board, that is, to transfer the student to Pascack Hills, no such compelling reason is evident. The Commissioner so finds. Thus, the Commissioner concludes that petitioner has failed to sustain its burden of proving that NJSIAA in the instant matter acted in an arbitrary or capricious manner. R.S.R., supra

Accordingly, the Commissioner affirms the decision of NJSIAA denying petitioner's waiver request. The Petition of Appeal is hereby dismissed. Pursuant to N.J.S.A. 18A:11-3, any appeal taken from this final decision of the Commissioner is to the Superior Court.

COMMISSIONER OF EDUCATION

August 19, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5303-86
AGENCY DKT. NO. 237-7/86

JOSEPH ROSANIA,
Petitioner,
v.
MIDDLESEX BOROUGH BOARD OF EDUCATION,
Respondent.

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

Malachi J. Kenney, Esq., for respondent (Kenney & Kenney, attorneys)

Record Closed: May 26, 1987 Decided: July 10, 1987

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

Joseph Rosania (petitioner) alleges and the Middlesex Borough Board of Education (Board) denies that the Board improperly withheld his employment and adjustment increments for the 1986-87 school year. The issue to be determined is whether the withholdings were proper in fact and, if not, to what relief the petitioner is entitled.

The matter was opened and joined before the Commissioner of Education, who transmitted it on August 12, 1986, to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on October 3, 1986, at which, among other things, the nature of the proceeding and issues were defined and the matter was set down for hearing.

For good cause shown, the hearing was twice adjourned. The matter was heard on February 19, 1987, in the Middlesex Borough Municipal Court. All post-trial submissions were scheduled to be made by March 19. Both counsel, for reasons beyond their control, requested enlargement of the time. The opportunity to file replies terminated on May 26, 1987, at which time I closed the record.

RELEVANT EVIDENCE

The petitioner testified that he began the 1985-86 school year with good evaluations. He received a memorandum from his building principal on November 15, 1985 (P-2). The memorandum discusses a meeting held with the petitioner the prior week. It raises questions of an instance in which the petitioner left a class unattended and incident in which he stated his lesson plans were done when, in fact, they were not. The petitioner says the principal's memorandum is completely incorrect. The petitioner identified a teacher observation report dated October 23, 1985 (P-1). The petitioner believes this is a good evaluation although he acknowledges that it contains reminders to effectively fulfill other duties such as hall duty; library duty; communications with students, parents and staff members; general supervision of the physical education area, and the like.

The petitioner also stated he believed his observation reports dated December 12, 1985 (P-4) and January 6, 1986 (P-5) are positive. Exhibit P-5 does contain one small comment about a pupil eating in class.

A teacher observation report dated February 24, 1986 (P-6), does contain rather detailed observer reactions to and recommendations concerning the events observed. Exhibit P-7 is a memorandum to the assistant principal and principal from a teaching staff member stating that the petitioner was not in the gymnasium during a class on February 27. The memo states, among other things, "The class began to fool around and push on large divider doors. Result is door damaged along with molding."

Exhibit P-8 is a memorandum dated March 4, 1986, from the principal to the petitioner. It summarizes a meeting held on March 3 following-up on the incident of February 27 referred to in the preceding paragraph. The memorandum mentions damage

to the gym partition and the fact that the petitioner left a class unattended while they were doing aerobics. The memo goes on to express concern with situations occurring almost daily. The principal states, "I have spent the last few years trying to help you by making appropriate recommendations. It is obvious that nothing has worked because the situation gets worse."

The petitioner replied to the principal by memorandum dated March 17 (P-9). The memorandum, in part, states:

> In reply to your memo of 2/27/86. I had gone to the team room for VCR Tape for my class and returned immediately. As for damaging the partition, the partition was already damaged in some areas. I ask what type of damage? In fact on 2 different occasions I reported to Mr. Freeman and made recommendations concerning (sixth period) improper and lack of enough personnel. We have to supervise the total gym area adequately. I am in the boys' locker room and Miss [R] is in the girls'. . . . This is when some of the damage is occurring. I did not teach hockey this cycle and I can honestly say on several occasions checking [presumably during hockey instruction or exercises] by students during games causes damage. I feel singled out in that this memo is written in what appears that my class damaged the partition. In our normal routine in teaching we check attendence [sic], have exercises, explain procedure & then go to get equipment, so kids are left alone for brief time to get equipment.
>
> . . . .
>
> I feel Mr. Freeman did not talk to me immediately when this occurred, or shortly thereafter - I did not hear or see him at that time.
>
> I am very upset at the way this was handled and these charges made against me.

The witness stated there earlier had been a discussion in a department meeting concerning supervision of pupils, especially in period six.

On March 6, the department chairman again wrote to the principal and vice principal, this time concerning damage to the main storage room door during period two (P-10). The essence of the memorandum is that the chairman had given equipment to another instructor before the first period. Before the third period began, the chairman again went to the main storage room to find that during period two, taught by the

petitioner, the door to the main storage closet had been kicked in and unlocked. The petitioner denies that this incident occurred during his class. The chairman merely assumes it was the petitioner's class. In order to reach the storage room it is necessary to go through two double doors. Teachers in the past did give keys to pupils and allowed pupils to secure equipment but were instructed to stop the practice and did so.

The high school principal notified the petitioner on March 10 that he had received a report from Mr. Freeman suggesting that the petitioner had been careless and had allowed vandalism to take place during the second period on the day in question (P-11). The petitioner replied, stating essentially that he and another instructor inspected the damage the next period and found two slats "which were very loose had been pushed in." He did not see any pupils in the area and asserts that the damage could have occurred during the first period before he held his class. The petitioner also stated, "I did not allow anyone in its my word vs. Mr. Poeltler as to when the damage occurred."

The petitioner next testified concerning an incident in which he reported his student attendance cards lost. The cards contained the attendance, discipline and grade records for each pupil from the beginning of the year. The witness stated the cards could have been taken from his office, which then was shared by three persons. The door was usually unlocked and the file cabinets were unlockable. No harm accrued to pupils because of this incident. The petitioner simply recopied information from master sheets onto new cards. If someone had not mentioned this to the assistant principal, nothing would have come of this.

Another incident concerned noise made by the petitioner's pupils who were permitted to exercise in a hallway (P-14). The petitioner testified that hallways had been used for certain activities over a period of time. The memorandum from the vice principal states, "I agree that in the past other teachers have permitted their students to use the hall for various activities, however, this is the first time that other teachers have complained to me [concerning noise]." Ibid.

The witness acknowledged receipt of a letter from the superintendent of schools dated April 7, stating:

> This is to advise you that you will be discussed by the Middlesex Board of Education in a private agenda session on Wednesday, April 9, 1986 at 8:00 p.m. and at the regular Board of Education meeting on April 14, 1986. [P-18]

The petitioner testified that no administrator had spoken to him prior to that day concerning the possibility of a withholding. The witness received a letter dated April 17 from the superintendent advising him that the Board had voted on April 14 to withhold the petitoiner's increment and given four reasons therefor (P-21). The petitioner testified that this was the first inkling he had of a withholding.

The superintendent of schools testified. He routinely reviews all building administrators' reports concerning staff. He reviewed the evaluations of the petitioner during the course of the year. He saw exhibit P-16, the April evaluation by the vice principal, before he sent his letter of April 7 (P-18) to the petitioner. He had discussed the matter thoroughly with all high school administrators and had reviewed exhibits P-1 through P-15 before making the decision to recommend withholding to the Board. His recommendatoin to the Board was based on the recommendation of the high school administrators and the documentation they provided.

The Board saw the petitioner's whole file, including the above materials. The Board voted to withhold and the petitioner was noticed in accordance with statute.

The assistant principal who performed the bulk of the evaluations testified that in 1985-1986 he was responsible for physical education department evaluations and, therefore, evaluated the petitioner. The witness was involved in teacher duty assignments. During the course of the school year, the petitioner had hall duty, library duty, an assignment known as 219 duty and he also was assigned to the guidance department. Teachers are not usually rotated in nonteaching duty assignments. In each of the duties assigned to the petitioner, however, problems arose. Each time the witness moved the petitioner, the witness told the petitioner why the move was being made.

In the case of the petitioner's removal from library duty, the librarian had complained that the petitioner was not always there when he was assigned and was not doing assigned tasks when he did appear. The assistant principal directed the librarian to retrain petitioner. The petitioner continued to perform poorly or not at all. The vice principal told the petitioner that the vice principal was not satisfied with his work in the library. The petitioner protested he was doing the job properly and then stated if given more time he could do the job properly.

In the guidance department, the petitioner again provided unsatisfactory performance. The director and staff complained to the vice prinicipal that the petitioner had misfiled materials. The vice principal again spoke to the petitioner and the petitioner blamed the misfilings on other persons. The vice principal again spoke to the guidance personnel and they stated they would prefer that the petitioner not be assigned to their department.

This witness also reviewed each of the teacher observation reports he completed concerning the petitioner in the 1985-86 school year. Each of these was discussed with the petitioner. Concerning the evaluation of June 6, 1986 (P-5), the witness pointed out several deficiencies to the petitioner and told the petitioner that they were indeed serious. As the exhibit demonstrates, the vice principal was particularly concerned with pupils eating during the course of a class and leaving the class area without permission. The petitioner protested that the nature of the class made this sort of behavior possible. The vice principal acknowledged that this has happened to other teachers, but not nearly to the extent as with the petitioner. There have been as many or more instances concerning the petitioner's classes as have concerned the classes of all other physical education instructors combined.

Concerning the teacher observation report dated February 24, 1986 (P-6), the vice principal stated that the checklist was not all positive and that several problems were brought out in the narrative portion of the document. During their conference concerning this observation, the petitioner did not know what equipment had been given out and returned during the observed period. The vice principal stated he had discussed equipment management with the petitioner three or four times before the observation of February 24.

The vice principal also stated that he was particularly concerned with the petitioner's loss of attendance, discipline and grade record cards. Other teachers reported they were not receiving these cards from the petitioner. When the vice principal asked the petitioner where the cards were, the petitioner replied that they must have been stolen from his office. It was possible for the petitioner to reconstruct what other teachers had recorded, but he would have had to do so from his own memory or notations.

The vice principal testified similarly about the other incidents and observations documented above. He amplified his testimony concerning the February 24 observation stating that he would not intrude into a disciplinary situation unless some danger to pupils as present because he was there to see how the teacher handled the whole class, including potential disciplinary problems.

The department chairman testified similarly and provided detail as to certain memorandums identified above. He stated specifically that on February 27, he observed a situation serious enough to require that he memorialize it (P-7). The chairman was, at the time in question, in a storage area. He could hear classes in the divided gymnasium. He heard an instructor call out to pupils on the petitioner's side of the gymnasium, "What's going on with the door?" The chairman went to the area. The crosswise divider was extended into the room beyond the center partition track. An aerobics tape was playing on a video cassette recorder. The respondent was not present. Several of his pupils were wrestling, some were doing aerobics with the tape and several were doing nothing.

It took approximately 15 seconds for the chairman to get from where he was to where the petitioner's pupils were. The chairman could not find the petitioner in the coaches' room. He did locate the petitioner in the chairman's office using the telephone. The chairman instructed the petitioner to get back to his class immediately. The chairman recalled that he had spoken to the petitioner about leaving his class unattended on at least one prior occasion.

The high school principal also testified. He had made or caused to be made several observations of the petitioner. This was an unusual number for a tenured person, but because of problems in the prior year, the principal had scheduled more. The principal's testimony was consonant with that of the vice principal and department chairman. He received copies of each of the vice principal's observations shortly after

each conference between the vice principal and petitioner. All checklist areas in the first three observations were satisfactory. The narrative portions, however, raised serious questions. As the year progressed, the observations became less positive and other documentation built up concerning the petitioner's performance.

POSITIONS OF THE PARTIES

The petitioner asserts that the Board's withholding of his salary increment for the 1986-87 school year was in violation of N.J.S.A. 18A:29-14, and must therefore be declared null and void. The review of the Commissioner and, therefore, of this tribunal, is controlled by Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). The only question open for review is whether the Board had a reasonable basis for its factual conclusion. This tribunal must determine (1) whether the underlying facts are as those who made the evaluations claim, and (2) whether it was unreasonable for them to conclude as they did upon those facts. The petitioner urges that numerous education and Appellate Division decisions require that there be a specific identification of a teaching staff member's inefficiencies and/or deficiencies with regard to the performance of designated professional duties which are based upon clearly identifiable standards and norms adopted by the local board of education. Further, the local board of education must establish that there were comprehensive efforts over a substantial period of time to help the employee achieve the clearly identified standards and norms. What is more, the local board of education must establish that the affected teaching staff member had been placed on notice that there were a sufficient number of perceived inefficiencies so as to warrant the withholding. In order for an increment to be withheld and the withholding to be sustained on review, it must not come as a surprise to the teaching staff member.

A long line of Commissioner of Education decisions, including among others Gollub v. Englewood Bd. of Ed., 1980 S.L.D. 1354, makes clear that the purpose behind an evaluation procedure is to ensure that a teacher receives adequate notice of any unsatisfactory performance and notice of ways of improving future performance sufficiently far in advance of economic sanctions.

The petitioner urges that the Board has not been consistent in its use of the term "satisfactory." The petitioner's first three observation reports indicate he clearly was

satisfactory. Any problem with his performance, based on prior years' evaluations, had been remedied. The only memorandum given to the petitioner during the first six months of the 1985-86 school year that criticized his work performance failed to set forth any specific facts to support the general observations that his supervision and lesson plan preparation were less than adequate.

During testimony, there were several allusions to stories administrators heard from pupils concerning the petitioner. However, the Commissioner has not yet permitted a local board of education to withhold employment and adjustment increments based on undocumented stories from school children.

The petitioner submits that he effectively had no notice, until literally days before the Board action, that his increments would be withheld or that his teaching performance was viewed by administrators to be so deficient as to warrant withholding.

The Board's decision to withhold the petitioner's increment for the 1986-87 school year can only be interpreted, consistent with prior case precedent, as a decision to withhold his employment increment only and the Board must restore, retroactive to the start of the 1986-87 school year, his adjustment increment and longevity increment. In Ormosi v. Kingwood Township Bd. of Ed., OAL DKT. NO. EDU 2726-97 (May 29, 1980), aff'd, Comm'r of Ed. (July 15, 1980), the administrative law judge and the Commissioner found that the Board acted properly on the principal's recommendation to withhold Ormosi's salary increment. Absent any board action to deny the adjustment increment, however, the board was directed to pay petitioner that amount. The petitioner maintains that exhibits P-15, P-19, P-20 and P-21 reveal that the Board acted to withhold his increment. No reference was made to increments nor was there any reference made to the withholding of all salary increases. There was no reference to the withholding of his adjustment increment and/or longevity increment, which were both actually withheld for the 1986-87 school year in addition to the employment increment.

The petitioner urges that in light of the compelling precedent, the Board acted illegally and in violation of its own resolutions when it went beyond withholding the salary increment.

Exhibit P-3 indicates that the Board, when it acted to withhold the petitioner's increment for the 1985-86 school year, still acted to pay him his longevity increment for that year. Certainly, absent any specific Board resolution to withhold his longevity increment for the 1986-87 school year, it is clear that there was never an intent to adversely affect the petitioner's receipt of his longevity increment, at the very least, for the 1986-87 school year.

The Board argues that the petitioner failed to sustain his burden of proving that the Board acted unreasonably to withhold his salary increment and adjustment increment for the 1986-87 school year. A proper assessment of the reasonableness of the Board's actions shows clear documentation of the number and nature of the petitioner's deficiencies (P-1 through P-14).

The petitioner does not deny that student record cards placed in his custody were lost. Rather, he claims that he was not responsible for their loss because of poor security in the phyiscal education department office. He testified to the number of pupils and staff who had unimpeded access to the office area. Whether the cards were lost or stolen is immaterial to the question of his responsibility, however. In any case, the petitioner's testimony that the cards were stolen does not constitute a verified fact, but rather, the wishful offering of an alternative explanation. The petitioner's testimony about his supervision of pupils on February 24, 27 and March 20 misses the point. It is a routine duty of any physical education teacher to manage the rotation of pupils and to supervise non-participants in a manner designed to maximize their involvement in the activity and their good order when not participating. The petitioner knows this. Indeed, he is commended for performing this very task properly in the December 12, 1985 observation report (P-4). Furthermore, he is specifically admonished in the January 6, 1986 observation (P-5) for failing to involve and monitor the nonparticipating pupils.

As to leaving an aerobics class unsupervised on February 27, the petitioner claims he should not be criticized for this because he had no choice. He claims it was necessary for him to go to his office to obtain additional videotapes for use in the aerobic exercises. The petitioner testified extensively that the tapes were not provided to him by the school but were, rather, prepared by him, voluntarily, to broaden the scope of instruction. This is laudable. However, all he had to do was bring the tapes with him to

the instructional area at the beginning of the class. He characterizes as a necessity that which was a matter of his poor planning and poor choice.

The petitioner makes much of the fact that the number of instances of unsatisfactory performance on his observations are small compared to the vast number of satisfactory ratings he received during the school year. This claim, however, misconstrues both the nature of the evaluative process and the limits the Commissioner may place on a local board's discretionary action. In Friedelbaum v. Manalapan-Englishtown Regional School District, OAL DKT. EDU 4417-83 (June 12, 1984), aff'd Comm'r of Ed. (July 26, 1984), the opinion states:

> The evaluation process is not a numbers game; even if there are only a few areas of the Petitioner's performance which are deemed to be either unsatisfacatory or needing improvement, they may be viewed by supervisors to be so serious and significant to the teaching process that they themselves may justify an increment denial even if overall the other areas of the teacher's performance are either good or excellent.

The petitioner failed to sustain his burden of proving that the facts underlying his unfavorable performance evaluation were not true. The petitioner contends that, in at least four instances, the factual allegations of unsatisfactory work performance were untrue. However, this is an increment withholding case, not a tenure case. Consequently, under Kopera, above, it is the petitioner who bears the burden of proving that the allegations documented are false.

In the documents described above, and in testimony, administrators stated that they believed the petitioner left pupils unsupervised to play flag football for part of a period. The petitioner offered no rebuttal beyond his bare denial. He offered no corroborative witnesses to support his claim. He offered no explanation as to why students would make false reports of this type against him.

The petitioner did not dispute the principal's testimony that all teaching staff members, including the petitioner, were given written notification of the date on which lesson plans were to be submitted. The petitioner does not dispute the department chairman's testimony that on the scheduled date he asked the petitioner for his lesson plans and did not receive them. He claims only that he did not have them with him and

submitted them a couple of days later. The department chairman testified that he concluded that the petitioner had hurriedly prepared the lesson plans after they had been requested because both the handwriting and the contents of the plans when received indicated they had been prepared hurriedly.

Both the principal and chairman testified that the petitioner had to be removed from duty assignments in the library and the guidance office due to complaints from the respective staffs. The petitioner admits that he was reassigned but denies that there were any problems in either the library or the guidance office. He further denies that anyone told him that his work in either of those duty assignments was inadequate. His testimony simply is not credible. On cross-examination, the petitioner proved sufficiently familiar with the substance of the complaints to characterize them as unfounded and based on a personality conflict with the librarian. This testimony is plainly inconsistent with his claim that he was unaware of the complaints.

The petitioner denies the allegation set forth in the March 10, 1986 memorandum (P-11) that pupils in his second period class on March 6 were permitted to leave the gym area and go to the storage room area unsupervised where they damaged the storage room door. The Board concedes that, in this single instance, there is neither documentary evidence nor testimony in direct contradiction of the petitioner's denial. However, the department chairman testified that he had occasion to inspect the storage room immediately prior to the petitioner's class on that date and immediately after the petitioner's class. Because the door was undamaged on first inspection and damaged on the second, he concluded that the students from the petitioner's class were responsible. He conceded that his conclusion was, in part, based on his prior experience of the petitioner allowing pupils to go to the storage area without supervision. Here again, however, the petitioner's testimony suggests that the fault lies with others.

The Board fully satisfied its duty to give the petitioner sufficient notice of deficiencies. The petitioner contends that the first three observation reports provided to him in the 1985-86 school year were so completely favorable as to lull him into a false sense of security by causing him to believe that his performance was satisfactory to his superiors. This can be supported only upon a willful misreading of the documents. The petitioner's interpretation can be supported only if one accepts his erroneous insistence that the checklist section of the observation report is intended or understood to refer to

anything other than the specific class which was the subject of the formal observation; an insistence, unsupported by any authority, that only observation reports, and only the checklist portion of the observation reports, may be considered evidence of notice of unsatisfactory performance, and a refusal to recognize that, although the petitioner was cited with 13 separate incidents of unsatisfactory behavior, several of the latter incidents are a repetition of unsatisfactory conduct of a type precisely identified and criticized earlier. The testimony of the administrators is clear and consistent. Nevertheless, the petitioner contends, on the basis of the first three observation reports he received in the 1985-86 school year, he was led to believe that his work was satisfactory. This requires that the principal's memorandum to the petitioner of November 15, 1985 (P-2) be completely disregarded. This claim also requires that the scope and purpose of the observation reports be construed in a manner inconsistent with the expressed terms of the reports and inconsistent with the long-established practice of the district. Examination of the reports makes manifest that the administrators did not so view them. The principal stated he made reference to the events occurring outside of the classroom observation in both the Recommendation Section and the Evaluation to Date Section of the form while the vice principal stated he made reference to events outside of the observed class only in the Evaluation to Date Section.

The Board fully satisfied its obligation to assist the petitioner to remedy his deficiencies. The language used in the four observation reports, above, as well as the five memorandums of admonition or reprimand, is entirely clear. The specific factual basis for the judgment of deficiency is set forth. The deficiencies in the petitioner's work do not involve particularly subtle or complex aspects of teaching. Rather, they involve basic and simple teacher responsibilities such as knowing where the students in one's class are and what they are doing, staying with the class during the instructional period, not allowing students to go unsupervised into the equipment area, keeping track of equipment used during the class and assuring its safe return, accepting responsibility for the submission of lesson plans in a timely fashion, accepting responsibility for student records placed in one's custody, and the like. The employer's duty to provide assistance in remediation does not and cannot be construed as relieving the teaching staff member of all responsibility to perform in a satisfactory manner.

The Board's resolution of April 14, 1986, was sufficient to withhold the petitioner's salary adjustment and increment adjustment for the 1986-87 school year. The

petitioner contends that exhibits P-15, P-19, P-20 and P-21 demonstrate that the resolution adopted by the Board on April 14, 1986 (P-20) made reference only to his salary increment. The petitioner argues that failure of the resolution to make express reference to the salary adjustment requires the conclusion, as a matter of law, that the Board could not have acted to withhold that adjustment pursuant to N.J.S.A. 18A:29-14.

At the outset of hearing, these documents, along with a number of others, were offered into evidence by the petitioner and stipulated by the Board. They were accepted by both parties and the administrative law judge as accurate copies of the minutes of the relevant Board meetings. However, during the course of the testimony of the superintendent, it became clear that an error had occurred. The superintendent noted that the documents in question were not, in fact, the actual minutes of the April 14 meeting but, rather, the agenda for the April 14 meeting.

The superintendent stated that the reference in the agenda was to an increment withholding without mention of salary adjustment. However, the superintendent testified that it was his recollection that the resolution actually adopted by the Board and spread upon the minutes made express reference to both salary and adjustment. Because this testimony was neither contradicted nor rebutted, the testimony of the superintendent to the effect that the resolution referred to both salary and adjustment increments must be accepted.

DISCUSSION AND DETERMINATION

The petitioner's testimony that he had no idea prior to April 17, 1986, that his increments were in jeopardy is not credible. He knew when he began the 1985-86 school year that the administration was not happy with his performance in the prior year. His professional improvement plan (R-6), signed by the petitioner, acknowledges certain deficiencies and promises to work on them. The petitioner also acknowledged meetings following each of his observations and that at each meeting recommendations were made for improvement. Even where no negative entries are made on the checklist portion of the observation, suggestions appear in the narrative. These suggestions highlight areas in need of improvement.

Concerning the December 12, 1985 observation (P-4), the petitioner stated that the observation report indicated a problem concerning nonteaching duties. He believed the principal was concerned with his ability to perform a duty, not that there was a duty assignment open. This did not surprise the petitioner. Yet, he earlier, on direct examination, stated that his September through February evaluations were all good.

His explanation of pupils who were eating during a period of instruction was, "I was not concerned with those who didn't want to learn." While acknowledging his duty to keep pupils from eating or drinking during an instructional period, he thought it was more his duty to deal with those who wanted to learn then to get into an argument with those who were eating.

The petitioner acknowledged that there were some criticisms of his work. He acknowledged that he had been told prior to March 3, 1986, not to allow pupils to go to the equipment room alone. The matter came up in a department meeting. Nevertheless, he believes he was "close enough" so that when he permitted pupils to go into the storage room alone they were, in reality, supervised.

The petitioner acknowledged that during the February 27, 1986 aerobics class (P-8) he did leave for "a minute or two" to get another tape. He also acknowledged he did not have all the tapes he planned to use with him at the beginning of the period.

More compelling then the petitioner's admissions, however, was the testimony of the assistant principal. His testimony showed that he clearly looked at all positives and negatives in the petitioner's performance and exercised discretion as to what went into the petitioner's evaluations. He could easily have dealt more harshly with the petitioner. However, he decided to handle some things orally; that is, not commit them to writing. His testimony was not only credible, his comportment and bearing were that of a credible witness.

I **FIND** that the petitioner had specific and timely identification of his inefficiencies or deficiencies. As the petitioner correctly notes, Gollub, above, and related decisions point out that the purpose behind an evaluation procedure is to ensure that a teacher receives adequate notice of any unsatisfactory performance and ways of

improving future performance sufficiently far in advance of any economic sanctions against him.

The cases cited by the petitioner in which criteria utilized by observers, within the factual context presented, were found to be arbitrary and unreasonable, are distinguishable. In that context, a superintendent had not informed teachers that persons with five designations of "needs improvement" from among the 28 possible responses in their summary evaluations would not receive annual salary increments. The present matter is quite different. There is no question here of simply counting up negative or positive responses. Importantly, it is the quality and not the quantity of the comments made on observations here that are compelling.

I also **FIND** unsubstantiated the allegation that supervisors manufactured incidents in order to support a decision to withhold the petitioner's increments. The overwhelming weight of the credible evidence simply belies the allegation.

The petitioner's complaint that "stories" from school children to administrators were relied upon is cognizable only in part. Were the administrators to base any decision concerning withholdings on purely undocumented stories related by pupils, that would be offensive to a basic sense of fairness. Here, however, the principal merely factored in these reports, which he deemed reliable, in his overall consideration of the petitioner's performance for the 1985-86 school year. It cannot be said upon this record that the reports of pupils were a controlling or even a significant factor in the overall determination to invoke N.J.S.A. 18A:29-14.

I **FIND** that the administrators did not merely point out deficiencies in the petitioner's performance. They also made concrete suggestions, orally and in writing, as to what needed to be done in order for the petitioner to perform in a satisfactory manner. The petitioner is a teacher of long experience. He is paid - a payment computed in part based on his years of experience - to perform the duties of physical education teacher. His testimony in this case illustrates that the basis of his problems is a failure to accept responsibility for his own actions. There is no legal or logical way in which that failure can somehow be interpreted as imposing upon the Board some greater responsibility than previously imposed by statute and case law decisions.

I **FIND** unconvincing the superintendent's testimony that the document submitted as minutes of the April 14, 1986 regular Board of Education meeting is not what it proports to be. If, as the testimony indicates, this is an agenda rather than actual minutes, the Board could have produced the minutes. The Board did not. This document says, in Attachment N, that Joseph Rosania is to receive no increment and is to be paid $30,300 for the 1986-87 school year. As the petitioner points out, this does not spell out whether an employment increment or an adjustment or both are to be withheld. However, the fact that the petitioner's salary is clearly identified as being $30,300 for the ensuing year makes it obvious that the intent was to withhold all increments. Had the Board intended to withhold only the salary increment, the $30,300 figure would have been different.

Obviously, the Board's intention could have been stated with greater clarity and specificity. Nevertheless, the clear statement of what the petitioner's salary was intended to be for 1986-87 shows the Board's intent in the matter. Absent the inclusion of that figure, the finding here might well be the same as in Ormosi, above. The cases are factually different, however, and so are the results.

In summary, I **FIND** and **CONCLUDE** that the petitioner has failed to show by a preponderance of the credible evidence in the record that the decision of the Middlesex Borough Board of Education to withhold his salary, adjustment and longevity increments for the 1986-87 school year is illegal, arbitrary or in contravention of N.J.S.A. 18:29-14.

Accordingly, the petition of appeal is **DISMISSED**. It is so **ORDERED**.

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

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

10 JULY 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

July 10, 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 15, 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

JOSEPH ROSANIA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed exceptions within the time prescribed by N.J.A.C. 1:1-18.4. The Board's reply exceptions were also timely pursuant to the above regulations.

Petitioner posits five exceptions which are summarized in pertinent part below.

EXCEPTION ONE

> THE ADMINISTRATIVE LAW JUDGE ERRED IN CONCLUDING THAT THE ORMOSI COMMISSIONER OF EDUCATION DECISION EXTENSIVELY CITED BY PETITIONER WAS INAPPLICABLE IN THE INSTANT MATTER

Citing Otto L. Ormosi v. Bd. of Ed. of the Township of Kingwood, Hunterdon County, decided by the Commissioner July 15, 1980, petitioner contends that the Board herein could not, pursuant to the prescriptions of N.J.S.A. 18A:29-14, withhold his employment increment, adjustment increment and longevity increment for the 1986-87 school year "when the Board minutes supplied to the Petitioner and introduced into evidence made reference to the action of withholding Mr. Rosania's increment only." (Exceptions, at p. 2) Petitioner avers Ormosi held that

> when the local board of education in Kingwood voted to withhold Petitioner Ormosi's "increment" for the [1979-80] school year the Board of Education could not, pursuant to the prescriptions of N.J.S.A. 18A:29-14, also withhold Petitioner Ormosi's adjustment increment, absent specific reference to the adjustment increment within the applicable board minutes and operative board resolutions. (emphasis in text)
>
> (Exceptions, at pp. 1-2)

Petitioner contends that in a letter dated April 17, 1986 (P-21) the Superintendent of Schools advised him "that the Middlesex Board of Education 'at its regular meeting of April 14, 1986 voted to withhold your increment for the 1986-87 school year.'" (emphasis in text)(Exceptions, at p. 2) Petitioner claims that the ALJ "while not disputing the continued viability of the Ormosi decision, concluded that one reference in one Board agenda to a figure of $30,300 clearly indicated the Board of Education's intent to freeze Joseph Rosania's employment, adjustment and longevity increments." (Exceptions, at pp. 2-3) Petitioner contends strongly that

> the Board of Education was bound by the specific language employed in its resolution regarding the actual withholding of Joseph Rosania's increment, which mandates the conclusion that given the Board of Education's reference to no increment, the Board of Education may only be permitted to withhold Joseph Rosania's employment increment for the 1986-87 school year. (Exceptions, at p. 3)

EXCEPTION TWO

THE ADMINISTRATIVE LAW JUDGE CLEARLY ERRED IN PERMITTING THE MIDDLESEX BOARD OF EDUCATION TO WITHHOLD JOSEPH ROSANIA'S LONGEVITY INCREMENT FOR THE 1986-87 SCHOOL YEAR

In the alternative, petitioner argues that Exhibit P-3 indicated that the Board of Education, when it acted in the past to withhold Joseph Rosania's increment for the 1985-86 school year, still acted to pay him his $760 longevity increment for that year, "which was specifically added to his $30,300 base salary." (Exceptions, at p. 3) Petitioner avers:

> At the very least, the Commissioner of Education should conclude that there was no basis for the Board of Education's decision to withhold Joseph Rosania's $760 longevity increment unless the longevity increment was specifically referred to in the appropriate Board of Education resolution. Certainly, clearly absent any specific Board resolution to withhold Joseph Rosania's longevity increment for the 1986-87 school year, it would appear axiomatic that there was never any intention on the part of the Board to adversely affect the continued receipt of Rosania's longevity increment, for the 1986-87 school year. (emphasis in text)
> (Exceptions, at p. 3)

EXCEPTION THREE

THE ADMINISTRATIVE LAW JUDGE FAILED TO COMPLY WITH THOSE PRESCRIPTIONS OF N.J.A.C. 1:1-16.3 (INITIAL DECISION) WHICH REQUIRE ADMINISTRATIVE LAW JUDGES TO (1) ANALYZE THE FACTS ADDUCED AT THE HEARING IN RELATION TO THE APPLICABLE LAW AND COVERING ALL ISSUES OF FACT AND LAW RAISED IN THE PLEADINGS; (2) DELINEATE FINDINGS OF FACT WITH REGARD TO DISPUTED FACTUAL ISSUES; AND (3) SPECIFY CONCLUSIONS OF LAW BASED UPON THE FINDINGS OF FACT

Petitioner claims

> the Judge in the instant matter simply failed to analyze the factual issues presented to the Court on behalf of the Petitioner, totally ignored any discussion of critically important factual and legal averments of Petitioner, and relied almost exclusively on the use of conclusionary language in his decision, in contrast to delineating specific findings of fact. (Exceptions, at p. 4)

Petitioner relies on his post-hearing brief and his reply brief in support of his position. Both documents are incorporated herein by reference. Further, petitioner suggests that recent Commissioner of Education, State Board of Education and Appellate Division decisions, in particular, In the Matter of the Tenure Hearing of Patrick Caporaso, School District of the Township of Belleville, Essex County, decided by the Commissioner October 15, 1985, aff'd State Board May 7, 1986, rev'd New Jersey Superior Court, Appellate Division, March 19, 1987, decision on remand July 17, 1987, "establishes that the following conditions must be met by a Board of Education in order to fulfill the Kopera standards briefly noted by the Administrative Law Judge in an early section of his Initial Decision:

1. There must be a specific identification of a teaching staff member's inefficiencies and/or deficiencies with regard to the performance of designated professional duties which are based upon clearly identifiable standards and norms adopted by a local board. These standards must be applied uniformly to all individuals in a particular teaching category or classification.

2. The local board of education must establish that there were comprehensive efforts over a substantial period of time to remediate perceived inefficiencies based on clearly identifiable standards and norms.

3. A local board of education must establish that the affected teaching staff member had been placed on notice that there were a sufficient number of perceived inefficiencies with regard to the performance of that person's professional duties identified as part of the evaluation process so as to warrant the withholding of an increment sufficiently prior to the invocation of this second most severe sanction against a teaching staff member so as to permit the remediation of any perceived problems. (Cases have clearly established that [it] is not enough to supply this notice through advising an individual that a determination had been made to withhold his or her increment days before the official Board action.)" (Exceptions, at pp. 4-5)

Petitioner avers the initial decision is "largely devoid of any specific factual findings concerning any of the proffered reasons by the Board for the withholding of the increments at issue." (Exceptions, at p. 5)

EXCEPTION FOUR

THE ADMINISTRATIVE LAW JUDGE FAILED TO MAKE ANY FACTUAL FINDINGS WITH REGARD TO WHETHER THE BOARD OF EDUCATION HAD PROFFERED ANY FACTS TO SUPPORT THE FOUR REASONS ENUNCIATED BY THE BOARD OF EDUCATION FOR THE WITHHOLDING OF JOSEPH ROSANIA'S INCREMENT FOR THE 1986-87 SCHOOL YEAR

Petitioner avers that the ALJ did not require the Board of Education to introduce facts that were specifically related to the proffered reasons for the withholding of Joseph Rosania's increment for the 1986-87 school year. "Judge Campbell deferred, in general, to the testimony of Board witnesses without analyzing the factual averments of the petitioner that pointed out numerous inconsistencies in the testimony of the Board's witnesses concerning specific events that the Board referred to in support of its increment withholding decision." (Exceptions, at p. 6) Petitioner cites again to his post-hearing submissions for support of his position.

EXCEPTION FIVE

THE ADMINISTRATIVE LAW JUDGE FAILED TO ACKNOWLEDGE THAT THE OBSERVATIONS PREPARED BY THE REPRESENTATIVES OF THE BOARD OF EDUCATION INDICATED SUBSTANTIAL IMPROVEMENT IN PETITIONER'S TEACHING PERFORMANCE DURING THE 1985-86 SCHOOL YEAR

Petitioner reiterates his position that the three evaluations conducted of his performance from September 1, 1985 through January 6, 1986 indicate that his performance was satisfactory, according to the seventy-five separate check-listed areas and, further, that other positive evaluative comments were contained in said evaluations. Relying again on his post-hearing submissions, petitioner avers that the Board administrators

> heavily relied on undocumented stories of unidentified students to support recommendations to withhold Joseph Rosania's employment adjustment and longevity increments for the 1986-87 school year. Contrary to the conclusions of Judge Campbell there was very little evidence presented with regard to any personal observations of any of the Board evaluators regarding the entire withholding of increment process affecting Joseph Rosania. (emphasis in text)(Exceptions, at p. 7)

Petitioner submits that the initial decision should be reversed and that an order should be entered directing the Board to restore petitioner's employment, adjustment and longevity increments for the 1986-87 school year, retroactive to the first day of the 1986-87 school year. "Most certainly, at the very least, this matter should be remanded to Judge Campbell in order for Judge Campbell to comply with the aforementioned prescriptions of N.J.A.C. 1:1-16.3 [now 1:1-18.1 et seq.]." (Exceptions, at p. 7)

The Board's reply exceptions rebut, point for point, those arguments raised in petitioner's exceptions. Said reply exceptions are summarized in pertinent part below.

Responding to petitioner's contention that Ormosi, supra, requires that petitioner's increments be restored, the Board concurs with the ALJ's analysis of that case and finds the circumstances in the instant matter are consonant with Ormosi. It cites the initial decision, ante, in support of its position, and further states that "the Respondent's specification of a salary figure in its minutes leaves no doubt as to its intention to withhold all increments." The Board further argues that Gail Gallitano v. Board of Education of the Town of Ridgefield, Bergen County, decided by the Commissioner May 23, 1983, aff'd State Board October 5, 1983:

> While not precisely analogous to the instant case, Gallitano is clear: the ambiguous intent of the Board will control. In this case, as Judge Campbell recognized, there is no doubt as to the Board's intent to withhold each increment. (emphasis in text)(Reply Exceptions, at p. 2)

Responding to petitioner's assertion that the Board failed to give statutory notice pursuant to N.J.S.A. 18A:29-14 that his increment was being withheld, the Board avers:

> The statutory language does not provide for a voiding of the right to withhold an increment for failure to specifically identify it in the notice. And, no reported decision has held that a failure to identify the specific increments in the notice in and of itself mandates that result. When combined with the "Notice to Tenured Teachers" dated "April, 1986" (Ex. R-27) advising respondent that his salary for the coming year would be $30,300, the respondent was clearly notified that each of his increments had been withheld.*** (Reply Exceptions, at pp. 2-3)

The Board submits that the ALJ was correct in his holding that petitioner received notice "adequate to sustain the withholding of his adjustment and/or longevity increments in addition to his employment increment. To hold otherwise would be to exalt form over substance in a manner contrary to law and common sense." (Reply Exceptions, at p. 3)

In response to petitioner's argument made in Exception Two that, in the alternative, his longevity increment should be restored because when the Board withheld his increment in 1985-86, it did not withhold the longevity increment, the Board contends this argument is without merit.

> As Judge Campbell correctly found, the Board's specification of the Petitioner's 1986-1987 salary in the context of acting to withhold his "increment" clearly evinces the Board's intent to include the longevity increment in its action. The Petitioner in effect argues that the actions of a prior Board can somehow estop a successor Board, under different circumstances, despite the successor Board's unmistakable, expressed intent to the contrary. (Reply Exceptions, at p. 3)

In response to petitioner's Exceptions Three, Four and Five, the Board concurs with the ALJ's analysis and review of the facts, citing pages 8-16 of the initial decision for its position that the ALJ carefully laid out the facts and arguments presented by both sides, and for the proposition that petitioner failed to sustain his burden, as found by the ALJ, based on his credibility determinations. The Board states in reply exceptions in pertinent part, "[That] Judge Campbell's determination[s] concerning credibility were carefully considered is evinced by the fact that he rejected the testimony of the Superintendent of Schools concerning the minutes of the Board meeting in which the withholding action was taken (Initial Decision, Pg. 17)." (Reply Exceptions, at p. 4)

The Board counters petitioner's contention that he was not provided adequate time in which to remediate alleged deficiencies by stating:

> [T]here is no requirement in an increment withholding case that the Administration undertake efforts to remediate deficiencies. This obligation, while present in the far more severe case of tenure charges, Rowley v. Bd. of Ed. of Manalapan-Englishtown, 205 NJ Super. 65 (App. Div. 1985), has never been extended to cover increment withholdings. Thus, even if the Commissioner were to disagree with the ALJ's amply-supported conclusion that the petitioner was afforded remedial assistance, it would not affect the conclusion. (emphasis in text)
> (Reply Exceptions, at p. 5)

The Board claims that petitioner's argument concerning the contention that he was provided no opportunity to remediate any alleged deficiencies is without merit.

Further, in response to petitioner's allegation that the ALJ erred by failing to make factual findings as to whether the Board's proffered reasons for the increment withholding were supported, the Board posits the following review of the ALJ's fact-finding which supports each of the proffered reasons:

> The April 17, 1986 letter from the Superintendent to Petitioner (Ex. P-21) notifying him of the decision to withhold his increment delineated four separate areas of deficiency, which will be treated serially below:
>
> (1) Failure to meet the requirements of established practices, procedures and policies: Judge Campbell found credible the testimony presented by the Board that on two separate occasions the Petitioner left his classes unattended, that he inadequately supervised students in his charge, and that the Petitioner's performance of non-teaching duties was so deficient that he was relieved of such duties.
>
> (2) Failure to maintain records and reports that are neat, accurate, and completed on time: Judge Campbell found credible the testimony presented by the Board that the Petitioner had lost student record cards entrusted to him, and failed to submit his lesson plans when they were due.

> (3&4) Failure to stimulate student interest and enthusiasm and failure to demonstrate appropriate teaching skills: Judge Campbell noted that testimony was taken concerning the Petitioner's failure to adequately manage the rotation of pupils in and out of activities, to supervise non-participants in an appropriate manner in order to maximize their involvement in the activity and ensure their good order. Again, Judge Campbell found the Board's version of these events to be the credible one. Moreover, Judge Campbell found that the Petitioner had in fact permitted a student to eat and drink in class.
> (Reply Exceptions, at pp. 6-7)

In reply to Exception Five, wherein petitioner contends that the ALJ "erred by failing to 'acknowledge' that the Petitioner's observations indicated 'substantial improvement'***" (Reply Exceptions, at p. 7, quoting Exceptions, at p. 6), the Board counters petitioner's reliance upon the satisfactory checklist marks contained in his first three observation reports for the year in question as lulling him into a false sense of security, by suggesting that the narrative sections of said observation reports were critical of his performance. Relying on Friedelbaum v. Manalapan-Englishtown Regional School District, decided by the Commissioner July 26, 1984, and the initial decision herein, the Board avers that

> there is simply no way that a reasonable person could believe, based upon the entirety of the Observation Reports, that his superiors considered his performance satisfactory early on in the 1985-86 school year.
> (Reply Exceptions, at p. 8)

In addition, the Board claims the memorandum of November 15, 1985 from Principal Diskin to petitioner (P-2) which concerned petitioner's leaving a classroom unsupervised and his failure to submit lesson plans is further evidence of the Board's dissatisfaction with petitioner's performance during the early part of the 1985-86 school year.

Further, the Board submits that "most significantly, Judge Campbell noted that the criticisms which the petitioner received went far beyond the confines of the Observation Reports." (Reply Exceptions, at p. 9) It cites the initial decision, ante, wherein

the ALJ credited the Assistant Principal's testimony as more compelling than petitioner's admissions, and that the assistant principal

> decided to handle some things orally; that is, not commit them to writing. His testimony was not only credible, his comportment and bearing were that of a credible witness.
> (Initial Decision, ante)

The Board dismisses as being without merit petitioner's contention that the administration relied on stories from students in making its determination. It cites ALJ Campbell's language in the initial decision as removing "any possible objection to the fact that Respondent's action took into account reports from pupils. As Judge Campbell noted, *** 'It cannot be said upon this record that the reports of pupils were a controlling or even a significant factor in the overall determination... (Initial Decision, p. 16)'" (Reply Exceptions, at p. 9)

In summary, the Board suggests that

> the evidence overwhelmingly established that the petitioner, despite clear notice of his supervisor's disatisfaction (sic) and their assistance to improve, was consistently deficient in his performance of the most fundamental responsibilities of a teacher. As Judge Campbell recognized, the petitioner's arguments do not obscure the fact that the petitioner failed to sustain his burden of demonstrating that the Board lacked a reasonable basis for its conclusion*** (Reply Exceptions, at pp. 9-10)

The Board submits that the Commissioner should affirm and adopt in its entirety the initial decision in this matter.

Upon his careful and independent review of the record, which, it is noted, does not include transcripts of the hearing below, the Commissioner must remand the recommended decision of the ALJ for the following reasons.

Initially, the Commissioner finds that document labeled P-20 does not represent the minutes of the regular Board of Education meeting held on April 14, 1986. Rather, he finds that said document represents the agenda for said meeting.

While the Commissioner agrees with the ALJ that P-15, P-19 and P-20 labeled respectively "Personnel Committee Meeting, April 1, 1986, Agenda", "Board of Education Agenda Meeting, April 9, 1986" and "Regular Board of Education Meeting" all represent manifestations of the Board's intent concerning what petitioner's compensation for the 1986-87 school year would be, he disagrees with the ALJ's assessment that any one of these documents is the actual

Board minutes which would represent proof that the Board actually adopted, by formal resolution in the same form as suggested by the aforesaid exhibits, the agenda items as listed therein. Neither does the Commissioner find in the record before him, an explanation as to why the Board failed to produce the official Board minutes for the April 14, 1986 regular Board of Education meeting.

Consequently, the Commissioner must remand the matter for further findings of fact as to the precise language of the resolution adopted by the Board establishing petitioner's salary for the 1986-87 school year. Without such determination, the Commissioner cannot render a determination as to the intent of the Board relative to whether petitioner was to be denied the employment, adjustment or longevity increments, or any combination thereof, in question herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 20, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8260-86
AGENCY DKT. NO. 358-10/86

KATHY PARTUS,
Petitioner,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld, Cohen & Blunda, attorneys)

Nathanya G. Simon, Esq., for respondent Board
(Schwartz, Pisano, Simon & Edelstein, attorneys)

Record Closed: June 1, 1987 Decided: July 10, 1987

BEFORE **JAMES A. OSPENSON,** ALJ:

Kathy Partus, a tenured teaching staff member employed as math teacher K-12 by the Board of Education of the Township of Belleville, Essex County, having used up all accumulated sick days in early 1986, was granted an unpaid leave of absence by the Board from April 29, 1986 until June 30, 1986, during which time she was disabled and underwent surgery. Thereafter, at her request, the Board further extended the unpaid leave of absence for two months in the 1986-87 school year from September 1, 1986 through

October 31, 1986. Upon her return to employment on November 5, 1986, she was granted twenty days sick leave (by N.J.S.A. 18A:30-2 and by contract) by the Board for 1986-87. In a petition of appeal filed with the Commissioner of the Department of Education, she alleged she was entitled to that sick leave as of September 1, 1986, even though she was then and thereafter for sixty days on unpaid leave of absence. The Board denied her claim for judgment directing grant and application of such sick leave entitlement during the leave period.

The petition of appeal was filed in the in the Bureau of Controversies and Disputes of the Department of Education on October 27, 1986. The Board's answer was filed there on November 26, 1986. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on December 3, 1986 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties a prehearing conference was conducted on January 15, 1987 and an order entered establishing hearing date of April 3, 1987. In the interim, the parties were directed to confer for the purpose of fashioning stipulations of all relevant and material propositions of fact, together with documentation as necessary, which were to be filed in the cause no later than ten days before hearing. Thereafter, the matters at issue were to be addressed and resolved as if on cross-motions for summary decision in accordance with N.J.A.C. 1:1-13.1 et seq., on pleadings, admissions, stipulations, documentation and memoranda of law. At issue in the matter was the following:

> Did twenty days sick leave for 1986-87 (ten days by N.J.S.A. 18A:30-2 and ten days by negotiated agreement) accrue as of September 1, 1986 or November 1, 1986, date of expiration of petitioner's extended leave of absence?

Such stipulations thereafter having been filed and time for posthearing submissions having elapsed, the record closed.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and/or stipulated, I make the following findings of fact:

1. Petitioner Kathy Partus, a tenured mathematics teacher, K-12, has been employed by the Belleville Board of Education since September 1, 1972.

2. Between September 1, 1972 and January 3, 1986, Partus used all of her 150 accumulated sick days. (Exhibits 1, 2, 3).

3. On September 5, 1985, Partus submitted a note from her physician, Dr. Michael P. Wujiack, diagnosing her application as "reflex sympothic [sic] dystrophy" and indicating that her expected date of return to work was "undetermined." (Exhibit 6).

4. Between September 1, 1985 and January 6, 1986, Partus failed to report to work on account of illness a total of 75.5 days. (Exhibit 3).

5. On December 17, 1985, Partus was informed that her request for additional sick days had been denied, and that the Board wished her to be examined by its physician, Dr. Robert Lorello. (Exhibit 4).

6. An appointment with Dr. Lorello was scheduled for Partus for January 7, 1986. (Exhibit 5).

7. On January 15, 1986, the Board received a letter from Howard L. Rosner, M.D., indicating that Partus should be able to return to work "within 2 to 3 weeks provided she is able to continue coming in for her injections and physical therapy." (Exhibit 7.)

8. On January 22, 1986, the Board's physician issued his report on Partus' condition. Based on the information then available to him, Dr. Lorello concluded that Partus "could return to light work, such as teaching." (Exhibit 8, p. 2).

9. During the month of January 1986, Partus was absent due to her physical condition a total of 21 days, 18 of which were uncompensated. (Exhibit 3).

10. Partus returned to her teaching post February 7, 1986 (exhibit 3; see exhibit 9) and continued to perform her duties, with sporadic absences, six, through May 15, 1986 (exhibit 3), at which time she informed the high school principal, via telephone, that she would be undergoing surgery on May 19, 1986, at Columbia Presbyterian Hospital in New York City. (Exhibit 10).

11. Following surgery, Partus informed her principal that she would be unable to return to work for the balance of the 1985-86 school year. The principal, in turn, so advised the Board. (Exhibit 11).

12. Partus remained absent from duty from May 19 through June 30, 1986. (Exhibit 3).

13. On June 27, 1986, Dr. Christopher B. Michelson wrote to the Board describing the operative procedure that Partus underwent and indicating that she would be disabled for the next three months. (Exhibit 12).

14. On August 26, 1986, Dr. Michelson again wrote, informing respondent that Partus' recovery had not progressed sufficiently for her to return to work in September, but that he anticipated a return date of October 1, 1986. (Exhibit 13).

15. On August 26, 1986, Partus requested a leave of absence from teaching duties until November 1, 1986. (Exhibit 14).

16. On September 8, 1986, the Board granted Partus' request, approving a "medical leave of absence without pay from September 1, 1986 to October 31, 1986." (Exhibit 15).

17. Partus returned to work on November 5, 1986. (Exhibit 3).

18. Pursuant to statute N.J.S.A. 18A:30-2, all persons who are steadily employed by a board of education and who are protected by tenure in their position are allowed sick leave with full pay for a minimum of ten school days in any school year. Pursuant to the contractual agreement between the Board of Education and Belleville Education Association, Article XIII, a teacher having served in respondent's district for more than ten years plus one day, through fifteen years, is entitled to twenty days sick leave per annum. (Exhibit 16).

19. The 1986-87 school year represents Partus' 14th school year with the Belleville school district.

20. Partus has requested that she be granted her sick leave entitlement for 1986-87, as of September 1, 1986.

21. Partus' request was denied and the matter was pursued through the district's contractual grievance procedure.

22. The Board denied Partus' grievance at level III of the process, taking the position that the use of her twenty sick leave days would become available to her upon her return to work in November 1986. (Exhibit 17).

23. Pursuant to the above-mentioned contractual agreement, Article IV (Exhibit 18), Partus referred her grievance to the Public Employment Relations Commission for arbitration on October 15, 1986. (Exhibit 19). The arbitration is advisory per the contract. The grievance was denied by PERC on March 25, 1987. (Exhibit 20).

24. On October 27, 1986, Partus initiated the present action by filing a petition of appeal with the Commissioner of Education.

25. The arbitration hearing between the parties was held on March 4, 1987. No decision has yet been made.

DISCUSSION

Article XIII of the contractual agreement between the Board and Belleville Education Association (exhibit 16 at 2) provides that sick leave is defined by N.J.S.A. 18A:30-1, et seq., as follows:

> Sick leave is hereby defined to mean the absence from his or her post of duty of any person because of personal disability due to illness or injury. . . [N.J.S.A. 18A:30-1].
>
> All persons holding any office, position or employment in all local school districts. . . who are steadily employed by the board of education or who are protected by tenure in their office, position or employment. . . shall be allowed sick leave with full pay for a minimum of ten school days in any school year. [N.J.S.A. 18A:30-2; emphasis added].

Because of her prior service, petitioner under the agreement is entitled to twenty sick days per year. J-1, no. 18.

Since petitioner did not commence employment in the 1986-87 school year until some two months had elapsed, the question results whether construction and interpretation of statute and contract permit or require, in effect, a proration of sick leave entitlement or delay in effectiveness until date of actual commencement of employment. That is, is petitioner entitled to the same number of sick leave days for working two months less in the 1986-87 school year as are other employees whose work in that school year was for a full ten months service? In analogous circumstances, the court has held that in N.J.S.A. 18A:30-2, the Legislature contemplated regular, full-time employees and did not contemplate employees who were hired for, or, presumably, worked less than, a full school year. In Schwartz v. Dover Public Schools, Morris County, 180 N.J. Super. 222 (App. Div. 1981), the court held that although the statute provided for paid sick leave for a minimum of ten school days in any school year, it was not violated by a collective bargaining agreement allowing a proportionate amount of sick leave for those employed less than a full school year, because the statute does not mandate that an employee be entitled to ten days sick leave regardless of whether they worked less than a full school year. Facts in the case showed that a full-time compensatory education teacher began working March 1 and worked through June 30, during which time she used one sick day. The following September she was informed that her sick leave accumulation as of that date was three days. She had been allowed one day a month of sick leave for four months, of which one day was used, leaving the three day balance. The calculation conformed to a provision of the collective bargaining agreement that provided:

> An employee whose contract is effective after the beginning of the school year shall be allowed one day of sick leave for each remaining month of the contract period.

The court found N.J.S.A. 18A:30-2 covered employees who were "steadily employed" and not those whose service was not co-extensive with the school year. Id. at 266-7.

One may note that Article XIII of the Belleville agreement contains no such specific proration clause as did the Dover agreement in Schwartz. But the rationale of the holding is nevertheless apposite to facts here, in my view, and dispositive thereof. Given the two-month leave of absence in September and October for which petitioner herself expressly applied (J-1, no. 14), and which the Board granted without pay (J-1, nos. 15, 17), I believe her delayed resumption of service on return from leave in November 1986 was sufficient to suggest she was not steadily employed in that school year or so steadily employed as to be entitled to the twenty-day sick leave allowance of statute and contract without proration. Boards of education have the right, moreover, to refuse to pay sick leave for every kind of disability arising during an extended leave of absence. See Logandro v. Bd. Ed. Cinnaminson, 1980 S.L.D. 1511, 1512. And once a board-approved unpaid leave of absence is granted for any reason, the teacher or employee is not entitled to use accumulated sick leave days after commencement of the leave of absence. Cf. Tchir v. Bd. Ed. Bloomfield, 1980 S.L.D. 1401, 1404; but see, in contrast to facts herein, Mariott v. Bd. Ed. Twp. Hamilton, 1950 S.L.D. 57; aff'd State Bd., 1950 S.L.D. 69.

CONCLUSION

Based on the foregoing, I **CONCLUDE** (1) petitioner's entitlement to sick leave for 1986-87 should not be conceived as having commenced until her actual resumption of service in November; and (2) even if it be assumed to have earlier commenced, a claim to have it retrospectively applied to a period of extended leave of absence does not lie. The petition of appeal, therefore, is **DISMISSED**.

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

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

July 14, 1987
DATE

JAMES A. OSPENSON, ALJ

JUL 15 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 15 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

KATHY PARTUS,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed and are summarized below.

Petitioner excepts to the ALJ's determination that she was not entitled to 20 days' sick leave for the 1986-87 school year until she actually resumed her service in the district in November 1986. The legal arguments advanced by petitioner in support of her position are essentially those contained in the brief submitted to and considered by the ALJ before rendering summary decision in this matter and are incorporated herein by reference.

Petitioner strongly objects to the ALJ's failure to address specifically Marriott, supra, a case she maintains is not only on all fours with the instant matter but mandates a decision on her behalf. She cites in specific support of her position that portion of the Commissioner's decision, affirmed by the State Board, which reads:

> Whether petitioner is entitled to twenty days' sick leave turns on whether she was absent from her post of duty. The respondent takes the view that a teacher cannot be absent from her post of duty until she has reported at the beginning of the school term. With this view, the Commissioner cannot agree. It is the opinion of the Commissioner that a teacher who is unable, because of illness, to report for duty the first day of school is just as much absent from her post of duty as if she were absent on any other day in the year. The statute does not provide that a teacher must report for duty on the first school day of September in order to qualify for sick leave. The Commissioner cannot read into the law a provision which is not included. Under the provisions of Section 18:13-20 [now 18A:28-8] of the Revised Statutes, the petitioner is continuously employed. (emphasis supplied) (at 58-59)

With respect to the above, petitioner avers that the ALJ's determination that Marriott, supra, does not apply in the instant matter is gross error. Moreover, she contends that the ALJ's reliance on Schwartz, supra, is inappropriate as it is far wide of the mark in this case in terms of applicability while Marriott is directly on point. She sees the former case as inapposite because she maintains it involved a scope of negotiations petition pertaining to a clause in a collective bargaining agreement which provided for a proportionate amount of sick leave for those employed less than a full year which was alleged to violate N.J.S.A. 18A:30-2, a contract clause not even present in the instant matter as was noted by the ALJ himself in the initial decision.

The Board urges among other things that petitioner's arguments with respect to Marriott, supra, are fatally flawed because while that case has admittedly been periodically reiterated in several subsequent cases, e.g., Woodbridge Twp. Federation of Teachers v. Board of Education of Woodbridge et al., 1974 S.L.D. 1201 and Reilly v. Board of Education of Jersey City, decided April 30, 1980, the law has undergone substantial refinement since 1949. Moreover, she ignores the more recent State Board decision in Logandro, supra, which, it contends, is currently controlling along with the progeny of cases arising from it. With respect to this, the Board argues that Logandro makes it clear that emoluments of employment including sick leave can be rightfully withheld during an unpaid leave of absence, a rule applied by the State Board in not only Tchir, supra, which was cited by the ALJ, but also Headley v. Bd. of Ed. of Jefferson Twp., 1980 S.L.D. 682, rev'd State Board 1981 S.L.D. 1433, aff'd N.J. Superior Court (App. Div.) 1435 and Slattery v. Bridgewater-Raritan Regional School District, 1979 S.L.D. 747, rev'd State Board 1980 S.L.D. 1537 which states that "a local board may refuse to pay sick leave for every kind of disability arising during an extended unpaid leave of absence***." (at 1537)

Further, the Board argues that even a case such as Hutchenson v. Bd. of Ed. of Totowa, 1971 S.L.D. 512 would not serve to require the relief petitioner seeks since she did not request a sick leave as Hutchenson had after the illness she experienced at the end of the 1970 school year prevented her from returning to her position during the subsequent school year. Rather, petitioner herein requested "a leave of absence." (Exhibit 14)

Upon review of the record in this matter, the Commissioner does not find Schwartz, supra, on point as the question of proration of sick leave entitlement is not at issue. Schwartz stands for the proposition that N.J.S.A. 18A:30-2 does not mandate that employees be entitled to ten days' sick leave regardless of whether they work less than a full school year. In the instant matter, the Board did not prorate petitioner's sick leave entitlement. On the contrary, it granted her the full 20 days due an employee with her number of years of service, albeit as of November 1, 1986, the day she resumed her teaching duties. (Exhibits 3 and 17)

However, the Commissioner agrees with the ALJ's conclusion that Logandro, supra, and its progeny provide support that the Board's action in this matter was appropriate. Logandro, Tchir, supra, and others stand for the proposition that an employee on an unpaid leave of absence is ineligible to accrue or utilize sick leave benefits once an unpaid leave commences.

In the instant matter, petitioner commenced an unpaid leave of absence on May 19, 1986 which she anticipated would last only to the end of the 1985-86 school year. Exhibit 12 indicates that as of June 27, 1986 she would be unable to return to work for three more months, thus precluding return from her unpaid leave of absence at the time the 1986-87 school year commenced. Her physician's correspondence of August 26, 1986 (Exhibit 13) subsequently approved a return date of October 1, 1986. Notwithstanding her medically approved return date of October 1, petitioner saw fit to request on August 26, 1986 a "leave of absence" from her teaching duties until November 1, 1986 which now extended her return date further. (Exhibit 14) Upon receipt of this request, the Board acted on September 18, 1986 to approve a medical leave of absence without pay to October 31, 1986 (Exhibit 15) which served to extend the unpaid leave of absence which commenced the prior school year.

Given the factual circumstances in this matter, the Commissioner concurs that Logandro, supra, makes it clear that petitioner was ineligible to acquire or use sick leave entitlement until she returned from her unpaid leave. Marriott, supra, nor any of its progeny, is not seen as controlling since Marriott did not involve the issue of entitlement to accrue or use sick leave once an employee has commenced and not returned from an unpaid leave of absence.

Accordingly, the Commissioner adopts the recommended decision of the ALJ dismissing the Petition of Appeal for the reasons stated in the initial decision except as modified herein.

COMMISSIONER OF EDUCATION

August 24, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0569-87
AGENCY DKT. NO. 4-1/87

BOARD OF EDUCATION OF THE SUSSEX-WANTAGE REGIONAL SCHOOL DISTRICT,
Petitioner,
v.
LYNN JENISCH TYLER,
Respondent.

R. Webb Leonard, Esq., for petitioner
(Busche, Clark & Leonard, P.C., attorneys)

Sheldon H. Pincus, Esq., for respondent
(Bucceri and Pincus, attorneys)

Record Closed: June 29, 1987 Decided: July 17, 1987

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

The Board of Education of the Sussex-Wantage Regional School District (Board) certified charges of unbecoming conduct against Lynn Jenisch Tyler (Tyler), a tenured teaching staff member employed by the Board for about 20 years. The Board alleged that Tyler repeatedly inflicted corporal punishment upon pupils assigned to her second grade class in violation of N.J.S.A. 18A:6-1, and subjected her pupils to physical abuse and intimidating behavior. Tyler denies all allegations excepting two, one of which she asserts was reasonable, and with no recall of the other notwithstanding the stipulation. Tyler was suspended without pay upon the certification of charges.

The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on January 28, 1987. A prehearing conference was held on February 24, 1987. The matter proceeded to plenary hearing on May 12, 13, 19, and 29. The record closed on June 29, 1987 with the completion of post-hearing submissions.

On motion to suppress evidence of any incidents prior to January 1, 1985, the parties agreed to limit proofs as of January 1, 1984. Charges 1a, b, c and d of single incidents alleged on September 12, 1969, May 10, 1979, and October 1981, respectively, are therefore **DISMISSED**.

A Statement of Evidence filed by the Superintendent of Schools, Robert Clark, incorporates the basis of the charges certified, which consists of a reprimand and memoranda prepared by Tyler's principal, Charles E. Lorber. All such references are in evidence and resulted from one parental report, two parental conferences, and two parental telephone calls with principal Lorber on the receiving end of all. The truth of the charges must be determined by the testimony of those present when the incidents are alleged to have occurred. Those present who testified are six second grades, one fifth grader, and Tyler. Credibility of testimony is critical.

Each charge will be independently addressed although grouped according to the child involved.

TESTIMONIAL EVIDENCE

1(e) - ON OR ABOUT JANUARY 1984, SHE SLAPPED A BOY

1(f) - ON OR ABOUT APRIL 17, 1984, SHE SLAPPED A BOY

1(g) - ON APRIL 24, 1984, SHE SLAPPED A BOY

The charges above are incorporated in the FIRST COUNT and all involve "K.B." when he was a pupil in Tyler's second grade class.

"M.D.", a classmate of "K.B." in 1983-84, was the only pupil who testified concerning 1(e). He testified that he observed "K.B." and Tyler standing and facing each other in the front of the classroom, and that his view of them was from the side. He stated that he saw one of Tyler's hands, but she hit "K.B." with the hand he didn't see. He stated further that "K.B." told him that Tyler had hit him, and added that "K.B." fell to the floor holding his face. On cross-examination, however, he stated the latter was not clear to him.

Tyler testified she had no recall of this incident.

The mother of "K.B." testified that she and her husband thought it best that her son not miss school or renew the trauma of incidents with Tyler by testifying. On cross-examination she stated that her son's advocate, a Mr. D., advised that he not testify.

Mrs. B. testified she triggered an investigation by the Division of Youth and Family Services (DYFS) for child abuse by Tyler in October 1984; became a self-appointed spokesperson for concerned parents; demanded action against Tyler in a December 1986 letter to the Superintendent with copies to each Board member; and was an unsuccessful candidate for the Board in the 1987 election. She conceded "K.B." was a troublesome child who was suspended from school for hitting a substitute teacher, and that she often hit her son because of his behavior or disobedience. It is noted that this January 1984 incident was not reported by Mrs. B. to principal Lorber until she telephoned him on April 25, 1984. See P-1.

Concerning charge 1(f) of the FIRST COUNT, Tyler testified she had no recall of the April 17, 1984 incident, notwithstanding that it was stipulated that it occurred. See P-1 and P-2.

Concerning charge 1(g) of the FIRST COUNT, Tyler testified that three pupils were on the floor and engaged in a fight after recess; "K.B." was on top; Tyler pulled "K.B." off the pile; "K.B." yelled at Tyler indicating he didn't start the fight; and Tyler slapped his face.

I **FIND** the Board has not met its burden of proof by a preponderance of credible evidence as to the truthfulness of charge 1(e) of the FIRST COUNT. I **DO FIND** charges 1(f) and 1(g) to be **TRUE** by stipulation and the testimony of Tyler in the latter.

> 1(h) - ON OCTOBER 13, 1986, SHE "POKED" A BOY ON THE SIDE OF HIS HEAD
>
> 1(j) - ON OR ABOUT OCTOBER OR NOVEMBER 1986, SHE THREW A BOY ACROSS HIS DESK OR INTO HIS SEAT
>
> 1(b) - ON OR ABOUT OCTOBER OF 1986, SHE REQUIRED A PUPIL TO REMOVE A TOY FROM A TOILET BOWL
>
> 1(c) - DURING THE CURRENT SCHOOL YEAR, 1986-1987, SHE HAS CONSTANTLY SINGLED OUT ONE OF HER PUPILS, HAS YELLED AT HIM AND CALLED HIM NAMES IN FRONT OF HIS CLASS

All of the above are concerned with "J.R." a pupil in Tyler's second grade class. 1(h) and 1(j) are incorporated in the FIRST COUNT. 1(b) and 1(c) are incorporated in the SECOND COUNT.

Concerning 1(h), "J.R." testified that Tyler poked him in the head with a finger when he was getting a book. Tyler emphatically denied the alleged incident occurred. Lorber testified that he had not talked to "J.R." concerning this incident until about six weeks after it allegedly occurred, and has no knowledge as to whether it in fact occurred.

Concerning 1(j), "J.R." testified that Tyler pushed him across his desk when he was getting a book out. On cross-examination, "J.R." stated he was facing his desk when this occurred; he slid across the desk head first on his belly; his feet dragged across the desk; and he landed on the floor on his back. Tyler denied any such incident occurred. Pupil "S.D." testified that he saw Tyler pick "J.R." up as he sat at his desk and threw him in his chair, and also stated that "J.R." did not slide across the desk or fall on the floor. There was no testimony from Lorber relative to this incident or reference to same in any memorandum, but an observation is worthy of note upon review of P-3. P-3 is a memo

about "J.R." from Lorber to Tyler under date of October 30, 1986 which is signed by Lorber and Tyler as having been received by the latter on October 31. The last paragraph of the lengthy memo indicates that "I met with Mrs. R . . . again on November 4 . . ." .

Concerning 1(b), "J.R." testified that Tyler made him remove a toy tire from the toilet, but some unknown other pupil, and not he, had put the tire in the toilet. Mrs. R. testified that "J.R." did not tell Tyler he did not put the tire in the toilet. Pupil "S.D." testified that "J.R." threw the tire during a game and it landed in the toilet, and that Tyler determined from the concensus of pupils that "J.R." was responsible. Tyler reiterated the testimony of "S.D." that she determined "J.R." was responsible and told him to remove the tire and wash his hands .

Concerning 1(c), "J.R." stated that Tyler called him a daydreamer in class, and on cross-examination testified he was daydreaming. Mrs. R. testified that she knew it to be a fact that "J.R." is a daydreamer, but that although true, Tyler should not label her son. Tyler said the daydreaming "name-calling" occurred when she spoke privately with "J.R." either at the reading table or in the hall, but that her conversation with him may have been overheard. Mrs. R. also testified that she and Tyler conferred on November 4 to improve pupil-teacher relations, and that "J.R." told her Tyler did not yell at him subsequent to the conference.

I FIND the Board has failed to meet its burden of proof by a preponderance of credible evidence as to the truthfulness of charges 1(h) and 1j) of the FIRST COUNT or charge 1(c) of the SECOND COUNT. I DO FIND charge 1(b) of the SECOND COUNT to be TRUE.

1(i) - SHE HIT A GIRL ON OCTOBER 14, 1986

The above charge concerns "A.G.", a pupil in Tyler's second grade class and is incorporated in the FIRST COUNT.

"A.G." testified that Tyler hit her in the cheek with an open hand, which made her face turn red, but did not remember when this occurred. She stated she had yelled out an answer to a question asked by Tyler due to her belief the entire class was to answer out loud, but learned that Tyler wanted pupils to raise their hands.

Pupil "A.S." testified that he saw Tyler's right palm make contact with "A.G.'s" right cheek.

Pupil "L.R." testified that he saw Tyler hit "A.G.", but didn't see the contact and didn't remember if Tyler pushed or hit "A.G."

Pupil "F.B." testified that he saw Tyler hit A.G." with an open hand. On cross-examination, "F.B." stated the incident occurred in the morning; saw that "A.G.'s" face was red in the afternoon; he had Tyler as a teacher before, but not in kindergarten or first grade; the current year is the only year Tyler has been his teacher; "A.G." sat in the first row; he didn't remember where he sat but was far away; he saw "A.G." and the incident from the side; after the incident "A.G." went back to doing what she was doing before the incident, but didn't know what "A.G." was doing before the incident.

Pupil "S.D." testified that he didn't see Tyler hit or push anyone.

Tyler testified that she never hit "A.G.", but did place her hand on "A.G.'s" neck and shoulder when "A.G." was standing in order to turn her around to sit at her desk. Tyler is of the belief that those pupils who testified that she hit "A.G." may have misperceived that as a slap. She further stated that Mrs. G. never talked to her about the alleged incident.

Mrs. G. testified that she discussed Tyler with Mrs. B., Mrs. R., Mrs. D., and Mrs. S. individually, particularly with Mrs. B., and that they gathered at a group meeting initiated by Mrs. B. and herself, which was followed by their appearance at a Board meeting to educate parents as to Tyler's classroom conduct.

Principal Lorber stated that Mrs. G. did not complain to him, but that Mrs. R. brought the alleged incident to his attention. See P-3.

The certified charge simply alleges that Tyler hit "A.G." on October 14, 1986. My observation of the demeanor of all witnesses, particularly of the tender ages of 7 or 8 years, and the determination of the credibility of testimonial evidence, leads me to the belief that Tyler used her hand on "A.G." to sit her down, but did not hit her as alleged. I FIND the board has not met its burden as to the truthfulness of the charge.

1(k) - ON OR ABOUT NOVEMBER 24, 1986, SHE HIT A BOY

1(l) - ON DECEMBER 1, 1986, SHE STRUCK A BOY IN THE FACE WITH PAPER

The above charges are concerned with "A.S.", a pupil in Tyler's second grade class and are incorporated in the FIRST COUNT.

Principal Lorber testified that his sole reliance for these charges was on the telephone complaints from the child's mother; he did not confer with children or "A.S." about the complaint; he recalled no discussions with Mrs. S. other than on the occasions of the telephone complaints; Tyler denied ever hitting "A.S."; and that he advised Tyler that it was necesary that he file a formal report with DYFS. See P-6 and P-7. He stated that Mrs. S. advised him that charge 1(k) was an incident that occurred on "balloon-launching" day.

"A.S." testified that Tyler hit him once, and that was with with paper [charge 1(l)], but it did not occur on "balloon-launching" day.

Tyler testified there was no "balloon-launching" event on or about November 24, but there was such an event in September 1986. She added that she may have placed her hands on "A.S." in requesting him to be seated, but never hit the child.

I FIND the Board has failed to meet its burden as to the truthfulness of this charge.

Concerning charge 1(l), "A.S." testified that paper held by Tyler made contact with the right side of his head, near the top. He stated he was playing when he should have been working, and went back to work after the alleged incident.

Pupil "L.R." said he saw Tyler hit "A.S." but didn't remember what happened.

Pupil "A.G." said she saw Tyler hit "A.S." on his cheek with a piece of paper.

Tyler stated that "A.S." was talking and fooling around during a creative writing period; "A.S." stood up from his desk when Tyler approached his desk while she was passing out papers, at which time "A.S." brushed against the papers. She emphatically denied ever hitting "A.S."

I believe the incident occurred in accordance with Tyler's testimony, and **FIND** that the Board has not met its burden as to the truthfulness of the charge.

This completes the recitation of relevant testimony related to the certified charges.

DIVISION OF YOUTH AND FAMILY SERVICES (DYFS)

Antonio Villega, an investigator in the Institutional Abuse Investigators Unit of DYFS, testified. His testimony was limited on motion to an investigative follow-up of a complaint filed by Mrs. B. concerning charges 1(e), (f) and (g) incorporated in the FIRST COUNT.

Villegas testified he conducted an investigation of the complaint on December 10, 1984, and submitted a report of same to the Superintendent of Schools, Robert Clark, under date of June 3, 1986. He stated he prepared the report in late May 1986 from notes he had made in 1984. The 18-month delay was attributed to his personal and office backlog. The report was approved and forwarded to Clark by Susan McGrory, Statewide Supervisor, with a covering letter from McGrory under date of June 3, 1986.

Neither the report or covering letter were marked for identification or submitted as evidentiary documents during the plenary hearing, but both accompanied a letter memorandum filed by counsel for the Board in opposition to respondent's motion to limit proofs.

It must be noted that counsel for the Board incorporated in his certification in opposition to said motion the following statement: "I personally know that a significant piece of evidence which the Board weighed in certifying the charges was the report of the Division of Youth and Family Services rendered under cover letter of June 3, 1986, a copy of which is annexed hereto as Exhibit A."

It was determined by the investigator that the case "was not appropriate for referral to the County Prosecutor."

SUMMARY OF FINDINGS OF FACT

I **FIND** that the Board has not met its burden of proof with a preponderance of credible evidence as to the truthfulness of charges 1(e), (h), (i), (j), (k) and (l) of the FIRST COUNT, as well as charge 1(c) of the SECOND COUNT.

I also **FIND** charges (f) and (g) of the FIRST COUNT and charge 1(b) of the SECOND COUNT to be **TRUE.**

Charge 2 of the THIRD COUNT refers to charges above as having demonstrated "a pattern of conduct on the part of respondent which constitute other just cause to warrant her dismissal as a teacher in the District," which shall be addressed in CONCLUSIONS.

DISCUSSION AND THE LAW

The corporal punishment statute is codified in N.J.S.A. 18A:6-1 which states:

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

Concerning charge 1(g) of the FIRST COUNT, I believe it to have been proper for Tyler to use her hands on "K.B." to quell the disturbance. N.J.S.A. 18A:6-1(1). I also believe, however, that it was improper for Tyler to slap him when he reacted with a vocal response.

Relative to charge 1(b) of the SECOND COUNT, although found to be true, I believe Tyler acted properly in directing "J.R." to remove the toy tire from the toilet bowl on her belief that he was responsible for its location there.

Tyler's admissions in both testimonial and documentary evidence makes it apparent that this seasoned teacher of some 20 years becomes frustrated when the conduct or response of her pupils falls short of her standards. Similarly, Tyler must recognize the frustration of her superiors when her own conduct falls short of their

expectations. She must also recognize that a higher standard of conduct must be imposed on her due to her maturity than she imposes on children of the tender ages of seven and eight years.

Other than the stipulated unrecalled incident in charge 1(f) and charge 1(g) of the FIRST COUNT, I do not believe that Tyler exercised corporal punishment in violation of N.J.S.A. 18A:6-1. I do believe, however, that Tyler rather freely uses her hands on pupils to reinforce her directions in order to achieve a desired response. She must develop the self-discipline to refrain from such physical contact with pupils if she wishes to avoid the risks encountered with the certification of tenure charges and aspires to a continuation of her career as a teacher.

Extensive case law was cited by counsel to support the position of their clients in their post-hearing submissions. They are incorporated herein by reference, and are best characterized as establishing standards for teachers and imposing penalties commensurate with the degree of conduct falling short of such standards. Such penalties have ranged from dismissal from tenured positions to reprimands.

CONCLUSIONS OF LAW

Based on the **FINDINGS** herein, I **CONCLUDE** that charges 1(e), (h), (i), (j), (k) and (l) of the FIRST COUNT and charge 1(c) of the SECOND COUNT shall be and are hereby **DISMISSED**.

Having found charges 1(f) and (g) of the FIRST COUNT and charge 1(b) of the SECOND COUNT to be **TRUE**. I **CONCLUDE** the latter shall be **DISMISSED** because of its de minimus nature.

Due to the truth of charges 1(f) and (g), and a finding of a pattern of conduct less than the standard expected of a tenured teacher, I **CONCLUDE** that an impositon of penalty other than dismissal as a teacher is warranted.

It is therefore **ORDERED**, that the compensation withheld from Lynn Jenisch Tyler during the first 120 days of her suspension shall be forfeited. The Board shall reinstate Lynn Jenisch Tyler to her tenured position as a teaching staff member in the Sussex-Wantage School District, and that she shall be retained at the same step of the salary guide through the 1987-88 and 1988-89 school years which determined her compensation for the 1986-87 school year. She is not to be denied any adjustment increments that may result from revised salary guides during that period. **IT IS SO ORDERED.**

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

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

17 July 1987
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

JUL 22 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 22 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF LYNN JENISCH TYLER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE SUSSEX-	:	DECISION
WANTAGE REGIONAL SCHOOL DISTRICT,	:	
SUSSEX COUNTY.	:	
	:	

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

It is observed that the Board's exceptions to the initial decision, as well as respondent's reply to those exceptions, were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

In excepting to the findings and conclusions of the ALJ, the Board has placed reliance upon certain testimony of the witnesses at the hearing, as well as those comments and rulings made by the ALJ, to argue that the ALJ erred in failing to find that the Board had met its burden of proving that respondent is guilty of the charges of unbecoming conduct including those charges which state that she inflicted corporal punishment upon certain of her second grade pupils during the 1983-84 and 1985-86 school years.

The Board argues that documents in evidence, as well as the transcript of the testimony of the witnesses produced at the hearing especially the pupil witnesses, establishes by a preponderance of credible evidence that respondent is guilty of all of the tenure charges in the First count except charge 1(k) as well as tenure charges 1(b) and 1(c) of the Second count.

Moreover, the Board takes exception to the ALJ's failure to accept as credible the testimony of those pupil witnesses who testified with respect to the tenure charges against respondent. The Board argues that the ALJ's refusal to allow certain relevant testimony of the DYFS investigator into the record to be responsible in part for the error in his findings and determination with regard to the dismissal of all but two of its tenure charges against respondent.

More specifically, the Board argues as follows in its exceptions:

> Petitioner takes exception to the refusal of the court to permit the testimony of the DYFS investigator with respect to his investigation of

> charges against respondent. The Court erred in not permitting the testimony of the DYFS investigator with respect to anything other than his interview with Respondent.
>
> In the Court's discussion of the DYFS investigation at pages 8 and 9 of the Initial Decision there is implicit criticism of the failure of Petitioner to introduce the report of the investigator in evidence. But there is no rule of law or evidence that prefers a written report to the live testimony of the preparer of the report; just the opposite is true. Also, the Court deals only with Villeges' investigation of the 1984 incidents which were admitted by Respondent. There is no mention at all of his 1986 investigation in which he did interview pupils in Respondent's class. Given the fact that the Court did not find the pupils' testimony credible, it would seem that under the residuum rule, the investigator's testimony with respect to the recollection of the pupils at a time near the incidents described might have lent credence to their testimony at the hearing.
>
> (Board's Exceptions, at pp. 8-9)

Respondent by way of her replies to the Board's exceptions urges the Commissioner to adopt the findings and conclusions reached by the ALJ in the initial decision as his own.

Respondent maintains that the ALJ correctly considered many of the inconsistencies in the testimony of the pupils who testified against her which appear in the transcripts of these proceedings. In her letter reply attached to her post-hearing brief, respondent also cites certain pages of the transcripts of these proceedings to point out what she considers to be the inconsistencies of the pupil witnesses who testified on the Board's behalf with respect to the tenure charges against her.

Finally, in reply to the Board's exception that the ALJ erred in refusing to permit certain testimony of the DYFS investigator who interviewed the pupil witnesses with regard to the alleged incidents of corporal punishment that occurred during the 1985-86 school year, respondent avers:

> The exception to the refusal of the Court to permit the testimony of a DYFS investigator was proper and reflects the ALJ's recognition that the investigator could do nothing more than state what students told him. Not only is this pure hearsay, it further took account that because these very students were being called on to testify in this proceeding, it had no basis other than to waste time. The ALJ, moreover, properly

> recognized that even the DYFS investigator, whose responsibility was to enforce an entirely separate statute and administrative code, determined that the allegations were not appropriate for referral. The investigator was, however, permitted to identify any admissions which respondent had made to him. Clearly, the ALJ's handling of this testimony was proper and his stated rationale did not constitute error.
>
> (Respondent's Reply Exceptions, at p. 3)

The Commissioner has reviewed the respective arguments raised by the parties to the findings and conclusions set forth in the initial decision. Each of the specific written exceptions and replies to the initial decision raised by the parties which were not addressed above are nevertheless noted and incorporated by reference herein. Moreover, the Commissioner has reviewed the transcripts of these proceedings as they relate to each of the specific exceptions filed by the Board and respondent's replies thereto. (See In re Morrison, 216 N.J. Super. 143, 159 (App. Div. 1987).)

In the Commissioner's judgment, the Board's exception to the ALJ's refusal to allow the DYFS investigator to present any testimony on the record which pertained to the comments made to him by those pupil witnesses during his earlier investigation of the incidents related to the charges of corporal punishment against respondent herein bears further review and comment.

It is clear from a review of the pertinent portions of the transcripts of these proceedings that the ALJ did, in fact, preclude the DYFS investigator from testifying on the Board's behalf in connection with the prior statements made to him by pupils who were interviewed by him during the 1985-86 school year. Those pupils also testified against respondent at the tenure hearing.

The reasons given by the ALJ for his ruling at the hearing conducted on May 12, 1987 were that the testimony of the DYFS investigator's prior interview of these pupil witnesses during 1986 constituted hearsay evidence and would do nothing more than overburden the record of these proceedings. (TR. I-112-118)

In reviewing the specific nature and circumstances arising in these proceedings, the Commissioner does not agree with the ALJ's underlying reasons with regard to his decision to disallow the testimony of the DYFS investigator, notwithstanding the fact that such testimony does, in fact, constitute hearsay testimony of the pupil witnesses in question. The provisions of N.J.A.C. 1:1-15.5(a), (b) pertaining to hearsay evidence, residuum rule, permit hearsay evidence to be admitted in the trial of contested cases. In the instant matter the Commissioner does not agree with the position taken by the ALJ that the admission of the hearsay testimony of the DFYS investigator would necessitate an undue consumption of time (N.J.A.C. 1:1-15.1(c)) or burden the record of

these proceedings. What is at issue here is whether the hearsay testimony of the DYFS investigator with regard to the earlier statements made to him by those pupil witnesses would be of assistance in the assessment of the credibility and reliability of their direct testimony adduced approximately one year later at the tenure hearing.

The Commissioner is fully cognizant of the difficulties with which the ALJ is confronted in assessing the reliability of youthful witnesses. (State v. R.W., 104 N.J. 14 at p. 29)

However, the Commissioner finds and determines that he cannot reach an informed decision in this matter without taking into consideration the statements obtained from those pupil witnesses concerning the incidents that occurred during the 1985-86 school year which are related to the Board's tenure charges of unbecoming conduct (corporal punishment) against respondent.

Accordingly, the ALJ's decision to exclude the testimony of the DYFS investigator is reversed and this matter is remanded to the Office of Administrative Law for a limited hearing and findings of fact pertaining to the information the DYFS investigator obtained from the pupil witnesses as the result of the investigation he conducted of the incidents involving respondent which occurred during the 1985-86 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 2, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1218-87
AGENCY DKT. NO. 11-1/87

BOARD OF EDUCATION OF
THE TOWNSHIP OF FLORENCE,
Petitioner,
v.
ELIZABETH PELLE,
Respondent.

Jeffrey E. Snow, Esq., for petitioner

Joseph M. Pinto, Esq., for respondent (Joseph F. Polino, attorney)

Record Closed: June 24, 1987 Decided: July 23, 1987

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

The Florence Township Board of Education (Board), petitioner, alleges and Elizabeth Pelle, respondent, denies that the Board overpaid the respondent upon her retirement by $3,051.26. The Board seeks reimbursement. The amount claimed represents $1,138.76 in temporary disability benefits that should have been set off against salary paid during a period of temporary disability and $1,912.50 overcompensation for accumulated unused leave.

The Board filed a petition of appeal before the Commissioner of Education on January 21, 1987. The petitioner filed an answer on February 24, 1987. On February 27, 1987, the matter was transmitted to the Office of Administrative Law for disposition as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

After notice, a prehearing conference was held on April 14, 1987. Among other things, the issue was defined as whether there had been any overpayment to the respondent and, if so, whether the Board may lawfully recoup some or all of the amount overpaid. Preliminarily, counsel were directed to address the question of timeliness of the appeal. Counsel promptly submitted papers and an order issued on May 13, 1987, finding it would work an injustice on the taxpayers of Florence Township and be contrary to the interests of justice if the matter did not go forward. Accordingly, I relaxed N.J.A.C. 6:24-1.2, commonly called the 90-day rule, in this case. The matter was heard on June 9, 1987, in the Merchantville Municipal Court. Counsel timely filed posthearing submissions and the record closed on June 24, 1987.

RELEVANT EVIDENCE

George J. Murphy, Jr., formerly the Board's superintendent and now retired, testified. The respondent was a payroll clerk and as such had payroll and leave records in her custody. She authorized the issuance of paychecks. The respondent retired effective February 28, 1986. She was entitled to certain compensation upon her retirement, namely payment for leave days accrued but unused.

Exhibit P-5, the respondent's last paystub, shows a gross pay of $2,499.18 and deductions of more than $700. The respondent did the computations that produced these figures. Approximately one month after the respondent's retirement, the Board directed Murphy to look into the amount paid to the respondent.

Exhibit P-1 is the payroll record of the respondent. All leaves are noted. The record was prepared by the respondent. Exhibit P-2 is a judgment of the Division of Workers' Compensation in favor of the respondent. A letter from Selective Insurance Company of America (P-3), the Board's carrier, explains:

> [T]he claimant's only total disability period was from January 4, 1983 to and including May 23, 1983. This was a grand total of 20 weeks which we paid.
>
> You will note that the claimant did attempt to argue and seek a finding of continuous temporary disability through 1984 but this was rejected by the Court probably on the basis that not only

> our Doctor but her Doctor estimated permanent disability earlier. You will note that the Judge did extend the disability an additional 7 weeks but thats [sic] all.

The witness stated that, upon his review, he believed a confusion existed as to the respondent's number of accumulated sick leave days and number of days covered by the compensation award. He wrote to the respondent on May 13, 1986 (P-6), and explained the differences and discrepancies he uncovered. He noted that the respondent's last compensation check was not endorsed to the Board. He emphasized that the respondent's integrity was not being challenged. He stated, "Instead it would seem that you were misinformed regarding your financial entitlements." A complete calculation of sick leave and compensation days is attached.

It became apparent to him that the respondent had mistakenly attributed 58 days of absence to workers' compensation time but, in fact, the award only covered the period up to and including May 23, 1983. Therefore, five days in May and 22 days in June, a total of 27 days, were not covered by workers' compensation and should have been charged to sick leave.

In the following year, 1983-84, the respondent was absent for 100.5 days. She attributed these days to "workers' compensation." However, the compensation judge's decision did not authorize these days as such. Thus, the 100.5 days were to be charged against accumulated sick leave. The respondent had a balance of 128.5 sick leave days at the commencement of the year and, therefore, a balance of 28 days at the end of the year. The respondent also ended her full-time employment in June 1984.

In 1984-85 and in 1985-86, until her retirement on February 28, 1986, the respondent amassed 18 sick leave days as a part-time employee.

On March 1, 1985, the respondent was issued a check in the amount of $1,138.76 to cover the extended time granted by the hearing judge from April 4, 1983 to May 23, 1983. As with the previous compensation checks, it should have been endorsed and given to the Board because for that period she had been paid her weekly salary.

When the last compensation payment and the overpayment for sick leave are added, they total $3,051.26.

The superintendent and the respondent met on May 2, 1986 to discuss the question. The respondent believed she was not overpaid and believed that her compensation award entitled her to all monies she had received. The superintendent began a step-by-step review of the calculation and the respondent became upset, but showed no animosity. She declared she was not trying to cheat the Board. The superintendent assured her that he believed no cheating was involved but merely confusion.

The superintendent also testified that the respondent drew up all payroll checks. They were then sent to the custodian of school monies for countersignature. As payroll clerk, she also drew checks to government agencies that received withholdings. The annual school audits were usually done in summer. The witness could not recall if the respondent's records had been reviewed upon her retirement. The witness was sure that all sick leave and personal leave as provided in the employee contract were given to the respondent. Sick leave days are cumulative; personal business days can be accumulated only for retirement purposes or can be used up to three per year.

Upon reexamination of his own calculations, the former superintendent observed that the respondent had not properly been credited with $60, $30, and $9.26 representing personal days not used in the last years of her employment. This still leaves an overpayment of $2,952.

The witness stated he also reviewed all insurance carrier correspondence and saw that the last compensation payment of $1,138.76 was not endorsed to the Board as had all other such payments.

The Board secretary also testified. He stated that when an employee receives compensation, he sends forms to the insurance carrier. He also begins to charge absences against accumulated sick leave. When he is notified that the compensation carrier will cover some or all of the absence, he restores the charged sick leave to the employee. This process takes "a couple of weeks." Notations are made on the records after the compensation carrier approves the absence. An employee receives full pay during a period of temporary disability. Checks normally are drawn to the employee and Board as copayees. The employee endorses the check and the Board deposits it to the Board's own account. The Board then pays the employee full salary.

The Board utilizes an automated payroll system. This witness did not review the respondent's last check. She filled out the necessary documentation, sent it to the computer company that provides payroll services and the company issued a check to the respondent. In addition, when he went over receipts from the compensation carrier, the last check, in the amount of $1,138.76, issued to the respondent was not there.

This witness also testified that he went over the respondent's records with the respondent shortly before her retirement. At that time, she had the last compensation check in her possession. He asked that the check be returned. She did not do so. Between February 15 and 28, 1986, he called the Board's bank and tried to stop payment but the check had been deposited. He had no copy of the compensation award at that time. However, any check from the carrier should have been endorsed to the Board. He made no effort to try to get back excess withholdings from various government agencies. He has no knowledge of the Board paying an employee salary after entitlement to salary has expired while he has been in the Board's employ. He cannot, of course, speak to what happened before he was hired in June 1985. This witness believes that there has been no bad faith on the respondent's part.

The respondent testified that she retired at the close of business on February 28, 1986. While employed, she had full charge of payroll activities for the Board. At some time prior to 1983, the Board adopted an automated payroll system.

On January 3, 1983, she suffered an accident arising out of and in the course of her employment. She returned to work on the first business day of 1984.

The respondent recalls that compensation checks were mailed to the Board office. She believes she endorsed some or most of these checks to the Board. At a February 1985 compensation hearing an additional judgment was entered. She received additional temporary disability in the amount of $1,138.76. The check went from her compensation attorney directly to her on March 15, 1985 (R-2). The respondent believed the check was hers and deposited it "because of my problems." No attorney told her that the check should be turned over to the Board. She believed whatever was sent directly to her was hers to keep. The Board did not ask for the money until she received the May 13, 1986 letter from the superintendent (P-6).

The respondent does not recall a late February meeting with the Board secretary. They did have a discussion at her desk, however. She informed him that the additional temporary disability check had already been deposited. He mentioned a discrepancy and she stated that she was entitled to the money because she was in the hospital, had physical therapy and then went back into the hospital for traction.

The respondent acknowledged that, in 1983, she received a letter stating that her benefits would end. In November, however, she was ordered into a hospital for traction. Blue Cross/Blue Shield did not cover this hospitalization because the injury was work-related. A supplemental compensation judgment ordered the Board's carrier to pick up the medical expenses through the end of 1983.

The respondent stated she was "not really" informed that her benefits stopped in April 1983 and her sick leave was being charged. When she issued herself a check, she would have reviewed her own card and made any necessary adjustments. She was under the impression that all days she marked on her record (P-1) actually were compensation days and she made calculations accordingly.

The respondent introduced the records of other employees and claims she has been treated less than equally. She states a certain employee received an overpayment of workers' compensation benefits in a situation similar to her own. Other employees have little difficulty in having their absences covered by workers' compensation insurance.

The Board secretary, recalled in rebuttal, testified that the employee who had been overpaid compensation benefits had reimbursed the Board (P-10).

DISCUSSION AND DETERMINATION

The Board concedes that it was shown at hearing that the respondent is entitled to a credit for six full unused business days ($90), and one part-time unused business day ($9.26), thereby reducing the amount owed to the Florence Township Board of Education to $2,952.

The allegations concerning treatment of other employees are untrue or unclear. In any event, the respondent has not made out a case of disparate treatment. I so FIND.

The respondent renews her motion to dismiss the Board's claim under the 90-day rule, N.J.A.C. 6:24-1.2. For the same reasons stated in my order of May 13, 1987, the motion is DENIED. The Commissioner of Education, of course, may review this order pursuant to N.J.A.C. 1:1-18.6.

The respondent cites North Plainfield Educ. Ass'n v. Bd. of Educ., 96 N.J. 587 (1984) and Stockton v. Bd. of Educ. of City of Trenton, 210 N.J. Super. 150 (App. Div. 1986) in support of her timeliness arguments. Both cases deal with employees who received paychecks in incorrect amounts. In North Plainfield, the Court held the 90-day rule came into play upon receipt of the first incorrect check. In Stockton, the Appellate Division held that because the teacher had twice notified the Board that he disputed the amount and because the Board did not respond until February 8, the 90-day period began to run on February 8, not the prior November 9, when he received the first check in the disputed amount. Although North Plainfield may by analogy lend some weight to the respondent's argument and Stockton may do the same for the Board, the cases are not on all fours with the present matter. I have considered them but do not find them to control the outcome here.

While discussing timeliness, I note that N.J.A.C. 6:24-1.4 requires the respondent(s) to serve an answer upon the petitioner within 20 days after receipt of a petition of appeal. In the present case, the petition was filed on January 21, 1987, but the answer was not filed until February 24, 1987. I believe the issue and subject of this case to be sufficiently important that the matter be disposed of by adjudication on the merits and not on procedural grounds.

Having reviewed the evidence in this matter and having observed the witnesses as they testified, I FIND:

1. Elizabeth Pelle was employed by the Florence Township Board of Education as payroll clerk from 1967 through June 30, 1984, on a full-time basis and from July 1, 1984 through February 28, 1986, on a part-time basis.

2. The respondent was injured in a work-connected accident on January 3, 1983.

3. The respondent was absent from her job for all of 1983, returning on the first business day of 1984.

4. The Board paid the respondent her full salary for 1983.

5. The respondent also received temporary disability benefits from the Board's compensation insurance carrier for 12.82 weeks, beginning January 3, 1983.

6. The respondent endorsed all compensation checks for this period to the Board.

7. The Division of Workers' Compensation entered a judgment on February 22, 1985, awarding the respondent an additional 7.18 weeks of temporary disability benefits ($1,138.76), medical expenses through 1983 and a permanent partial disability award not in contention here.

8. The compensation carrier sent a check for $1,138.76 to the respondent's then attorney in March 1985.

9. The attorney sent the check to the respondent.

10. The respondent did not endorse this check to the Board.

11. The respondent continued her employment until her retirement at the close of business on February 28, 1986.

12. The respondent received a check for $1,786.04, net after taxes and withholdings, from the Board on February 14, 1986.

13. This check represented her own calculations as to accumulated leave benefits, both sick leave and personal business days, due to her.

14. The respondent and the Board secretary met briefly in late February 1986, at which time the secretary asked that the $1,138.76 check be given to the Board.

15. In March and April, the then superintendent looked into the matter and became convinced that confusion of both parties existed as to the number of days covered by the compensation award and, hence, the calculation of accumulated leave days for which the respondent was entitled to payment.

16. The respondent and the superintendent met on May 2, 1986, to discuss the matter.

17. The superintendent reviewed the respondent's calculations of accrued leave days in light of the compensation award.

18. The respondent became upset and no agreements were reached at that meeting.

19. On May 13, 1986, the superintendent wrote to the respondent again explaining the calculations and demanding reimbursement of $3,051.26.

20. On May 19, 1986, the respondent's present counsel replied and stated, among other things, that because the matter involved calculations based on a workers' compensation award, it was necessary to obtain the compensation matter file from the respondent's former attorney.

21. The respondent's counsel had some difficulty obtaining the file but ultimately did so and, on September 12, 1986 responded to the Board, stating that the respondent reasonably believed the last compensation check ($1,138.76) to be hers and that the Board was time-barred from collecting either the overpayment for accumulated leave days or the last compensation payment.

22. On September 24, 1986, the Board's counsel wrote to the respondent's counsel, again demanding repayment, stating the Board would institute

action if the respondent refused and asking counsel to advise if the respondent would comply.

23. Apparently hearing nothing, the Board filed the present petition on January 21, 1987.

Whether the Board is successful in recouping the monies in question, the Board's agents must be admonished in the strongest possible terms that their duties of fiscal responsibility are heavy and unceasing. Schools are established under the laws of the State and a school board is an instrumentality of the State itself. Durgin v. Brown, 37 N.J. 189 (1962). A school board is a quasi corporation. No political subdivision of the State can make any gift of money or property. N.J. Const. (1947), Art. VIII, §III, pars. 2, 3.

The respondent urges the Board should be estopped from making its claim because the Board's compensation carrier continued to pay the respondent's medical expenses relating to her accident until the end of September 1983 (R-9, R-10). The respondent therefore logically drew the conclusion that she still was entitled to workers' compensation benefits. This argument must be rejected. The respondent was represented by counsel in the compensation claim case. The compensation award was neither more nor less than stated on its face. The respondent's former counsel had a responsibility to be sure that his client understood the terms and extent of the award she received. This applies both to the original award and the further award.

Laches is an equitable doctrine to the effect that unreasonable delay will bar a claim if the delay results in prejudice to the defendant or respondent. In the present case, the respondent may argue that having had the use of the subject monies for some time she would be unfairly prejudiced if required to return them to the Board. However, relief still may be denied if the act complained of affects the general public. What the case comes down to, then, is a balancing between the seemingly dilatory behavior of the Board and what under a contract theory would be called unjust enrichment of the respondent.

In Polaha v. Buena Regional School Dist., 212 N.J. Super. 628 (App. Div. 1986), the court remanded to the Commissioner of Education the question of whether or not relaxation of the 90-day rule was appropriate, pursuant to the discretion granted to the

Commissioner, where the Commissioner had not considered his authority to relax the rule in the case and the parties had negotiated the ultimate question for some time before the petitioner filed his appeal. Statutory entitlements are exempt from the 90-day rule. Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982). Where, as in this case, there is no statutory entitlement, the Commissioner has the authority to extend the provisions of the 90-day rule. My review of the record in this matter reflects greater weight and persuasive force in the arguments that the 90-day rule must be relaxed in this matter because public funds are involved.

I **CONCLUDE** that Elizabeth Pelle was overpaid $2,952 in connection with her temporary disability and in connection with her accumulated personal business and sick leave days at the time of her retirement. These monies must be repaid to the Board. The parties are **ORDERED** to confer within 30 days of the date of final decision in this matter and to draw up a schedule for repayment. The Board of Education of Florence Township is further **ORDERED** to seek reimbursement of any withholdings from the overcompensation for accumulated leave from the federal and state governments, the Social Security Administration and any other agencies to which withholdings from that amount were paid. I do not retain jurisdiction.

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

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

23 JULY 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

JUL 27 1987
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 28 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
ELIZABETH PELLE,	:	
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the findings and conclusions of the ALJ set forth in the initial decision rendered by the Office of Administrative Law.

It is observed that respondent's exceptions to the initial decision and the Board's reply to those exceptions were filed pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. However, that portion of the Board's response which constitutes exceptions to the initial decision are deemed to be untimely and will not be considered herein.

In her exceptions to the initial decision respondent argues:

> The arguments in opposition to the Administrative Law Judge's finding on the applicability of the 90-day rule is set forth in detail in the attachments. The Administrative Law Judge's decision cites Polaha v. Buena Regional School District, 212 N.J. Super. 628 (App. Div. 1986), as authority for relaxing the 90-day rule. As set forth in the attachments, the negotiations regarding this matter broke off long before the petition was filed by the Board of Education. As such, there is no unfairness in invoking the 90-day rule in this case regardless of the fact that public funds are involved. If an exception is made every time public funds are involved, the 90-day rule would not be enforced in a substantial number of cases.
>
> On page 11 of the Administrative Law Judge's decision, he finds that Mrs. Pelle was overpaid $2,952. That figure includes $713.14 in withholding taxes which Mrs. Pelle did not receive. That was sent directly to the taxing authorities. The petitioner could have avoided payment of the withholding taxes by stopping the

> transmission to the Internal Revenue Service, Social Security Administration and the State of New Jersey since it had knowledge of the alleged overpayment and withholdings at the time the check was drawn, according to the evidence presented. Since it did not do so, the respondent should not be obligated to pay those monies back to the petitioner. Therefore, the total responsibility of Mrs. Pelle under the decision should be $2,238.86. That may be the intent of the Administrative Law Judge in ordering the Board of Education to seek the withholdings from the taxing authorities. However, the matter may be unclear and therefore this exception is filed with that in mind.
>
> Further exception is taken to the conclusion that Mrs. Pelle must repay any funds to the Board. The decision of the Administrative Law Judge on the issues of estoppel for unequal treatment and the reliance on payment of workers compensation benefits is against the weight of the evidence.
>
> (Respondent's Exceptions, at pp. 1-2)

Alternatively, the Board in its reply to respondent's exceptions states in pertinent part:

> Respondent argues that the ninety day rule should be ridgedly (sic) adhered to in this case and the petition for reimbursement dismissed.
>
> It should be pointed out that the discovery of the overpayment to the Respondent was discovered within ninety days of the date on which it was made. Both the School Board Secretary and the Superintendent discussed the circumstances with the Respondent (who as payroll clerk was the individual directly responsible for the miscalculation) and requested repayment. Accordingly, Respondent refused to refund the money. Consequently, a detailed letter delineating the overpayment issued from the Superintendent.
>
> Within a week after the Superintendent's letter was received by Respondent, she contacted counsel, who by letter dated May 19, 1986 requested time to acquire the entire Worker's Compensation file of the Respondent for review. The Board acquiesced in this request through its counsel in the hope that the matter could be amicably adjusted between the parties. The compensation file was not received and/or

> reviewed by Respondent's counsel until in or about September, 1986. By letter dated September 12, 1986, Respondent, through counsel, advised that no monies would be repaid. One last effort was made thereafter on September 24, 1986 to obtain payment. All efforts at negotiating a settlement having failed, this proceeding was instituted.
>
> Since the Board of Education attempted to amicably resolve the dispute over time and most of the delay was caused by Respondent in acquiring her compensation file, it is respectfully submitted that the Petitioner should not be penalized for its spirit of cooperation and receptiveness to negotiation. Action was instituted only after all attempts at settling the case had been exhausted and the Respondent refused to refund the disputed sum. (emphasis in text) (Board's Reply Exceptions, at pp. 1-2)

Upon review of the record and the respective arguments of the parties, the Commissioner observes that the sum of $2,952 which the ALJ found to be owing and due to the Board by respondent is actually derived from two separate claims for reimbursement by the Board:

a) The Board claims that respondent owes it $1,138.76 by virtue of the supplemental check she received on or about March 15, 1985 from a supplemental workers' compensation award.

b) The Board further claims that it is entitled to recover $1,813.24 in compensation reimbursement from respondent by virtue of the error she made in calculating her accumulated sick leave credits prior to the time of her retirement on February 28, 1986.

The ALJ concluded that each of above amounts totaling $2,952 were not statutory entitlements (Lavin, supra) and therefore warranted consideration by the Commissioner under the relaxation provision of the 90-day rule set forth in N.J.A.C. 6:24-1.17. In support of this ruling, the ALJ concluded that North Plainfield, supra, and Stockton, supra, were not directly applicable with regard to the factual circumstances in the instant matter. Instead he relied upon Polaha wherein the question of the relaxation of the 90-day rule was remanded by the Appellate Court to the Commissioner for his consideration. In Polaha the Court held that the Commissioner had not considered his authority to relax the rule in the case wherein the parties had been negotiating the ultimate issue in controversy between them for some time before petitioner filed his appeal.

The Commissioner observes that the Board's claim for $1,138.76 from respondent represents the supplemental workers' compensation award she received on or about March 15, 1985 and refused to endorse the check for that amount to the Board. In the Commissioner's judgment this portion of the Board's claim against respondent is exempt from the 90-day rule provision of N.J.A.C. 6:24-1.17 inasmuch as the Board's claim to the $1,138.76 withheld by respondent is statutorily prescribed pursuant to the provisions of N.J.S.A. 18A:30-2.1 which read as follows:

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.
>
> (emphasis supplied)

Accordingly, for the reasons stated herein the Commissioner finds and determines that the Board has a statutory entitlement to the $1,138.76 which is recoverable from respondent as the result of the workers' compensation award she received by check on or about March 15, 1985.

The question remaining for the Commissioner's determination is whether the Board is barred by the 90-day rule provision (N.J.A.C. 6:24-1.17) from recovering the $1,813.24 that it erroneously paid to respondent for accumulated sick leave credit at the time of her retirement on February 28, 1986.

In the Commissioner's view, payment by the Board to respondent for accumulated sick leave at the time of her retirement is not a statutory entitlement but rather resulted from the Board's exercise of its discretionary authority to formulate a policy to that effect or was the result of the Board having entered into a negotiated contractual agreement with its employees which provided for compensation for accumulated sick leave credit upon retirement.

The undisputed facts set forth in this matter clearly established that the Board's action in filing its Petition of Appeal on January 21, 1987 to recover, in part, an amount of $1,813.24 from respondent exceeds the 90-day time period set forth in N.J.A.C. 6:24-1.17.

In this regard, the Commissioner does not concur with the findings and conclusions of the ALJ that the 90-day rule provision of N.J.A.C. 6:24-1.17 warrant relaxation in order to permit the Board to recover this sum of money paid to respondent.

In arriving at his determination not to relax the 90-day rule and to bar the Board from seeking restitution of $1,813.24 from respondent in accumulated sick leave compensation, the Commissioner has considered those delays that occurred between May 13, 1986 and September 12, 1986 attributable to efforts by the parties to negotiate a resolution to this matter. (Polaha, supra)

However, it is clear from a reading of the letter dated September 12, 1986 from respondent's attorney to Board counsel that respondent had definitively determined not to pay back such sum and, thus, clearly any negotiations had concluded.

Consequently, even if the Commissioner were to ignore respondent's letter of September 12 and consider the Board's letter reply of September 24, 1986 to respondent as being the date upon which the 90-day rule was triggered, the last date for the Board to have filed its Petition of Appeal with the Commissioner would have expired on December 23, 1986. Instead, without good cause shown, the Board failed to file its Petition of Appeal in this matter until January 21, 1987, approximately one month (29 days) after the expiration of the 90-day period.

It is for the reasons stated above that the Commissioner reverses those findings and conclusions in the initial decision that are inconsistent with the Commissioner's own findings and determination summarized below.

1. It is found and determined that pursuant to the provisions of N.J.S.A. 18A:30-2.1, the Board is statutorily entitled to recover an amount of $1,138.76 received by respondent in a supplemental workers' compensation award. Respondent is therefore directed to reimburse the Board said sum of money within 30 days of the receipt of this decision.

2. The Commissioner finds and determines that the record of this matter fails to establish that the Board failed to provide good and sufficient reason for the relaxation of the 90-day rule (N.J.A.C. 6:24-1.17) in order to seek restitution of $1,813.24 which represents overpayment of accumulated sick leave credit to respondent at the time of her retirement on February 26, 1986.

Accordingly, the relief requested by the Board is granted in part and denied in part consistent with the reasons stated by the Commissioner herein. It is so determined.

COMMISSIONER OF EDUCATION

September 2, 1987

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8186-85
(EDU 2698-85 - Remanded)
AGENCY DKT. NO. 92-4/85

IN THE MATTER OF THE TENURE HEARING OF JUDE MARTIN, SCHOOL DISTRICT OF THE TOWNSHIP OF UNION BEACH, MONMOUTH COUNTY

Louis E. Granata, Esq., for petitioner
(Yacker & Granata, attorneys)

Thomas W. Cavanagh Jr., Esq., for respondent
(Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys)

Record Closed: April 13, 1987 Decided: July 24, 1987

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

This is a remand of a teacher tenure case for psychiatric examination of respondent Jude Martin ("Martin") and for further proofs on an appropriate penalty. As the result of a prior hearing on the merits of the charges, the Commissioner of Education ("Commissioner") adopted the administrative law judge's finding that Martin engaged in conduct unbecoming a teacher in connection with an incident which occurred on September 1, 1984. However, on the existing record the Commissioner rejected the judge's

recommendation that the appropriate penalty for Martin's misconduct should only be 150 days suspension without pay. Instead, the Commissioner remanded the matter to the Office of Administrative Law ("OAL") with instructions to supplement the record. Specifically, the Commissioner directed further consideration of four questions: (1) Whether the conduct of respondent on the evening in question represents a momentary aberration from the normal behavior of a stable individual or whether respondent's actions on the night in question are an indication of more serious psychological or psychiatric problems reflective of a disturbed personality unfit to return to his duties in the classroom. (2) For what reason was respondent's license revoked? (3) Why was respondent driving while on the revoked list? (4) Whether there are any circumstances surrounding the events of September 1, 1984 which would tend to mitigate the penalty of dismissal from respondent's tenured position.[1]

Procedural History

In April 1985 petitioner Union Beach Board of Education ("Union Beach") certified tenure charges of unbecoming conduct against Martin. Basically, Union Beach accused Martin of having made unsolicited homosexual advances to a young adult and having committed various motor vehicle offenses. Martin filed an answer denying any improper conduct. Subsequently, on May 13, 1985, the Commissioner transmitted this matter to the OAL for handling as a contested case. The OAL held tenure hearings on September 18, 19 and 23, 1985. Later, on November 14, 1985, administrative law judge Leon S. Wilson issued an initial decision sustaining the charges and recommending a 150-day suspension. On December 20, 1985, the Commissioner remanded the matter to the OAL to develop a more complete record regarding Martin's mental stability and his fitness to teach.

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[1]In addition, the Commissioner reversed an evidentiary ruling which had excluded certain items seized by police during a search of the trunk of Martin's automobile. On remand, Union Beach was afforded the opportunity to introduce the excluded evidence. Apparently the actual contents of the trunk had been destroyed and could no longer be produced. Union Beach referred to a police officer's subjective characterization of the material as "pornographic books" and to Martin's admission that a "book about a homosexual priest" was "among many other books in his trunk." While Union Beach could have called the officer to describe the material in greater detail, it chose not to do so.

Before the remand hearing was scheduled, Martin applied first to the Commissioner and then to the State Board of Education ("State Board") for a stay pending appeal of the Commissioner's order. Meanwhile, the OAL placed the case on inactive status until resolution of Martin's application. Ultimately, the Commissioner on June 11, 1986 and the State Board on August 11, 1986 denied Martin's request for a stay. Furthermore, the State Board affirmed the Commissioner's order of remand. Consequently, on August 11, 1986 the OAL restored the case to the active calendar.

Both parties selected Dr. Chester L. Trent of Neptune, New Jersey as the expert to perform the psychiatric examination ordered by the Commissioner. Dr. Trent examined Martin on October 22, 1986 and submitted his written report to the Office of Administrative Law on December 4, 1986. Additionally, Martin retained his own expert, Dr. Harry H. Brunt of Wall, New Jersey, to conduct a separate psychiatric examination. Dr. Brunt saw Martin on September 30, 1986 and prepared his written report on October 9, 1986.

Next, the OAL held remand hearings on December 11 and 19, 1987. Due to a recording problem, some of the tapes of the hearing on December 11 were not fully audible. The OAL arranged for these tapes to be amplified to improve the quality of sound. Counsel for Martin filed a statement of evidence on March 23, 1987. Counsel for Union Beach filed objections on March 27, 1987. On April 6, 1987, the Office of Administrative Law settled the form of the record. Upon receipt of post-hearing briefs, the record closed on April 13, 1987. Time for preparation of the initial decision has been extended to July 27, 1987.

Findings of Fact

(1) Momentary Aberration or Serious Psychiatric Disturbance

Of utmost concern to the Commissioner is whether Martin's conduct on September 1, 1984 "represents a momentary aberration from the normal behavior of a

stable individual . . . or psychiatric problems reflective of a disturbed personality unfit to return to his duties in the classroom." It is unnecessary to recaptitulate the findings reached at the earlier hearing. Suffice it to note that Judge Wilson found that Martin was guilty of "unwarranted intrusion upon the privacy of a perfect stranger" and that Martin had persisted in making "crude" sexual suggestions despite rejection by his victim.

Insofar as this single incident might be indicative of latent homosexual tendencies, both psychiatrists agreed that the evidence was insufficient to make a diagnosis of any sexual disorder. Dr. Trent, a board-certified psychiatrist affiliated with Monmouth Medical Center, opined that "it is not psychiatrically probable that Mr. Martin has an established pattern of active homosexuality[.]" Although Dr. Trent views homosexuality as a disorder, he did not believe that "only one documented incident of overt homosexual behavior" was enough to conclude that Martin was suffering from such condition. Similarly Dr. Brunt, with over 24 years of private practice in psychiatry, shared the belief that Martin should not be classified as homosexual. Dr. Brunt's opinion was based on his personal observation of Martin's mannerisms, the absence of any known prior homosexual experiences and Martin's self-report of involvement with women. Neither expert suggested that Martin posed any unusual risk to the safety of young boys entrusted to his care.

Expert opinion differed, however, on the broader question of whether Martin exhibited other psychiatric problems likely to interfere with his classroom performance. In his written report, Dr. Trent reached a primary diagnosis of "substance abuse, alcohol." During his testimony, Dr. Trent pointed to several factors in support of this diagnosis. Besides his recent brush with the law, Martin had been previously arrested for an alcohol-related incident in December 1982. On that earlier occasion, Martin had consumed an undisclosed amount of alcohol while a passenger on a bus trip to a hockey game. Police apprehended him as he was driving home after the bus ride. Martin was acquitted of the drunk driving charge when the case came to court. In connection with the current episode

in September 1984, Martin acknowledged drinking "a couple beers" before operating a motor vehicle. Arresting officers described Martin's demeanor as "carefree and cocky." Again Martin was found not guilty of drunk driving. According to Dr. Trent, these two encounters with law enforcement officials are symptomatic of an alcohol abuse problem.

Another factor on which Dr. Trent depended for his diagnosis was the result of a medical examination performed by Dr. Lawrence Katz, a specialist in internal medicine. Dr. Katz examined Martin on November 14, 1986 and reported his impression of "questionable" moderate alcohol consumption. Laboratory tests showed "some minor elevation" of enzyme levels, which Dr. Trent interpreted as being "biological markers" of excessive alcohol use and "signs of disturbance" of liver functioning. Further, Dr. Trent relied on Martin's own admissions regarding his drinking habits, including statements to the effect that he has a "tendency to overdrink at parties."

After preparation of his report, Dr. Trent obtained a computerized psychological profile generated as a result of Martin's responses to a standardized test known as the Minnesota Multiphasic Personality Inventory ("MMPI"). The MMPI is an instrument designed, in the words of its distributor, to "serve as a useful source of hypothesis about clients" provided that its recommendations can be "verified by other sources of clinical information." Martin's own expert, Dr. Brunt, had administered this test battery as part of his interview. On one measurement, the MacAndrew Addiction Scale, Martin achieved an "extremely high score," said to suggest "great proneness to the development of an addictive disorder." Not surprisingly, Dr. Trent regarded this new information as consistent with his findings.

Significantly, Dr. Trent was unable or unwilling to express any opinion on Martin's fitness to teach, claiming that such "ultimate question" was for the Commissioner to decide. He did concede that the lack of any reported difficulties in

school over an 18-year period indicates that Martin is able to exercise some degree of control over any alcohol problem he might have. Nevertheless, he concluded that Martin's alcohol abuse is more than an aberration because of its repetitiveness. Dr. Trent also commented that persons with Martin's personality characteristics are resistent to treatment and poor candidates for psychotherapy.

By contrast, Dr. Brunt did not think that Martin was suffering from "alcohol abuse" in the medical sense. Referring to an authoritative diagnostic manual, Dr. Brunt explained that each of three criteria must be present for a correct diagnosis of alcohol abuse: (1) a pattern of pathological alcohol use; (2) impairment in social or occupational functioning due to alcohol use; and (3) duration of the disturbance for at least one month. Dr. Brunt emphasized that Martin had maintained an "unblemished work record" for 18 years and had served as head of the local teacher's association. Apart from the two arrests involving alcohol use, Dr. Brunt noted there was no evidence of any behavior traits characteristice of alcohol abuse, such as binge drinking, blackouts, violence, tardiness, absenteeism, traffic accidents or family arguments. Rather, Dr. Brunt regarded Martin as a "social drinker who occasionally gets tipsy," but possesses the internal control to refrain from excessive drinking. Dr. Brunt found support for his view in the fact that Martin has not been involved in any alcohol-related incidents within the last two years.

With regard to the elevated enzyme levels, Dr. Brunt stated that such results could be attributable to causes other than alcoholism, including hepatitis or liver disease. While acknowledging that the MMPI score showed a susceptibility toward addiction, Dr. Brunt did not believe that the remaining clinical information justified a finding of alcohol abuse. In sum, Dr. Brunt did not consider Martin to be in need of treatment for alcohol abuse. He testified that Martin was fit to return to the classroom and continue teaching at the elementary level.

At the hearing, Dr. Trent suggested for the first time a secondary diagnosis of "personality disorder." No mention of this alleged condition was made in Dr. Trent's written report. Moreover, Dr. Trent was vague about the exact nature of this broad disorder, except to say that Martin had some difficulty "curbing his impulses" and "dealing with authority." Illustrative of these difficulties, Dr. Trent mentioned Martin's obesity problem and his commission of traffic violations resulting in revocation of his driver's license. Since "personality disorder" had never been previously identified as a problem, Dr. Brunt did not directly address it in his report. He did, however, testify that everyone has some type of personality defect, but that Martin's particular problems are unrelated to his fitness to teach.

I FIND that Martin does not have any sexual disorder which renders him unfit to teach. Both experts agreed that the proofs do not establish a consistent pattern of homosexual behavior, much less the degree of aggressiveness and overtness which might constitute a threat to the welfare of students or justify his rejection as an acceptable role model.

With respect to the conflicting evidence, the record clearly demonstrates that Martin has a serious drinking problem. Undeniably, the facts are that Martin has been arrested twice for offenses involving intoxicated behavior; that he shows objective physical symptoms linked to alcoholism; that he admits to occasional overuse of alcohol; and that his personality profile reveals a tendency toward addictive behavior. Regardless of whether or not he fits the technical definition of "alcohol abuse," Martin's important responsibilities as a teacher require that his future use of alcohol be carefully monitored to avoid potential trouble. Of course, this does not mean that Martin must be forever excluded from the classroom. Throughout a long and distinguished teaching career, Martin has never allowed his drinking to interfere with his job performance. Under such circumstances, the public interest will be adequately protected by requiring ongoing

participation in a suitable alcohol treatment program. If Martin fails to comply with the terms of such program, Union Beach may initiate appropriate action to remove him from his position.

Lastly, the evidence presented is inadequate to prove that Martin has a "personality disorder" which might preclude his return to the classroom. Not only was such diagnosis entirely omitted from Dr. Trent's original report, but also his testimony on this subject was evasive and imprecise.

(2) Revocation of Respondent's License

All facts regarding this issue are stipulated. Back in December 1982, Martin had been issued a traffic summons for reckless driving. Eventually he was convicted and received a three-month suspension of his driving privileges. As established by testimony, Martin did not start to serve his three-month suspension until July 1984. Thus, his license was still suspended on September 1, 1984 for a reckless driving offense which had taken place one year and nine months earlier.

Although this explanation answers the Commissioner's narrow question, the record has been expanded to cover Martin's subsequent driving history. On August 26, 1984, Martin received a ticket for operating a motor vehicle during a suspension period. At that time, he was returning home from a temporary job as a stage hand at the Garden State Arts Center in Holmdel. His license was suspended for two months for this offense. Martin also drove illegally on September 1, 1984. He was given another one-month suspension for this second offense of driving while suspended. Additionally, Martin's license was suspended six months for a breath test refusal arising out of the same events of September 1, 1984. Taken together, Martin lost his driving privileges for a total of one year. Since restoration of his license on October 14, 1985, Martin has not received any other tickets for moving violations.

(3) Why Respondent Was Driving

These facts are also undisputed. The incident of September 1, 1984 occurred on early Saturday morning of the long Labor Day weekend. Late on the preceding Friday, Martin started celebrating the end of summer by going to a local tavern in Keansburg, where he consumed "a couple beers." Because his license was suspended, he walked rather than drove to the tavern. There he encountered a female acquaintance, whom Martin described as "distraught" over an argument with her husband, also a friend of Martin. After the tavern closed, Martin brought the lady to his apartment, where he gave her a cup of coffee, listened to her troubles and tried to calm her down. She remained "very distressed" and "wheepy." Understandably, Martin did not want his friend's wife to stay overnight at his apartment. When he offered to call a taxi, the woman insisted that she did not feel like taking a cab home alone. In this context, Martin made the unfortunate decision to drive her home himself. It was on the way back from this ill-conceived errand that Martin engaged in the serious misconduct which forms the main basis of the tenure charges. Without excusing or condoning Martin's unacceptable behavior, it should be recognized that he was motivated by good intentions when he illegally got behind the wheel of a car.

(4) Mitigating Circumstances

Judge Wilson has already set forth numerous factors relevant to any penalty determination, including the non-criminal nature of Martin's conduct, the lack of deliberation or planning on his part, Martin's "laudable" record of service in his profession, and the absence of harm to the administration of the Union Beach school system. On remand, the Commissioner limited the scope of inquiry to any additional mitigating circumstances "surrounding the events of September 1, 1984."

Within those confines, it is noteworthy that Martin made no effort to resist arrest and generally cooperated with the police investigation. While it is ture that he refused to submit to the breath test, he did so in the mistaken belief that he had a legal

right not to take the test. As previously noted, a second mitigating circumstance is that Martin did a good deed by escorting home a lady in distress. One can fault the wisdom but not the underlying motivation behind this action. A third mitigating circumstance, which goes beyond the events of September 1, 1984, is Martin's expressed willingness to participate in an alcohol rehabilitation program. During his testimony, Martin promised to abide by whatever corrective measures are deemed necessary for him to get his job back.

Conclusions of Law

Based on the foregoing facts, I **CONCLUDE** that the recommended penalty should be modified to include as a condition of reinstatement that Martin successfully participate in an approved alcohol treatment program and that periodic reports of his progress be sent to Union Beach.

Local boards of education have the restricted function of reviewing charges made against tenured employees and determining whether the supporting evidence warrants the bringing of tenure charges. N.J.S.A. 18A:6-11. Only the Commissioner or his representative has the statutory authority to hear the charges and, if they are sustained, to decide what penalty to impose. N.J.S.A. 18A:6-16. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967).

In assessing the appropriateness of a proposed penalty, the Commissioner should consider "the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and . . . any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." Fulcomer, at 422. While the tenure law is phrased literally in terms of "dismissal or reduction in compensation," N.J.S.A. 18A:6-10, the Commissioner necessarily has implicit authority to impose a lesser penalty than outright dismissal or permanent reduction in salary, such as suspension without pay for a

fixed period, In re Wells, 1982 S.L.D. 170 (Comm'r of Ed. 1982), aff'd 1982 S.L.D. 173 (St. Bd. 1982), or reinstatement contingent on satisfaction of reasonable conditions, In re Bernstein, 67 S.L.D. 73 (Comm'r of Ed. 1967).

Order

It is **ORDERED** that the above factual findings are certified to the Commissioner in accordance with his order of December 20, 1985.

Further **ORDERED** that, as a condition of reinstatement to his teaching duties, Martin must fully participate in an acceptable alcohol treatment program operated by Alcoholics Anonymous or other program acceptable to Union Beach.

Further **ORDERED** that no such program shall be acceptable unless the person in charge agrees to submit periodic reports on Martin's progress directly to the Union Beach superintendent of schools. Said reports shall be due no less frequently than once every month for the first six months, once every three months fo the next six months, and once every six months thereafter.

Further **ORDERED** that no such program shall be acceptable unless the person in charge agrees to notify the Union Beach superintendent of schools promptly in the event that Martin fails to comply with any requirement of the program.

And further **ORDERED** that all costs of the treatment program shall be paid by Martin (or his health insurance carrier) and not by Union Beach.

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

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

July 24, 1987
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

JUL 28 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JUL 29 1987
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF JUDE MARTIN, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION ON REMAND
UNION BEACH, MONMOUTH COUNTY.	:	
	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. The Board's exceptions were untimely filed pursuant to N.J.A.C. 1:1-18.4. Such determination is made having noted from the postal return receipt cards (Form 3811) that two stamped dates appear as dates the initial decision was received at the office of counsel for the Board. Calculating the 10-day period for receipt of exceptions pursuant to the above-stated regulations from either of the two dates, July 30 or July 31, the exceptions should have been received at the Department of Education by August 10. In fact, the exceptions were received in the Office of the Commissioner of Education August 12, 1987 and are thus deemed untimely. Moreover, because the exceptions are untimely, respondent's reply exceptions thereto are likewise not made part of the record to be considered herein.

Upon his careful review of the record before him the Commissioner remands the instant matter a second time for a limited re-hearing for the reasons that follow.

The Commissioner notes the absence of a full set of transcripts from the two days of hearing on remand in the record. He further notes that the tapes of the first day of hearing on remand conducted on December 11, 1986 are inaudible. He also takes cognizance of ALJ Springer's attempt to resolve the matter by letter to counsel to the parties dated April 7, 1987 wherein he "settled the form of the record." (Initial Decision on Remand, ante) The ALJ therein accepted from Mr. Cavanagh, respondent's counsel, over the objection of Mr. Granata, Board's counsel, a "statement of evidence" (Letter dated April 7, at p. 1) prepared from notes Mr. Cavanagh took from the tapes, albeit difficult to hear, of the first day of hearing. With some deletions and additions based on specific objections from Mr. Granata in his letter to ALJ Springer dated March 26, 1987, ALJ Springer accepted said "statement of evidence" as "an accurate representation of the evidence" adduced from Dr. Harry Brunt, Jr., respondent's psychiatrist and witness. (Letter dated April 7, at p. 1)

There is an obvious void in the record of this matter as a consequence of the absence of either an audible voice-activated tape or a stenographic record. As a result, neither the parties themselves nor the ALJ have been provided opportunity to properly review and consider the testimony of these two crucial witnesses as

it relates to their written submissions. It is obvious from the aforecited documents that the parties do not entirely agree as to the exact detail of their testimony, one party's summation of which has been accepted by the ALJ as a "statement of evidence."

In the Commissioner's view said acceptance was in error since there exists no conclusive proof as to whose recollection is more accurate as to what are conceivably critical matters necessary for resolution of this case. Consequently, the Commissioner directs that this matter be remanded to the Office of Administrative Law for the purpose of permitting these two witnesses to re-testify under direct and cross-examination as to the content of their written findings so that there is opportunity to create an accurate record for possible reference by the parties and/or the ALJ and ultimately to the Commissioner for his decision. See N.J.A.C. 1:1-14.1(a).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 2, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2826-87
AGENCY DKT. NO. 63-4/87

CALDWELL-WEST CALDWELL EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT,

Respondent.

Paul L. Kleinbaum, Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys)

Brenda C. Liss, Esq., for respondent
(McCarter & English, attorneys)

Record Closed: July 20, 1987 **Decided: July 31, 1987**

BEFORE WARD R. YOUNG, ALJ:

The Caldwell-West Caldwell Education Association (Association) alleged the Caldwell-West Caldwell Board of Education (Board) violated the tenure rights of a school social worker by abolishing said position terminating the employment of the social worker, but reemploying him on a contractual per diem basis as a social worker consultant.

The Board denied its action was improper, and seeks dismissal of the Petition for lack of standing and an untimely filing in violation of N.J.A.C. 6:24-1.2.

The matter was transmitted as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on April 27, 1987. A prehearing conference was held on June 19, 1987 at which the parties agreed to submit the standing and timeliness issues for summary decision and proceed to plenary hearing on the substantive issue if petitioner prevails in the former. The standing and timeliness issues were briefed and the record closed on July 20, 1987, the date established for final submission.

The timeliness issue will now be addressed. The following stipulated facts, incorporated in the Prehearing Order entered on June 19, 1987, are adopted herein as **FINDINGS OF FACT:**

1. The cause of action occurred on October 20, 1986 when the Board acted to create a social worker consultant's position, and appointed Pasquale Spitaletta (the tenured social worker terminated by the abolishment of a school social worker position on March 24, 1986, effective June 30, 1986) to that position on that same date, effective September 5, 1986.

2. The Petition of Appeal was filed on April 6, 1987.

The petitioner concedes that N.J.A.C. 6:24-1.2 generally requires petitions to be filed within 90 days of the alleged violation, but seeks relaxation of the rule through the application of N.J.A.C. 6:24-1.17 because of the expressed belief that the matter presents appropriate circumstances.

Petitioner cites Shokey v. Cinnaminson Board of Education, 1978 S.L.D. 919 wherein the Commissioner determined that strict adherence to the 90-day rule would place form over substance in a matter concerned with use of accumulated sick days during a maternity leave.

Wyckoff Education Association v. Wyckoff Board of Education, 1980 S.L.D. 233 is also cited for the proposition that an action with a continuing rather than a terminal effect should preclude the application of the 90-day rule. Although the Administrative Law Judge stated in Wyckoff, 1980 S.L.D. 228 at 229 that "The Board's Motion to Dismiss with respect to N.J.A.C. 6:24-1.2 was denied upon the grounds that the controverted action herein is not a precise action; that is, an action which has been taken and its effects are terminal.", it must be noted that the issues in that matter was determined to be ripe for adjudication in light of cited statutes and State Board of Education regulations. Petitioner buttresses its argument with the contention that its members were continuously denied tenure and seniority rights which may continue into subsequent years.

Respondent counters the "continuing in nature" contention by citing North Plainfield Ed. Ass'n. v. North Plainfield Bd. of Ed., 96 N.J. 587 (1984), wherein the Court determined the withholding of a salary increment was not attributable to a new violation each year, but rather to an earlier employment decision requiring application of the 90-day rule.

A distinction between a statutory right and a claim arising out of an alleged violation of a statutory tenure right was made in Polaha v. Buena Regional School Dist., 212 N.J. Super. 628 (App. Div. 1986), wherein the State Board was affirmed in holding N.J.A.C. 6:24-1.2 applicable. The question then arises whether the 90-day rule should be relaxed pursuant to N.J.A.C. 6:24-1.17 because strict adherence should "be deemed inappropriate or unnecessary or may result in injustice."

It must be noted that the petitioner in this matter is the Association, and that Pasquale Spitaletta "did not initiate a grievance procedure against the board nor am I interested." See Exhibit B.

Notwithstanding that the Board could be denied its statutory right to exercise its discretionary authority in restructuring its Table of Organization pursuant to N.J.S.A. 18A:11-1 if the petitioner were to prevail on the substantive issue herein, I FIND insufficient indication by petitioner of circumstances warranting relaxation under N.J.A.C. 6:24-1.17.

I also FIND the Petition of Appeal to have been filed 168 days after the cause of action and is therefore time-barred, and that Summary Decision is GRANTED to respondent.

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

I find no compelling reason under the circumstances to address the issue of Standing.

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

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

31 July 1987
DATE

Ward R. Young
WARD R. YOUNG, ALJ

AUG - 4 1987

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

August 5, 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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CALDWELL-WEST CALDWELL EDUCATION ASSOCIATION, PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY, RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Association filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. The Board's reply exceptions thereto were also timely filed in accord with the aforesaid regulations.

The Association avers in exceptions that the initial decision did not attempt to explain its departure from Delores Shokey v. Cinnaminson Bd. of Ed., 1978 S.L.D. 919, aff'd State Board 1979 S.L.D. 869 and Wyckoff Education Ass'n. v. Wyckoff Bd. of Ed., 1980 S.L.D. 233, wherein "the Commissioner concluded that relaxation of the 90-day rule was warranted pursuant to N.J.A.C. 6:24-1.19, the predecessor to N.J.A.C. 6:24-1.17" on the basis of "a 'continuing violation' Shokey *** at 921 *** [or] where the 'controverted action continues into *** future years.' Wyckoff *** at 229." (Exceptions, at pp. 1-2)

Further, the Association would distinguish the instant matter from North Plainfield Ed. Ass'n. v. North Plainfield Bd. of Ed., 96 N.J. 587 (1984) on the basis that the "Board's action was not terminal as was true with the increment denial in North Plainfield ***." (Exceptions, at p. 2) The Association claims that the "reemployment of an outside 'consultant' represents a continuing denial of the tenured and seniority rights of the individual whose position was eliminated.***" (Exceptions, at p. 2) Citing N.J.S.A. 18A:28-11 and N.J.S.A. 18A:28-12 for the proposition that a tenured teaching staff member has certain seniority and reemployment rights after a RIF, the Association contends that the "Board's failure to properly recall that teaching staff member affects not only his or her rights but those of teaching staff members who may also have reemployment rights. This failure by the Board will, therefore, continue into the future." (Exceptions, at p. 2) The Association further argues that said failure will continue into the future and, thus, this matter justifies relaxation of the 90-day rule pursuant to N.J.A.C. 6:24-1.17.

Citing Freehold Regional H.S. Education Ass'n. and Walter Holcomb v. Freehold Regional H.S. District, 1978 S.L.D. 960 and Wyckoff Education Ass'n. v. Wyckoff Board of Education, 1981 S.L.D. 1128, aff'd State Board 1982 S.L.D. 1598, the Association claims it here has standing as representative of the employees as much in this case as in both of the Wyckoff cases cited herein, because its petition alleges that the Board violated the tenure and seniority rights of one of its members. "The impact of the Board's actions here on the Association's members is no less than in the Freehold and the Wyckoff cases." (Exceptions, at p. 4)

Petitioner requests that the Commissioner reject the initial decision, conclude that the Association has standing and remand the matter for plenary hearing.

In reply to the above exceptions, the Board notes that the Association received immediate notice of the Board's action on October 20, 1986 on which date it confirmed a consulting contract between the Board and a former teaching staff member, Pasquale Spitaletta, inasmuch as the Association president was at that Board meeting. Further, the Board avers:

> The Association has stipulated that the cause of action herein arose, if at all, on that date. Eight days later, on October 28, 1986, the Association filed a grievance complaining of the contract with Mr. Spitaletta; but it waited five months, until April 6, 1987 to file the petition herein. (Board's Reply Exceptions, at p. 2)

Moreover, the Board refutes the Association's reliance on Shokey and Wyckoff, supra. The Board suggests the Commissioner did not adopt the "continuing harm" theory in Shokey, but rather based his decision on other grounds, not addressing that issue at all. As to Wyckoff, petitioner therein, according to the Board, alleged that "the board '[had] assigned and continue[d] to assign personnel not properly certificated....'" (Reply Exceptions, at p. 2, citing Wyckoff, 1980 S.L.D. at 228) Thus, the Board claims, Wyckoff is distinguishable

> since the Association herein does not claim the Board has taken any objectionable action since October 1986, or will take any such action in the future. The alleged violation is the result of one particular Board action, and the Association admits that the cause of action arose, if at all, on one particular date, which was more than 90 days before the filing of the petition.
> (Reply Exceptions, at p. 2)

The Board contends further that North Plainfield, supra, eliminates any support that the Association might muster from Wyckoff, supra. Therein, the Board avers, the Supreme Court found, that the continuing harm theory had no relevance to a claim involving withholding of a salary increment, even though the result of such action was that petitioner would forever be one step behind on the salary scale. "Notwithstanding this continuing effect, the Court found that the alleged violation of petitioner's rights was the result of one particular board action. It therefore refused to relax the 90-day rule." (Reply Exceptions, at p. 3) Citing Ackerman et al. v. Oakland Bd. of Ed., decided by the Commissioner August 25, 1986 and Arena v. Bd. of Ed. of the Westwood Regional School District, decided by the Commissioner June 3, 1986, the Board also argues that in tenure and seniority cases, the 90-day rule has been consistently applied. Thus, the Board avers, the ALJ was correct to dismiss the petition on timeliness grounds, and it submits the Commissioner should adopt the initial decision.

Averring that the Commissioner, like the ALJ, need not reach the standing issue, the Board relies on its Brief in Support of Summary Decision and the cases cited therein for its position in regard to standing in this matter. Said submission is incorporated herein by reference. In summary, the Board avers that while a teachers' association would have standing to represent the interests of its members, the Association herein does not have standing, "since it does not allege a violation of the rights of any of its members, and the only former member affected by this case does not claim any violation of his rights and does not seek any relief or representation by the Association." (Reply Exceptions, at p. 3)

The Board submits there is no relief which the Commissioner could grant the Association, and, for that reason alone, the matter should be dismissed.

Upon his careful review of the record, the Commissioner grants summary decision dismissing the instant Petition of Appeal for the reasons that follow.

It is undisputed that the Association's Petition of Appeal was filed 168 days after the cause of action accrued. The Association's post-hearing brief states:

> The Association filed its petition in this case more than 90 days after the initial violation. The Board approved the hiring of the social worker consultant on October 20, 1986. The Association filed its petition on April 6, 1987. This case presents appropriate circumstances, however, to relax strict adherence to the rules.
> (Post-Hearing Brief, at p. 4)

Initially, the Commissioner finds no merit in the Association's argument that the instant circumstances constitute a continuing violation warranting relaxation of the 90-day rule, averring:

> The social worker consultant continued to work beyond October 20, 1986. The Association's members were, therefore, continuously denied tenure and seniority rights. Similarly, the Board's alleged violation may continue into subsequent academic years. Its action is not terminal but continuous in nature as was the Board's action in Wyckoff. (Id., at p. 5)

Rather, the Commissioner agrees with the Board that the Association's reliance on Shokey and Wyckoff for its position are inapposite because neither case involved a claim that tenure or seniority rights had been violated thereby presenting cause for relaxation of the 90-day rule. The case law is clear that in matters concerning tenure and seniority, the 90-day rule shall be strictly applied. In Paul Gordon v. Board of Education of the Township of Passaic, Morris County, 1983 S.L.D. 1141, aff'd in part/rev'd in part State Board March 6, 1985, aff'd N.J. Superior Court, Appellate Division May 27, 1986, the State Board stated:

> The State Board finds that the tenure and seniority rights of teachers, unlike the right to military service credit, are predicated on the rendering of services as a school teacher. Under N.J.S.A. 18A:28-5, teaching staff members acquire tenure only after employment in a school district or by a board for a specified period of time. Likewise, seniority rights accrue only after a teaching staff member has rendered services for a period of time sufficient for him to have achieved tenure. N.J.S.A. 18A:28-9 et seq. In both cases, the rights acquired are functionally related to teaching experience. As set forth above, the kind of statutory right that renders the statute of limitations inapplicable is one that, like the right to military service credit, does not bear a functional relationship to service as a teacher. North Plainfield, supra, Lavin, supra. We therefore conclude that the statute of limitations specified in N.J.A.C. 6:24-1.2 applies to claims, such as that in the instant case, which allege the violation of tenure or seniority rights. (emphasis supplied) (Id., at p. 4)

Further, in the instant matter the Commissioner finds no circumstances warranting relaxation of the 90-day rule pursuant to N.J.A.C. 6:24-1.17 such as those present in Charles R. Stockton v.

Board of Education of the City of Trenton, Mercer County, decided by the Commissioner November 19, 1984, rev'd State Board April 3, 1985, rev'd/rem. N.J. Superior Court, Appellate Division May 16, 1986, decided by the Commissioner on remand February 20, 1987, particularly because it is unrefuted by petitioner that the matter is currently pending before the Public Employment Relations Commission (PERC). The Board's Post-Hearing Brief so states:

> The Superintendent and his staff formulated a job description for the social worker consultant position, and drafted a contract. In late summer the Superintendent offered the contract to Pasquale Spitaletta, and Mr. Spitaletta accepted. He began working as a consultant on September 5, 1986. The Board retroactively confirmed Mr. Spitaletta's contract on October 20, 1986.
>
> Like all official action of the Board, its vote to confirm the contract was taken at a public meeting. Among the members of the public present was the Teachers' Association President, John Raby. The Association thus received immediate notice of the Board's action. The Association has stipulated that the cause of action in this matter arose on October 20, 1986.
>
> Eight days later, on October 28, 1986, the Association filed a grievance protesting Mr. Spitaletta's contract. The grievance has been submitted for arbitration to the Public Employee Relations Commission, where it remains pending. Though the Association waited only eight days to file its grievance, it took more than five months to file its petition with the Commissioner. (The petition was filed more that seven months from when Mr. Spitaletta began as a consultant, and more than a year from the abolition of the former social worker position.) The Association has offered no excuse or explanation for its failure to file in a timely manner. (emphasis supplied) (Id., at pp. 3-4)

Moreover, the Commissioner notes from the record the absence of any indication whatsoever in the Petition of Appeal that the matter is currently pending in another forum as required by N.J.A.C. 6:24-1.3(b) which states:

> (b) Any party to a controversy or dispute before the commissioner, who is a party to another action before any other administrative agency, arbitration proceeding or court involving the same or similar issue of fact or law, shall indicate the existence of such action or

> complaint with the petition of appeal or the answer to the commissioner, as may be appropriate. Failure to so certify may be deemed to be sufficient cause for dismissal of the petition of appeal when, in the judgment of the commissioner and/or the ALJ, such failure results in the duplication of administrative procedures for the resolution of a controversy or dispute.
> (emphasis supplied)

The Commissioner does find in this matter that the Association's failure to indicate in its petition the existence of an action before PERC, based upon the same facts and parties as the instant appeal, to be cause for dismissal. See Sara Riely v. The Board of Education of Hunterdon Central High School, Hunterdon County, decided by the Commissioner September 19, 1978, State Board dismissed appeal December 6, 1978, Super. Ct. (App. Div.) rev'd/rem. to dismiss petition 1980 S.L.D. 1532, wherein the Court stated:

> If, as it appears, respondent now contends that her appeal to the commissioner involves matters that were not, or could not, have been submitted for arbitration, in that such matters were exclusively within the managerial discretion of the local board, then clearly there was no reason to withhold the appeal to the commissioner during the pendency of her arbitration proceedings. Respondent had ample time to file the petition after the promulgation of N.J.A.C. 6:24-1.2. It is evident to us that she gambled on a favorable arbitration award and, having lost, then decided to seek further relief at the hands of the commissioner. By then, her petition was out of time. (at 1534)

Further, because the matter is also determined to be untimely, the Commissioner does not reach either the matter of standing or the merits of the matter.

Accordingly, summary decision is granted in favor of the Board. The Petition of Appeal is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 10, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3800-87
AGENCY DKT. NO. 170-5/87

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE,
Petitioner,
v.
MUNICIPAL COUNCIL OF THE TOWNSHIP OF WOODBRIDGE,
Respondent.

Carl J. Palmisano, Esq., for petitioner (Palmisano & Goodman, attorneys)

Joseph R. Bulman, Esq., for respondent (Arthur W. Burgess, attorney)

Record Closed: July 13, 1987 Decided: July 31, 1987

BEFORE BRUCE R. CAMPBELL, ALJ:

The Woodbridge Board of Education (Board) appeals from the April 27, 1987 determination of the Municipal Council of the Township of Woodbridge (Council) to fix an amount to be raised by local tax levy for school purposes for the 1987-88 school year that is $2,220,000 less than the amount to be raised by local tax levy contained in the Board's 1987-88 budget as originally submitted to the electorate.

This matter was joined before the Commissioner of Education and transmitted by the Department of Education to the Office of Administrative Law on June 2, 1987, for disposition as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

The Board filed a motion for summary decision with its petition of appeal. The Council timely filed responsive papers. I heard oral argument on the motion pursuant to N.J.A.C. 1:1-12.2(e) on July 13, 1987.

The Board sets forth a chronology of events following defeat of the budget on April 7, 1987, and argues that it is entitled to summary decision setting aside the budget reductions made by the Township Council as a matter of law because the Council's actions in reducing the budget were arbitrary, capricious and unreasonable. Specifically, the Board alleges the Council failed to set forth its underlying determinations and supporting reasons for the cuts, the Council was politically motivated in determinating the amount of the budget reductions and the Council refused to meet with the Board after April 27 to discuss settlement of the budget.

The Council argues that the Board has failed to satisfy the standards for entry of summary decision. The Council maintains it properly articulated its determination and supporting reasons for each reduction made in the school budget. It denies political motive in determining the amount of budget reductions and maintains it satisfied its legal obligations to consult with the Board following defeat of the budget at the polls.

The Board's second and third arguments need not be addressed because the matter turns and is decided on the Board's first argument.

The record shows that the budget was transmitted to the Council, pursuant to N.J.S.A. 18A:22-33, on April 8, 1987. Board's Exhibit E. The two bodies met on April 20 at 7:30 p.m. From 8:00 p.m. until 11:15 p.m., a committee from each of the two bodies met in a joint closed session. The Council's minutes of that meeting, attached to Board Exhibit G, show discussion of some line items, but ultimately action on a $1.6 million reduction. The minutes do not reflect, by line items, how this figure is reached and what the reason for each line item reduction is.

The Council held a special meeting on April 27, 1987. Its minutes, Board Exhibit J, show a combination of line item and across-the-board cuts totaling $2,220,000 although the Council had resolved on April 20 to reduce the budget by $1,600,000.

On May 7, the Board passed a resolution requesting that the Council meet with the Board to discuss the budget further and that the county superintendent of schools be invited to mediate the session. Board's Exhibits P, Q. The Council at first accepted and then refused the invitation. Board's Exhibits R, S.

DETERMINATION AND ORDER

N.J.S.A. 18A:22-37 requires, in pertinent part, that if the voters reject any of the budget items submitted at the annual school election, the Board of Education must deliver the proposed school budget to the governing body of the municipality within two days thereafter. This the Board did.

The statute further provides:

> The governing body of the municipality . . . shall, after consultation with the board, and by April 28, determine the amount which, in the judgment of said body . . . is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district, and certify to the county board of taxation the totals of the amount determined. . . . [Emphasis supplied.]

The authority of the Commissioner of Education and, hence, the Office of Administrative Law to hear school budget disputes derives generally from N.J.S.A. 18A:6-9 and specifically from Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94 (1966). The Court's language in E. Brunswick at 105-106 is particularly instructive.

> 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 view of the make up of the community. Where its action entails a significant aggregate reduction in the budget and the resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determintions and supporting reasons. This is particularly important since, on the Board of Education's appeal under R.S. 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could be properly eliminated or curbed and on what basis it so found. [Emphasis added.]

In Bd. of Ed., Tp. of Union v. Tp. Committee of the Tp. of Union, OAL DKT. EDU 2788-81 (June 5, 1981), adopted, Comm'r of Ed. (July 9, 1981), the Commissioner stated in his affirmance:

> In the opinion of the Commissioner, . . . the law set forth in E. Brunswick, supra, [requires] the municipal government to recommend to the Board the supporting reasons for the reduction or elimination of specific line items which it believes necessary to total budgetary reduction. The Commissioner deems it proper that such decisions be made at the time of the reduction and not on a contingency basis only, if and when the budget reduction is appealed by the Board to the Commissioner.

In the Initial Decision, adopted by the Commissioner, the administrative law judge explained, "The governing body must have the rationale for its reductions at the time it acts and shall not be permitted subsequently to construct one in a 'boot-strap' manner." See also, Bd. of Ed., Tp. of Deptford v. Mayor and Council, Tp. of Deptford, OAL DKT. NO. EDU 4910-86 (Mar. 9, 1987), rev'd, Comm'r of Ed. (Apr. 27, 1987).

The governing body argues that summary judgment is not appropriate. It contends that there are genuine issues of fact that must be determined. Nevertheless, the case law discussed above indicates clearly that the failure of a governing body to specify each line item to be reduced or eliminated and the particular reasons for reduction or elimination, at the time of its action, is a fatal defect.

Having considered the arguments of counsel, I **FIND** and **CONCLUDE** that there are no issues of material fact concerning the reasons put forth by the governing body for the reductions it proposes. I **FIND** that the reasons are untimely or insufficient as a matter of law or both and, therefore, must be set aside.

Summary judgment is **GRANTED** in favor of the Woodbridge Township Board of Education setting the reductions and restoring in full the amounts originally set forth in the budget presented to the voters on April 7, 1987.

It is **ORDERED** that the sum of $2,220,000 be and is hereby certified to the Middlesex County Board of Taxation in addition to the $51,961,599 already certified to the Board of Taxation for current expense purposes of the Woodbridge Township Board of Education for the 1987-88 school year so that the total amount to be raised by tax levy for current expense purposes for the 1987-88 school year shall be $54,181,599.

Finally, it is noted that N.J.S.A. 18A:22-37 requires the governing body to act by April 28. Although a governing body has the power to amend its actions, I **FIND** that the failure of the Council to meet with the Board after that date is neither arbitrary nor capricious.

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

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

31 JULY 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

AUG - 3 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

AUG 5 1987
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

ds

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MUNICIPAL COUNCIL OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY, RESPONDENT.	:	DECISION

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

It is observed that the Council's exceptions to the initial decision and the Board's replies to said exceptions have been filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

The Commissioner further observes that the ALJ has recommended that the Board's Motion for Summary Judgment be granted in this matter by virtue of the Council's failure to provide the Board with its underlying determinations and supporting reasons for its tax levy reductions in current expenses for the 1987-88 school year. The ALJ concluded that the Council's action violated the provisions of N.J.S.A. 18A:22-37 and that the Council's action was inconsistent with those school law decisions in East Brunswick Township, supra, Union Township, supra, and Deptford Township, supra. It is noted that the Commissioner's decision in Deptford Township has since been affirmed by the State Board of Education on August 7, 1987. In affirming the Commissioner's decision in Deptford Township the State Board held in pertinent part as follows:

> The question presented by the Council's appeal is whether the failure of a governing body to provide the district board of education with the reasons for its line item reductions at the time it acts to reduce those amounts pursuant to N.J.S.A. 18A:22-37 invalidates the reductions so as to require restoration of the amounts. We conclude that its does.
>
> In Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966), the New Jersey Supreme Court considered the question of whether the Commissioner of Education had jurisdiction over a controversy

between a township council and a board of education resulting from the council's reduction of the board's proposed budget that had been twice rejected by the voters. Resolving that question in the affirmative, the court further discussed the operation of the applicable statute[1] and the obligations of governing bodies thereunder. In this regard, the court emphasized that

> 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 view 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. This is particularly important since, on the Board of Education's appeal under R.S. 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found.

Id. at 105-106 (emphasis added).

We conclude that the language of the court clearly requires that a governing body provide reasons for its reductions at the time it acts

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[1] We note that the statute involved in that case was a predecessor to N.J.S.A. 18A:22-37. We however emphasize that the obligations elucidated by the court in East Brunswick also apply when a governing body acts pursuant to current statute. Branchburg Bd. of Ed. v. Branchburg, 187 N.J. Super. 540, 545 (1983).

> pursuant to N.J.S.A. 18A:22-37. Further, we emphasize that the Commissioner has long held that the rationale for the reductions must be provided at that time, e.g. Union Township Bd. of Ed. v. Township Committee, decided by the Commissioner, July 9, 1981, and we fully concur with the Commissioner that the failure of the governing body to know, identify and set forth the specific line items of the budget and to ennunciate (sic) supporting reasons at the time of the reduction renders the reduction an arbitrary act. Union Township, supra. We also agree that such arbitrariness is not negated by the subsequent submission of information or subsequent construction of a rationale. Id. We therefore affirm that the failure of the Council in this case to provide reasons for its line item reductions either at the time of its original tax levy certification or of its amended certification invalidated the reductions so as to warrant restoration of the total amounts. To hold otherwise would ignore the primary obligation of governing bodies acting pursuant to N.J.S.A. 18A:22-37 to act conscientiously at every step to effect savings that do not impair the educational process. East Brunswick, supra, at 105-106.
>
> Our view of the significance of a failure of the governing body to provide the board of education with the rationale for reductions at the time it acts is reinforced by the specific requirement imposed by N.J.S.A. 18A:22-37 that the board of education notify the governing body if it intends to appeal to the Commissioner within 15 days after the governing body certifies to the county board of taxation the amount it judges to be necessary to be appropriated. In light of this requirement, we conclude that to allow a governing body to act without providing the district board with its rationale at the time it makes the reductions would place an undue burden on the board of education, and would, as here, force district boards to file appeals in the absence of any indication from the governing body as to why it concluded that the reductions were justified. This would result in unnecessary litigation and also would undermine the Commissioner's ability to determine quickly on what basis the governing body in fact made its judgments. (Slip Opinion, at pp. 2-4)

In its exceptions to the initial decision, the Council argues that the ALJ erred in concluding that it was in violation of the provisions of N.J.S.A. 18A:22-37 and that its action was incon-

sistent with the prescribed procedures discussed in East Brunswick Township, supra, Union Township, supra, and Deptford Township, supra.

In support of its contention, the Council maintains that its action of April 20, 1987 to reduce the Board's current expense appropriations by $1,600,000 for the 1987-88 school year was preliminary to its final determination to impose a total tax levy reduction of $2,220,000 which it acted upon on April 27, 1987.

The Council, in relying on the minutes of its meetings held on April 20 and April 27, 1987, as well as the opposing affidavits of Councilmen Nardiello, Oros, and Czajkowksi, argues that the specific line item economies with the Council's underlying determinations were considered in arriving at its decision to impose a $2,220,000 tax levy reduction in the Board's current expense appropriations for the 1987-88 school year.

Finally, the Council argues that, assuming arguendo that its papers submitted in opposition to the Board's Motion for Summary Judgment do not clearly establish that the Council satisfied the provisions of applicable statutory and case law at the time it made its tax reductions in the Board's 1987-88 current expense appropriations, such papers at least establish the existence of genuine issues of material fact at the time such reductions were made so as to deny summary judgment in the Board's favor.

In support of its argument against granting summary judgment, Council relies on the standards enunciated by the Courts in Singer v. National Fire Insurance Company of Hartford, 110 N.J. Super. 59, 63 (Law Div. 1970); Ruvolo v. American Casualty Company, 39 N.J. 490 (1963) and Judson v. Peoples Bank & Trust Company of Westfield, 17 N.J. 67 (1954).

The Board in reply to the Council's exceptions urges the Commissioner to adopt as his own the findings and conclusions reached by the ALJ in the initial decision. In support of its position the Board in its opposing brief relies on the exhibits and the minutes of the Council's meetings of April 20 and April 27, 1987 made part of the record to point out the inconsistencies in the arguments raised by the Council in its exceptions to the initial decision.

The Board's replies are noted by the Commissioner and incorporated by reference herein.

The Commissioner has independently reviewed the record of this matter including the various exhibits, affidavits, minutes of the Council and the respective arguments advanced by the parties with respect to the findings and conclusions set forth in the initial decision.

The Commissioner cannot agree with the position taken by the Council that there are existing outstanding issues of material fact which demand a reversal of the ALJ's findings, conclusions and recommendation to award summary judgment in the Board's favor.

The minutes of the meetings held by the Council on April 20 and 27, 1987 (Exhibits G and J) establish that certain members of the Council were adamant in their views that substantial line item reductions could be made in the Board's current expense appropriations. However, there is no evidence in the record which reveals that the Council made a specific determination of "the amount which, in the judgment of said body or bodies, is necessary to be appropriated, for each item appearing in such budget***." (N.J.S.A. 18A:22-37, emphasis added). Further, there is no evidence that the Council knew or identified the specific current expense line items of the budget in which a total tax levy reduction of $2,220,000 could be effected on April 27, 1987, (Exhibit N) at the time it resolved to make its certification to the Middlesex County Board of Taxation. Similarly the record is devoid of any proof that the Council enunciated its supporting reasons for each of the current line item economies totaling $2,220,000 at the time it acted to impose such tax levy reduction upon the Board's 1987-88 school budget appropriations.

In support of his determination to grant summary judgment on the Board's behalf in the instant matter, the Commissioner relies on the specific language of the State Board's decision in Deptford Township, supra, recited in pertinent part above.

Accordingly, for the reasons stated above, the Commissioner hereby adopts as his own those findings and conclusions set forth in the initial decision.

It is ordered that the sum of $2,220,000 can be and is hereby certified to the Middlesex County Board of Taxation in addition to the $51,961,599 already certified to the Board of Taxation for current expense purposes of the Woodbridge Township School District for the 1987-88 school year shall be $54,181,599.

COMMISSIONER OF EDUCATION

September 11, 1987

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 5475-85 and
EDU 3894-86 (CONSOLIDATED)
AGENCY DKT. NOS. 255-7/85 and
175-5/86

LINDA LEDWITZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF MANALAPAN-
ENGLISHTOWN REGIONAL SCHOOL
DISTRICT, MONMOUTH COUNTY,
Respondent.

Thomas W. Cavanagh, Jr., Esq., for petitioner (Chamlin, Schottland, Rosen, Cavanagh and Uliano, attorneys)

Gerald L. Dorf, Esq., for respondent

Record Closed: May 5, 1987 Decided: August 6, 1987

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

Petitioner filed two spearate Petitions of Appeal before the Commissioner of Education alleging that: (1) the action of the Board of Education of the Manalapan-Englishtown Regional School District (Board) to withhold her salary and/or adjustment increment for the 1985-86 school year was arbitrary, unjustified and in violation of N.J.S.A. 18A:29-14 (OAL Dkt. No. EDU 5475-85, Agency Dkt. No. 255-7/5); and (2) the

Board's decision to terminate her employment was in violation of N.J.S.A. 18A:6-10 et seq. by virtue of her tenure status as a teacher of the handicapped (OAL Dkt. No. 3894-86, Agency Dkt. No. 175-5/86). Petitioner seeks restoration of her salary increment for the 1985-86 school year and reinstatement to her teaching position effective February 26, 1986, the date the Board terminated her employment.

The Board denies petitioner's allegations contending, among other things, that its actions were at all times proper and in accordance with the law.

PROCEDURAL HISTORY

Petitioner filed her Petition of Appeal with regard to the 1985-86 salary and adjustment increment withholding on July 31, 1985. On August 29, 1985, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 25, 1985, the undersigned presiding, at which it was agreed to go to hearing on February 25 and 26, 1986. The scheduled hearing dates were adjourned and the matter was reassigned to Beatrice S. Tylutki, Administrative Law Judge (ALJ). On February 27, 1986, the parties agreed to place the matter on the OAL's list of inactive cases for a period of six months for the purpose of settlement discussions and negotiations (OAL Dkt. No. EDU 5475-85, Agency Dkt. No. 255-7/85). (See, Order to Inactive List, dated March 3, 1986.)

On May 19, 1986, while the former matter was still on the list of inactive cases, petitioner filed her Petition before the Commissioner alleging the Board's violation of N.J.S.A. 18A:6-10 et seq. and her tenure rights. The Commissioner transmitted the matter to the OAL on June 13, 1986. A prehearing was held by the undersigned on August 19, 1986, at which, among other things, hearing dates were set down for December 9 and 10, 1986 (OAL Dkt. No. EDU 3849-86, Agency Dkt. No. 175-5/86).

On November 18, 1986, Administrative Law Judge Tylutki, with the consent of both parties, issued an Order to Consolidate the two matters. The hearing was conducted on December 9, 1986, at the Manalapan, New Jersey, Township Municipal Building. The parties requested and were granted leave to submit post-hearing memoranda. The last submission was received by the OAL on May 5, 1987, which constitutes the closing of the herein record.

As a result of the undersigned's illness and hospitalization, extensions for the execution of the herein initial decision were requested and granted by the Acting Director of the OAL and the Commissioner, pursuant to N.J.A.C. 1:1-18.8.

ISSUES

The issue with respect to the Board's action to withhold petitioner's 1985-86 salary and adjustment increment is:

1. Whether the Board's action to withhold petitioner's salary and adjustment increment for the 1985-86 school year was arbitrary, capricious and/or unreasonable?

The issues with respect to the Board's action to terminate petitioner from her employment position effective February 26, 1986, were agreed to as follows:

1. Whether petitioner was certificate-eligible for the designation of the teacher of the handicapped while employed by the Board but the certificate was not perfected during the course of her employment?

2. Whether, under the circumstances, petitioner acquired a tenure status in the Board's employ under her K-8 elementary teaching certificate?

3. Whether the action by the Board in terminating petitioner from her employment position was proper under the circumstances?

STIPULATION OF FACTS

Upon opening the record in this matter on December 9, 1986, the parties offered this administrative tribunal a Stipulation of Facts and attached Exhibits (A-1 through P), which are set forth hereinbelow as follows:

1. Petitioner became a full-time teacher in respondent's school system during the scholastic year 1979-80. During that year, and the following two scholastic years (1980-81 and 1981-82), she served as the Resource Room (Special Education) teacher for grades 1 through 3. During 1982-83, and the subsequent scholastic year (1983-84), she continued her employment in Respondent's school system in a self-contained neurologically impaired class, servicing grades 4 through 6. During 1984-85,

she was employed in a self-contained neurologically impaired class for second and third grade students at the Clark Mills School. During 1985-86, she was employed in a similar position with respondent school system for first and second grades.

2. Petitioner was continually employed in respondent's school system in a full-time capacity as a teacher of the handicapped, beginning in 1979-80 and culminating in her termination on February 26, 1986.

3. Petitioner received her K through 8 (limited) certification from the New Jersey State Department of Education in February 1965. That certificate was updated and recorded as permanent in July 1973 (Exhibit N).

4. During the entire seven (7) year period when petitioner was employed by respondent, she taught only as a special education teacher in the various positions previously mentioned.

5. (a) During the seven (7) year period while petitioner was in the employ of respondent, her employer did not raise any question nor inquire of her regarding her certificate as a special education teacher until the latter part of January 1986.

(b) Petitioner advised respondent on May 25, 1979, in her professional employment application, that she had completed her certification for classroom teacher of the handicapped. (A copy of that application is attached as Exhibit A-1). Furthermore, petitioner's resume, which was attached to her application, clearly shows her claim that she had certification as a classroom teacher of the handicapped (Exhibit A-2). Therefore, respondent had no idea that petitioner was an uncertified teacher of the handicapped until January 1986.

(c) When respondent found out, and after several oral inquiries, petitioner received a written memorandum from respondent's Director of Personnel inquiring into the existence of the original teaching certificate qualifying her as a teacher of the handicapped on February 12, 1986 (Exhibit A-3).

6. On February 19, 1986, petitioner received a typed inquiry from her employer regarding the certificate, which document is attached hereto as Exhibit B. In that document, petitioner admits she had applied for the teacher of the handicapped certification in May 1979 and received it in the summer of 1979.

7. On February 21st, petitioner forwarded a request to the Monmouth County Superintendent's Office seeking the issuance of a teaching certificate for special education (Exhibit C).

8. (a) Respondent school district contacted the New Jersey State Department of Education, more particularly, the Director of Teacher Certification, to inquire regarding the certificate of petitioner. On February 18, 1986, the Director of Teacher Certification advised respondent as to petitioner's only certificate endorsement (Exhibit D).

   (b) Respondent, through its counsel, contacted the Director of Teacher Certification again to inquire as to petitioner's certificate for teacher of the handicapped (Exhibit D-1).

9. (a) On February 19th, counsel for respondent forwarded another letter to Dr. Rorro concerning the certification question of petitioner (Exhibit E).

   (b) On February 20th, respondent's counsel received a response to his February 18th letter from the Director of Teacher Certification (Exhibit E-1).

10. On February 20, 1986, Monmouth College forwarded a letter to respondent school district indicating that, after a review of their file of certification requests, there was none indicating a request for a teacher of the handicapped certificate for petitioner (Exhibit F).

11. On February 21, 1986, the Monmouth County Superintendent's Office verified to respondent school system that it did not have any information regarding a certificate of the handicapped filed on behalf of petitioner (Exhibit G).

12. On February 26, 1986, a letter was issued through the Monmouth County Superintendent of Schools verifying that petitioner had applied for a certificate of the handicapped through the State Department of Education. Petitioner filed the application and the copy of her transcript with the Monmouth County Superintendent's Office which forwarded the documents to the Department of Education in Trenton (Exhibit H).

13. On February 21, 1986, petitioner received a copy of a letter indicating that respondent Board of Education would discuss her certification situation at the public meeting on February 25, 1986 (Exhibit I).

14. On February 24, 1986, respondent received a letter from Milton G. Hughes, Monmouth County Superintendent of Schools, advising respondent as to the prohibition of

petitioner's employment as a special education teacher and the law relating to her continued employment with respondent (Exhibit I-1).

15. On February 25, 1986, respondent Board of Education held a hearing on the issue of petitioner's certificate and determined to terminate her employment immediately, as a result of her not possessing the aforementioned certificate (Exhibit J).

16. In March 1986, the New Jersey Department of Education issued a certificate to petitioner as a teacher of the handicapped (Exhibit K).

17. In October 1986, the New Jersey Department of Education verified, through the Director of Teacher Certification, that petitioner was eligible for the endorsement of teacher of the handicapped, upon completion of the Spring 1980 semester (Exhibit L).

18. Petitioner was terminated immediately on February 26, 1986, at which time her salary and all of her benefits were terminated.

19. A copy of petitioner's transcript, as forwarded to the Department of Education [is marked as] (Exhibit M).

TESTIMONIAL EVIDENCE

The following is a summary of the relevant and material testimony of the two witnesses offered by the parties to the herein controversy.

Petitioner Linda Ledwitz testified on her own behalf asserting, among other things, that she had graduated from Monmouth College in 1964 and was issued a Limited K-8 Teacher Certificate by the Board of Examiners. Petitioner asserted she had no administrative responsibility for the acquisition of the teaching certificate but, rather, agents of the college processed all the paperwork for the issuance and that it was awarded to her upon her graduation from the college. Petitioner subsequently taught under her certificate in the public schools of Long Branch and Middletown Township from September 1964 until December 1967 when she terminated practicing her profession to have a family. Petitioner returned to teaching as a Supplemental Teacher with the Ocean Township Board of Education in 1973.

In or about 1973, the Board of Examiners of the Department of Education issued petitioner a permanent certificate as Elementary School Teacher without her applying for same (Exhibit N). Petitioner asserted that, without any effort on her part, the new certificate just simply arrived at her place of residence by way of regular mail.

In January 1976, petitioner commenced a graduate program of studies at Monmouth College with the intent of becoming certified as a teacher of the handicapped in the area of special education. Through her advisors at Monmouth College, petitioner was led to believe that the completion of 18 graduate credits, or one-half of the credits required for a Master's Degree, qualified her for certification to teach in special education.

As a consequence of her belief and understanding, petitioner applied for a teaching position in special education with the Board in summer 1979. At the time of her application, petitioner had completed 18 credit courses in the field of special education. She was subsequently employed and assigned as a Supplemental Teacher by the Board. Petitioner was subsequently awarded the degree of Master of Science in Education on September 1, 1983. During her employment by the Board from September 1979 until February 1986, while petitioner taught in the field of special education, there was never a question raised by the Board's agents concerning petitioner's certification.

Petitioner testified it was her understanding and belief that upon her completion of the required course work the college would complete the necessary paperwork for the certificate and that the certificate would subsequently be sent to petitioner. This understanding by petitioner was consistent with her prior involvement, or noninvolvement, in the issuance of her certificates.

Petitioner asserted that she first became aware that there was a problem with her certification in late January 1986. At that time petitioner was approached by Harriet Bernstein, the Board's Director of Personnel, who informed petitioner that petitioner's certificate as Teacher of the Handicapped could not be located in petitioner's personnel file maintained by the Board. Petitioner understood the problem was that her certificate had been misplaced and that as a standard Board procedure, it was to be produced in order to bring her file up-to-date. Petitioner advised Ms. Bernstein that she would search at her home for the certificate. Subsequently, petitioner again spoke with the Director to advise the Director that petitioner was unable to locate the certificate; however, petitioner

would continue her search for the document. Petitioner contended that Ms. Bernstein did not express any concern or urgency in her request to petitioner to locate the certificate. It was petitioner's understanding that the Board's need for her certificate was a somewhat routine, auditing process.

Subsequently, on or about February 12, 1986, petitioner was in receipt of a memorandum from Director Bernstein advising petitioner that the Director was still awaiting petitioner's certificate of Teacher of the Handicapped (Exhibit A-3). As a consequence of the Director's memorandum and upon advise of the Director, petitioner completed an application to the Commisioner of Education, together with the $10 fee, for the replacement of her lost or misplaced certificate (Exhibit C). This activity of acquiring a $10 money order and application for certification occurred between February 14 through February 20, 1986 (Exhibit C).

On February 19, 1986, after petitioner had completed her portion of the reapplication process, petitioner was hand-delivered a memorandum from Director Bernstein, which was in the form of a questionnaire (Exhibit B). The memorandum raised a series of five questions concerning petitioner's certification, which petitioner answered based upon her understanding and belief. Petitioner signed and dated the memorandum and it was returned to Ms. Bernstein (Exhibit B).

Petitioner was unaware that on February 18, 1986, counsel for the Board had a telephone conversation with Dr. Celeste M. Rorro, Director, Office of Teacher Certification and Academic Credentials, New Jersey Department of Education, concerning petitioner's certification and teaching credentials (Exhibit D-1). Nor was petitioner made aware of counsel's subsequent February 19, 1986 communication with Dr. Rorro or Dr. Rorro's responses (Exhibits D, E and E-1). In his letter, dated February 19, 1986, addressed to Dr. Rorro, Board attorney Eric M. Bernstein stated, in part:

> The Board has been advised of Ms. Ledwitz's certificate deficiency. The Board plans to take action, including possible dismissal of Ms. Ledwitz, at its Tuesday, February 25, 1986, Board Meeting. It is imperative that I receive correspondence from you by Monday, February 24th, as to whether or not Ms. Ledwitz either has a certificate in Special Education or Handicapped, or has submitted credentials for such, which would make her eligible for such certificate. [Exhibit E] [emphasis in the original]

Petitioner was not provided with a copy of counsel's letter dated February 19, 1986, nor was she advised of the seriousness of the matter or that the Board intended to take any action on February 25, 1986.

Petitioner testified that she was not advised, informed or provided with any of the correspondence stipulated as Exhibits D, D-1, E, E-1, F, G and H. On Friday, February 21, 1986, petitioner was in receipt of a hand-delivered letter from Director Bernstein wherein it informed petitioner that the Board would discuss her Teacher of the Handicapped certification on February 25, 1986, and possible action thereby by the Board with respect to her employment status (Exhibit I). The letter continued to advise petitioner of her options as to an open or closed discussion with respect to the Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.). The letter was hand-delivered by the building principal without comment. Petitioner signed and dated her signature to the letter which was thereafter transmitted to the Director (Exhibit I).

On February 21, 1986, subsequent to receipt of the Director's letter advising her of the February 25, 1986 Board meeting, petitioner telephoned the Department of Education to inquire as to the procedures for applying for certification. She was instructed as to the procedure, which petitioner followed by: (1) traveling to Monmouth College and receiving a sealed copy of her official transcript; (2) obtaining a money order from the bank for the required fee; and (3) completing the necessary application form. On Monday, February 24, 1986, petitioner took all of the above to the Office of the Monmouth County Superintendent of Schools. A representative of the County Superintendent advised petitioner that it appeared she was eligible for the certificate of Teacher of the Handicapped and that the representative would rush through petitioner's application to the Department of Education.

Petitioner was present at the February 25, 1986 Board meeting and attended its executive session at which she presented a second copy of her sealed college transcript and explained what she believed had happened with her certificate. She was subsequently excused by the Board during its deliberations. Later petitioner was advised that the Board terminated her employment as of February 25, 1986.

The herein record demonstrates that petitioner was certified eligible for the certificate of Teacher of the Handicapped in spring 1980 (Stipulation #17, Exhibit L). Petitioner was in receipt of the certificate of Teacher of the Handicapped issued in March 1986 (Exhibit K, Stiuplation #16).

Director Bernstein testified on behalf of the Board asserting, among other things, that its administrative officers were prompted to review the Board's staff personnel files because it was subject to monitoring under the thorough and efficient education requirements and to assure that the school district was in compliance with the regulations. As the result of the review, Bernstein determined that ten teaching staff members were not in compliance with the regulations by not having their certificates recorded in the Office of the Monmouth County Superintendent of Schools. Petitioner herein was one among the ten and was advised on January 29, 1986, to present an original certificate to Bernstein in order that it could be duly recorded. Nine of the ten teaching staff members produced their valid certificates. Petitioner Ledwitz did not so produce a valid certificate under which she was teaching.

Ms. Bernstein testified that the Board's schools and offices were closed on Friday, February 14, and on Monday, February 17, 1986. Prior to Bernstein's writing the questionnaire letter to petitioner, dated February 19, 1986, Bernstein had telephoned the New Jersey Department of Education and learned that petitioner did not possess a certificate as Teacher of the Handicapped. The Director testified she sent the letter to petitioner after learning that petitioner did not possess the required certificate because Bernstein, "wanted to find out some information from her, what her recollection was" (TR. p. 95) (Exhibit B). Ms. Bernstein did not advise petitioner of her telephone call to the Department of Education.

Ms. Bernstein testified that on February 19, 1986, subsequent to her discussion with agents of the Department of Education and learning that petitioner was not issued a certificate as Teacher of the Handicapped, she communicated with Monmouth College and was advised that the college had never processed the Teacher of the Handicapped certificate for petitioner.

On February 21, 1986, Ms. Bernstein took all of the information she had collected and presented it to the Superintendent. It was determined, on that date, that the information should be presented to the Board for its deliberation and possible action. The Director met with petitioner in the afternoon of February 21, 1986, subsequent to

petitioner's receipt of Bernstein's letter (Exhibit I). Bernstein advised petitioner that there was no record of petitioner's certificate and that the Board would discuss petitioner's employment status on February 25, 1986. The Director did not attend the February 25, 1986 Board meeting at which the Board summarily dismissed petitioner from her employment position.

FINDINGS OF FACT

Having carefully reviewed and considered the stipulated facts, exhibits and testimony adduced at hearing, and having given fair weight thereto, I make the following **FINDINGS OF FACT** in this matter:

1. The testimony of petitioner was credible with regards to her belief and understanding that she made no efforts to procure her Limited Elementary School Teacher certificate upon graduating from Monmouth College in or about June 1963. In re Perrone's Estate, 5 N.J. 514, 522 (1950).

2. Petitioner's testimony was similarly credible with respect to her lack of effort or application upon the issuance of her permanent Elementary School Teacher Certificate by the Department of Education State Board of Examiners. In re Perrone's Estate.

3. I **FIND** that under such circumstances, petitioner could reasonably believe that upon the completion of the required courses for eligibility for the Teacher of the Handicapped certificate, Monmouth College would have processed her application for the issuance of the certificate.

4. The Board, in 1979, failed to investigate and verify whether petitioner was the holder of the certification required to be assigned to the position as a Supplemental Teacher (Stipulation #5(a)).

DISCUSSION AND CONCLUSIONS

The petitioner, who has the burden of persuasion by a preponderance of the credible evidence, argues, in part, that she acquired a tenure status in the employ of the

Board by virtue of her valid Elementary Teacher Certificate together with more than three years of continuous employment by the Board. N.J.S.A. 18A:28-5. Notwithstanding that petitioner was at all times employed, taught and performed her professional duties in the area of Special Education for Handicapped Children, she argues that all such employment was within a K-8 school system and, therefore, she acquired tenure under her Elementary Teacher Certificate. Alternatively, petitioner argues she acquired a tenure status by virtue of her eligibility for the certificate as Teacher of the Handicapped. The Stipulation of Facts clearly demonstrates that while petitioner did not possess the required Teacher of the Handicapped certificate during the period of her employment with the Board between September 1979 to and including February 25, 1986, she was, nevertheless, eligible for the certificate in spring 1980.

The Board argues, contra, that although petitioner may have been certification eligible, New Jersey law clearly establishes that a teacher must have the appropriate certificate for the position in which one is employed and teaches in order to acquire tenure with the school district. The Board cites N.J.S.A. 18A:28-4, in support of its proposition, which provides that:

> No teaching staff member shall acquire tenure in an position in the public schools in any school district or under any board of education, who is not the holder of an appropriate certificate for such position, issued by the state board of examiners, in full force and effect, . . .

The Board observes that N.J.S.A. 18A:26-2 and N.J.A.C. 6:11-3.1(a) mandate that in order to be a teaching staff member in the State of New Jersey, one must be the holder of an appropriate teaching certificate. The appropriate certificate means a certificate to teach in the subject in which the teacher is teaching within the district, not just the holding of a teaching certificate. In this case, Ledwitz was the possessor of a certificate for elementary education, which governs the grades K through 8. However, during the seven years in which petitioner taught as an employee of the Board, she was hired and was assigned to teach as a teacher of the handicapped, either in a resource room or in a special education classroom.

The Board contends that State law mandates that personnel who teach handicapped children must hold a Teacher of the Handicapped certificate in order to teach special education. The necessity for such a specific certificate is to insure that

teachers are versed not only in the issues of special education, but also in dealing with a specific type of child who requires a different type of teaching modality. A Teacher of the Handicapped certificate entails entirely different requirements and training than what is necessary to obtain an elementary education certificate. Petitioner may not equate her Elementary Teacher certificate with that of the specialized Teacher of the Handicapped certificate for the purpose of acquiring tenure in the school district.

The Board asserts that State law mandates that a teaching staff member be the holder of the appropriate certification, not just any certification. In terminating petitioner, the Board relied upon both N.J.S.A. 18A:28-4, cited above, and N.J.S.A. 18A:27-2, which provides that:

> Any contract or engagement of any teaching staff member shall cease whenever the employing board of education shall ascertain by written notice received from the county or city superintendent of schools, or in any other manner, that such person is not, or has ceased to be, the holder of an appropriate certificate required to this title for such employment, notwithstanding that the term of such employment shall not then have expired. [See also, N.J.A.C. 6:11-3.2]

The Board contends that the position held by petitioner with the Board was as a teacher of the handicapped pupils and not that of an elementary teacher. Petitioner's failure to hold a Teacher of the Handicapped certificate invalidated any time she spent with the Board for the purposes of obtaining tenure. Furthermore, under State and administrative law, the Board had the right to terminate petitioner's employment immediately upon discovery that she lacked the appropriate certification. The prohibition of employment without the proper teaching certificate, as established by N.J.S.A. 18A:27-2, required the Board to terminate petitioner's employment immediately upon advisement that petitioner did not possess the appropriate certificate.

The Board contends that the holding by the New Jersey Supreme Court in Spiewak v. Board of Education of Rutherford, 90 N.J. 63 (1982) precludes petitioner's tenure claim. Therein, the Court held, among other things, that a teaching staff member employed by a board of education is entitled to tenure only by meeting all of the following conditions:

> 1. [The person] works in a position for which a teaching certificate is required;

2. [The person so employed] holds the appropriate certificate; and

3. [The person] has served the requisite period of time. [Spiewak at 74]

The Board argues that under Spiewak, petitioner's failure to hold the appropriate certificate made her ineligible for tenure, no matter how many years she may have served in the teaching position. The Board continues that because petitioner failed to hold the Teacher of the Handicapped certificate her entire career is made null and void in terms of legal protection. Because petitioner did not possess such certificate, the Board had the right to terminate her immediately.

As Administrative Law Judge Daniel McKeown observed, there is a well-established principle in Hansen v. Board of Education of the Boro of Runnemede, 1983 S.L.D. ____, that tenure does not come into being until the precise conditions laid down in the tenure statute have been met (citing Zimmerman v. Bd. of Ed. of City of Newark, 38 N.J. 65 (1962); Ahrensfield v. State Board of Education, 126 N.J.L. 543 (1941)). Judge McKeown also observed that teachers without proper teaching certificates in full force and effect are not entitled to tenure. Schultz v. State Bd. of Ed., 132 N.J.L. 345 (1945).

Decisional law, however, has clearly held that eligibility for an appropriate certificate, rather than actual possession of the certificate, is sufficient to allow an individual to assume an employment position where a specific certificate is required. Saad v. Bd. of Ed. Boro of Dumont (OAL Dkt. EDU 4126-81, Commissioner's decision, May 10, 1982); Fulton v. Long Branch Bd. of Ed. (OAL Dkt. EDU 83-2/78, Commissioner's decision, October 17, 1980, aff'd, State Bd. of Ed. February 4, 1981); Givens v. Bd. of Ed. City of Newark, 1974 S.L.D. 906; Kane v. Hoboken Bd. of Ed., 1975 S.L.D. 12. It is also well-established that the teaching staff member is primarily responsible for procuring the appropriate certificate, however, ". . . [i] t is also the responsibility of the Superintendent [of Schools] to insure that all teaching staff members are either certified or apply in timely fashion for appropriate certificates." Sydnor v. Bd. of Ed. City of Englewood, 1976 S.L.D. 113, 117. See also, N.J.A.C. 6:11-3.5(a).

In the instant matter, petitioner credibly testified that she believed she possessed the appropriate certificate. In any event, petitioner was, and had been, eligible for the required certificate since spring 1980. There is no evidence that the Board's Superintendent assumed his responsibility to insure that petitioner was appropriately

certified or that he advised petitioner to apply in a timely fashion for the appropriate certificate. Sydnor. In Saad, the Commissioner took careful note of the Board's dereliction of duty and failure to uphold the statutory provisions of N.J.S.A. 18A:26-2, which provides that:

> No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law.

The Commissioner noted that the Board has assigned Saad to a teaching position for a period of ten years where Saad was eligible for, but not in possession of, an appropriate certificate. Based upon the Board's action and Saad's eligibility, the Commissioner affirmed the findings and determinations of the Administrative Law Judge to award Saad seniority rights which had been denied her by the Board, together with a monetary award for her misplacement on half-time employment. Saad at 12-13.

In Givens, the Commissioner determined that petitioner's service time as a teaching staff member during which she was eligible for, but had not received, her teaching certificate, was to be counted in determining whether her total service met the precise conditions of the tenure statute for the acquisition of a tenure status. N.J.S.A. 18A:28-5; 1974 S.L.D. 910. The Commissioner in Givens cited the matter of Zielenski v. Bd. of Ed. Twp. of Guttenberg, 1970 S.L.D. 202, rev'd, N.J. State Bd. of Ed. 1971 S.L.D. 664, wherein the State Board said at 668, that:

> . . . These statutes [N.J.S.A. 18A:27-1 and N.J.S.A. 28-4] lead us to conclude that it was not intended to deny tenure to a teacher, otherwise eligible, who taught continously and performed all the duties of a regular teacher. . . .

Here, the stipulated undisputed facts clearly demonstrate that petitioner served six and one-half years in the position for which she was certificate-eligible for at least five and one-half of those years. Recognizing that the Commissioner has held that eligibility for a certificate is the essential ingredient in respect of possessing an appropriate certificate, as opposed to the actual physical possession of such certificate, Hanesen at 14, and, under the principles laid down in Saad, Fulton, Givens, Kane and

Zielenski, I **CONCLUDE** that petitioner's eligibility for the certificate as a Teacher of the Handicapped neither precluded nor barred her from holding that teaching position although she did not actually possess the requisite certificate.

The undisputed facts in this matter also demonstrate that the Board and/or its agents failed to determine, at the outset of her employment, whether or not petitioner was certified or eligible for the appropriate certificate to teach in the Board's special education classes for handicapped pupils. Recognizing that the procurement of certification is primarily the responsibility of the teaching staff member (Sydnor at 117), it is equally recognized that the Board, through its Superintendent, has a secondary obligation and responsibility to "insure that all teaching staff members are either certified or apply in a timely fashion for appropriate certificates." Sydnor at 117; N.J.A.C. 6:11-3.5(a). Here, the Superintendent neither insured the Board that petitioner was appropriately certified upon her initial employment, nor did the Superintendent insure that petitioner apply for the Teacher of the Handicapped certificate when she became eligible for the certificate in spring 1980.

I **CONCLUDE** that, pursuant to Givens, petitioner's service time as a teaching staff member during the period she was eligible for the certificate as a Teacher of the Handicapped shall be counted in determining her tenure status. Consequently, I **FIND** and **CONCLUDE** that petitioner Linda Ledwitz substantially met the conditions for tenure as a teaching staff member with the Manalapan-Englishtown Regional Board of Education, pursuant to N.J.S.A. 18A:28-5(b).

ORDER

Accordingly, it is hereby **ORDERED** that the Manalapan-Englishtown Regional Board of Education immediately restore petitioner to her former teaching position. It is further **ORDERED** that the Board make restitution to petitioner all salary and emoluments due her from February 25, 1986 and for the 1986-87 school year, less mitigation.

It is further **ORDERED** that petitioner's Petition of Appeal with respect to the Board's withholding of her 1985-86 salary and/or adjustment increment is hereby **DISMISSED** (EDU 5475-85, Agency Dkt. No. 255-7/85). Petitioner failed to carry her burden of proof, by a preponderance of the credible evidence, with regards to the allegations asserted therein.

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

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

6 August 1987
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

AUG - 7 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 11 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

LINDA LEDWITZ,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The exceptions filed by petitioner and the Board were timely pursuant to N.J.A.C. 1:1-18.4 as was petitioner's reply to the Board's exceptions.

The Board takes exception to the ALJ's conclusion that petitioner's service time as a teaching staff member during the period she was eligible for a teacher of the handicapped certificate shall be counted in determining tenure status. Pointing to Hansen, supra, and Schultz, supra, it argues that to acquire tenure one must meet the precise requirements laid down in the tenure statute and, as it is undisputed petitioner failed to do this, she is therefore not entitled to tenure. Further, the Board avers that the factual circumstances of this matter are distinguishable from Givens, supra, which the ALJ relies upon to reach his determination of tenure acquisition because in the Givens case, petitioner had properly filed for certification prior to reporting to her teaching duties but the issuance of the certificate was administratively delayed. Moreover, while it acknowledges that Sydnor, supra, does stand for the proposition that the superintendent of schools has a secondary responsibility to insure that teaching staff members are appropriately certified, as stated by the ALJ, that case also highlights that the procuring of a certificate is the primary responsibility of the teacher. With respect to this, the Board argues that in Sydnor, the Commissioner rejected the petitioner's tenure claims as she had failed to meet the precise conditions of statute and because the case was clearly distinguishable from Givens, supra, in that Sydnor had not applied for certification.

The Board argues among other things that:

> As the A.L.J. below notes in stipulation of facts 5.b. the Petitioner advised respondent on May 25, 1979, in her professional employment application, that she had completed her certification for classroom teacher of the handicapped, furthermore that Petitioner's resume, which was attached to

> her application, clearly showed her claim that she had certification as a classroom teacher of the handicapped, and therefore, respondent Board had no idea that Petitioner was an uncertified teacher of the handicapped until January of 1986. There is no question that the Petitioner took absolutely no steps whatsoever to obtain the necessary certification which is required under the precise terms of the statute required in order to be able to teach per statute. As cited by the A.L.J. below, the Board relied upon both N.J.S.A. 18A:28-4 and N.J.S.A. 18A:27-2 which state in general that no tenure can be obtained without a teacher having an appropriate certificate for a position, and further that any contract or engagement by a teaching staff member shall cease whenever the employing board of education shall determine that such person is not the holder of an appropriate certificate notwithstanding the term of such employment shall not have expired.*** (Board's Exceptions, at p. 3)

Additionally, the Board argues that the ALJ appears to have skirted the issue that petitioner was not forthright with regard to her certification status, incorporating by reference its Statement of Law provided to the ALJ by cover letter of April 29, 1987 which highlights the discrepancies in representation by petitioner as to whether or not she had the required certificate. This reads in pertinent part:

> Ledwitz's own stories that she had the appropriate certification were lies since they changed constantly over a three (3) week period of time until the truth finally came out. When Ledwitz was first informed by Harriet Bernstein, Director of Personnel for the Board, that she was without a teacher of the handicapped certificate, Ledwitz informed Mrs. Bernstein that she did have such a certificate and was looking for it, but could not find it. She continued to tell Mrs. Bernstein this even after she was advised by her that the State Department of Education could find no records on file regarding such a certification.
>
> On February 18, 1986, Ledwitz sent a letter to Betty Battle of the County Superintendent's Office stating that her teaching certificate had been misplaced and that she was enclosing an application to receive a duplicate certificate (Exhibit C). On February 19, 1986, in response to a letter sent by Mrs. Bernstein to her, Ledwitz informed the Board that she possessed a

teacher of the handicapped certificate, she had applied for it in May 1979 and had received it in the summer of 1979 (Exhibit B). However, the following Tuesday evening (February 25) at an executive session of the Board, Ledwitz, through her representative Joseph Murphy, for the first time, advised the Board that she had never filed for the certificate; and, in fact, was in the process of filing for said certificate when she came before the Board that night. (See Exhibit H - letter from Betty Battle to Linda Ledwitz regarding her application for certificate which only confirms the fact that she was without a certificate when she originally applied to the Board, and lied to the Board during the investigation period.)

Only heightening the lies regarding this issue was Ledwitz's own testimony before this court on December 9, 1986. On direct questioning by her attorney, Ledwitz advised the court that she believed she was qualified for a certificate in the summer of 1979 on the basis of the fact that she had taken course work at Monmouth College and that Monmouth College was responsible for obtaining her certification. In fact, she testified that all you needed to get a certification was to merely obtain a certain number of credits and you are automatically entitled to certification (pp. 31-33 of December 9, 1986 testimony). In fact, the credits she contended she had which made her eligible were not enough since she had failed one important and necessary course.

The crowning piece to this whole puzzle comes from Ledwitz's own resume which she submitted to the Board when applying for the job in 1979. In that resume (Exhibit A-2), she states at the beginning of the summary of qualifications that she had a certification as classroom teacher of the handicapped. Therefore, when she applied for the job in 1979, she lied to the Board and its agents that she was a certificated teacher of the handicapped, when in fact she did not receive such a certificate until March 1986, some seven (7) years after she originally advised the Board she was certificated and hired on the basis of such certification.***

The mere holding of an elementary education certificate does not save the day for Ledwitz. She never taught a class with the Board that

1982

> merely required an elementary education certificate. She applied for a teacher of the handicapped position, and lied to the Board [in] 1979 to get the job. She lied to the Board and its Director of Personnel on several occasions claiming that she had such a certificate when she did not, and did not admit to the lack of certification until the Board caught her and took actions against her which were proper under the law. (Board's Brief, at pp. 6-8)

Petitioner's reply to the exceptions summarized above contend that no new legal authority is raised which conflicts with the ALJ's decision and that the Board is merely attempting to distinguish certain cases relied on by him. She urges that the ALJ correctly found that case law indicates that eligibility for an appropriate certificate rather than actual possession is sufficient to allow an individual to assume an employment position. She avers, among other things, that it cannot be argued that the case law relied upon by the ALJ does not allow tenure to be acquired despite the failure to actually possess an appropriate certificate, maintaining that the Board itself does not even argue this, but merely attempts to distinguish the cases referenced by the judge. In support of her position she draws attention to the following Stipulation of Facts and the factual conclusions which constitute the basis of the ALJ's decision:

> ***
>
> 2. Petitioner was continually employed in respondent's school system in a full-time capacity as a teacher of the handicapped, beginning in 1979-80 and culminating in her termination on February 26, 1986.
>
> ***
>
> 5. (a) During the seven (7) year period while petitioner was in the employ of respondent, her employer did not raise any question nor inquire of her regarding her certificate as a special education teacher until the latter part of January 1986.
>
> ***
>
> 7. On February 21st, petitioner forwarded a request to the Monmouth County Superintendent's Office seeking the issuance of a teaching certificate for special education (Exhibit C).

***

15. On February 25, 1986, respondent Board of Education held a hearing on the issue of petitioner's certificate and determined to terminate her employment immediately, as a result of her not possessing the aforementioned certificate (Exhibit J).

***

17. In October 1986, the New Jersey Department of Education verified, through the Director of Teacher Certification, that petitioner was eligible for the endorsement of teacher of the handicapped, upon completion of the Spring 1980 semester (Exhibit L).***
(Initial Decision, ante)

And

1. The testimony of petitioner was credible with regards (sic) to her belief and understanding that she made no efforts to procure her Limited Elementary School Teacher certificate upon graduating from Monmouth College in or about June 1963. In re Perrone's Estate, 5 N.J. 514, 522 (1950).

2. Petitioner's testimony was similarly credible with respect to her lack of effort or application upon the issuance of her permanent Elementary School Teacher Certificate by the Department of Education State Board of Examiners. In re Perrone's Estate.

3. I FIND that under such circumstances, petitioner could reasonably believe that upon completion of the required courses for eligibility for the Teacher of the Handicapped certificate, Monmouth College would have processed her application for the issuance of the certificate.

4. The Board, in 1979, failed to investigate and verify whether petitioner was the holder of the certification required to be assigned to the position as a Supplemental Teacher***.
(Initial Decision, ante)

In addition to the above, petitioner excepts to the ALJ's conclusion that her possession of a K-8 certification during the period of time she taught in a primary school system did not give rise to a tenure claim in and of itself and urges that, if nothing else, possession of such certification should form an additional basis for the equitable result reached by the ALJ. Petitioner also contends that should the decision of the ALJ be reversed, she is entitled to 60 days' pay because her elementary certification entitles her to this benefit.

Further, petitioner excepts to the ALJ's disposition of the increment withholding case, namely, that she did not carry the burden of proof by the preponderance of the credible evidence with regard to the allegations asserted therein. (Initial Decision, ante) She urges that the ALJ apparently overlooked the agreement of the parties on the resolution of the increment withholding set forth on pages 127 and 128 of the transcript. Thus, petitioner contends that the ALJ's decision should be amended to indicate that the increment would be withheld for the 1985-86 school year only.

Upon a thorough examination of the record in this matter, the Commissioner is in full agreement with the ALJ that petitioner has no claim to tenure by virtue of her possession of a K-8 certificate. The fact that she taught in a primary system while possessing a K-8 certificate has absolutely no bearing whatsoever on acquisition of tenure in a teaching position which requires a teacher of the handicapped endorsement. It is only under the authority of the specific special education endorsements issued by the State Board of Examiners, not the authority conferred by an elementary endorsement, that enables one to teach classes of special education/handicapped pupils. As stated by the Commissioner in Dullea v. Northvale Bd. of Ed., 1978 S.L.D. 638:

> 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.*** 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 (at 641)

See also Carol Gundlah v. Bd. of Ed. of Emerson, decided by the Commissioner July 2, 1984.

The Board is correct in arguing that statute dictates that tenure cannot be acquired unless one possesses an appropriate certificate that is in full force and effect for the position held and has fulfilled the requisite time period. N.J.S.A. 18A:1-1, 28-4, 28-5. Spiewak, supra, succinctly expresses this when stating:

> By the express terms of these statutes, an employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time.
>
> (90 N.J. at 74)

However, petitioner and the ALJ are likewise correct that there exists case law allowing for tenure acquisition for time served based on one's eligibility for certification even though the individual was not in actual possession of same. Saad, supra; Fulton, supra; Givens, supra There are also several cases, however, which demonstrate that such relief is not always forthcoming depending on the factual circumstances of the matter.

In Sydnor, supra, petitioner did not prevail in her claim that eligibility for certification is sufficient to qualify service toward tenure acquisition. It was determined that Sydnor had not even applied for certification and, thus, her circumstances were distinguishable from Givens, supra. Moreover, the Commissioner, while recognizing a superintendent of school's responsibility and finding a delay of a period of years in meeting that responsibility "abhorrent," nevertheless determined that "such inexcusable delay does not create for petitioner a valid claim to tenure." (1974 S.L.D. at 117)

In Fischbach v. North Bergen Bd. of Ed., 1983 S.L.D. 1418, aff'd State Board July 11, 1984, the Commissioner and State Board also rejected the claimant's argument that eligibility alone is sufficient to meet the requirements for tenure acquisition given the factual circumstances of the matter which were found to be distinguishable from Givens, supra, because the delay in obtaining certification was found to be of no one's fault but petitioner's.* Therefore, the measuring of time toward tenure acquisition was triggered as of the date of actual issuance of certification, February 4, 1974, notwithstanding the fact that his eligibility for the particular certificate extended back to 1968.

A review of the various decisions relied on by the ALJ which afford relief to petitioners based on eligibility for certification indicates the factual circumstances of each are distinguishable from the factual circumstances in this matter. In each instance the petitioner was eligible for certification from the date of initial hire, a factor not present in this matter. Nor was there any issue of representing that one already possessing a certificate, when this was undisputedly not so. Nor was there any

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* The November 15, 1985 Appellate Division decision in this matter specifically refrained from addressing the tenure acquisition issue.

representation that one was eligible for certification by virtue of successfully completing the necessary requirements, when the facts were otherwise.

In the instant matter, the record demonstrates that petitioner misrepresented her possession and/or eligibility for certification as teacher of the handicapped on May 29, 1979. Assuming for argument's sake that she should be allowed to rely on the advice she said she received from Monmouth College personnel that she merely had to complete 18 graduate credits for securing teacher of the handicapped certification, at the time she applied for and assumed the duties of teacher of the handicapped, she was neither in possession of nor eligible for certification because she had not completed or obtained 18 credits, due to receiving an Incomplete for a course which was subsequently changed to a Failure. (Exhibits A-1, A-2 M, P and Tr. 72-73, 83-85) Regardless of whether it be by a failing grade or an incomplete, it is clear petitioner was not eligible for certification when she commenced employment with the Board contrary to her written claims otherwise.

Further, when confronted with a request from the administration of the school district when it was discovered a copy of her certificate was not on file in either the district or the county office, petitioner persisted in her representation that she possessed the certification but could not locate it. (Exhibits B, C, the latter of which is a notarized representation)

Upon a careful and thorough consideration and weighing of the facts and arguments in this matter, the Commissioner does not conclude that petitioner is entitled to the relief afforded in Givens, supra; Kane, supra; Fulton, supra; Saad, supra, nor does he determine her to be entitled to it as of the date she did become eligible, namely at the end of the Spring semester of 1980. (Exhibit L) As in Fischbach, supra, the Commissioner does not find the delay in the issuance of appropriate certification in this matter attributable to anyone but petitioner herself. Moreover, as was found in Sydnor, he finds abhorrent the inexcusable delay in the superintendent meeting his legal responsibilities in this matter. Nevertheless, such delay does not absolve petitioner of her own primary responsibility to apply for and possess the certificate required for the position taught. Nor does the delay provide an absolute right to the relief she seeks notwithstanding the existence of case law which has, under certain circumstances, found eligibility for certification sufficient for tenure acquisition.

Even accepting the ALJ's finding that under the circumstances, petitioner could reasonably believe that upon completion of the required courses for eligibility Monmouth College would have processed her application for the issuance of the certificate (Initial Decision, ante), this does not excuse her failure for never taking steps to acquire the certificate when it was not forthcoming in a reasonable period of time. Nor does it excuse her continued misrepresentation as to having received such certificate in the summer of 1979 when she did not.

Accordingly, the determination of the ALJ in this matter granting her time toward tenure measuring from the date of her eligibility for teacher of the handicapped certification is reversed.

Moreover, the Commissioner determines that the Board was within its legal rights to dismiss her as of February 26, 1986 for failure to be in possession of an appropriate certificate in full force and effect. Therefore, in accordance with N.J.S.A. 18A:27-2 she is not entitled to the 60 days' pay she seeks.

Lastly, a review of the record appears to indicate that the increment withholding matter was never heard by the ALJ. Thus, the conclusion that petitioner failed in her burden of proof is in error. The transcript at pages 127-28 indicates that a settlement was reached on the increment withholding issue as contended by petitioner in her exceptions and not disputed by the Board.

Consequently, the record is corrected to reflect that the parties reached agreement before the ALJ that if the Board prevailed in the termination of petitioner, the increment issue would be considered disposed of as well.

Accordingly, the Petitions of Appeal are hereby dismissed for the reasons expressed herein.

COMMISSIONER OF EDUCATION

September 16, 1987

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6129-86
AGENCY DKT. NO. 311-9/86

BOARD OF EDUCATION OF THE
BOROUGH OF RUTHERFORD, BERGEN COUNTY,
Petitioner,

V.

STEPHANIE KARABAIC,
Respondent.

H. Ronald Levine, Esq., for the Board

Gregory T. Syrek, Esq., for respondent
(Bucceri and Pincus, attorneys)

Record closed: May 26, 1987 Decided: August 7, 1987

BEFORE **JAMES A. OSPENSON**, ALJ:

In a complaint filed on September 10, 1984 in Superior Court of New Jersey, Special Civil Part, Bergen County, the Board of Education of the Borough of Rutherford, Bergen County, alleged it had employed Stephanie Karabaic as supplementary teacher for the school year commencing September 1983 until December 2, 1983, when she resigned.

The Board alleged her salary payments then were projected on a basis of complete months and that by reason of employment termination before the end of December 1983 (that is by resignation effective December 2, 1983), respondent was overpaid in the amount of $1,575 for services not performed. The Board demanded judgment of restitution in that amount against respondent plus interest and costs of suit. In answer on November 1, 1984, respondent admitted such employment generally, denied liability for judgment of restitution or recoupment, and in counterclaim alleged that for the period in question as well as for service in a prior year from November 22, 1982 through June 30, 1983, respondent being a properly certificated teaching staff member, she was entitled to receive, but did not, salary comparable to that of other full-time teaching staff members in the district of comparable qualifications and experience according to salary guide. Salary payments made to her in those periods, respondent alleged, were unlawfully deficient, thus entitling her to judgment for the difference between sums actually paid and sums to which she was legally entitled. By order of the Superior Court of New Jersey, Bergen County, on December 24, 1984, on respondent's motion, the matter was transferred to the Commissioner of the Department of Education for hearing and determination "pursuant to N.J.S.A. 18A:6-9." Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on September 16, 1986 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on November 12, 1986 and an order was entered establishing, inter alia, a hearing date of February 19, 1987. At request and/or with consent of the parties, that date was adjourned until April 23, 1987, at which time testimonial evidence was concluded. Thereafter, posthearing submissions having been completed, the record closed. The parties had been directed to confer for the purpose of fashioning stipulations of all relevant and material propositions of fact in chronological and sequential order, together with documentation as required. Such stipulations were filed in the cause on April 23, 1987. It was provided by prehearing conference order that the issues thereafter should be addressed and resolved as if on cross-motions for summary decision, should no genuine triable issues of fact remain unproven or uncontroverted, on

pleadings, admissions, stipulations, documentation and memoranda of law. At issue in the matter generally were the following:

A. Whether the Board is entitled to recoupment of $1,575 in overpayment for employment services for the period of September 1983 to December 2, 1983, when during that period and until the end of December 1983 the Board paid respondent in advance as if services had been performed (they had not) for the entire month of December 1983;

B. Effect of respondent's defenses of laches and the bar of limitating period of N.J.A.C. 6:24-1.2;

C. Whether respondent was illegally paid (in 1982 and 1983) in a manner and at a rate unrelated to salaries paid full-time teaching staff members under a salary schedule and at rates less than those paid comparably trained teaching staff members, contrary to Hyman v. Bd. Ed. Twp. of Teaneck, 1985 S.L.D. — (State Board, March 1985); and

D. Whether respondent's counterclaims for deficient salary paid during 1982 and 1983 are time-barred by laches and/or N.J.A.C. 6:24-1.2.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so stipulated, I make the following Findings of Fact:

1. Stephanie Karabaic was employed by the Board of Education of the Borough of Rutherford, Bergen County, in the following capacities:

November 22, 1982 - June 12, 1983 supplemental teacher
September 6, 1983 - December 2, 1983 supplemental teacher

2. While employed by the Board, respondent was required to hold a valid teaching certification issued by the State Board of Examiners. Respondent possessed any necessary certification during all periods of employment.

3. Copies of the following pay checks to respondent from the Board are admitted:

12/15/82 (J-1)
1/14/83 (J-2)
2/15/83 (J-3)
3/15/83 (J-4)
4/15/83 (J-5)
5/13/83 (J-6)
6/15/83 (J-7)
6/29/83 (J-8)
10/15/83 (J-9)
10/15/83 (J-10)
10/31/83 (J-11)
11/15/83 (J-12)
11/30/83 (J-13)
12/15/83 (J-14)
12/22/83 (J-15)

4. Copies of respondent's earnings records with the Board are admitted:

Fourth quarter 1982 (J-16)
First quarter 1983 (J-17)
Second quarter 1983 (J-18)
Fourth quarter 1983 (J-19)

5. By letter dated November 29, 1983, respondent notified the Board that she would be resigning from employment effective December 2, 1983. (J-20)

6. Admitted are two salary guides applicable to full-time classroom teachers in the school district:

1982-83 (J-21)
1983-84 (J-22)

7. While employed by the Board, respondent was paid an hourly wage as follows:

1982-83 $9.00
1983-84 $12.00

8. During her employment with the Board, respondent was paid the following total gross wages:

1982-83 $6,701.40
1983-84 $6,891.75

9. Copies of the following letters are admitted:

December 28, 1982 (J-23)
August 12, 1983 (J-24)
September 20, 1983 (J-25)

10. Copies of respondent's employment vouchers for the 1983-84 school year are admitted:

September 1983 (J-26)
October 1983 (J-27)
November 1983 (J-28)
December 1983 (J-29)

11. While employed by the Board, respondent's responsibilities differed from classroom teachers in the following respects:

(a) Her work year did not start and end at the same time;

(b) She was not given any extra duty assignments;

(c) Petitioner was not required to take part in in-service requirements;

(d) She worked with smaller numbers of students.

12. The following excerpts from minutes of the Board of Education are admitted:

(a) December 13, 1982 (J-30)
(b) September 12, 1983 (J-31)
(c) Undated (J-32)

13. Copies of the following documents are admitted:

(a) Homeroom summary 1983-84 (J-33)
(b) Respondent's attendance at faculty meetings (J-34)

In addition, the parties stipulated at hearing, and I shall so **FIND**, the following:

1. Assuming arguendo no counterclaims by respondent, the amount by which respondent has been overpaid is $1,575, by virtue of the fact that those monies were given to her for work not performed.

2. During discovery in the present litigation, respondent made demand upon the Board for production of respondent's time sheets for the 1982-83 school year, but the Board was unable to locate any such documents.

Called by the Board at hearing, Luke A. Sarsfield, superintendent of schools, referring to Board minutes of December 13, 1982 and September 12, 1983 (J-30 and J-31), testified respondent was a part-time employee since she was employed for less than a full working day as were full-time teaching staff members.

Respondent in testimony said her employment in the 1982-83 school year required her to begin the work day at 7:50 a.m. It ended at 3:02 p.m. During that time she was paid for six hours, twelve minutes, five days a week. She was not paid for her lunchtime. For 1983-84, she said, time sheets (J-26 through J-29) showed her starting and finishing time, the column showing "regular hours" being those hours for which she was paid. She conceded she did not contest, however, and indeed accepted, terms of her employment in 1982-83 as those shown in the superintendent's letter of December 28, 1982, exhibit J-23, specifically, six hours per day, five days per week, at $9 per hour.

DISCUSSION

Respondent argued that evidence both stipulated and testimonial demonstrated she was employed by the Board as a full-time teacher both in 1982-83 and in the first part of 1983-84 and that, accordingly, her salary in both of those school years should have been, but was not, commensurate with that of all full-time teaching staff members in the district. For her employment from November 22, 1982 through June 12, 1983, a period of some six months and three weeks, respondent's prorated salary less sums actually paid would yield the deficit still owed her to be $2,648.02, the amount demanded by respondent in judgment on her counterclaim. On the claim of the Board for restitution of a $1,575 overpayment during the 1983-84 school year, respondent argued she was guilty of no misrepresentation and that the mistake, if any, was the Board's and not therefore equitably recoverable since her employment in 1982-83 at an hourly rate was conditioned by the Board on the outcome of the Spiewak litigation. As to defenses of laches and the bar of the limiting period of N.J.A.C. 6:24-1.2, respondent argued the defenses should bar the Board's claim for restitution, but not respondent's claims for salary correction for 1982-83.

The Board argued to the contrary. N.J.A.C. 6:24-1.2 debarred respondent from recovery on her counterclaim. The Board's claim against respondent for restitution, it said, was not a controversy or dispute arising under school laws requiring exhaustion of administrative remedies but was, instead, one cognizable in a judicial forum where the statute of limitations in N.J.S.A. 2A:14-1 of six years applied, the 90-day limiting period of N.J.A.C. 6:24-1.2, therefore, remaining no impediment to recovery by the Board in restitution.

Respondent's claim for underpayment of salary is limited to the period in 1982-83 school year, that is, from November 22, 1982 through June 12, 1983, to the difference ($2,648.02) between her prorated salary of $9,349.42 for six months and three weeks work in a placement on step one of the 1982-83 salary guide and the sum of $6,701.40 actually received in salary during that period. Rb at 14-15.

The Board's claim against respondent in restitution is the sum of $1,575 representing salary mistakenly paid her for work not performed in the 1983-84 school year, from December 3, 1983 through December 31, 1983.

I

N.J.A.C. 6:24-1.2 provides:

> (a) To initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall serve a copy of a petition upon each respondent. . .
>
> (b) The petitioner shall file a petition no later than the 90th day from the date of the receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

The Board's claim against respondent for restitution of $1,575 in salary in December 1983, presumably sounds in unjust enrichment, a general principle that one person should not permitted unjustly to enrich himself at the expense of another, but should be required to make restitution for benefits received, retained or appropriated where it is just and equitable that such restitution be made and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. Thus one who has conferred a benefit upon another solely because of a basic mistake of fact induced by a non-disclosure is entitled to restitution under the doctrine. Restitution claims may sound in tort or contract and, generally, are subject to jurisdiction of the superior court. They may also, presumably, be subject to the six-year statute of limitations in N.J.S.A. 2A:14-1. Running of the period, again presumably, begins on the date of loss, here, perhaps, the date of December 1983 ending the period for which the last salary payment to respondent for unpaid service was made. But that date likewise, in my view, served to begin the running of the 90-day limiting period of N.J.A.C. 6:24-1.2, since it is also the last date of action on which the Board grounds its claim. The Board's resort to a judicial forum on September 10, 1984 in Superior Court for relief was suspended by the Court's order on December 24, 1984 transferring the matter to the Commissioner for hearing and determination "pursuant to N.J.S.A. 18A:6-9." It is my view, however, that the transfer, made under the doctrine of exhaustion of administrative remedies under school laws, can neither enlarge nor confer jurisdiction in the Commissioner not otherwise granted him under N.J.S.A. 18A:6-9 and the regulatory limitation in N.J.A.C. 6:24-1.2. Put another way, even assuming the Commissioner's disputes resolution jurisdiction is broad enough to entertain the Board's restitution claim, the act of transfer from a judicial to an administrative forum remains subject to time limitations otherwise restricting his administrative jurisdiction. The six-year statutory limiting period does not follow transfer to the administrative forum. Since the complaint in Superior Court was filed more than eight months after the Board's cause of action arose, and since that delay exceeded the regulatory limitation in N.J.A.C. 6:24-1.2, the Board's claim is untimely, there appearing here no reason under N.J.A.C. 6:24-1.7 for relaxation thereof.

Accordingly, I **FIND** and **DETERMINE** the Board's claim for restitution against respondent should be, and is hereby, **BARRED** from consideration in this administrative forum for untimely initiation. By this judgment, I express no opinion on the question whether the Board's claim for restitution may not be reinstituted in a judicial forum free of the administrative limiting period of N.J.A.C. 6:24-1.2. See Matawan Bor. v. Monmouth Cty. Tax Bd., 51 N.J. 291, 296-7 (1968)(". . . Ordinarily, administrative remedies must be exhausted before resort is had to the courts, but the exhaustion is neither jurisdictional nor absolute and may be departed from where, in the opinion of the court, the interest of justice so requires.").

II

Respondent's counterclaim for judgment of underpayment $2,648.02 in salary for the school year 1982-83 may be seen as a claim independent of the Board's claim for restitution. That is to say, each claim has its genesis in differing facts and circumstances. Respondent's claim for money judgment restoring her to salary parity with full-time teaching staff members for her six-months service in 1982-83, however, is subject to the same limiting stricture of a necessity for timeliness as was that of the Board for restitution. Broadly seen, respondent's claim for salary parity for service in 1982-83 triggered commencement of the 90-day limiting period at least as early as conclusion of the 1982-83 school year and, therefore, was well beyond the 90-day limiting period when lodged in counterclaim on November 1, 1984. Under accepted analysis, respondent's claim for retrospective salary payment does not derive from any statutory entitlement. It was, presumably, under N.J.S.A. 18A:29-9, a matter of initial negotiation between her and the Board at the time she began employment in the district since the record shows no superseding collective negotiations agreement. It is difficult to credit respondent's argument that the Board's initial compensation of her in November 1982 was conditional and that, as result, delay in registering her counterclaim represented a justifiable forbearance, under Stockton v. Bd. of Ed., City of Trenton, 210 N.J. Super. 150 (App. Div. 1986), that she was merely awaiting actual creation of a "controversy" and

that she was never apprised one existed until institution by the Board of its independent claim in restitution in 1984. Cf. North Plainfield Ed. Assn. v. Bd. of Ed., Borough of North Plainfield, 96 N.J. 587, 594 (1984). Specifically, no sound reason is apparent from evidence or argument that respondent is justified in not having long since 1983 registered her claim for salary correction within the 90-day limiting period.

I FIND and DETERMINE, therefore, that respondent's counterclaim against the Board for judgment correcting an ostensible salary underpayment in the school year 1982-83 is untimely and therefore BARRED herein against the Board for untimely filing under the time limitation of N.J.A.C. 6:24-1.2, there appearing no justifiable reason under N.J.A.C. 6:24-1.7 for relaxation thereof. Cf. Conner et al v. Bd. Ed., Bor. of River Vale, 1986 S.L.D. — (Feb. 18, 1986, slip op. at 34-35; aff'd State Bd., 1986 S.L.D. — (Oct. 3, 1986); Spooner v. Bd. Ed., Bor. of Pal. Park, 1986 S.L.D. — (Aug. 22, 1986; slip op. at 10-11); aff'd State Bd., 1987 S.L.D. — (Feb. 6, 1987).

CONCLUSION

For the foregoing reasons, and subject to the reservation hereinabove, the Board's complaint against respondent is DISMISSED for untimeliness under N.J.A.C. 6:24-1.2; and respondent's counterclaim against the Board for judgment of salary correction for the year 1982-83 is DISMISSED for like non-compliance therewith.

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

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

August 7, 1987
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

AUG 10 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 12 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY, PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STEPHANIE KARABAIC, RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions were not timely filed pursuant to N.J.A.C. 1:1-18.4. Because the Board's exceptions were untimely, respondent's reply exceptions thereto are not considered in this decision.

The Commissioner notes from the record that the Board's complaint was originally filed on September 10, 1984 in the Superior Court of New Jersey, Law Division, Special Civil Part, Bergen County, more than nine months after respondent resigned from her position with the Board on December 2, 1983. Respondent's answer to said complaint and her counterclaim were filed in Superior Court on November 1, 1984. Therein, respondent sought to have the matter transferred to the Commissioner of Education as a contested matter pursuant to N.J.S.A. 18A:6-9, averring, inter alia, that "Plaintiff's claim is barred by laches," that "Plaintiff has failed to exhaust administrative remedies" and that "This court lacks jurisdiction to decide this matter as it arises under the school laws and is within the exclusive jurisdiction of the Commissioner of Education, pursuant to N.J.S.A. 18A:6-9." (Answer and Counterclaim, at pp. 1-2)

On December 27, 1984, the Court, having reviewed the papers submitted in connection with the motion of respondent and having considered the arguments of counsel, transferred the matter to the Commissioner of Education for disposition pursuant to N.J.S.A. 18A:6-9.

Nowhere in the moving papers filed by respondent is it averred that the matter before the Superior Court was time-barred pursuant to N.J.A.C. 6:24-1.2, the 90-day rule applicable to matters arising under the education laws of the State of New Jersey. Neither does the Board's Notice of Objection to Defendant's Motion for Transfer and Request for Oral Argument argue untimeliness pursuant to the 90-day rule. Moreover, the Commissioner observes that the matter was transferred to him for consideration of the education law issue raised by respondent in her motion. That issue is whether respondent was entitled to payment greater than that which she received, citing the Supreme Court's decision in Spiewak

v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) for the proposition that she was entitled to receive a salary comparable to that paid other teaching staff members in the district, not the hourly wage which was the basis for the compensation she received during her employment with the Board.

Based upon his own independent review of the record, the Commissioner is in accord with the ALJ that "no sound reason is apparent from evidence or argument that respondent is justified in not having long since 1983 registered her claim for salary correction within the 90-day limiting period." (Initial Decision, ante) The Commissioner finds and determines that the counterclaim now before him is time-barred pursuant to N.J.A.C. 6:24-1.2 inasmuch as respondent failed to advance any such claim for relief before the Commissioner and only counterclaimed said argument in response to the Board's complaint filed in Superior Court, and that 11 months after her resignation. The Commissioner adds that not only was said counterclaim filed untimely, but also, upon review of the merits of her counterclaim, that respondent has no legal basis to such monies claimed as due her. See Frances W. Hyman et al. v. Board of Education of the Township of Teaneck, 1983 S.L.D. 699, rev'd State Board March 6, 1985, aff'd/rem'd to State Board N.J. Superior Court, Appellate Division, February 26, 1986, cert. den. 104 N.J. 469 (1986). (Board may maintain separate salary scale for supplemental teachers so long as such guides conform to the requirements established by school laws.)

Similarly, the Commissioner agrees with the ALJ that the Board's claim for restitution, while not grounded specifically in education law, is untimely, pursuant to N.J.A.C. 6:24-1.2. He adopts as his own the reasoning embodied in the initial decision, ante, in this regard. He emphasizes the point made by the ALJ therein that no opinion is expressed in this decision with respect to the question of "whether the Board's claim for restitu- tion may not be reinstituted in a judicial forum free of the administrative limiting period of N.J.A.C. 6:24-1.2." (Initial Decision, ante)

Accordingly, the initial decision is adopted, as amplified herein. The Board's complaint against respondent is dismissed for untimeliness under N.J.A.C. 6:24-1.2. Respondent's counterclaim against the Board for judgment of salary correction for the year 1982-83 is likewise dismissed for noncompliance with the same regulation.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 18, 1987

HAYDEE GONZALEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY, ESSEX COUNTY SUPERINTENDENT OF SCHOOLS AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF TEACHER PREPARATION AND CERTIFICATION,	:	DECISION
RESPONDENTS.	:	

For the Petitioner, Giblin & Giblin (John L. Schettino, Esq., of Counsel)

For the Respondents, Essex County Superintendent of Schools and State Department of Education, W. Cary Edwards, Attorney General (E. Philip Isaac, DAG)

For the Respondent Newark Board of Education, Vickie A. Donaldson, General Counsel (Robin T. McMahon, Esq., of Counsel)

This matter was originally opened before the Commissioner of Education on July 13, 1987 through the filing of a Petition of Appeal in the above-captioned matter. On July 28, petitioner filed an Amended Petition of Appeal with attachments wherein she alleges in pertinent part the following:

***

9. Petitioner Haydee Gonzalez submitted all necessary transcripts and records to the New Jersey Department of Education prior to August of 1985. Attached hereto and made a part hereof are copies of Ms. Gonzalez's records and transcripts ***.

10. Despite meeting all the qualifications of the State of New Jersey Department of Education for certification as a bilingual teacher prior to September 1, 1986 the State Department of Education failed to issue a certification to the petitioner until January 5, 1987.

11. Prior to January 5, 1987 the petitioner was employed by the Newark Board of Education as a per diem sub teacher due to the New Jersey Department of Education's failure to issue petitioner a certification as a bilingual teacher.

12. On January 22, 1987 petitioner received a contract from the Newark Board of Education for the position of bilingual education teacher. The contract was effective as of January 5, 1987 because of petitioner's late validation of certification from the New Jersey State Department of Education. Attached hereto and made a part hereof is a copy of a contract dated January 20, 1987 ***.

13. As a result of the New Jersey Department of Education's failure to issue petitioner a certification in a timely fashion, petitioner was unable to receive the benefits of a certified teacher from the Newark Board of Education from September 2, 1986 to January 5, 1987 resulting in lost benefits and wages.

(Amended Petition, at pp. 2-3)

In her prayer for relief petitioner requests that she be granted by the Board full salary payments with benefits from September 2, 1986 to January 5, 1987.

The Board filed its answer with separate defenses to the petition on August 4, 1987. On August 17, 1987, Respondents Essex County Superintendent of Schools and N.J. State Department of Education, hereinafter "State," moved for summary judgment and/or an order from the Commissioner dismissing the instant Petition of Appeal.

This matter will be considered by the Commissioner on the record of the pleadings and the briefs of the respective parties in support of and in opposition to the State's motion for summary judgment and/or dismissal of these proceedings. The two points argued by the State in its brief in support of its motion are as follows:

POINT I

PETITIONER'S CLAIM IS IN THE NATURE OF A TORT CLAIM FOR A MONETARY AWARD AND, AS A CONSEQUENCE, THE COMMISSIONER OF EDUCATION HAS NO JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION UNDER N.J.S.A. 18A:6-9. (State's Brief, at p. 3)

POINT II

BECAUSE PETITIONER HAS SUED A SUBDIVISION OF THE STATE OF NEW JERSEY, AND ITS EMPLOYEES IN THEIR OFFICIAL CAPACITY FOR MONETARY DAMAGES, THE MATTER IS BARRED; AND IS IMPROPERLY BEFORE THE COMMISSIONER OF EDUCATION AS IT BELONGS IN A COURT OF LAW. (State's Brief, at p. 6)

In support of its contention with respect to Point I, the State maintains that it has long been established in case law that in order for the Commissioner to exercise his authority and jurisdiction to decide a controversy, a contested matter must require his expertise and be cognizable under the provisions of N.J.S.A. 18A:6-9 et seq. Bd. of Ed. of East Brunswick Twp. v. Twp. Council of East Brunswick, 48 N.J. 94, 102 (1966); Bd. of Ed. of the City of Englewood v. Englewood Teachers Association, 64 N.J. 1, 8 (1973); Bd. of Ed. of the City of Elizabeth v. City Council of Elizabeth, 55 N.J. 501, 508 (1970); Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514, 532 (1978); Dunellen Bd. of Ed. v. Dunellen Education Association, 64 N.J. 17, 28 (1983) In instances where a controversy or dispute originates under school law but subsequently evolves into another substantive law, the Commissioner lacks jurisdiction to hear such matters. A case which stands for this proposition was decided by the court in Bd. of Ed. of the Vocational School in the County of Camden v. Camden Voc. Teachers Association, 183 N.J. Super. 206 (App. Div. 1982). In the above-cited case the court held that a dispute originally arising out of a reduction in force (RIF), which later became a labor dispute, was outside of the Commissioner's jurisdiction. The court reasoned that because the educational issue itself (the RIF), was "an accomplished fact", that issue was not in dispute. Consequently the court determined that the subsequent litigation belonged before PERC and not the Commissioner of Education. In adopting the court's reasoning set forth above, the State avers that the substantive nature of a dispute, not only the identity or employment of the parties to such dispute or its statutory origins, is determinative of whether or not the Commissioner may hear a case.

The State maintains that the undisputed facts in this case establish that petitioner is seeking damages qua damages from the Board and, apparently, the State. In this regard the State argues that petitioner's action has no relationship to the expertise of the Commissioner inasmuch as the primary claim for relief is centered upon a monetary tort compensation due to the State's alleged failure to issue petitioner a certification in bilingual education in a timely manner. The State points out that petitioner admits that she was indeed issued a certificate in bilingual education on January 5, 1987 (Amended Petition, paragraph 10) and by reason of having received such certification, petitioner acquired a full-time teaching position in the Board's employ. It is the State's position that because petitioner received her teacher's certificate and

thereby gained full-time employment with the Board on January 5, 1987, there are no further educational issues to be decided by the Commissioner by virtue of the fact that petitioner's claim does not fall within the purview of the education laws. In requesting the Commissioner to dismiss the instant petition under the provisions of N.J.A.C. 6:24-1.9, the State argues in pertinent part that

> ***the present action by petitioner does not fall within the education laws but, rather, is grounded in the common law principles of negligence and tort law, an area within which the Commissioner has no expertise nor jurisdiction to determine disputes. This principle has been affirmed in Jackson v. Concord Company, 101 N.J. Super. 126 (App. Div. 1968) where the court held at 133:
>
> > ...The award of damages to a person suffering monetary loss as the result of the unlawful action of a third party has traditionally been limited to judicial proceedings. Power to award damages will not be extended to an administrative body unless the legislative purpose to grant such power is plainly indicated. [emphasis added]
> >
> > (State's Brief, at p. 5)

The State's position with regard to Point II is that petitioner's demand for monetary damages is susceptible to the provisions of N.J.S.A. 59:1-1 et seq. under the Tort Claims Act and as such must be adjudicated in a "court of law" and not an administrative forum. (N.J.S.A. 59:8-8) The Commissioner observes that the arguments advanced by the State rely upon the specific provisions of N.J.S.A. 59:3-6 and 9-1 to establish that petitioner is barred by reason of sovereign immunity from suing the State in a court of law. (See State's Brief, at pp. 6-7.)

The Commissioner observes that the Board in its brief concurs with the argument advanced by the State regarding the Commissioner's lack of jurisdiction in resolving petitioner's claim for monetary damages against itself or the State in the instant matter. The Board further agrees with the State's position that the New Jersey Tort Claims Act is controlling with respect to petitioner's claim. The Board relies upon the ruling of the court in Malloy v. State, 76 N.J. 515, 520 (1978) addressing the provisions of N.J.S.A. 59:2-5 which provides in relevant part that:

> A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization***.

In relying on Malloy to buttress the State's motion, the Board avers that there is no "dispute" which attaches to petitioner's claim herein over which the Commissioner may assert jurisdiction.

Additionally, the Board argues that the Amended Petition of Appeal filed by petitioner fails to state a claim upon which relief may be granted by the Commissioner and must therefore be dismissed. More specifically, the Board argues that:

> Petitioner premises her entitlement upon the "New Jersey Department of Education's failure to issue petitioner a certification in a timely fashion." Assuming arguendo that the State Board of Examiners was unreasonably long in processing the petitioner's application for certification, the Newark Board of Education may not be ordered to pay the petitioner any additional compensation therefor.
>
> Significantly, the petitioner does not claim that the asserted delay was in any way caused by action or inaction attributable to the Board. The petition and the amended petition notably fail to allege any action on the Board's part with respect to the application process.
>
> The only conclusion that can be drawn from the petitioner's allegations is that she seeks to compel additional compensation from the Board based on a theory of vicarious liability. The Board's asserted liability would therefore be derivative in nature and based on the co-respondents' asserted unnecessary and unreasonable delay in issuing the certification.
>
> Although creative, the petitioner's theory finds no support in law. (Board's Brief, at pp. 2-3)

In opposing the State's motion, petitioner maintains that the factual circumstances giving rise to her claim against the Board and the State are properly before the Commissioner of Education. She further maintains that the Commissioner has the jurisdictional authority to hear and determine whether her certification should have been issued by the State prior to September 2, 1986 and whether she is entitled to be compensated for back wages and benefits by the Board from September 2, 1986 to January 5, 1987. Petitioner argues that before an action is ripe for adjudication by our State courts, administrative remedies must first be exhausted. In this regard, petitioner relies on those rules of the court, R. 2:2-3(a)(2) and R. 4:69-5 which read in pertinent part:

> Except as otherwise provided by R. 2:2-1(a)(3) (final judgments appealable directly to the Supreme Court), appeals may be taken to the Appellate Division as of right
>
> ***
>
> (2) to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer excepting matters prescribed by R. 8:2 (tax matters) and matters governed by R. 4:74-8 (Wage Collection Section appeals), except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise****."
>
> (R. 2:2-3a(2)
>
> Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted. (R. 4:69-5)

The Commissioner has reviewed the respective arguments of the parties with regard to the State's Motion for Summary Judgment and/or dismissal of the instant pleadings filed by petitioner.

In the Commissioner's judgment, petitioner's reliance upon the above-cited rules of the court to argue the jurisdictional question to be resolved in the instant matter is misplaced. While the pertinent rules of the court do speak to the exhaustion of administrative remedies before contested matters may be brought up on appeal before an appellate court of law, the provisions of N.J.A.C. 6:24-1.9 vest with the Commissioner the authority to dismiss a petition of appeal filed before him on the following grounds:

> At any time after the receipt of the answer and prior to transmittal of the pleadings to the OAL, the commissioner, in his or her discretion, may dismiss the petition on the grounds that no sufficient cause for determination has been advanced, lack of jurisdiction, failure to prosecute or other good reason.

In reviewing the relevant facts in this matter which do not appear to be disputed by the parties and in granting to petitioner all favorable inferences to be derived from such facts, the

Commissioner is not persuaded by those arguments advanced by petitioner in opposition to the State's application for dismissal of these proceedings.

The Commissioner's reasoning for arriving at the above finding and determination is grounded upon the respective arguments advanced by the parties to the motion under consideration and a review of the contents of the Amended Petition of Appeal.

It is observed from the amended petition that no charges of wrongdoing or violations of education law are made by petitioner against the Board. However, the prayer for relief set forth requests that the Board be directed to pay petitioner back wages and benefits from September 2, 1986 to January 5, 1987.

Similarly, it is concluded that the allegations set forth in the petition charge the State with failure to issue petitioner her teaching certificate in a timely manner.

Although there is no specific request for relief advanced against the State by petitioner with regard to the above-referenced allegations in the petition, it must be concluded that petitioner is seeking monetary damages from the State by virtue of what she alleges is its failure to issue to her a timely teaching certificate.

In the first instance, the Commissioner finds and determines that petitioner has presented no just cause of action in her petition for the relief she has requested from the Board in the form of back salary and benefits from September 2, 1986 to January 5, 1987.

Accordingly, pursuant to the provisions of N.J.A.C. 6:24-1.9, the Commissioner hereby dismisses petitioner's claim for back pay and benefits against the Board on the grounds that no sufficient cause for determination has been advanced in the instant Petition of Appeal.

In similar manner, the Commissioner hereby dismisses petitioner's claim for damages against the State pursuant to the provisions of N.J.A.C. 6:24-1.9 by virtue of the fact that he is without jurisdiction in law to render a determination with regard to the subject matter of petitioner's allegations against the State.

Accordingly, for all the reasons set forth above, the Commissioner finds and determines the State's Motion to Dismiss petitioner's claims against the above-named party respondents can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

September 23, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 3022-86
AGENCY DKT. NO. 109-4/86

IN THE MATTER OF THE TENURE HEARING OF RUTH PARKER, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY

Mark S. Ruderman, Esq., for North Bergen Board of Education, petitioner

Victor P. Mullica, Esq., for Ruth Parker, respondent

Record Closed: July 22, 1987 Decided: August 11, 1987

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

On or about April 14, 1986, petitioner, the North Bergen Board of Education certified charges of conduct unbecoming a teacher and criminal conduct towards the students in her classroom against respondent, Ruth Parker. Respondent filed an answer on May 1, 1986, and on May 5, 1986, this matter was transmitted by the Department of Education, Bureau of Controversies and Disputes, to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on June 2, 1986, before Adminstrative Law Judge Ward Young, and a hearing was scheduled before the undersigned Administrative Law Judge in August 1986.

On June 11, 1986, a Hudson County grand jury returned an eleven count indictment against respondent. Respondent was arraigned on June 19, 1986. By motion dated July 30, 1986, respondent requested that this matter be placed on the inactive list until the conclusion of the criminal matter. Respondent indicated that the criminal charges were similar or identical to the tenure charges. Respondent argued that it would incriminate her if she were to testify during the instant proceeding. By letter dated August 5, 1986, petitioner advised that it had no objection to the above-captioned matter being placed on the inactive list, providing the 120-day period was inactivated. On August 21, 1986, this tribunal ordered that this matter be placed on the inactive list for a period of six months, or until the pending indictment was brought to a conclusion, whichever was earlier.

By letter dated February 5, 1987, petitioner requested that the matter be reactivated. Petitioner sought to file a motion for summary decision based on respondent's criminal conviction. By letter dated February 25, 1987, this judge notified counsel that the matter had been reactivated and that it was awaiting petitioner's motion for summary decision. Petitioner moved for summary decision on February 28, 1987. In support of his motion, petitioner stated that respondent had been convicted of N.J.S.A. 2C:30-2(a) entitled Official Misconduct on December 18, 1986. Petitioner argued that the issue, therefore, was whether forfeiture of public office (N.J.S.A. 2C:51-2a(2)) applied to a conviction of N.J.S.A. 2C:30-2(a). Petitioner opined that the crime for which respondent was convicted fell precisely within the definition contained in the forfeiture statute.

Respondent filed a brief in opposition to the motion for summary decision on March 6, 1987. Arguing against the motion, respondent indicated that it was the intent of respondent's counsel in the criminal matter to appeal the conviction and move for a stay. Respondent argued that Ms. Parker had not been sentenced. Counsel filed a letter on March 9, 1987, indicating that the trial court judge in the criminal matter was entertaining a motion for a stay of forfeiture of respondent's teaching certificate. By letter dated March 17, 1987, petitioner indicated that respondent had received a five-year sentence but that the judge had reserved decision on the forfeiture of respondent's teaching license. He requested that his response to respondent's answer to his summary decision motion be delayed until the judge in the criminal matter ruled on this final issue.

On April 16, 1987, petitioner filed a letter (with a Judgment of Conviction attached) from Gilbert G. Miller, Deputy Attorney General, who was litigating the criminal matter. The documents indicated that Ms. Parker had been convicted of Count 1 ("Official Misconduct N.J.S. [sic] 2C:30-2(a)"), and found not guilty of Counts 2, 4 and 5. The jury had been unable to reach a verdict with respect to Counts 6 through 11, and Count 3 was dismissed by the court on December 1, 1986. She had been sentenced on March 12, 1987, to a term of five years. Her sentence was stayed pending appeal. Further, there was a forfeiture and permanent disqualification of her teaching license.

On April 16, 1987, a conference call was held among the parties. Deputy Attorney General Miller indicated that Ms. Parker's license had been forfeited, and that at the sentencing the forfeiture had been stayed for two weeks. Petitioner was advised by the judge to order a transcript of the sentencing. The motion for summary decision was held in abeyance until the transcript was filed with this tribunal. By letter dated April 20, 1987 counsel for petitioner ordered five-day service of the transcript of the Parker sentencing. In view of petitioner's difficulty in receiving this transcript, this judge requested that the attorneys take all necessary steps in order to determine the status of the criminal matter. The attorneys were informed that a resolution of the pending motion would be forthcoming only after the terms of the sentencing were clarified.

On June 11, 1987, petitioner filed a transcript of the sentencing of Ms. Parker with this tribunal. The transcript of the sentencing of March 12, 1987, clarified that counsel for Ms. Parker had asked for a couple of weeks to submit additional written briefs or memoranda with regard to the issue of a stay of a forfeiture of tenure under the statute. The sentencing judge, the Honorable Kevin G. Callahan, Superior Court, Hudson County, stated that there was no question but that he would stay the forfeiture and give counsel two weeks to respond in greater detail. He indicated that he would not decide the issue that day. He gave counsel for Ms. Parker 10 days "to submit to me why I should not [proceed with the forfeiture of tenure]" and withheld implementation of the forfeiture for two weeks. He stated that if did not receive a brief by that time, the forfeiture would take effect. If he received a brief, he would set the matter down for further argument if necessary. Subsequent to reviewing the aggravating factors and mitigating factors in the

case, and because of her violation of the public trust, the judge committed Parker to the Department of Corrections for a period of five years. He further indicated that she would forfeit all her teaching rights under the State of New Jersey and the Charter given thereof, ordered her to pay a fine in the amount of $1,000, and stayed imposition of the sentence pending appeal.

Subsequent to a review of the transcript of the sentencing, this judge held a conference call with counsel. Counsel for petitioner advised that no brief had been forthcoming from Ms. Parker during the two-week stay of the forfeiture, and therefore the forfeiture was in effect. He confirmed this statement by letter dated July 16, 1987, indicating that no additional papers staying Ms. Parker's forfeiture of position and license in Judge Callahan's sentencing had been filed. He therefore requested that petitioner's motion for summary decision dismissing the tenure charges and forfeiting her teaching license be granted. I have received no response to that letter from respondent.

I have reviewed the transcript of the sentencing of March 12, 1987, as well as petitioner's statement, which has not been refuted, that no additional papers as to Ms. Parker's forfeiture have been filed with the sentencing judge. In view of this, I am compelled to conclude that the sentencing judge intended, by his decision, to stay the forfeiture only for a two-week period. He specifically stated that if he did not receive a brief by that time, the forfeiture would take effect. In view of the fact that no brief was filed during that two-week period, I must find that Judge Callahan's determination that Ms. Parker forfeit all her teaching rights under the State of New Jersey and the Charter given thereof is in effect. In view of this, I will not determine whether a forfeiture could be granted under the forfeiture statute. That determination has already been made by Judge Callahan and must be complied with. I do conclude, however, that petitioner's motion for summary decision is granted.

It is **ORDERED** that petitioner has, by virtue of her conviction and sentencing in the criminal matter, forfeited all her teaching rights under the State of New Jersey and the Charter given thereof. The determination as to her tenure rights and employment with the North Bergen Board of Education is clear; she has forfeited her employment and

tenure rights. That being so, a determination of the tenure charges would be unnecessary, unwarranted and moot.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that petitioner's motion for summary decision is **GRANTED.**

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

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

August 13, 1987
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

AUG 17 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 17 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

jrp/ed

IN THE MATTER OF THE TENURE HEARING OF RUTH PARKER, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

Having reviewed the record, the Commissioner concurs with the ALJ's determination that by virtue of respondent's conviction and sentencing in the criminal matter, she has forfeited all her teaching rights under the State of New Jersey and the Charter given thereof. Thus, the tenure charges are moot and a hearing with respect to such, unwarranted and unnecessary.

Given the sentence rendered by Superior Court Judge Kevin Callahan in the criminal proceedings against respondent, this matter is to be transmitted to the State Board of Examiners for action to revoke respondent's certification.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 23, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3014-87
AGENCY DKT. NO. 115-4/87

DUNELLEN BOROUGH BOARD OF EDUCATION, MIDDLESEX COUNTY,
Petitioner,
v.
DAVID T. DRAKE,
Respondent.

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

David T. Drake, respondent, pro se

Record Closed: July 21, 1987 Decided: August 18, 1987

BEFORE DANIEL B. MC KEOWN, ALJ:

By way of an Order to Show Cause issued by the Commissioner of Education on March 20, 1987 the Dunellen Borough Board of Education (Board) seeks to have suspended any and all teaching certificates held by David T. Drake (respondent) for his asserted failure to afford it 60 days written notice of his intention to resign from its employ. The Commissioner transferred the matter to the Office of Administrative Law on May 5, 1987 as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A prehearing conference was scheduled to be conducted in the matter on July 1, 1987 at the Office of Administrative Law, Mercerville. Respondent did not appear at that prehearing conference. The record in the case closed July 21, 1987.

FACTS

The facts of the matter as established by the written record are these. At the time of the scheduled prehearing conference, Board counsel advised that respondent did not intend to oppose the application of the Board to suspend his certificates to teach. I advised respondent in writing on July 1, 1987 as follows:

> Dear Mr. Drake:
>
> A prehearing conference in the above-entitled matter was scheduled for July 1, 1987 at the Office of Administrative Law, Mercerville. At approximately 8:30 a.m. I was advised by David Rubin, Esq., counsel for the Board, that you advised him you did not intend to oppose the Board's application to suspend your teacher certificate for the reasons stated in the superintendent's certification. It is noted that your letter dated April 21, 1987 is part of the file I have.
>
> You did not appear at the scheduled prehearing conference. Absent a contrary writing from you by July 20, 1987 I shall assume that you do not intend to oppose the Board's application to have your teacher certificate suspended.

No response has been received from respondent. Respondent's letter of April 21, 1987 is reproduced here as written:

> To whom it my concern,
>
> In compliance with the Order [from the Commissioner] I received by certified mail on April 6, 1987, the following is an attempt to show cause why my teaching certificate should not be suspended.
>
> If it had been possible for me to have given the full sixty day notice prior to my last day at Dunellen I certainly would have. I understand the inconvenience I caused them and I'm truely sorry.
>
> However, the business opportunity presented me was too good to pass up. Having struggled financially for the four and one-half years I was in education, the prospect of a one hundred and twenty five percent increase in annual salary was a formidable enticement. I'd like to one day own a home, not make a landlord wealthy; how can I do that on a teacher's salary?
>
> The reality is my cause for leaving will not have any bearing whether or not you suspend my certificate. The Dunellen Board of Education did what they had to do, as did the State and myself. The sad part is that I enjoyed teaching and I was good at it, but those things don't pay the bills.
>
> Very truely yours, David T. Drake

The certification of the superintendent of schools advises that respondent advised the Board on December 17, 1986 he intended to terminate his employment on December 23, 1986. Respondent did, in fact, leave the employ of the Board on December 23, 1986.

The foregoing facts, I FIND, are all relevant and material facts of the matter.

LAW

N.J.S.A. 18A:28-8 provides in full as follows:

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

While the foregoing statute specifically addresses teachers under tenure, N.J.S.A. 18A:26-10 is more inclusive in that it provides in full as follows:

> Any teaching staff member employed by a board of education, who shall, without the consent of the board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

CONCLUSIONS

While the facts established by the written record are not clear whether respondent had acquired a tenure status in his employment with the Board, it is established that respondent was employed by the Board for the 1986-87 academic year. It is further established that respondent gave seven days notice of his intention to resign that employment. It is also established that respondent did not have the consent of the Board to relinquish his employment as a teacher in its schools.

Respondent's pronounced desire to improve his financial status by accepting a business opportunity presented him is appreciated. Nevertheless, respondent did accept employment with the Board to be a teacher of its pupils for 1986-87. The sudden departure of a teacher who has been working with a group of pupils for four months results in a disruption of the educational program to those pupils, if only because of a sudden change in teachers. Respondent is deemed to have known his obligation upon his acceptance of employment with the Board to carry out the full term of the academic year, absent consent of the Board to terminate his employment.

If respondent was under tenure in the Board's employ, N.J.S.A. 18A:28-8 imposes upon him the obligation to provide at least 60 days written notice. The facts in this case demonstrate respondent did not afford this Board 60 days notice of his intention to resign.

Accordingly, under either statute, N.J.S.A. 18A:26-10 if respondent had not acquired the status of tenure or N.J.S.A. 18A:28-8 if respondent had acquired the status of tenure in the Board's employ, he is by his conduct guilty of unprofessional conduct. Therefore, his certificate or certificates to teach in the State of New Jersey as issued him by the New Jersey State Board of Examiners shall be and is or are suspended for one year. The one year suspension shall commence the day this decision becomes final and shall continue for 12 months from the date respondent returns to the Commissioner of Education all teaching certificates and endorsements issued him by the State Board of Examiners. If respondent fails to return all certificates and endorsements in his possession then the suspension of his privilege to teach shall be indefinite.

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

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

August 18, 1987 — Daniel B. McKeown
DATE — DANIEL B. MC KEOWN, ALJ

AUG 19 1987 — Receipt Acknowledged: Seymour Weiss
DATE — DEPARTMENT OF EDUCATION

AUG 20 1987 — Mailed To Parties: Ronald L. Parks /ks
DATE — OFFICE OF ADMINISTRATIVE LAW

sc

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
DAVID T. DRAKE, SCHOOL DISTRICT	:	DECISION
OF THE BOROUGH OF DUNELLEN,	:	
MIDDLESEX COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law which recommends that respondent's teaching certificates be suspended for one year from the date of the Commissioner's decision herein. (N.J.S.A. 18A:26-10, 28-8)

It is observed that no timely exceptions were filed to the initial decision pursuant to the provisions of N.J.A.C. 1:1-18.4.

Upon review of the record the Commissioner adopts as his own the findings and conclusions of the ALJ and his recommendation that respondent's teaching certificates be suspended for one year from the date of the Commissioner's decision.

However, the Commissioner rejects that part of the initial decision which concludes that in the event respondent does not return all his teaching certificates in accordance with this decision that the suspension of his privilege to teach in the State of New Jersey shall be indefinite. In the Commissioner's judgment,

the ALJ erred in this part of his findings and conclusions inasmuch as there is no requirement in law for a teaching staff member to return his or her teaching certificates upon the suspension of same by the Commissioner. It is noted for the record that copies of all Commissioner's decisions pertaining to the suspension of teaching certificates are routinely distributed to the County Superintendents of Schools and the Director of the Division of Teacher Preparation and Certification.

Accordingly for the reasons stated above, the Commissioner hereby directs that respondent's teaching certificates conferring upon him the privilege to teach in the State of New Jersey shall be suspended for a period of one year from the date of this decision.

The Commissioner hereby directs that a copy of his decision be immediately forwarded to the Division of Teacher Preparation and and Certification. Further, it is ordered that a copy of the decision herein shall be mailed to all county superintendents.

COMMISSIONER OF EDUCATION

SEPTEMBER 23, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5469-87
AGENCY DKT. NO. 221-7/87

BERNARD LAUFGAS,
Petitioner,
v.
BARNEGAT TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Bernard Laufgas, petitioner, pro se

Kathleen W. Hofstetter, Esq., for respondent (Gelzer, Kelaher, Shea, Novy & Carr, attorneys)

Record Closed: August 17, 1987 Decided: August 27, 1987

BEFORE DANIEL B. MC KEOWN, ALJ:

Bernard Laufgas (petitioner), a resident of Barnegat Township, filed a Petition of Appeal before the Commissioner of Education by which he alleges the Barnegat Township Board of Education (Board) expended or intends to expend public funds without authority for the engagement of outside counsel to prosecute a motor vehicle complaint filed against him by one of its school bus drivers. Petitioner also alleges the Board expended or intends to expend public funds without authority to compensate witnesses who appeared at the municipal court hearing which was conducted on the motor vehicle charge and to secure photographs to be used as evidence in the municipal court hearing against him. In addition to the Verified Petition of Appeal, petitioner filed an application for an Order to Show Cause, with supporting affidavit, which Order was signed by the Commissioner on July 20, 1987. By the terms of the Order, the Board was required to show cause in writing

why it should not be enjoined from making payments to outside counsel and to witnesses regarding the motor vehicle violation signed by the Board's school bus driver and heard in Barnegat Township Municipal Court. The Board duly responded to the Order on August 5, 1987. Thereafter, the Commissioner transferred the matter on August 11, 1987 to the Office of Administrative Law for disposition as a contested case under the provisions of N.J.S.A. 52:14F1-1 et seq. The Clerk of the Office of Administrative Law assigned the matter to this judge on August 17, 1987. For the reasons which follow, petitioner's application to restrain the Board from making all such payments is denied. Furthermore, upon the Board's first separate defense the Petition of Appeal is dismissed for failure to state a cause of action.

BACKGROUND FACTS

The background facts of the matter as determined by the pleadings and affidavits filed by the parties are these. On or about February 10, 1987 a school bus driver employed by the Board, Deborah Bylinski, signed a motor vehicle complaint alleging that petitioner violated N.J.S.A. 39:4-128.1 by passing her school bus while pupils were loading or unloading. While the parties in this case seem to agree that the municipal court proceeding which followed on the complaint was heard in Barnegat Township municipal court on July 14, 1987, an excerpt of the transcript of that proceeding which is attached to the Board's letter memorandum shows the hearing date to have been July 15, 1987. In either case, the matter of the motor vehicle violation was heard against Laufgas in Barnegat Township municipal court. While Ms. Bylinski was on the face of these facts the complaining witness against petitioner, the complaint was prosecuted against him for and on behalf of the State of New Jersey.[1]

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[1] New Jersey Court Rule 7:6-1 provides that complaints involving violations of statutes relating to the operation or use of motor vehicles shall be on a uniform traffic ticket in the form prescribed by the Administrative Director of the Courts. The complaint may be made and signed by any person, and the summons which follows shall be signed and issued only by a police officer, the judge, clerk or deputy clerk of the court in which the complaint is filed. Rule 7:4-4(b) provides that if the municipal court prosecutor or municipal attorney does not appear to prosecute a complaint filed by a citizen, any attorney may appear on behalf of any complaining witness and prosecute the action for and on behalf of the state.

The regularly appointed attorney for the Board is the firm of Gelzer, Kelaher, Shea, Novy & Carr. Prior to the municipal court proceeding, the Board on April 27 and again June 15, 1987 approved the appointment of Jay G. Trachtenberg, Esq., to prosecute the complaint filed by its bus driver, Bylinski, against Laufgas. Paul J. Carr, a member of the firm regularly appointed as Board attorney, is the municipal court judge in both Stafford and Lacey Townships, both of which are located in Ocean County as sister communities in Ocean County. R. 1:15 prohibits any member of the Gelzer firm from practicing in any municipal court in Ocean County. Accordingly, the Board's regularly appointed law firm of Gelzer, Kelaher, Shea, Novy & Carr was prohibited from appearing in the Barnegat Township municipal court to prosecute the motor vehicle complaint against Laufgas. According to the transcript of proceedings, Mr. Trachtenberg made application to the court to specially prosecute the complaint against petitioner. Petitioner's counsel stated he had no objection to that application. The court granted the application.

It is noted that petitioner served three separate subpoenas upon Milton H. Gelzer, a partner in the Board's regularly retained law firm, to testify in the municipal court proceedings. Rules of Professional Conduct prohibit an attorney from acting "* * * as [an] advocate at a trial in which the lawyer is likely to be a necessary witness * * *." R.P.C. 3.7(a). Petitioner also subpoenaed the superintendent to testify in court. By affidavits filed, Mr. Gelzer attests that neither he nor his law firm including Ms. Hofstetter, counsel of record in this present case, have billed, or intend to bill, the Board for appearances in court in response to any subpoena served by petitioner, while the superintendent attests he was paid his regular salary for July 14, 1987. The Board's transportation supervisor also appeared at the municipal court proceeding July 14, 1987 at the request of Mr. Trachtenberg. The transportation supervisor attests in an affidavit filed that he, too, was paid his regular salary for July 14, 1987. Finally, it is noted that the Board secretary, in an affidavit filed, attests that a photographic film developer and processor was paid $134.49 by the Board for the processing and developing of certain prints intended for use at the municipal court proceeding. The Board secretary further attests that neither Mr. Trachtenberg nor Ms. Bylinski submitted a voucher for a bill for payment regarding their appearances at the municipal court proceeding conducted July 14, 1987 against petitioner.

THE PETITION OF APPEAL

The Petition of Appeal filed by Bernard Laufgas against the Board recites in its first three paragraphs that a motor vehicle complaint was filed against him by Ms. Bylinski on or about February 10, 1987; that on April 27, 1987 the Board appointed Jay G. Trachtenberg as counsel "* * * to represent her as a Prosecutor in the alleged motor vehicle violation"; and, that on June 15, 1987 the Board reaffirmed its earlier asserted determination that Ms. Bylinski "be represented" by Mr. Trachtenberg. Paragraphs four and five of the Petition of Appeal are reproduced here in full exactly as presented by petitioner:

> 4. The said appointment and approval of Jay C. Trachtenberg, Esq. to represent not only Deborah Bylinski but the respondents Barnegat Twp. School Board as a Special Prosecutor pursuant N.J.S.A. 18A:16-6.1 is a violation of state law and thus illegal.
>
> 5. Respondents have no statutory authority to appoint nor authority to pay for such service to a "Special Prosecutor" for Deborah Bylinski and/or the Barnegat Twp. School Board (Respondents) in this Petition as they relate to any criminal allegation[2] against petitioner.
>
> Wherefor, Petitioner BERNARD LAUFGAS respectfully demand judgment against Respondents BARNEGAT TWP. BOARD OF EDUCATION, as follows;
>
> A. For an Order declaring Resolution of both April 27, 1987 and June 15, 1987 appointment of Jay C. Trachtenberg, Esq. as a "Special Prosecutor" in the alleged criminal motor vehicle violation Null and void.
>
> B. For an order prohibiting respondents any payments of tax dollars for service to special prosecutor.
>
> C. For an Order prohibiting respondents to to pay dollars to Mr. Doty [board's transportation supervisor], Mr. Horbelt [the superintendent], Mr. Gelzer, Ms. Hostetter and any other witness that appeared as a witness on said Court date (July 14, 1987).
>
> D. For an Order to comple respondents to reeup any and all tax dollars in form of Time, Materials (use of school bus, film and development of same, and pictures used in court on July 14, 1987) which Mr. Doty and Deborah Bylinski use to take pictures to be used on July 14, 1987 for the alleged motor vehicle violation against Petitioner.

[2]The asserted motor vehicle violation which Laufgas was to have committed is not a "crime" under the New Jersey criminal code, N.J.S.A. 2C:1-1 et seq.

E. For an Order prohibiting Respondents to make and approve any prosecutor in any matter relating to criminal action.

F. Such other relief as this Court may deem just and equatable.

G. Cost of any expenses relating to this matter.

Petitioner filed a purported affidavit in support of his application for interim relief as required by N.J.A.C. 1:1-12.4. Nevertheless, the administrative rule provides in part that "Such affidavits shall set forth only facts which are admissible in evidence under N.J.A.C. 1:1-15 [evidence rules], and to which affiants are competent to testify." Petitioner attests to the fact he is the petitioner in the matter, that the Board twice approved a resolution to appoint "a special prosecutor", that ostensibly Board employees appeared in municipal court without first having been subpoenaed. The remainder of the purported affidavit addresses what may be loosely referred to as his legal conclusions which are not "facts" to which petitioner is competent to testify. Nevertheless, and as noted above, the Commissioner signed an Order to Show Cause against the Board on July 20, 1987.

In response to the Order to Show Cause, the Board filed a nine page legal memorandum in which it opposes petitioner's application for interim relief; it raises an issue regarding the Commissioner's jurisdiction to hear the complaint in the first instance; and, it argues that even if jurisdiction is properly with the Commissioner petitioner's likelihood of success on the merits is remote if not nonexistent. The Board attached to its memorandum the affidavits of Mr. Gelzer, the Board secretary, Mr. Doty, Mr. Horbert, and Ms. Hofstetter.

LAW, DISCUSSION, CONCLUSION

The singular complaint raised in the Petition of Appeal is that the Board acted in the matter without statutory authority. Petitioner does not allege that the Board abused its discretionary statutory authority or exercised its discretion in an arbitrary, capricious or unreasonable manner. Petitioner simply alleges that the Board acted without statutory authority. Accordingly, two issues are presented by the Petition of Appeal: one, whether a board of education has lawful authority to appoint and compensate legal counsel in

circumstances where regularly appointed counsel is otherwise disqualified from representing it; two, whether a board of education has lawful authority in the circumstances presented to expend public funds to compensate individuals for time or services rendered relating to an otherwise proper course of conduct pursued by that board. Both issues refer to the "circumstances" presented by the Petition of Appeal. Accordingly, the circumstances presented shall be discussed.

Local boards of education have the responsibility to provide a thorough and efficient program of education for pupils residing in its district. When a board of education provides its pupils with school bus transportation to and from its schoolhouses it takes on the further responsibility of ensuring that the pupils are transported safely. An element of transportation safety is for boards of education to ensure that their school buses comply with the law and with rules and regulations adopted by the State Board of Education at N.J.A.C. 6:21-1.1 et seq. These regulations are in detail and include certain kinds of warning lamps as approved by the Director of the Division of Motor Vehicles N.J.A.C. 6:21-5.8(d). The warning lamps, at least four of which must be red, are to be placed in a flashing mode by the school bus driver when pupils are entering or exiting school buses.

The legislature saw fit to make the conduct of a motor vehicle operator who passes a school bus while its red warning lamps are flashing to be a motor vehicle offense. N.J.S.A. 39:4-128.1. In this instance, the school bus driver, Ms. Bylinski, alleged she observed petitioner pass her school bus while her red warning lamps were flashing. Ms. Bylinski, as the driver of the school bus and upon whom the Board relies to transport pupils safely to and from school, filed a complaint against petitioner alleging he violated N.J.S.A. 39:4-128.1. Clearly, the course of conduct exhibited by Ms. Bylinski in bringing the alleged conduct of petitioner to the attention of municipal officials is within the scope of her responsibility. The Board of Education, as the body ultimately responsible for the safe transportation of its pupils, adopted a course of conduct within the scope of its responsibility to insure that its bus driver's allegations against petitioner were judicially adjudicated. Pupils entering or exiting a stopped school bus, with its red warning lights flashing, must not be exposed to the risk of injury by a motorist passing the bus.

These are the circumstances in which petitioner alleges the Board took its controverted actions without lawful authority.

THE APPOINTMENT OF JAY C. TRACHTENBERG

On the face of the Petition of Appeal, it is clear that the interest of the Board in seeing the complaint prosecuted in Barnegat Township municipal court was to ensure that a motor vehicle operator who allegedly violates the law prohibiting the passing of a stopped school bus while pupils are entering or exiting is brought before a court of competent jurisdiction in order to determine whether the allegations are true. If true, the obvious interest of the Board is to ensure that the offender is disciplined within the confines of the law so that the risk to pupils' safety is not repeated by that offender. The Board's course of conduct regarding the complaint filed by its school bus driver against petitioner is clearly proper and appropriate within the scheme of its total obligation at N.J.S.A. 18A:11-1(d) to "Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." This legislative grant of authority includes a local board taking action to minimize, if not eliminate, real or potential threates to the total well-being of its pupils.

Nevertheless, there is no specific legislative authority which authorizes any board of education to engage an attorney. However, that does not end the inquiry. It is recognized that a board of education is a creation of the state and, as such, may exercise only those powers granted to it by the legislature either expressly or by necessary or fair implication. Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Ed., 79 N.J. 574 (1979). N.J.S.A. 18A:11-2 grants specific authority to boards of education the power to sue or be sued. Boards of education are routinely the target of litigation and occasionally the proponent of litigation. They must have the authority to retain legal counsel. The legal capacity to sue or be sued must carry with it the authority to appoint and compensate counsel so long as the appointment is for a purpose within the board's proper function.

In this regard, N.J.S.A. 18A:16-1 provides in part as follows:

> Each board of education * * * subject to the provisions of this title and of any other law, may employ and dismiss * * * officers and employees, as it shall determine, and fix and alter their compensation and the length of their terms of employment.

In 1924, the courts of this state held that local boards of education have the implied authority to engage counsel. Merry v. Bd. of Ed. of City of Paterson, 100 N.J.L.

273 (Sup. Ct. 1924). The court found boards of education had such implied authority by virtue of the fact there was specific authority for a board to sue or be sued. More recently, the courts of this State have by implication recognized the authority of boards of education to engage legal counsel when counsel claimed the legislative protection of tenure in their assignments. See, as examples, Gill v. Hamilton Twp. Bd. of Ed., 44 N.J. Super. 79 (App. Div. 1957); Koribanics v. Clifton Bd. of Ed., 48 N.J. 1 (1966); and, Perella v. Jersey City Bd. of Ed., 51 N.J. 323 (1968). Each of these cases filed by the respective attorneys were decided without the court questioning the authority of the board of education to employ legal counsel. Consequently, each of these cases by implication recognize the authority of local boards of education to engage legal counsel. The Commissioner of Education himself in Gibson v. Newark Bd. of Ed., 6 N.J.A.R. 304, 325-332 (1984) implicitly recognized the authority of the Newark Board of Education to engage legal counsel.

The law, I **CONCLUDE**, establishes by fair implication the authority of a board of education to engage legal counsel. Furthermore, N.J.S.A. 18A:16-1 specifically authorizes boards of education to employ officers and employees as it shall determine. This case presents the situation where the Board retained outside counsel to perform a legal task that would have otherwise been performed by regularly retained counsel. Nevertheless, the implied authority of a board to employ counsel in the first instance must also be extended to include implied authority to retain outside counsel when regularly retained counsel is otherwise disqualified to represent it in a particular matter as here. N.J.S.A. 18A:16-1.1 authorizes boards of education to designate some person to act in the place of any officer or employee specifically during the disqualification of that officer or employee. This authority is clear and unambiguous.

Accordingly, I **CONCLUDE** that while there is an absence of specific statutory authority for a board of education to retain outside counsel the specific authority of a board of education to conduct its affairs and to sue or be sued carry the necessary implication that a board of education has the authority to engage legal counsel. Specific authority for a board to engage other officers and employees as it shall determine is at N.J.S.A. 18A:16-1. Having concluded that the authority of a board of education necessarily implies the authority to retain legal counsel, I further **CONCLUDE** a board of education has the implied authority to retain outside counsel to represent it in a chosen course of conduct within its purpose of existence when regularly retained counsel is disqualified. See also, N.J.S.A. 18A:16-1.1.

COMPENSATION TO INDIVIDUALS FOR TIME AND SERVICES RENDERED REGARDING THE MUNICIPAL COURT PROCEEDING

Keeping in mind the significant interests of the Board regarding pupil safety, it follows that the Board should insure that the allegations made by its school bus driver against petitioner were adjudicated in a court of competent jurisdiction. Recognizing that the Board must 'Perform all acts and do all things * * * necessary for the lawful and proper conduct * * * of the public schools of the district', I **CONCLUDE** that the Board of Education is authorized to expend the public funds necessary for time and services rendered by individuals in carrying out the course of conduct with which it is engaged at a particular time so long as the course of conduct is within the lawful function of the Board. Furthermore, petitioner challenges Board compensation with public funds for time spent by the superintendent at the municipal court proceeding when he himself subpoenaed that very same person to appear. It is he who, through the process of the subpoena, required that employee to be away from his regularly assigned duties at the schoolhouse. Yet, he seems to argue here that the salary of that person should be docked for the amount of time he spent at the municipal court proceeding.

I **CONCLUDE** given all the circumstances of this case that the Board of Education is completely within its statutory authority to compensate individuals for time and services rendered, including the film developer, in regard to the municipal court proceeding against Bernard Laufgas. Such authority, I **CONCLUDE**, means that this Board need not, indeed may not, deduct from an employee's salary any amount for time spent at the municipal court hearing. I also **CONCLUDE** that this Board must pay all nonemployees, or specially appointed persons, who gave their time and services at the municipal hearing for and on behalf of the State of New Jersey through this Board of Education.

INTERIM RELIEF

Petitioner's application for interim relief as set forth in his purported affidavit claims that absent interim relief great harm will occur because the Board would have paid legal fees; that the Board if it pays legal fees ostensibly to Mr. Trachtenberg will have no avenue available to recoup the monies once paid; and, that the issuance of the interim

relief will prevent irreparable harm to Barnegat Township taxpayers. In short, petitioner seeks a restraint pendente lite in order to maintain the status quo by not allowing the Board to compensate particularly Mr. Trachtenberg for his services rendered and the film developer for services it rendered.

A restraint pendente lite, or a preliminary injunction, is an extraordinary remedy utilized primarily to forbid and prevent irreparable injury. It must be administered with sound discretion and also upon considerations of justice, equity and morality in a given case. Zoning Board of Adjustment v. Service Electric Cable TV, 198 N.J. Super. 370, 379 App. Div. 1985). A preliminary injunction should not issue unless the proponent demonstrates a probability of eventual success on the claim, there is a threat of immediate and irreparable harm, and absent the preliminary injunction the proponent would suffer greater hardship than the opponent.

In this case, the Board clearly was within its authority to engage outside legal counsel regarding the motor vehicle complaint brought by its bus driver against Laufgas in the Barnegat Township municipal court for and on behalf of the State of New Jersey. The Board's interests in that case are the interests of the State. Given the facts of this case, regularly retained counsel of the Board was disqualified from pressing the complaint. The interests of the Board were also served by having its employees dutifully appear at the municipal court proceeding in response to subpoenas served or legitimate requests made. Finally, the Board acted within its authority to cause certain photographs to be developed for use in the prosecution of the motor vehicle complaint against petitioner.

The application for interim relief is predicated solely upon the allegations made within the Petition of Appeal that the Board was without lawful authority to expend such public funds. This ruling arrives at a different conclusion. Petitioner's likelihood of success on the merits is so far remote as to be nonexistent. Petitioner has failed to show irreparable harm. There is no basis, I **CONCLUDE**, upon which interim relief should or could be granted to petitioner Bernard Laufgas. Accordingly, petitioner's application for interim relief is **DENIED**.

THE FAILURE OF THE PETITION OF APPEAL TO STATE A CAUSE OF ACTION

Having concluded that a board of education, and in particular this Board, is lawfully authorized to engage outside counsel in the circumstances presented within the Petition of Appeal and having further concluded that the Board has lawful authority to expend public funds to vindicate its lawful interests in the circumstances presented in the Petition of Appeal, the Petition of Appeal itself must be dismissed for failure to state a cause of action. As noted earlier, petitioner Bernard Laufgas does not allege the Board abused its lawful discretionary authority in an arbitrary, capricious or unreasonable fashion. Rather, the Petition merely alleges the Board has no authority to engage outside counsel or to expend public funds in the circumstances presented. Having already decided that the Board does have such lawful authority, no issue remains to the Petition of Appeal. N.J.A.C. 6:24-1.3 requires petitions of appeal to contain "* * * a statment of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws * * *." This initial decision addresses the specific allegations contained within the Petition of Appeal.

Accordingly, not only is petitioner's application for interim relief denied, but pursuant to the Board's first separate defense I **CONCLUDE** the Petition of Appeals fails to state a cause of action. The Petition of Appeal is itself **DISMISSED**. Having arrived at this ultimate conclusion, there is no need to address the issue of jurisdiction regarding the asserted merits of the case as raised by the Board in its memorandum of law.

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

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

August 27, 1987
DATE

DANIEL B. MC KEOWN, ALJ

AUG 2 8 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

SEP 1 1987
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

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BERNARD LAUFGAS,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Upon review of the record, the Commissioner concurs with the Administrative Law Judge's recommendation dismissing the Petition of Appeal for failure to state a cause of action and he adopts the initial decision as the final decision in this matter for the reasons stated therein.

COMMISSIONER OF EDUCATION

October 2, 1987

Pending State Board

DERON SCHOOL OF NEW JERSEY, INC., AND RONALD L. ALTER AND DIANE C. ALTER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION AND THE COMMISSIONER OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions, while timely filed with the Commissioner, were not served upon respondent's counsel, even after said counsel called petitioners' counsel to apprise him of the failure to serve exceptions upon the Attorney General's office. Thereafter, on September 29, 1987 Deputy Attorney General Marlene Zuberman, counsel of record for the Commissioner in this matter, requested that the exceptions be disallowed for failure to follow the prescriptions of N.J.A.C. 1:1-18.4(a) or in the alternative that she be "immediately provided with the exceptions and allowed the appropriate five (5) days to respond." (Letter from DAG Zuberman to Commissioner of Education, at p. 1) In light of the above, the Commissioner grants respondent's request to suppress the exceptions. Thus, petitioners' exceptions are not made part of the record herein and are not considered in this decision. N.J.A.C. 1:1-18.4(a); cf. R. 1:5-1(a), 2:5-1(e), 4:4-4(f)

Upon careful review of the record, the Commissioner observes that the answer sets forth an affirmative defense which states:

> 1. The Petition fails to state a claim upon which relief may be granted.(Answer, at p. 4)

It is further observed that the Prehearing Order expanded this issue to state:

> 1. Shall the Petition of Appeal be dismissed due to respondent's contention that petitioners fail to state a claim upon which relief may be granted by an Administrative Law Judge and/or due to the alleged violation of N.J.A.C. 6:24-1.2(b)?
> (Prehearing Order, at p. 1)

It is further observed that the parties agreed to submit Issue No. 1 for summary decision. Thereafter, counsel for respondent stated in her brief that "*** this office does not wish to challenge petitioner's right to a hearing in this forum [Office of Administrative Law] as to the applicability of N.J.A.C. 6:20-4.5 to it." (Respondent's Brief in Support of Motion to Dismiss, at p. 2, also cited in Initial Decision, at p. 2)

Thus, on the basis of the aforesaid stipulation by respondent's counsel, the ALJ therefore resolved that the only issue to be addressed in the initial decision was the applicability of the 90 day rule, N.J.A.C. 6:24-1.2(b). The Commissioner disagrees. Notwithstanding the fact that the ALJ's determination as to timeliness is correct, the Commissioner believes it necessary for purposes of settling the jurisdictional issue and to forestall future litigation in this regard to render a determination as to whether this matter, as projected in this Petition of Appeal, is properly before him. Upon careful review of the record as a whole, including the procedural stance and the prayer for relief, he finds and determines that he is not empowered to grant the relief requested and therefore dismisses the petition pursuant to N.J.A.C. 6:24-1.9.

In so doing, the Commissioner observes that petitioners' prayer for relief includes, inter alia, a request that judgment be entered "declaring N.J.A.C. 6:20-4.5 unconstitutional and of no force and effect as to the Petitioners" (Petition of Appeal, at pp. 4-7) predicated upon the argument, inter alia, that "Respondents' adoption of the aforesaid Administrative Code Provision is arbitrary, capricious and unreasonable ***." (Petition of Appeal, at p. 7)

As drafted above, the Commissioner finds and determines he is without authority to grant that which petitioners ask, that is, to determine the reasonableness of a State Board of Education regulation. Said jurisdiction reposes with the courts of New Jersey. He further finds that although the Court in The Council of Private Schools for Children with Special Needs Inc. v. Saul Cooperman, Commissioner of Education and the State of New Jersey, Department of Education and The Association of Schools and Agencies for the Handicapped v. Saul Cooperman, Commissioner of Education and the State of New Jersey, Department of Education, 205 N.J. Super. 544 (App. Div. 1985) did not preclude the right of individual private schools to challenge the applicability of N.J.A.C. 6:20-4.5 as applied to them, it is clear from the factual recitation in this petition, as well as from the relief requested, that the herein petitioners do not seek to adjudicate the applicability of the rule to their circumstances, but rather seek another challenge to the facial validity of the rule.

Thus, the Commissioner finds that petitioners' challenge to the regulation in question herein is not cognizable before him (N.J.S.A. 18A:6-9) and, consequently, he does not reach the applicability of N.J.A.C. 6:24-1.2.

Accordingly, the instant Petition of Appeal is dismissed with prejudice for failure to state a claim upon which relief can be granted.

COMMISSIONER OF EDUCATION

October 14, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 4441-87
AGENCY DKT. NO. 160-5/87

BOARD OF EDUCATION OF THE
BOROUGH OF MIDDLESEX,
Petitioner,
v.
BOROUGH COUNCIL OF THE BOROUGH
OF MIDDLESEX,
Respondent.

Thomas C. C. Humick, Esq., on behalf of petitioner (J. Douglas Wellington, Esq., on the brief) (Dillon, Bitar & Luther, attorneys)

Thomas Benitz, Esq., on behalf of respondent

Record Closed: August 18, 1987 Decided: August 28, 1987

BEFORE SOLOMON A. METZGER, ALJ:

This is a budget appeal brought by petitioner to contest respondent's reduction of its 1987-88 school budget, pursuant to N.J.S.A. 18A:22-37. The matter was transmitted to the Office of Administrative Law on June 25, 1987, as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A motion for summary decision was filed by petitioner on July 14, 1987, and responsive papers were received on August 18, 1987. This decision follows.

The question presented for summary decision is whether the budget cuts imposed by respondent were explained at the time they were made with the particularity required by the Act and decisional law.

> by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. This is particularly important since, on the board of education's appeal . . ., the Commissioner will undoubtedly want to know quickly what individual items in the budget a governing body found could properly be eliminated or curbed and on what basis it so found. [Id. at 105-106.] [Citation omitted.]

Since this decision in 1966, the Commissioner's policy has with strict consistency required a detailed statement of reasons for reductions by the governing body at the time they are made. See, e.g., Bd. of Ed. of the Borough of South River v. Mayor and Council of the Borough of South River, Middlesex County, OAL DKT. NO. EDU 4546-86 (October 14, 1986), adopted, Commissioner of Ed. (November 20, 1986); Keansburg Bd. of Ed. v. Borough of Keansburg, Monmouth County, OAL DKT. NO. EDU 6000-82 (September 17, 1982), adopted, Commissioner of Ed. (October 29, 1982); Bd. of Ed. of the Tp. of Ewing v. Tp. Committee of the Tp. of Ewing, Mercer County, 1977 S.L.D. 305; Bd. of Ed. of the Borough of Union Beach v. Mayor and Council of the Borough of Union Beach, Monmouth Cty., 1973 S.L.D. 231.

Respondent's resolution and the attachment page show only where the reductions were made, not why they were made. With respect to the capital budget, the only statement that might be taken as a rationale for the action is that respondent is thinking about forming a committee to consider closing Watchung School. This one sentence does not at all come to grips with the pragmatic problem at hand. If respondent felt either as a matter of economics or health and safety that this expense was unnecessary, it was obligated to say why, and provide any interim alternatives.

Respondent represents through counsel's brief that the two meetings held between the parties were tape recorded, that these tapes can be transcribed for review, and that they set out respondent's position in detail. Passing the question of whether this representation satisfies the requirement of N.J.A.C. 1:1-12.5 for an affidavit or the transcribed tape, the response does not raise a legitimate fact question. A tape of municipal proceedings, in which parties and the public discuss and debate their points of view, is not the statement of specific reasons required by East Brunswick. The requirement for a detailed statement of reasons at the time the decision is made is a function of a statutory requirement driven by a practical need to keep the budget process moving apace. See N.J.S.A 18A:22-37. To permit what respondent suggests here is to bog the process down by requiring a school board made up of a number of individuals to

The relevant facts are undisputed. On April 7, 1987, the local tax levy of the current expenses portion of the proposed 1987-1988 school budget of $7,479,748 and the capital outlay expenses portion of $126,016 were defeated by the voters of the Borough of Middlesex. Petitioner forwarded the defeated budget to respondent on April 9, 1987, and the two bodies held joint meetings on April 24, 1987 and April 27, 1987, to review the matter. At the conclusion of the second meeting, respondent adopted a resolution reducing the current expenses portion of the budget by $155,984 and eliminating the capital expense item, a new roof for the Watchung School. A resolution and one-page attachment prepared by respondent to memorialize its action were appended to petitioner's motion and are annexed and made a part hereof. They do not set forth specific reasons for the reductions made. The attachment page itemizes the amounts cut in 17 separate areas of the current expenses budget. The only reference to the capital budget is a one-line note on the attachment page, making a "nonbinding recommendation" to establish a study committee to consider closing the Watchung School. On April 28, 1987, petitioner voted to seek the Commissioner's review of these budget reductions.

This is the substance of the record. In a motion for summary decision, inferences of doubt are to be resolved against the movant. N.J.A.C. 1:1-12.5; Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). Here the essential facts are undisputed, and the only question is whether the resolution and attachment page are adequate as a matter of law in explaining the cuts imposed by respondent.

In Bd. of Ed. of the Tp. of East Brunswick v. the Tp. Council of the Tp. of East Brunswick, 48 N.J. 94 (1966), the Supreme Court instructed municipal governing bodies in their obligation when reviewing an educational budget defeated by the voters. The court wrote:

> 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 affect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. . . . 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. This is particularly important since, on the board of education's appeal . . ., the Commissioner will undoubtedly want to know quickly what individual items in the budget a governing body found could properly be eliminated or curbed and on what basis it so found. [Id. at 105-106.] [Citation omitted.]

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decipher the fine details of another group's meaning out of the contents of what may have been a series of lengthy meetings. A governing body's action is generally evidenced by the content of its formal motion or resolution, Woodhull v. Manahan, 85 N.J. Super. 157, 164 (App. Div. 1964) and this rule is all the more appropriate in budget appeals.

Based on the foregoing, it is my conclusion that respondent did not provide the detailed and considered explanation for its reductions required by East Brunswick as it has been interpreted administratively for many years. It is **ORDERED** that tax levies of $155,984 and $126,016 for current expenses and capital outlay expenses, respectively, are restored so that total tax levies for the current expenses and capital outlay expenses for the 1987-88 school budget be $7,479,748 and $126,016, respectively.

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

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

8/28/87
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

AUG 31 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 2 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

bc/ee

BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, PETITIONER,	
V.	COMMISSIONER OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY, RESPONDENT.	DECISION

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

It is observed that Borough Council's (Council) exceptions to the initial decision and the Board's reply to said exceptions have been filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

The Commissioner further observes that the ALJ has recommended that the Board's Motion for Summary Judgment be granted in this matter by virtue of Council's failure to provide the detailed and considered explanation for its tax levy reductions in the amount of $155,984 in current expense appropriations and $126,016 in capital outlay appropriations in the Board's 1987-88 school budget request. In recommending that summary judgment be granted in the Board's favor, the ALJ concluded that Council's failure to provide the Board with a detailed statement setting forth its underlying determinations and supporting reasons for its current expense and capital outlay tax levy reductions was inconsistent with the court's mandate in East Brunswick, supra, and other decisional school law cases recited, ante, in the initial decision.

In excepting to the ALJ's findings and recommendations to the Commissioner, Council seeks to persuade the Commissioner that the ALJ erred in his findings and conclusion and that the Board is not entitled to summary judgment in its favor. Council maintains that there are outstanding contested issues of material fact in this matter which must be resolved against the Board in denying its motion.

The thrust of Council's contention relates to its claim that the Board was apprised of the supporting reasons for its underlying determinations to impose a school tax levy reduction in current expense ($155,984) and capital outlay appropriations ($126,016) prior to the passage of its resolution to that effect on April 27, 1987. (Exhibit 3, Attachment to Initial Decision) Council

maintains that it has satisfied the standards for budget appeals enunciated by the court in East Brunswick, supra, inasmuch as its tax levy reductions imposed upon the Board's current expense and capital outlay appropriations may not be deemed to be as "significant" as those envisioned by the court in East Brunswick. Moreover, Council argues in pertinent part:

> In response to the taxpayers concerns, the Borough Council had several meetings with the Board of Education. During those meetings, there was much discussion regarding the entire school budget. The Board of Education was made fully aware of the budget areas to be cut and the reasons for those cuts. All of these meetings were tape recorded. In addition, there were minutes kept of those meetings. Finally, the recommendations were reduced to a resolution which was duly passed by the Borough Council.
>
> In support of Petitioner's motion, they detailed the areas of proposed cuts and the effect those cuts would have on their budget and educational process. Surely, the Petitioner cannot now claim they are unaware of the Borough Council's intentions. (Council's Exceptions, at pp. 1-2)

In its reply to Council's exceptions, the Board urges the Commissioner to adopt as his own the findings, conclusion and recommendation in the initial decision. The Board maintains that the ALJ's recommendation that summary judgment be granted in its favor is well reasoned and consistent with the court's mandate in East Brunswick, supra, from which a long line of Commissioner's decisions has emanated. These decisions, the Board avers, stand for the proposition that a detailed statement of supporting reasons must accompany the line item reductions imposed by a municipal governing body upon a defeated school budget.

Moreover, the Board rejects Council's argument that the Board's analysis as to why budget cuts should not be made (Exhibit 1A, Board's Brief) relieves Council from preparing a detailed statement of reasons as to why Council made the budget reductions in the first instance.

Such position taken by Council is specious according to the Board and only serves to point out the necessity for Council to have provided the Board with a detailed explanation of its reasons for the reductions that were made in the current expense and capital outlay appropriations.

Finally, the Board categorically rejects the position taken by Council which attempts to rely on the proceedings of two public meetings held on April 24 and April 27, 1987, as the basis for having provided reasons for its school budget reductions. In this regard the Board asserts the following:

Respondent apparently attempts to rely on informal discussions of two public meetings between the Board of Education and the Borough Council to circumvent the requirements of East Brunswick to provide a detailed statement of determinations and supporting reasons at the time budget cuts are made. During such discussions many ideas are usually voiced and, consequently, there is the need to memorialize the exact reason budget cuts are made. Of course, in this case, no such written statement was ever prepared. As properly stated by Judge Metzger in his initial decision:

> A tape of municipal proceedings, in which parties and the public discuss and debate their points of view, is not the statement of specific reasons required by East Brunswick.... To permit what respondent suggests here is to bog the [budget] process down by requiring a school board made up of a number of individuals to decipher the fine details of another group's meaning out of the contents of what may have been a series of lengthy meetings.***
> (Board's Reply, at p. 3)

The Commissioner has reviewed the respective positions advanced by the parties with regard to the findings and conclusion stated in the initial decision.

In the Commissioner's judgment the arguments of Council in opposing the Board's Motion for Summary Judgment are totally without merit. The Commissioner cannot agree with Council's contention that the aggregate tax levy reduction of $282,000 that it imposed on the Board's 1987-88 school budget is not deemed to be "significant" as envisioned by the court in East Brunswick. To the contrary the Commissioner does consider Council's aggregate reduction of $282,000 a significant reduction in the Board's 1987-88 school budget request to be raised by local taxation. In the Commissioner's judgment Council's failure to provide the Board with specific reasons for its line item reductions when it acted pursuant to N.J.S.A. 18A:22-37 flies in the face of the court's mandate in East Brunswick as well as those subsequent school law decisions cited, ante, by the ALJ. See also Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, Gloucester County, decided by the Commissioner April 27, 1987, aff'd State Board August 5, 1987.

In Deptford, supra, the State Board, in relying on East Brunswick, held in pertinent part:

We conclude that the language of the court clearly requires that a governing body provide reasons for its reductions at the time it acts pursuant to N.J.S.A. 18A:22-37. Further, we emphasize that the Commissioner has long held that the rationale for the reductions must be provided at that time, e.g. Union Township Bd. of Ed. v. Township Committee, decided by the Commissioner, July 9, 1981, and we fully concur with the Commissioner that the failure of the governing body to know, identify and set forth the specific line items of the budget and to ennunciate (sic) supporting reasons at the time of the reduction renders the reduction an arbitrary act. Union Township, supra. We also agree that such arbitrariness is not negated by the subsequent submission of information or subsequent construction of a rationale. Id. We therefore affirm that the failure of the Council in this case to provide reasons for its line item reductions either at the time of its original tax levy certification or of its amended certification invalidated the reductions so as to warrant restoration of the total amounts. To hold otherwise would ignore the primary obligation of governing bodies acting pursuant to N.J.S.A. 18A:22-37 to act conscientiously at every step to effect savings that do not impair the educational process. East Brunswick, supra, at 105-106.

Our view of the significance of a failure of the governing body to provide the board of education with the rationale for reductions at the time it acts is reinforced by the specific requirement imposed by N.J.S.A. 18A:22-37 that the board of education notify the governing body if it intends to appeal to the Commissioner within 15 days after the governing body certifies to the county board of taxation the amount it judges to be necessary to be appropriated. In light of this requirement, we conclude that to allow a governing body to act without providing the district board with its rationale at the time it makes the reductions would place an undue burden on the board of education, and would, as here, force district boards to file appeals in the absence of any indication from the governing body as to why it concluded that the reductions were justified. This would result in unnecessary litigation and also would undermine the Commissioner's ability to determine quickly on what basis the governing body in fact made its judgments. (Slip Opinion, at pp. 3-4)

Accordingly, the Commissioner, upon making an independent review of the findings and conclusion set forth in the record of this matter, rejects Council's arguments opposing the grant of summary judgment on the Board's behalf.

The findings and conclusions in the initial decision are adopted by the Commissioner as his own.

The Commissioner hereby certifies to the Middlesex County Board of Taxation the additional amounts of $155,984 in current expense and $126,016 in capital outlay appropriations to reflect a total amount of $7,479,748 in current expenses and $126,016 in capital outlay to be raised for school purposes in the local tax levy for the 1987-88 school year in the School District of Middlesex Borough.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 14, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2590-87
AGENCY DKT. NO. 66-4/87

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION, MATAWAN-ABERDEEN SCHOOL DISTRICT, MONMOUTH COUNTY

Louis N. Rainone, Esq., for petitioners (Karcher, McDonnell & Rainone, attorneys)

Andrew J. DeMaio, Esq., for respondent (DeMaio & DeMaio, attorneys)

Record Closed: July 22, 1987 Decided: September 8, 1987

BEFORE **JOSEPH LAVERY**, ALJ:

This is a petition by two unsuccessful candidates (petitioners) in the annual school board election held for seats on the Board of Education, Matawan-Aberdeen Regional School District, in Monmouth County (Board). The two petitioners, James Smith and Hy Rosenberg, here pursue an "inquiry" under N.J.S.A. 18A:14-63.12. They allege violations of statutorily prescribed procedures which affected the outcome of the election.

PROCEDURAL HISTORY

Following timely appeal, the Commissioner of Education forwarded this matter to OAL. After its filing here, on April 16, 1987, the Acting Director and Chief Administrative Law Judge, under authority of N.J.S.A. 53:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. assigned the matter for public inquiry. Hearing first convened before

Administrative Law Judge Lillard Law on April 21, 1987, but was interrupted by his illness. The case was then reassigned to this Administrative Law Judge and scheduled for rehearing ab initio beginning April 28, 1987. This date was adjourned to allow counsel to respond to an issue raised by the judge: whether the New Jersey Conflict of Interests Law, at N.J.S.A. 52:13D-16(b), barred representation by petitioners' counsel (see below). When that motion was resolved in favor of petitioner, hearing convened on the following dates and locations: May 13, 1987 in Matawan Municipal Court; June 2, 1987 in Aberdeen Township Municipal Court; June 18, 1987 in the Hazlet Municipal Building; and July 9, 1987 in Matawan Municipal Court. The parties were given until July 22, 1987 to submit briefs and certifications by absent witnesses, with the understanding that, on that date, the record would close.

MOTION

When this case was reassigned from Judge Law this administrative law judge, acting sua sponte, raised an issue which was prompted by his reading of the New Jersey Conflicts of Interest Law (the Act). The question was: whether the Act barred petitioners' counsel (whose firm included a member of the legislature) from appearance in this case. Counsel responded that no such bar existed, and in support of that position, obtained a letter from assistant legislative counsel to the Joint Committee on Ethical Standards dated April 28, 1987 (Exh. C-2). The Board took no position on the issue. Eventually, a ruling was made here in favor of counsel for petitioner, grounded on the following rationale:

There is no suggestion that petitioner's counsel has acted in anything other than good faith or with anything but professional correctness, within his understanding of the Act. Additionally, assistant legislative counsel to the Joint Committee on Ethical Standards clearly advised him that an appearance before an administrative law judge, as opposed to an agency head, does not pose a conflict. (Exh. C-2).

Notwithstanding, a plain construction of the relevant statute is at odds with that view. The pertinent section N.J.S.A. 52:13D-16(b) (subject to the exceptions in the following subsection, N.J.S.A. 52:13D-16(c)) bars representation by counsel before an administrative law judge, which under the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 14F-1 et seq. is tantamount to appearance before an agency head. Further, the Office of Administrative Law has authority through administrative law

judges to determine, as a threshold issue, whether attorneys should be disqualified on ethical grounds. Matter of Tenure Hearing of Onorevole, 3 N.J. Super. 548 (1986). A ruling in this case that the foregoing statute should prohibit appearance by petitioners' counsel would be supported by Joint Legis. Comm. on Ethical Standards v. Perkins, 179 N.J. Super. 352, 358 (App. Div. 1981).

Nevertheless, such a determination cannot be made in the abstract, ignoring the instant circumstances. Because of those circumstances, the "law of the case" doctrine must now prevail. It is implicit that Judge Law, in the hearing terminated because of his unfortunate illness, accepted the appearance of counsel for petitioners. Before the case was reassigned here, counsel had not only thoroughly prepared witnesses, but had presented his entire case before that Judge. It has been held that the "law of the case" doctrine applies regarding questions of law or fact made during the course of the same litigation. It is generally applicable and binding on the trial judge, even when the rule was made by another judge, State v. Powell, 176 N.J. Super. 190 (App. Div. 1980), certif. den. 87 N.J. 333 (1981). Finally, fundamental fairness, as well as the overall need for expeditious handling of this case, demands deference to Judge Law's admission of petitioner, in the present circumstances.

ISSUES

The sole issues for resolution as a result of this inquiry may be gleaned from the legislative intent apparent in N.J.S.A. 18A:14-63.12.

Issue No. 1 - Whether violations of statutorily prescribed procedures for school elections occurred and, if so,

Issue No. 2 - Whether those violations affected the outcome of the election to the point where the will of the electorate was thwarted.

Burden of Proof:

Petitioners must prove a connection between the irregularities charged and the results of the election. They must show that the irregularities contravened a full and free expression of the popular will, before the election may be overturned. A presumption of correctness reposes in the incumbents, In re Wene, 26 N.J. Super. 377 (Law Div. 1953).

Undisputed Facts:

Some of the material background facts are not in dispute:

Under the education laws, at N.J.S.A. 18A:14-1 et seq., in the spring of this year, the Matawan-Aberdeen Regional School District Board of Education had responsibility to carry out a "meeting", or election to fill three positions for 3-year terms on its Board of Education. That Board represents the interests of the entire regional school district, which is comprised of the Borough of Matawan and the Township of Aberdeen, in Monmouth County. One position was to be filled from the Borough of Matawan, while two were to be filled from Aberdeen Township. The vote was to be gathered from six voting districts within the regional school district.

To carry out this responsibility, the Board passed a resolution setting down April 7, 1987 as the day of the election (Exh. R-6). On that day, the following candidates received those votes tallied below:

	AT POLLS	ABSENTEE	TOTAL
MATAWAN BOROUGH			
William J. Martin	351	4	355
Jerome Moshen	247	1	248
ABERDEEN TOWNSHIP			
Ardis Kisenwether	381	6	387
J. Douglas Scott	383	6	389
Hy Rosenberg (write-in)	402	3	405
James Smith (write-in)	384	4	388

As the foregoing discloses, the successful candidates were William J. Martin from Matawan Borough, as well as Hy Rosenberg and J. Douglas Scott from Aberdeen Township.

These results were not accepted by all, however. As noted above, Board candidate James A. Smith, Jr. sought the present "inquiry." He also asked the Commissioner of Education for a recount. Mr. Smith, as well as Hy Rosenberg, one of the successful candidates, had been the beneficiaries of an energetic and well-publicized

campaign which encouraged the voters of the Regional School District to elect them by "write-in" votes, or "irregular" ballots. While Mr. Rosenberg was elected subsequently, Mr. Smith, who was not, protested. He believed that he had lost a very close race because of violations of statutorily prescribed procedures for school elections which affected the outcome, to his detriment.

In response, the Commissioner not only forwarded the instant case to OAL, he also dispatched a representative to conduct a recount, N.J.S.A. 18A:14-63.5. After reviewing the outcome of that recount, the Commissioner issued a decision (Exh. C-1) invalidating 165 write-in votes. As a consequence, the positions of the candidates have been realigned as follows:

	AT POLLS	ABSENTEE	TOTAL
MATAWAN BOROUGH			
William J. Martin	351	4	355
Jerome Moshen	247	1	248
ABERDEEN TOWNSHIP			
Ardis Kisenwether	381	6	387
J. Douglas Scott	383	6	389
Hy Rosenberg (write-in)	235	3	238
James Smith (write-in)	220	4	224

The elected Matawan Borough Board member, Mr. Martin was untouched by the new tally. However, since the discrepancies which the Commissioner's representative discovered were all in the "irregular" votes registered under the write-in procedure, Mr. Smith, and now also Mr. Rosenberg, were both relegated to a standing indisputably lower than before Mr. Smith's appeal. Thus, Mr. Rosenberg has himself become an additional petitioner (represented by Mr. Smith's counsel) in the instant proceedings.

In the main, petitioners attack the conduct of the election as it took place in three of the six districts.[1]

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[1] Four "certifications" were submitted protesting procedures at the Matawan High School polling place in District no. 4, (Exh. P-4(1), (9), (11), and (14). Three certifications were submitted from voters who did not include the name of their polling place. P-4 (15), (17), (31).

The officials and polling places in those districts were set forth in the Board's resolution as follows (Exh. R-6):

DISTRICT #3 — TOWNSHIP (Cliffwood Elementary School)

Judge — Ann Kaplan
Inspector — June Purcell (replaced by Carol A. McCoy)
Clerk— Almeta Neal
Clerk— Ethel Richardson

DISTRICT #5 — TOWNSHIP (Strathmore Elementary School)

Judge — Carolyn Mankin
Inspector — Helen Mose
Clerk— Janet Soyak
Clerk— Loretta MacAvoy

DISTRICT #6 — TOWNSHIP (Lloyd Road School)

Judge — Shirley Stone
Inspector — Celia Kupetz
Clerk— Richie Goodrum
Clerk— Adrienne M. Carroll

ARGUMENTS OF THE PARTIES:

The parties presented their arguments through witnesses' briefs, and certifications (Exh. P-4(1) through (34) submitted in support of their positions):

Petitioners' Arguments:

Petitioners assert that the overall record reveals in the pollworkers a fatal incompetence. In one admitted instance, there was also a lack of certified instruction on voting machines and procedure. They claim that these shortcomings warrant a voiding of the present election results, and the scheduling of a new election. Petitioners are primarily critical of occurrences at the schools listed above: Lloyd Road School (District #6), the Strathmore School (District #5), and the Cliffwood School polling place (District #3).

Lloyd Road School:

Ruth J. Nebus recalled arriving at the Lloyd Road School at approximately 1:15 p.m., with her husband, Frank. They were early enough that no line had yet formed, and she, with her husband, was among the first voters. After going in, Mrs. Nebus read what were, to her, complicated write-in ballot instructions (Exh. R-1). After pulling down levers five and six without result, she called out to nearby poll workers for help. They responded that they could not assist her. On her own, she then pulled levers one and two, which worked. After she exited, her husband entered the booth and experienced the same difficulty. Being impatient, and aggravated with what he viewed as cumbersome instructions and machinery, he was unable to accomplish his vote at all. Although Mrs. Nebus could not recall whether her husband asked the poll workers for help, she remembered that he did question her about the machine, after leaving it. She then called Mr. Bruce Quinn, who was Secretary to the Board of Education as well as Assistant Superintendent in the School District, at about 1:30 p.m., from her home. He responded that the workers must have misunderstood his instructions. They in fact were told to help, if asked. He assured Mrs. Nebus that he intended to go to the poll site and correct any misapprehensions.

Recalling her own experience, **Betty L. Golub** remembered that she was approximately 15th in line during the opening votes at Lloyd Road School. Like Mrs. Nebus and her husband, she intended to enter write-in votes for James Smith and Hy Rosenberg. She too was unable to make the voting matching work, despite the written directions, and left the machine for assistance. The workers insisted they could not help. So rebuffed, Ms. Golub returned to the machine and attempted to write on "gray paper" outside. Ms. Golub was sure that the workers cited orders from an unspecified official as the reason they could not become involved in the problem. In the end, she was unable to cast her vote. She recalled leaving the site in great embarrassment. Additionally, she remembered seeing Mrs. Nebus, and observing an agitated man leave the voting area. Ms. Golub was convinced that she was unable to vote because the machine did not work. This, despite her considerable and varied efforts, while trying to adhere to instructions.

Beyond this testimony, petitioners offered 12 "certifications"[2] from voters whose testimony could have been produced at hearing, but were duplicative. They recited

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2 Exh. P-4 (2), (3), (4), (12), (13), (18), (21), (22), (23), (26), (29) and (30).

the signers' encounters with impediments to write-in votes for Mr. Rosenberg and Mr. Smith. These difficulties included: refusals by workers to give assistance, incorrect advice; inability to move the machine slot; misleading size of Slot no. 1, suggestions by workers that two names should be written-in; difficulty in opening slot no. 2; failure of officials to advise voters that a second slot for write-in vote was available after describing how to open the first slot.

Strathmore School:

Petitioners again offered "certifications,"[3] from eight persons who could have testified and would have voted for petitioners by write-in ballot. They complained that they could not obtain assistance from co-workers; had difficulty opening the second slot; found that the first slot was so large as to suggest that both petitioners names should be written in; and in some instances, were advised to write both names there by election workers. All contended that, for these reasons, they were effectively barred from voting for petitioners.

Cliffwood School:

Remembering her voting experience at Cliffwood School, **Catherine Kennedy** described her problems while attempting to write-in votes for Mr. Rosenberg and Mr. Smith. Finding herself at first unable to push the write-in lever to the right, she moved over to vote on the budget question. After this, she tried repeatedly to register her write-in vote, without succeeding. Frustrated, she called for help, four or five times, from within the booth. There was no answer. Finally, she leaned outside the curtains, and called to Carol McCoy, a poll worker. Ms. Kennedy stated: "I'm having difficulty." Ms. McCoy pointed, and instructed her to turn the red lever to the left. Ms. Kennedy did so, and the voting booth curtain opened. This terminated her voting opportunity before her write-in votes for Mr. Rosenberg and Mr. Smith were recorded.

Mrs. Kennedy immediately discussed the problem with **Ann Kaplan,** Judge of Election. Ms. Kaplan gave her two telephone numbers to call with her complaint. After returning home, at some point Mrs. Kennedy called the numbers given (Mrs. Kennedy could not recall at hearing whether the two telephone numbers in Exh. R-3 matched those

[3] Exh. P-4 (7), (8), (16), (19), (25), (27), (28), and (33).

Mrs. Kaplan wrote on a slip of paper for her). She did remember that the answering voice was male, and said: "Mr. Miklus, can I help you?" Mr. Miklus then directed her to return to the voting site, at Cliffwood School, which, he said, Mrs. Kennedy should not have been permitted to leave. On her return, she asked Mrs. Kaplan to call Mr. Miklus. When Mrs. Kaplan complied, but then did not relate the facts to her satisfaction, Mrs. Kennedy complained. Mrs. Kaplan then handed her the phone, and Mrs. Kennedy described the event to Mr. Miklus herself. Afterward, Mrs. Kaplan again talked to Mr. Miklus, but once the call ended, she informed Mrs. Kennedy that "nothing could be done."

Mrs. Kennedy recalled that she had been extremely nervous while voting. She had never cast a write-in vote. In answer to questions about a yellow "flyer" (Exh. R-14) giving write-in vote instructions (it had been distributed by the campaign committee for petitioners) Mrs. Kennedy was adamant. She insisted at hearing that at no time had she received such a flyer, although her husband had obtained one.

In addition to Mrs. Kennedy's testimony, petitioners offered the certifications of seven other voters who complained of their experience at Cliffwood School.[4] These complaints included: being told to write two names in the first slot; having difficulty or finding it impossible to open the second slot; seeing another voter being told by poll workers to turn the wrong (red) lever, thus ending the voting opportunity; being able to only open the first slot, which was so large as to suggest that both petitioners' names could be included, especially when the second slot refused to open; being advised by a poll worker to use the first slot only; being told by poll officials that problems with the write-ins would not matter.

Matawan High School Polling Place:

Four certifications were offered by petitioner which repeated the complaints above, and which complained of denial of their write-in votes.[5]

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[4] P-4 (5), (6), (10), (20), (24), (32), and (34).

[5] (Exh. P-4 (1), (9), (11), and (14).

Unidentified Polling Places:

Additionally, three certifications were offered with similar complaints, charging disenfranchisement, without noting which voting site was involved.[6]

When questioned at hearing on his role, **Edward Miklus,** who represented the Commissioner of Education to monitor compliance with Title 18A, stated that he fielded complaints arising from some 54 elections. He found it impossible to keep records of calls, averaging 25 to 35 a day. Yet, he did know that that one call from Aberdeen on election day was found with his secretary's informal notes. It was placed through his office number, an extension always answered first by his secretary. Neither of the phone numbers listed on Exh. R-3 was his. Mr. Miklus did have an inside number, but very few people knew it. When answering that phone, his response definitely would not have been the official greeting, (including his name) which he routinely gave to calls answered and forwarded by his secretary.

Mr. Miklus knew that the call which he received from Aberdeen occurred about 5:30 p.m., at dinnertime. It was his impression that the call was from a judge of elections, although he could not remember the judge's name. The caller was female, but he could not recall which polling place was involved. The substance of the problem relayed was that a voter had turned the red lever by mistake, opening the curtain after a vote for the budget, but before a vote for the candidate. Mr. Miklus remembered telling the judge to allow the voter to go back into the booth and vote only for her candidate, because of the confusion.

In contrast, petitioner **James A. Smith, Jr.** testified that the morning following the election, he called Mr. Miklus. He informed him of two incidents seemingly adverse to voters' rights. The first involved Mrs. Kennedy at the Cliffwood school polling place. Another occurred at Strathmore school. In that discussion, Mr. Miklus said he was aware of the Cliffwood incident. He described the phone call which informed him, and related the name and address of Mrs. Kennedy. He said he had instructed the poll worker to allow Mrs. Kennedy to vote for her candidate, but not the budget, for which she had already voted. Mr. Smith was certain that Mr. Miklus said nothing which touched on the incident at the Strathmore polling place. Commenting on the yellow instructional flyer (Exh.

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[6] (Exh. P-4 (15), (17) and (31).

R-14), Mr. Smith described seeing Mrs. Kennedy go into Cliffwood School with the yellow flyer in her hand. He himself had distributed that flyer on the prior Saturday to every home in the Cliffwood District. He remembered handing one to Mrs. Kennedy.

Describing the role of the Board of Elections, Commissioner of Elections Elizabeth Haberstroh testified that, for elections held under Title 19, her office trains and supervises workers. Three classes of instruction are held prior to general and primary elections. A certificate of appointment confirms that these classes have been attended. Ms. Haberstroh added that, although the Board of Elections has no authority over school district "meetings" or elections, as a courtesy the Board does provide lists to school districts. These lists include only qualified, certified workers. She conceded that "substitute" cards were kept for those workers not certified by law but used in emergencies. She also stated that, even under Title 19, substitutes are used in general elections as well as primary elections in such situations. This happens with increasing frequency. Ms. Haberstroh observed that Carol A. McCoy, though not certified at the time of the school Board elections, was at that time a "substitute", uncertified worker (Exh. P-3).

By way of legal argument in a written letter of summation, petitioners contend that, as prohibited by N.J.S.A. 18A:14-63.12 and N.J.A.C. 6:24-6.1, there were violations of the proscribed procedures for school elections. These deficiencies affected the outcome of the election, and thwarted the will of the electorate by repressing the full and free expression of the popular will. Petitioners urge the theory that, before the Commissioner's decision to order a recount, the record showed that petitioner was only one vote below the then successful candidate, J. Douglas Scott. The acts and omissions of election officials were such as to prevent voters who would have cast votes for Mr. Smith and Mr. Rosenberg from doing so. These lost votes would have advanced petitioner ahead of Mr. Scott.

More importantly, petitioners contend, after the Commissioner decided to void 165 write-in votes, there was substantial and extraordinary damage done to the will of the electorate. The intention of the majority of the voters was to vote for Mr. Rosenberg and Mr. Smith. Neither the school Board nor the other candidates entered any opposition to this contention at hearing. Both Title 18A, governing school Board elections, and Title 19, controlling general elections, define the voting process. Qualified officials, by law, must administer the voting procedures. Carol McCoy, at Cliffwood school, was not qualified.

Her failure to assist Mrs. Kennedy at Cliffwood illustrates her lack of experience, and incompetence. Moreover, similar patterns of shortcomings, it can be inferred, affected far more voters than those who came forward through this appeal. As an illustration, the workers at Lloyd Road School improperly refused to give assistance. These workers were also selected without consideration as to whether they were certified to be election officials. Additionally, where machines are inoperative, as has been shown here, with respect to the second slot for write-in vote, no calls were made to Mr. Siciliano at the voting machine warehouse. The overall failures of voting officials eventually disenfranchised 165 voters, all who were determined to write-in votes for petitioners. The liberal construction prescribed in case law to effect the will of the voters demands that petitioner's remedy be granted, by calling a new election.

The Board's Argument:

The Board takes no position on the question of which candidate should have been elected on April 7, 1987. Instead, it restricts itself to a rebuttal of petitioners' charges that the Board permitted violations of applicable law and procedures.

Lloyd Road School:

Shirley Stone, the judge of election for District #6, recalled that she and other workers had been told explicitly by Mr. Quinn to assist voters, but only when asked. They did so throughout the day at Lloyd Road School. Ms. Stone was satisfied that all the voting machines were in working order, because she checked them periodically until the vote closed. No complaints had come to her that the machines were not working. On the other hand, Ms. Stone found that voters were even writing on metal, in error.

In particular, Mrs. Stone remembered that Mrs. Nebus had trouble in the voting booth. A poll worker summoned Ms. Stone, and the latter instructed Mrs. Nebus from a card while standing outside the booth. Mrs. Nebus followed these instructions and seemed satisfied. Her husband, however, who followed, cursed while in the machine, exclaimed after his exit that this was to be his last vote, went outside, returned, and while the voting curtains were still open, asked his wife why the machine did not work. In contrast, while he had been in the machine, Mr. Nebus did not ask workers or his wife for assistance.

Mrs. Stone also was present while Betty Golub complained about poll list books, emphasizing that she was in a rush during her lunch hour. Mrs. Stone stated that the workers were required first to check which of the three books she was to sign. They could not fairly move Ms. Golub ahead of other voters. Ms. Stone helped Mrs. Golub as well at the voting machine. **Adrienne Carroll**, election worker, testified that she knew she should not instruct any voters to place two names in one slot. However, she was assigned to books at a nearby desk, and was unable to hear whether any other worker gave instructions on where to write-in votes.

Bruce M. Quinn, Board Secretary, stated that, at the 11:30 a.m. meeting held before the polls opened, he discussed the handling of write-in votes. He was cognizant of the organized and well-published pre-election write-in campaign on behalf of petitioners. Consequently, he emphasized to all election officials that assistance should not be offered, unless sought by a voter. This approach was necessary to avoid the danger of "persuading" voters. Commenting on Mrs. Nebus' complaints, Mr. Quinn stated that immediately after hearing of her objections, he went to the Lloyd Road School and talked to the election workers. Mr. Quinn ascertained that the officials were helping voters, and understood their obligation to do so, when asked. The workers did speak of problems, but assured him that the machines were working. Mr. Quinn recalled finding no need to call the voting machine warehouse.

Strathmore School:

Carolyn Mankin, judge of elections at Strathmore School, denied instructing voters to write-in two names on the larger, number one slot. Neither did she hear other poll workers give such instructions. All four poll workers were standing near her by the voting machines. It was stipulated that poll workers **Helen Mosen** and **Lorretta MacEvoy** were available, and would have testified similarly.

Ms. Mankin remembered that one incident did occur. It involved a voter named Linda Kelly. Through a miscommunication between an election worker and Ms. Kelly, the curtain opened before she could vote. Ms. Mankin recalled telephoning Freehold. She spoke to someone who, on a separate phone line, asked Mr. Quinn for advice. Through that person, Mr. Quinn responded to Ms. Mankin. He directed that, since the instructions as related by Lorretta MacEvoy were miscommunicated, Ms. Kelly should have an opportunity to vote again, which Ms. Kelly did (Exh. R-7A). The polling list book, at voting numbers 162 and 169 as well as two voting authority slips are verification.

Mr. Quinn testified similarly that Ms. Mankin called, citing the problem of poll worker error. Later, before acting on this complaint, he telephoned Mr. Miklus, who, at the same time, received a call from Ms. Mankin. Mr. Quinn heard Mr. Miklus advise Ms. Mankin to give the voter, Linda Kelly, a second opportunity. Ms. Kelly was to cast her vote for a candidate, but not on the budget question for which she had already voted.

Cliffwood School:

The judge of elections at Cliffwood, **Ann Kaplan**, with some twenty years experience, recalled that at the morning meeting with election workers, Mr. Quinn made clear that when assistance was needed, it should be provided. She remembered that later, at her site, Mrs. Kennedy, voter #11, had difficulty. After hearing a commotion, Mrs. Kaplan found Mrs. Kennedy and election worker Carol A. McCoy in discussion. From them, Mrs. Kaplan learned that Mrs. Kennedy had not completed her vote. Relying on her understanding of Ms. McCoy's erroneous instructions, Mrs. Kennedy had pulled the red lever, opening the voting curtain. For this reason, Mrs. Kennedy demanded another opportunity to cast her write-in ballot. Mrs. Kaplan refused. However, she did give Mrs. Kennedy the two Freehold telephone numbers listed on Exh. R-3.

Approximately one hour later, Mrs. Kennedy returned, claiming she had called, and had received, "satisfaction." Mrs. Kaplan in turn phoned one of the Freehold numbers, 431-7291, which was answered by a man. He did not identify himself. Although Mrs. Kaplan began to describe the incident, Mrs. Kennedy interrupted, and Mrs. Kaplan passed the phone to her. After some discussion, Mrs. Kennedy returned the phone to Mrs. Kaplan who learned from the still unidentified man that Mrs. Kennedy should still not be permitted to vote. Mrs. Kaplan recalled that, at that point Mrs. Kennedy left, again insisting that she had gotten "satisfaction." Mrs. Kaplan stated she was unaware that Carol McCoy had not received appropriate schooling before the election. Otherwise, she would have observed Ms. McCoy more closely.

Carol A. McCoy recalled that the April 7, 1987 district election was her first school election. She had worked, without certification, on the general election in November 1986, where she served as a substitute, because of an absent regular. Additionally, she was currently (post-hearing) certified for work at the general election (Exh. R-12). She stated that, prior to the April 7, 1987 school district election, she had read the general instruction pamphlet from the county thoroughly (Exh. R-13). When

called, she had served as a last-minute "alternate" for Jane Purcell, a regular school election worker. She was selected on the Friday preceding election. As an "inspector," she retrieved the white voting authorization slips from each voter. She then pulled the release handle which engaged the voting mechanism. Ms. McCoy testified that she was well aware of the write-in campaign. She also knew that she was obligated to give as much assistance as possible, but only after being asked.

Ms. McCoy remembered specifically that Mrs. Kennedy arrived early to vote. Workers were rushed, and seven people were already in line before the polls opened. Before Mrs. Kennedy voted, there had been no problems, except possibly with one man who asked how to open the curtain. Ms. McCoy checked after each voter to assure the machine was in working order.

When Mrs. Kennedy entered the booth, she did so with a determined demeanor, and stayed a long time. The voting lines continued to form. Ms. McCoy heard clickings and mutterings. Eventually, thrusting her head through the curtains, Ms. Kennedy asked "how do you open this up." She made no mention of her write-in vote. Ms. McCoy, thinking she wished to exit, then directed Mrs. Kennedy to open the curtain the same way she had closed it. Mrs. Kennedy did so, opening the curtains. She exclaimed that she had not yet voted. It was after some discussion that Mrs. Kaplan walked over. Ms. McCoy also was certain that Mrs. Kennedy had a yellow instructional flyer when she entered the booth. Ms. McCoy stated that this paper gave erroneous instructions on write-in vote procedure. Both Ms. McCoy and Ms. Kaplan testified that numerous voters carried copies of the same flyers into the booth throughout the day.

Recalling his own participation, and notwithstanding testimony at Judge Law's hearing, Mr. Quinn remembered with certainty that he never called Mr. Miklus on the Kennedy incident at Cliffwood. His only call dealt with the Strathmore problem involving Ms. Kelly. However, he did speak with Ms. Kaplan herself early into the election. Ms. Kaplan informed him that an unnamed voter had thrown the red lever. On her information, he concluded that the voter was at fault. He instructed Ms. Kaplan not to permit another vote. He conceded that, had he known then what hearing testimony disclosed now, he would probably have permitted a corrective vote. In his view, the circumstances at Strathmore involving Ms. Kelly, who voted again, were similar. Mr. Quinn was positive that he had not given Ms. Kaplan Mr. Miklus's telephone number at any time.

Outlining his responsibility for school elections, Mr. Quinn related that he oversaw the annual date and, with his assistant, Providence Marino, prepared for the election. Together, they gathered materials, solicited lists of County Board of Election workers, prepared the necessary resolution for the Board of Elections and conducted the annual instructional meeting on election morning. Workers were chosen according to three criteria: (1) party, (2) past experience, and (3) closeness of residence.

At the polling places, Mr. Quinn placed copies of phone numbers to call for assistance (Exh. R-3), an orientation agenda (Exh. R-4), and a check-list for relevant materials (Exh. R-5). Mr. Quinn maintained that the Aberdeen Municipal Board of Election list (Exh. R-9) did not distinguish between those who had been certified by law and those who were not. Carol McCoy was used as an "alternate" in the District only because she had not worked in a school election. She was chosen at the last minute. Neither Mr. Quinn nor Ms. Marino knew that Ms. McCoy had not attended school, or lacked certification. In any event, Mr. Quinn understood that, even so, such appointment under emergent circumstances was lawful. As to all other officials he selected, they were in the main, repeaters.

Providence Marino testified similarly. She had requested a list of certified workers from the Board of Elections (Exh. R-8). Its response was the list which included Ms. McCoy's name (Exh. R-9). In an emergent call, she selected Ms. McCoy (Exh. R-10). Ms. Marino stated that, routinely, the list was requested annually, without inquiry as to individual certification. This was consistent with the procedures prepared by the predecessor of Mr. Quinn, a Mr. Scullion. He had served in that post for 20 years or more. Ms. McCoy's placement on the list, under past practice, was verification of a "qualified" worker.

The Director of the Voting Machine Department for Monmouth County, **James Siciliano,** recalled his awareness that there was a significant pre-election write-in campaign. With a heavy write-in vote expected, Mr. Siciliano assigned two mechanics to the Matawan-Aberdeen District alone. A third "floating" mechanic was directed to assist, before going to his regular assignment. All three completed their tasks before the 1:00 p.m. election opening. Additionally, they called in before the closing of the day and reported no deficiencies. Beyond this, he received no telephone complaints of machine breakdown. One woman had called asserting that she had been denied one-half of her vote. Mr. Siciliano referred her to Mr. Miklus. Mr. Siciliano added that, in his

experience, the average voter was invariably confused by write-in votes. Even petitioners had sought an explanation at the warehouse on the machine itself of the write-in vote process before the election. He accommodated their request.

Addressing the legal aspects of the case, the Board reiterated in summation that it favored no particular candidate or candidates. It simply asserted that it had performed its lawful function. It conceded that N.J.S.A. 18A:14-6.1 required instruction of poll workers not less than ten or more than 21 days before the election. Yet the Municipal Board of Election itself had listed Ms. McCoy as a substitute (Exh. P-3) and used her services at a general election. More to the point, Ms. McCoy's designation at the school election was emergent in nature, coming four days in advance. It is also relevant, the Board argues, that N.J.S.A. 19:50-3 provides only one exception to permit assistance in casting a ballot. Workers are limited to helping those suffering from disability. Apropos of this, the Board notes that reported case law holds it improper for election workers to volunteer assistance during write-in votes. In the instant matter, the testimony was unanimous that workers did not offer their assistance, but did respond to requests for help.

With respect to telephone calls placed and received with officials, the Board contends this is irrelevant. No law permits the County Superintendent's Office to direct that an additional vote be cast. As to Mrs. Kennedy's specific problem, her past experience as both voter and election worker casts doubt on her claim of being misguided by a poll worker. She must have understood the significance of so fundamental a step as turning the red lever to open the curtains. The Board notes that the weight of influence exerted by the yellow flyer with erroneous instructions should be determined by this tribunal.

Discussing Lloyd Road School and Mrs. Nebus, the Board observed that is was clear that her husband did not request assistance and, in fact, was not a patient person. Neither did Ms. Golub bring her problem to the attention of election workers. Had she done so, she might have been allowed to vote again, as happened at Strathmore School. However, the evidence shows the machines were working. Mr. Siciliano revealed the extensive preventive maintenance, and pre-election inspection. There was also a "lock-out" of any slots not used for write-in votes. While write-in voters understandably had difficulty, this was unrelated to machine functioning. It is not disputed that 240 voters, spread through all polling places, were able to open the two write-in slots and properly cast their votes. Of the 405 votes cast for Mr. Rosenberg, only 165 were disqualified.

The Board stresses that the only question for resolution here is whether proper procedures were followed. Election workers testified unequivocally that neither workers nor voters were instructed by anyone to place two names in one write-in slot. Past Commissioner's decisions in similar circumstances involving irregular ballots and voter confusion have been uniform in their holdings: voting irregularities and the speculative effects thereof do not justify changing results. All that must be shown is a fair and honestly-conducted election. Absent fraud, gross irregularities would not vitiate. In one case where election reversal followed, the margin was a one-vote difference. Here, the margin between candidates is 149 votes. Even giving credence to the three voters who testified and all those who submitted certifications, there remains a margin of 116 votes.

Finally, the Board asks that the time, energy, and motivation of poll workers, together with their insignificant pay, should be taken into account.

FINDINGS OF FACT

Therefore, after considering the testimony previously set forth, and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following **FINDINGS OF FACT:**

1. James Siciliano, Director, Voting Machine Department, Monmouth County, fully prepared the machines for write-in votes prior to their installation at the Aberdeeen polling places.

2. On election day, April 7, 1987 voting machine mechanics supervised by Mr. Siciliano assured the machines were in working order, up to the time the polls opened. No later calls to Mr. Siciliano complained of machine breakdown.

3. At Lloyd Royd School, Ruth J. Nebus cast her vote successfully, after some difficulty. Her husband Frank did not, because of inability to operate the machine. However, he did not ask for assistance at any time during the process.

4. Betty Golub was unable to cast her vote because of inability to operate the machine, despite written instructions inside the booth (Exh. R-1), as well as assistance from poll workers.

5. After receiving calls from Bruce Quinn and Carolyn Mankin, Edward Miklus of the Department of Education granted voter Linda Kelly another opportunity to cast her ballot.

6. Catherine Kennedy was unable to cast her vote because of inability to operate the machine and because of a misunderstanding between herself and Carol A. McCoy, who sought to assist. Ms. Kennedy meant to solicit help in opening up a write-in slot. Ms. McCoy believed she was asking which lever, if pulled, would open the curtain and terminate her vote.

7. Bruce Quinn, Secretary to the Board of Education, never called Edward Miklus to discuss the Katherine Kennedy voting problem which occurred at Cliffwood School. Mr. Quinn himself refused her another opportunity to vote.

8. Bruce Quinn, instructed election workers at the 11:30 a.m. meeting on April 7, 1987 that they should not volunteer help to voters. They should assist only if requested.

9. All election workers who testified, as well as those who the record discloses were available to testify, similarly followed Mr. Quinn's instructions. No preponderating evidence proves that the remaining poll workers refused to assist when asked.

10. As a practice, the Aberdeen Municipal Board of Elections made use of "substitute" poll workers lacking experience or training in emergent circumstances. The Matawan-Aberdeen Regional School District Board of Education made use of "alternate" poll workers lacking experience, in emergent circumstances.

11. Carol A. McCoy on April 7, 1987, lacked formal training and certification in the election process. The Board, without knowing this, used her services in emergent circumstances to replace a regular worker four days prior to election.

12. At least 34 voters had difficulty in voting, perceived inadequate or erroneous instructions from poll workers, and/or were unsuccessful in casting their write-in ballots, as set forth in Exhibit P-4 (1-34).

13. An unspecified number of voters brought with them into the voting booth a yellow flyer (Exh. R-14) containing erroneous write-in instructions.

ANALYSIS

Any understanding of this dispute requires a review of the prevailing law and its application to the facts found above:

The Law:

The underlying statute N.J.S.A. 18A:14-63.12 states:

> Upon written request within 5 days of the announcement of the result of an election by any defeated candidate, or, in the case of a question, proposition or referendum, upon petition of 10 qualified voters at any school election, the Commissioner of Education or his authorized representative shall inquire into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election.

Also as a matter of law, the Commissioner's decision to invalidate 165 write-in ballots pursuant to a separate appeal under N.J.S.A. 18A:14-63.2 et seq. (Exh. C-1) must be held controlling here.

Beyond this cited authority, relevant case law affords a comprehensive overview of the Act's interpretation. It has been held that a mere directory requirement of the election laws will not void an election unless fraud or miscarriage of a free election is shown. Mere irregularities will not form a ground of contest. In re Wene, 26 N.J. Super. 363, 377 (Law Div. 1953). Acts and omissions to act on the part of local election

officers may render them liable to indictment. Yet, absent malconduct, fraud, or corruption, the election result is unimpeachable (citation omitted) Wene v. Meyner, 13 N.J. 185, 196 (1953). An election is not vitiated by the defaults of election officers not involving malconduct or fraud, unless it be shown that thereby the free expression of popular will in all human likelihood had been thwarted (citation omitted) Ibid. Irregularities pleaded must be sufficient, if established by proof, to warrant the relief sought. Proofs must operate per se to disqualify a nominee or alter the result of the election. Id. 197-198. See also Mundy v. Bd. of Ed., Borough of Metuchen, 1938 S.L.D., 192, 194. Voluntary offering of advice on the procedure for casting write-in votes is an irregularity not sufficiently gross when not amounting to fraud to vitiate election if the will of the people has been fairly expressed and determined and has not been thwarted. In the Matter of Election Inquiry, School District Borough of Fairlawn, 1977 S.L.D. 1156. Although fraud or collusion must be demonstrated to void an election, where irregularities free of such malfeasance in an election lost by only one vote affect the contest, full and free expression of the popular will is interfered with, justifying an annulment and a declaration that positions are vacant. In re Klayman, 97 N.J. Super. 295, 305-306 (Law Div. 1967). Where there is great difficulty in properly recording irregular write-in ballots, when voting spaces are awkward to reach, where reguired "lock-out" mechanisms are not understood by voters, and where instructions by election officials are incorrect in an election where irregular ballots have not been employed in recent years, such confusion, which is more the rule than the exception with respect to irregular, write-in balloting, is insufficient to overturn a school district election. There must be concrete evidence that the will of the people has been suppressed rather than speculation that improved conditions would have afforded a different result, 1974 S.L.D. 591. What must be established is the real intent of a voter. The expression of intent is to be read in light of the surrounding circumstances proven by reliable evidence. In re 15 Registered Voters, Cty of Sussex, 129 N.J. Super. 296, 300-301 (App. Div. 1974). It is also relevant under N.J.S.A. 18A:14-6.1 and N.J.S.A. 19:50-3 that, despite a requirement for certification of instruction concerning the duties of election officials, this requirement shall not prevent the appointment of a person to fill a vacancy in any emergency, as now provided by law.

The Facts:

The evidentiary burden has been set forth at page 2, supra, and reiterated in the foregoing case holdings. However, it must also be remembered that there is a presumption of reasonableness which attends the actions of administrative agencies, and

the burden of establishing the valid exercise of the legislatively conferred authority is on the proponent, Fulginiti v. Cape May County Sheriff's Department, 199 N.J. Super. 56, 61-62 (App. Div. 1985). In carrying that burden, a preponderance of the credible evidence is required as a standard of proof in administrative proceedings, even though the Administrative Procedure Act does not prescribe a particular standard, In re Polk License Revocation, 90 N.J. 55561, 1982. The preponderance of the evidence means that which has a greater weight of credibility, without regard to the number of witnesses. State v. Lewis, 67 N.J. 47 (1975). Whether the standard has been satisfied is a case by case determination on evidence which leads a reasonably cautious mind to a given conclusion, Bornstein v. Metropolitan Bottling Company, 26 N.J. 263 (1958). Guess or conjecture is insufficient, and the evidence must demonstrate that the offered hypothesis is a rational inference permitting a conclusion grounded in a preponderance of probabilities according to common experience. Joseph v. Psy. Hospital Ass'n., 26, 557 (1958).

The factual findings supra arise from application of these evidentiary standards. Board workers testified with the understanding that those other workers disclosed of record would simply repeat their views. They were persuasive both in content and demeanor. Perceptions of voters who had clearly labored under great stress in the voters' booth were less so. Mr. Siciliano was convincing in relating the thorough, up-to-the-minute maintenance and monitoring of the election machines. He was totally believable. No calls were placed on machine breakdowns. Although the petitioners' witnesses projected unquestionable sincerity, their recollections, compared to those of the Board's witnesses, are not more believable. Neither malfeasance nor fraud thwarting the will of the electorate emerge from the record as fact. There is no preponderating proof that the deficiencies of any of the 165 votes voided by the Commissioner are attributable to violations of statutorily prescribed procedures, at least as N.J.S.A. 18A:14-63.12 has been judicially construed to intend.

In the face of this conclusion, the predominating argument is that of the Board. If all the 34 certifications and the testimony of witnesses were given total credence, the number of votes involved would not change the result of the election. Only that impact would warrant vacating the Aberdeen School Board positions. Even if it were conceded that each of the voters complaining would have voted for petitioner Smith and petitioner Rosenberg, their numbers would be inadequate to cause a change. If added to the most recent tallies, which must prevail by law after the Commissioner's recount,

neither petitioner would have a total which would approach that of the lowest successful candidate. Ardis Kisenwether obtained 387 votes. Adding a round number of 40 contested votes (an amount exceeding that which the record discloses), Mr. Rosenberg would have only 275 "at polls" votes, and Mr. Smith would have only 260.

In the absence of fraud, and remembering that mere directory irregularities are insufficient to overturn election results, there is no preponderating evidence that the will of the electorate has been thwarted. The emergent use of Ms. McCoy (authorized under N.J.S.A. 18A:14-63.12) or the alleged failure of Board officials to ascertain whether other workers were certified, does not alter that conclusion.

CONCLUSION

I CONCLUDE, therefore, based on my review of the entire record, including the credibility of witnesses, and based on the rationale set forth in the ANALYSIS portion of this initial decision that: irregularities charged by petitioners have not been shown to contravene a full and free expression of the popular will rebutting the presumption of correctness which reposes in the incumbents.

ORDER

I ORDER, therefore, that the results of the Annual School Election in the Matawan-Aberdeen School District held on April 7, 1987 be allowed to stand as amended by the Commissioner of Education following the above-described recount.

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

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

September 2, 1987
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

SEP - 8 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 10 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
MATAWAN-ABERDEEN REGIONAL SCHOOL	:	DECISION
DISTRICT, MONMOUTH COUNTY.	:	
	:	

The Commissioner has reviewed the record of the school election inquiry conducted in this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that no timely exceptions to the initial decision were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

The Commissioner has weighed all the evidence presented in the record with respect to petitioners' claims that the school election officials in the constituent district of Aberdeen Township committed procedural violations at the annual school election in the Matawan-Aberdeen School District which were sufficient to invalidate the election in Aberdeen Township. (N.J.S.A. 18A:14-63.12)

While the Commissioner agrees that there was some degree of confusion at the polls in Aberdeen Township with regard to those 34 voters who claimed they had difficulty in casting write-in votes for the write-in candidates of their choice in Aberdeen Township, he nevertheless adopts as his own the findings and conclusion in the initial decision which hold as follows:

> In the absence of fraud, and remembering that mere directory irregularities are insufficient to overturn election results, there is no preponderating evidence that the will of the electorate has been thwarted. The emergent use of Ms. McCoy (authorized under N.J.S.A. 18A:14-63.12) or the alleged failure of Board officials to ascertain whether other workers were certified, does not alter that conclusion.
> (Initial Decision, ante)

The Commissioner notes with approval that the conclusion reached by the ALJ is adequately supported by prior case law set forth in the initial decision and incorporated by reference herein.

In the Commissioner's judgment, the school election officials are not permitted to assist a voter in casting a vote once he or she has entered the voting machine booth and has closed the curtain. Such instruction may be provided to the voter by a school

election official upon request prior to the time the voter has entered the voting machine booth. The only exception to this rule is provided in N.J.S.A. 19:50-3 which pertains to voters who are blind, disabled or illiterate.

Accordingly for the reasons set forth in the initial decision as supplemented herein, the Commissioner finds and determines that the irregularities charged by petitioners are not deemed to be sufficient to alter the outcome of the annual school election held in the constituent district of Aberdeen Township on April 7, 1987 as amended by the Commissioner's decision issued on May 19, 1987. In his decision of May 19, 1987, the Commissioner determined that 165 irregular ballots cast on April 7, 1987 at the polls in the constituent district of Aberdeen Township were voided because there were multiple write-in votes for write-in candidates appearing on designated lines Nos. 1 and 2 of the paper rolls of the voting machines. See In the Matter of the Annual School Election Held in Matawan-Aberdeen Regional School District, Monmouth County, decided by the Commissioner May 19, 1987.

Accordingly for the reason set forth above, the Commissioner finds and determines that petitioners' claims with respect to procedural violations committee pursuant to N.J.S.A. 18A:14-63.12 at the annual school election of April 7, 1987 held in the constituent district of Aberdeen Township are insufficient to invalidate the outcome of the Commissioner's prior ruling rendered on May 19, 1987.

COMMISSIONER OF EDUCATION

October 20, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 3481-87
AGENCY DKT. NO. 126-5/87

M.A.H., ON BEHALF OF L.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY, AND LUKE SARSFIELD, SUPERINTENDENT,
Respondents.

Kathryn A. Brock, Esq., for petitioner

Rodney T. Hara, Esq., for respondents (Fogarty & Hara, attorneys)

Record Closed: July 23, 1987 Decided: September 8, 1987

BEFORE **RICHARD J. MURPHY**, ALJ:

Petitioner M.A.H. claims, on behalf of her minor daughter, L.H., that the respondent Board of Education and Superintendent of Schools have unlawfully denied her daughter permission to attend the Rutherford School District either free of charge or on a tuition paying basis pursuant to N.J.S.A. 18A:38-1 et seq. She admits that she and her daughter have resided in Hasbrouck Heights since the middle of April 1987, but claims that they intend to move to Rutherford and, also, that the Hasbrouck Heights school is not suitable for her daughter, L.H., because she suffers from an allergic illness. Petitioner further claims that the Superintendent's and Board's decision to bar her daughter from Rutherford was motivated by a personal vendetta as described below. This is denied by

the Superintendent and Board, who contend that petitioner has access to the school system in Hasbrouck Heights where she resides, and they move for summary decision on that basis. The issues are: (1) whether petitioner's daughter is entitled to attend the Rutherford schools free of charge under N.J.S.A. 18A:38-1, and (2) whether the refusal of the Board of Education to allow the daughter to attend as a nonresident on a tuition basis was arbitrary and capricious under N.J.S.A. 18A:38-3. For the reasons set forth below, I affirm the decision of the Board of Education and Superintendent of Schools.

The procedural history of this matter is as follows. M.A.H. filed a petition on behalf of L.H. on May 9, 1987, which was transmitted to the Office of Administrative Law for hearing as a contested case on May 20, 1987. Petitioner sought emergent relief to keep her daughter enrolled in Rutherford, and a hearing was held in Newark on May 22, 1987. An order denying interim relief was issued on that day because petitioner could not establish that she would suffer immediate and irreparable injury in light of her access to the Hasbrouck Heights school system and home studies. Judgment was reserved as to whether the petitioner was likely to prevail on the merits. The Commissioner of Education affirmed the denial on June 2, 1987.[1] Respondents moved for summary judgment with supporting affidavits on June 18, and petitioner replied without affidavits on June 24. Petitioner subsequently obtained counsel, who filed a memorandum opposing summary decision with affidavits on July 8, with a request for oral argument. That memorandum was admitted over objection and the request for oral argument was denied on July 23, 1987, at which time the record on the motion was closed.[2]

The following facts are not in dispute; they were set forth in my May 22 order denying emergent relief and are reiterated here.

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[1] Petitioner also unsuccessfully sought injunctive relief in state and federal courts.

[2] It is also noted for the record that petitioner moved to disqualify me on June 24 because, as she saw it, I had failed my duty to protect her daughter's rights to an education without interruption. The disqualification motion was denied on July 7 because of the absence of any disqualifying grounds under N.J.A.C. 1:1-14.12 or of any other source of bias or interest which will require refusal.

Petitioner and her mother have lived in Hasbrouck Heights at the Quality Inn since sometime in early April.[3] They had previously resided on a temporary basis in Rutherford, following a car accident in which their automobile had been damaged. They had earlier come from Texas to New Jersey to take care of personal business and to consult with a New Jersey physician. On March 31, 1987, petitioner was enrolled by her mother in Rutherford High School. Subsequent to that, they moved to Hasbrouck Heights. When this information came to the attention of the Rutherford superintendent of education and the Board, questions were raised as to petitioner's residence in Rutherford. Petitioner was given a hearing before the Board on May 5, 1987, at which it was determined that she was not a resident of Rutherford and therefore was not eligible for free schooling in that community. Petitioner offered to pay tuition, but her request to do so was denied at a further Board meeting on May 11, 1987, on the grounds that petitioner had access to the Hasbrouck Heights school where she now resides and thus was not being deprived of any appropriate educational program that was available only in Rutherford. The Rutherford Board of Education acted on the basis of a policy adopted in December 1984 on the eligibility of nonresident pupils, pursuant to N.J.S.A. 18A:38-3:

> The Board of Education shall admit to school children who reside in this district and are eligible for attendance in accordance with law and will admit other children in accordance with this policy. The Board reserves the right to verify the residency or anticipated residency of any pupil and the validity of any affidavit of guardianship.
>
> A non-resident child otherwise eligible for attendance whose parent anticipates district residency and has entered a contract to buy, build, or rent a residence in this district may be enrolled without payment of tuition. If any such pupil does not become a resident of the district within 60 days after admission to school, tuition will be charged for attendance until such time as the pupil becomes a resident or withdraws from school.
>
> Pupils whose parents have moved away from the school district can not continue their children in the Rutherford Public Schools, unless their child is in the twelfth grade in which case the pupil may finish the school year without payment of tuition.

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[3] Petitioner claims in her supplemental affidavit of July 8 that she was asked to leave the Quality Inn in Hasbrouck Heights on July 5 because of nonpayment of the bill and has been staying with friends on a day-to-day basis pending preparation of the treatment plan in Connecticut for her daughter's allergic illness. Her current residence (or whereabouts) is not known to me.

> Children of Board employees who do not reside in this school district may not be admitted to school in this district. Other non-resident children, otherwise eligible for attendance, may be admitted to school in this district as tuition pupils provided that their admission is warranted by the inaccessibility of school in their home district or the singular availability of an appropriate educational program in this district.
>
> The admission of any non-resident child must be approved by the Superintendent. No child, otherwise eligible, shall be denied admission on the basis of the child's race, creed, color, national origin, gender, or handicap. The continued enrollment of any non-resident pupil shall be contingent upon the maintenance of good standards of citizenship and discipline.
>
> The Board will not be responsible for the transportation to or from school of any non-resident pupil. [emphasis added; respondent's Exhibit A filed with its answer.]

There is no dispute to the above facts and I so **FIND**.

Petitioner and her mother maintain that Hasbrouck Heights is not accessible because it does not offer a course in German or the classroom part of driver's education, which L.H. was taking at Rutherford. Hasbrouck Heights offers the rest of the educational program, but petitioner and her mother maintain that L.H. is unable to attend a geometry and English class because she suffers from toxic allergy to chemicals, known as Environmental and Chemical Illness, which would be triggered by chemicals in the science room and smoke from offices. Hasbrouck Heights offered a home study alternative to petitioner upon medical evidence, as well as evaluation to be made by a Child Study Team. This was declined by her mother, who claimed that L.H. was entitled to attend classes in a regular classroom setting by Federal law. L.H. and her mother further argued that she was being denied enrollment in Rutherford as a result of a personal vendetta against them by the Superintendent and a policy of arbitrary selectiveness by the Board.

The heart of her vendetta claim is that the Superintendent bears some grudge against petitioner and her daughter because of an incident occurring when L.H. was in fourth grade (1980) and was injured by other students, allegedly as a result of the Superintendent's negligence. Petitioner threatened the school board with suit though none was ever filed. She states that the Superintendent denied her daughter admission to Rutherford in retribution for the above incident and further contends that the school

board, as well as the Office of Controversies and Disputes within the Department of Education, has joined in a conspiracy to further the Superintendent's vendetta. In her supplemental affidavit of July 8, 1987, petitioner also alleges that the Superintendent has refused to release school records to Hasbrouck Heights so that her daughter may be enrolled in an appropriate program. Petitioner also alleges that the Board's policy on eligibility of nonresident students is being arbitrarily and selectively applied to bar her daughter.

The Superintendent of Schools, Luke A. Sarsfield, denies in affidavits of June 17 and July 1, that his actions were based on any personal vendetta or arbitrary application of the Board policy. He maintains, rather, that the basis for denying admission was that of nonresidence, as well as the accessibility and availability of the Hasbrouck Heights school system. Sarsfield also states that respondents first learned that petitioner had moved from Rutherford on April 14, 1987. Sarsfield denies that he refused to release school records to Hasbrouck, and claims that grades for the last marking period could not be provided because L.H. was enrolled for an insufficient period. While respondents do not deny petitioner's claim that she threatened suit some seven years ago, they claim that the current decision not to admit L.H. was based entirely on the objective facts of nonresidence as well as the accessibility and appropriateness of the educational program offered in Hasbrouck. Respondents deny that L.H.'s environmental and chemical illness had any bearing on the decision not to admit her and assert that her illness can be accommodated by home study in Hasbrouck if necessary.

On the basis of the testimony presented, as well as affidavits submitted, I make the following Findings of Fact:

1. In the middle of April 1987, petitioner and her daughter moved from Rutherford to the Quality Inn in Hasbrouck Heights where they resided until July 5, 1987;

2. The petitioner and her daughter, as of July 5, resided in Hasbrouck Heights and therefore had access to the Hasbrouck Heights public school system, which offers a full academic program, with the exception of German and the classroom portion of driver's education, and which further offers a

home study alternative, where needed as established by medical evidence, and a child study team evaluation;

3. No evidence has been presented to show that petitioner and her daughter currently reside in Rutherford and, while petitioner's statement of intent to reside in Rutherford is noted for the record, she has produced no lease, contract of sale or other evidence of anticipated residence beyond her statement of intention;

4. In 1980, while attending fourth grade, L.H. was injured by students in the Rutherford school system and the petitioner expressed her intention to sue the Superintendent and Board of Education for negligence in connection with this incident. No such suit was filed and the nature and extent of L.H.'s injuries has not been established by the evidence;

5. L.H. currently suffers from an abnormal hypersensitivity reaction to fumes, odors, and many chemicals, as well as to all kinds of petrochemical derivatives, which is known as environmental and chemical illness. As a result of her illness, L.H. should not be exposed to chemicals of any kind, including perfume, hair spray, cigarette smoke, paint, cleaning agents, nail polish, and related materials.

Respondents argue, under N.J.A.C. 1:1-12.5(b), that there is no genuine issue as to any material fact challenged and that they are entitled to prevail as a matter of law. They claim that petitioner and her daughter are not entitled to tuition-free education under N.J.S.A. 18A:38-1 because they do not reside in Rutherford. As to attendance on a tuition paying basis, respondents contend that L.H. was fairly and reasonably denied admission under the above Board policy, issued under the authority of N.J.S.A. 18A:38-3, which leaves these matters to the discretion of the local board. Respondents maintain that that discretion has not been abused or arbitrarily applied and therefore should not be disturbed. They deny that the purported vendetta or L.H.'s allergic illness had any bearing on the decision to deny her admission.

Petitioner argues that summary decision should be denied because the following issues of facts remained to be resolved:

1. Did respondents give petitioner a fair opportunity to present her case on May 4, 1987, and was the Board's decision correct in light of petitioner's claimed intent to reside in Rutherford?

2. Did the Board violate state law by excluding L.H. from school during the pendency of this proceeding?

3. Did the Superintendent's decision to exclude L.H. on May 5 prior to a Board hearing on the matter violate the due process clause in the Fourteenth Amendment?

4. Did the hearing granted by the Board on May 11 comport with the procedural due process and state law requirements?

5. Was the Board's decision to deny M.A.H. the opportunity to pay tuition arbitrary and capricious in that it was based on a personal vendetta?

6. Did the Board properly consider the issue of accessibility of the Rutherford program to L.H. under section 504 of the vocational-rehabilitation act of 1973?

7. Did the Superintendent deny M.A.H. access to L.H.'s student records in violation of N.J.A.C. 6:3-2.5 from May 5 until June 25?

8. Did the Superintendent act in an arbitrary and capricious manner and in violation of the Commissioner's decision by not cooperating with Hasbrouck Heights in providing records and grades?

Respondents argue that the alleged vendetta by the Superintendent is not material, even if true, because he acted lawfully under the statute and Board policy and the final decision was, in any event, made by the Board after a full hearing of the matter.

Respondents also dispute that the Superintendent obstructed petitioner's efforts to obtain records and grades.

The rule on summary decision provides that:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavits set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, summary decision, if appropriate, shall be entered. [N.J.A.C. 1:1-12.5(b); emphasis added]

The first question is whether there is a genuine issue as to any material fact challenged. There is no dispute as to the fact that petitioner and her daughter did not reside in Rutherford after mid-April 1987 and moved at that time to Hasbrouck Heights. And while petitioner claims her intent to reside in Rutherford, the fact of that intent is not disputed by the Board and is not sufficient under the statute to entitle her to have L.H. attend Rutherford schools free of charge. There is also no factual dispute as to the educational program available in Hasbrouck, which, while not identical to that offered in Rutherford, is accessible and appropriate to L.H. Petitioner claims the existence of a genuine issue as to whether Superintendent Sarsfield, in conspiracy with the Board of Education and Department of Education, is conducting a personal vendetta against her daughter because she threatened suit some seven years ago. Petitioner also alleges selective and arbitrary application of the nonresident admission policy, but sets forth no specific facts in support of that bald claim. Superintendent Sarsfield denies that his action or that of the Board's is based on any personal vendetta or selective application of policy. He states in his affidavit of June 17 paragraph 4 that evidence of petitioner's nonresidence in Rutherford was obtained before he was personally aware of their presence in the town. Petitioner supports her claim of vendetta with unsworn statements that do not allege that the Superintendent ever did or said anything in retribution for petitioner's threats to bring suit against the Board in 1980. She does allege that "Sarsfield has a brain like an elephant and he doesn't forget his enemies." Petitioner's response and brief, received June 24, at 5, but she could point to no specific actions which suggest that the "vendetta" was anything

other than a figment of her imagination. According to petitioner, the conspiracy of the vendetta does not stop with the Superintendent, but extends to his counsel, the Board of Education and the Office of Controversies and Disputes in the Department of Education. Accordingly, I CONCLUDE that there is no genuine issue as to any material fact with respect to petitioner's residence and the accessibility and appropriateness of the Hasbrouck Heights school system. I further CONCLUDE that petitioner has failed to show that there is a genuine issue as to the supposed vendetta that can only be determined in an evidentiary proceeding.

Having determined that there is no genuine issue as to any material fact challenged, I turn to the ultimate question as to whether the respondents are entitled to prevail as a matter of law in denying petitioner's daughter admission both as a tuition free and tuition paying student.

With respect to attendance at school free of charge, N.J.S.A. 18A:38-1 provides that:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> (a) Any person who is domiciled within the school district;
>
> (b) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child . . .
>
> . . . .
>
> (d) 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-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for purposes of this section,. . . . [emphasis added]

There is no factual dispute that petitioner and her daughter did not reside in Rutherford at the time the Superintendent and Board of Education determined that she was not eligible to attend school free of charge. Accordingly, I CONCLUDE that, because

L.H. was not domiciled or temporarily residing in Rutherford, she was not entitled to attend Rutherford schools free of charge pursuant to N.J.S.A. 18A:38-1.

Should L.H. have been allowed to continue to attend Rutherford schools as a tuition paying nonresident? The legislature has left the issue of attendance at school by nonresidents to the discretion of the local boards of education:

> Any person not resident in a school district, if eligible except for residence, may be admitted to the school's other district with the consent of the Board of Education upon such terms, and with or without payment of tuition, as the Board may prescribe. N.J.S.A. 18A:38-3.

Acting under that statutory mandate, the Board adopted a policy permitting attendance of nonresident children on a tuition basis providing that their admission is: (1) warranted by the inaccessibility of the school in their home district, or (2) by the singular availability of an appropriate educational program in the Rutherford District. After reviewing the question of petitioner's access to the Hasbrouck schools, as well as the availability of appropriate eductional programs, the Board concluded that she should not be admitted on a tuition paying basis. The issue raised is whether the Board's denial was unreasonable, arbitrary and capricious and therefore invalid. In short, did the Board abuse its discretion? See, Amorosa v. Bayonne Board of Education, 1966 S.L.D. 214, 217. Having considered the facts concerning petitioner's residence, as well as the accessibility and appropriateness of the educational program offered by the Hasbrouck school system, I CONCLUDE that the respondents did not abuse their statutory discretion in denying her admission as a tuition paying student. The provisions of the policy on nonresident students with respect to accessibility and availability of appropriate programs is geared to ensure that students have convenient access to an education suited to their needs and abilities. The Board considered those factors of access and approrpriateness, and there is no evidence in the record to support the conclusion that the policy was selectively applied to the petitioner. It might have been preferable or more desirable for the Board to have admitted L.H. as a tuition paying student so that her education would not have been interrupted in this fashion; however, to deny her admission on a tuition basis did not, in the circumstances of this case, constitute an abuse of discretion in that L.H. had available to her an appropriate and accessible educational program in Hasbrouck Heights. Though it might be preferable to have a student remain enrolled in a school district pending the outcome of an appeal, as the New Jersey Association of School Administrators has

recommended, that policy has not been adopted by statute or regulation, which leave attendence of nonresidents to the discretion of the local board. I regret that the education of L.H., who impressed me as an intelligent, articulate and creative young woman, was disrupted to her distress, but I cannot conclude on the facts of this case that the Board abused its discretion in denying her admission as a tuition paying student.

I also see no merit in the petitioner's claim that the hearings accorded her by the Board of Education violated her due process rights. M.A.H. was permitted to present her petition to the Board on two occasions in May 1987, and the Board was not bound by her expression of intent to reside in Rutherford, nor was the Board bound to consider the vocational-rehabilitation act of 1973 in the absence of any finding that L.H. was handicapped. With respect to allegations that the Superintendent denied M.A.H. access to her daughter's grades and records, I make no ruling because the question has no bearing on the attendance issue, and Sarsfield has denied the charge in any event. I do hope that a concerted effort will be made by all involved parties to ensure that L.H. is placed in a stable and suitable educational environment mso that she may get on with the learning that she seems eager to pursue.

On the basis of the above findings of fact and conclusions of law, I **ORDER** that respondents' motion for summary decision be granted and the petition of appeal dismissed.

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

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

Sep 8, 1987
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

SEP - 8 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 11 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

M.A.H., on behalf of L.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD AND LUKE SARSFIELD, SUPERINTENDENT, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by petitioner pursuant to N.J.A.C. 1:1-18.4, as was the Board's reply. Simultaneously filed with petitioner's exceptions was a Motion for Emergent Relief which resulted in a notification to the parties that the request would be acted upon by the Commissioner at the time he issued his final decision in the matter. A motion in opposition to the request for emergent relief was received from the Board within the timelines set forth for such purpose by the Director of Controversies and Disputes, State Department of Education. The motion was not considered by the ALJ as the initial decision had already been rendered by him.

Petitioner excepts to the ALJ's conclusion of law that L.H. did not have a right to continue to attend school in Rutherford as a temporary resident under N.J.S.A. 18A:38-1(d). She points out that it is not disputed that L.H. was properly enrolled in the district in March 1987 as a temporary resident under N.J.S.A. 18A:38-1(d) and takes strong exception to the ALJ's factual conclusion that she "moved" to Hasbrouck Heights. With respect to this, she acknowledges that she and her daughter did, in fact, use a motel in that community on a day-to-day basis while trying to find a place in Rutherford. However, she argues that a recent Commissioner decision, Board of Education of Harrison Township v. C.W. by his parents, J.R.W. and K.T.W., decided May 5, 1987, along with the statutes governing the use of motels/hotels as residences, supports her position that L.H. was entitled to be educated in Rutherford.

Petitioner also excepts to the ALJ's conclusion that she produced no lease, contract of sale or other evidence of anticipated residence beyond her statement of intention, a finding which is in conflict with the May 12, 1987 affidavit of Daniel H. Van Winkle, a realtor in Rutherford assisting petitioner on a daily basis for four weeks to find housing in Rutherford, as well as her affidavit dated May 13, 1987.

Moreover, petitioner avers that even if the Commissioner determines that as a matter of fact and law L.H. ceased to reside in Rutherford under N.J.S.A. 18A:38-1(d), L.H. should have been allowed to complete the final six weeks of school during the pendency of the controversy based on N.J.S.A. 18A:38-1(b) which requires that a student remain enrolled when a board challenges residency status as an affidavit student until the controversy is resolved. In addition, she points to the New Jersey Association of School Administrators' guidelines on residency in support of her position.

Petitioner also alleges that the ALJ erred in his findings of fact with respect to the issue of whether or not the Board's decision not to allow her daughter to continue to attend Rutherford High School as a tuition-paying student was arbitrary and capricious. First off, she notes that the ALJ did not address her allegation that L.H.'s disenrollment by the superintendent before the Board took action violated Board policy and her due process rights. She then goes on to reiterate her arguments that, under Board policy, L.H. qualified for attendance because her admission was warranted by inaccessibility of a school in the home district and due to the singular availability of an appropriate educational program in Rutherford. Regarding this, she avers, inter alia, that the ALJ erred in finding that the Board did not have to consider the Vocational Rehabilitation Act of 1973 in the absence of any finding that L.H. was handicapped because her environmental and chemical illness by its very nature creates an accessibility problem. As such, she argues that L.H. did qualify as handicapped, that the Rutherford program was accessible to her while the Hasbrouck Heights program was not, thus qualifying her to be a tuition student.

Petitioner likewise repeats her arguments that her daughter qualified under the second part of the Board's policy regarding singularity of program. As to this, she urges that the Commissioner rule as error the ALJ's conclusion that the absence of German and classroom driver education did not constitute grounds for determining that Rutherford was not a singularly available appropriate educational program as compared to the Hasbrouck Heights program, given that L.H. would obviously have lost credit for two courses by transferring to Hasbrouck Heights.

Lastly, in regard to the allegations of selective enforcement of the Board's policy and personal vendetta by the superintendent, petitioner argues that (1) an evidentiary hearing was necessary in that the issues were not ripe for summary decision and (2) she was unable to bear her burden of proof due to the Board's failure to provide discovery of Board records from 1980 to the present relative to the nonresident policy and cites L.P. v. Board of Education of Jackson Township, 1980 S.L.D. 1049 in support of her argument.

The Board's reply[1] contends that it is beyond dispute that at the time her daughter was denied enrollment petitioner did not reside in Rutherford and that she lived in a motel in Hasbrouck Heights until July 5, 1987. It argues that simply because she was looking for a place to live in Rutherford does not afford a right to be educated in Rutherford and to rule otherwise would be tantamount to disregarding the plain meaning of the statute. Further, the Board rejects petitioner's reliance on Harrison Township, supra, as support that her intent to reside in Rutherford entitles L.H. to an education in its district because the facts in that matter established that for the period of time the Board was suing for tuition, the mother and child in question had temporarily resided in the Harrison School District. Thus, contrary to what petitioner avers, the Harrison decision stands for the proposition that petitioner only has a right to a cost-free education from the district in which she temporarily resided - Hasbrouck Heights. Moreover, it maintains that (1) the motel/hotel statutes have no relevance to this matter, (2) since L.H. is not an affidavit student, N.J.S.A. 18A:38-1(b) is not relevant either, and (3) reliance on an association's guidelines has no binding precedent upon an ALJ or the Commissioner.

At this point, the Commissioner will address the issue of any legal entitlement petitioner's daughter may have to be educated in Rutherford. Upon review of the record and the exceptions of the parties, the Commissioner is in full agreement with the ALJ's determination that as a matter of fact and law L.H. had no entitlement under N.J.S.A. 18A:38-1(d) to an education in the Rutherford School District.

The record establishes that from March 1987 to mid-April 1987 petitioner temporarily resided in Rutherford and was properly enrolled in that district under the provision of the above cited regulation. It is also clear that petitioner's temporary residence ceased in Rutherford upon her assumption of temporary residence in Hasbrouck Heights which continued until July 5, 1987. At the time petitioner commenced temporary residency in Hasbrouck Heights, Rutherford's obligation under N.J.S.A 18A:38-1(d) ceased and the responsibility for L.H.'s education shifted to Hasbrouck Heights, notwithstanding petitioner's arguments to the contrary. Nor does the fact that she had a realtor looking for housing for her in Rutherford alter this conclusion. As correctly argued by the Board, N.J.S.A. 18A:38-1(d) does not state that an obligation to educate exists because a person intends to reside in a district nor does Harrison Township, supra, or any other case cited by petitioner in her exceptions stand for that proposition.

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[1] It is noted for the record that the Board's reply references and has appended to it material which was neither before nor considered by the ALJ. As requested by petitioner's attorney this information will not be considered in arriving at a final decision on the issues before the ALJ.

As such, the ALJ's finding that petitioner produced no contract of sale or other evidence of anticipated residence beyond her statement of intent is not vital to rendering a determination in this matter as to legal entitlement to an education under N.J.S.A. 18A:38-1(d). However, given petitioner's exception, the Commissioner will go so far as to state he agrees with the ALJ that if it did the letter from the realtor does not constitute evidence of anticipated residence such as a lease or contract for sale or contract for rent. At best, such a letter signifies a desire to reside in Rutherford if and when a suitable residence to her needs could be located.

Moreover, the Commissioner finds as meritless petitioner's argument that the Board was obligated to continue L.H.'s enrollment during the pendency of the disputed enrollment. The dispute does not relate to N.J.S.A. 18A:38-1(b) as pointed out by the Board in its reply exceptions.

Next to be addressed is the issue of whether the refusal of the Board to allow L.H. to attend as a nonresident on a tuition basis was arbitrary and capricious under N.J.S.A. 18A:38-3. Initially, it must be pointed out that petitioner is incorrect in asserting the ALJ failed to address her due process claim. On page 10, ante, the ALJ states that he "***also see[s] no merit in the petitioner's claim that the hearings accorded her by the Board violated her due process rights. M.A.H. was permitted to present her petition to the Board on two occasions in May 1987***." The record indicates that L.H. was not actually denied enrollment until after the Board considered her residency status on May 5, 1987. Further, there is nothing in law which prevents a superintendent from acting to deny admission under N.J.S.A. 18A:38-3 prior to the issue being acted on by the Board. Moreover, the Board's policy itself specifically states that the superintendent must approve the admission of nonresident children.

Petitioner argues that L.H. should have been admitted because she has met the requirements of the Board's stated policy which reads in pertinent part:

> Children of Board employees who do not reside in this school district may not be admitted to school in this district. Other non-resident children, otherwise eligible for attendance, may be admitted to school in this district as tuition pupils provided that their admission is warranted by the inaccessibility of school in their home district or the singular availability of an appropriate educational program in this district.
> (Initial Decision, ante)

Upon review of the record, the Commissioner agrees with the ALJ's conclusion that the Board's decision to deny enrollment was not arbitrary or capricious. N.J.S.A. 18A:38-3 grants to a board of

education the express legal right to accept or deny nonresident pupils as it sees fit. See R.M. v. Mahwah Bd. of Ed; decided by the Commissioner October 28, 1985. This right is not unfettered, however, in that a board may not act in an arbitrary or capricious manner nor may the decision be motivated by bad faith.

In the instant matter, the Board chose to conclude that schooling in Hasbrouck Heights was not inaccessible to L.H. It likewise concluded that L.H.'s circumstances did not signify that there was a singular availability of an appropriate program in its district. Of this, the Board states in its reply exceptions:

> ***[R]espondents have assumed that petitioner and her daughter suffer from environmental and chemical illness and that the Hasbrouck Heights School District was not able to provide instruction in German or the classroom portion of driver's education. The assumption of these facts does not, however, mean that the Hasbrouck Heights School District was remiss in its responsibility under the Vocational Rehabilitation Act of 1973 because it did not automatically accept petitioner's handicap claim and instead insisted upon fulfilling its obligation pursuant to N.J.A.C. 6:28-3.2(d) to determine whether petitioner's daughter possesses an educationally handicapping condition and how it should provide educational services for her. To the contrary, the Hasbrouck Heights School District acted consistent with its obligation under the law and was ready, willing and able to provide educational services for her while the district was ascertaining the nature of her problem and how to address it. Home instruction was, in fact, offered as an accommodation to petitioner's claim that the environment at the high school was harmful to her daughter.
>
> The purported inability of the Hasbrouck Heights School District to offer instruction in German and the classroom portion of driver's education does not render the school in the district "inaccessible" or transform the program offered by the Rutherford School District into a "singular availability of an appropriate [educational] program" within the meaning of the board policy. One could hardly characterize the educational program offered by the Hasbrouck Heights School District as being inaccessible since, as an accommodation to the petitioner, the district offered to provide home instruction for petitioner's daughter. With regard to the

> "singular availability of an appropriate educational program" in the Rutherford School District requirement of the board policy, the word, "appropriate," does not mean identical.***
> (Reply Exceptions, at p. 7)

The Commissioner finds the Board's rationale reasonable and its decision a proper exercise of its discretion. He likewise agrees with the ALJ that the Rutherford Board was not bound to consider the Vocational Rehabilitation Act of 1973. L.H. has not been designated as handicapped under N.J.A.C. 6:28-1.1 et seq. nor handicapped under P.L. 94-192 in any other state. While it could be that given the circumstances at Hasbrouck Heights High School L.H. may have qualified as handicapped in that setting, the Hasbrouck Heights School District was never given the opportunity to evaluate her and to determine if alternative educational programming were needed. If L.H.'s health prevented attendance at its high school, the Hasbrouck Heights Board would have been responsible to develop a program for her whether it be inside or out of the district. Home instruction is only a temporary program.

Further, the absence of an identical program of study or certain courses does not render an educational program inappropriate or inaccessible. Students face the possibility of losing credit when transferring from one district to another during a school year if a given course(s) is not offered by the new district. This does not automatically lead to a conclusion that an appropriate program cannot be provided by the district even though the program is not identical or that credit is lost due to the unavailability of a given course in the new district. Nor in this matter does it create automatic qualification for attendance in Rutherford under its nonresident tuition policy. Such an interpretation would be exceedingly narrow and an unwarranted burden to place on the district.

As to petitioner's argument that the ALJ erred when determining she failed in her burden of proof with respect to the allegations of selective enforcement of its policy and that the superintendent was motivated by a vendetta, the Commissioner's independent review of the record leads him to the same conclusion as the ALJ. He finds the ALJ's treatment/analysis of petitioner's arguments in opposition to summary judgment and in support of her position that issues of material fact exist thorough, well-reasoned, and correct.

N.J.A.C. 1:1-12.5(b) regulates the basis for summary decision. It reads:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show

> that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The record more than amply supports that petitioner does not even provide a reasonable suggestion that issues of material fact exist precluding summary judgment. She offers naked assertion only and does not provide a single specific fact to support her claims of selective enforcement or vendetta. Petitioner's allegations that the Board failed to produce records back to 1980 do not alter the conclusion that petitioner's allegations appear to be no more than a fishing expedition. The Commissioner agrees with the ALJ when he states:

> The first question is whether there is a genuine issue as to any material fact challenged. There is no dispute as to the fact that petitioner and her daughter did not reside in Rutherford after mid-April 1987 and moved at that time to Hasbrouck Heights. And while petitioner claims her intent to reside in Rutherford, the fact of that intent is not disputed by the Board and is not sufficient under the statute to entitle her to have L.H. attend Rutherford schools free of charge. There is also no factual dispute as to the educational program available in Hasbrouck, which, while not identical to that offered in Rutherford, is accessible and appropriate to L.H. Petitioner claims the existence of a genuine issue as to whether Superintendent Sarsfield, in conspiracy with the Board of Education and Department of Education, is conducting a personal vendetta against her daughter because she threatened suit some seven years ago. Petitioner also alleges selective and arbitrary application of the nonresident admission policy, but sets forth no specific facts in support of that bald claim. Superintendent Sarsfield denies that his action or that of the Board's is based on any personal vendetta or selective application of policy. He states in his affidavit of June 17 paragraph 4 that evidence of petitioner's nonresidence in Rutherford was obtained before he was personally aware of their presence in the town. Petitioner

> supports her claim of vendetta with unsworn statements that do not allege that the Superintendent ever did or said anything in retribution for petitioner's threats to bring suit against the Board in 1980. She does allege that "Sarsfield has a brain like an elephant and he doesn't forget his enemies." Petitioner's response and brief, received June 24, at 5, but she could point to no specific actions which suggest that the "vendetta" was anything other than a figment of her imagination. According to petitioner, the conspiracy of the vendetta does not stop with the Superintendent, but extends to his counsel, the Board of Education and the Office of Controversies and Disputes in the Department of Education. Accordingly, I conclude that there is no genuine issue as to any material fact with respect to petitioner's residence and the accessibility and appropriateness of the Hasbrouck Heights school system. I further conclude that petitioner has failed to show that there is a genuine issue as to the supposed vendetta that can only be determined in an evidentiary proceeding. (Initial Decision, ante)

Accordingly for the reasons expressed herein, the Commissioner adopts the recommended decision of the ALJ to grant summary decision to the Board and to dismiss the Petition of Appeal.

Petitioner's emergent relief request will now be addressed. In the affidavit in support of the motion for emergent relief, petitioner states that before the end of the semester she enrolled L.H. in the Hasbrouck Heights School District for the purpose of taking final exams and that its board attorney and the school officials agreed to this. However, the superintendent of Rutherford refused to send them books and exams to be administered.

In August, petitioner and her attorney inquired of school districts which L.H. might possibly attend what their requirements for enrollment would be. Each of them indicated that L.H. could not begin mandatory third year subjects without final grades in her second year subjects as they are full year courses only and there is no authorization to test L.H.'s achievement and place her in third year classes based on the results.

On September 3, 1987 petitioner's attorney wrote to the Rutherford superintendent requesting that in L.H.'s best interest, she be allowed to study for and take final exams so as to receive final grades from Rutherford thus precluding her loss of credit for an entire year.

This request was denied by the superintendent on September 4, 1987 because L.H. was in the system for 19.5 days only but he did forward the request to the Board for it to be polled on its decision. On September 10, 1987, the superintendent informed petitioner's attorney that the Board denied the request. As to this, petitioner argues that L.H.'s disenrollment was controlled by respondents and yet now they use it as a reason to deny final credit.

Petitioner relies on her papers in opposition to summary judgment that the superintendent was without authority to disenroll L.H. on May 5, 1987 without a Board decision and that respondent's decision to exclude L.H. from school during the pendency of the proceedings in this matter was in violation of state law and due process. As such, she avers that she will prevail on the merits with respect to L.H.'s exclusion from school and denial of credit for the year.

The Board, in its papers submitted in opposition to petitioner's motion for emergent relief, asserts that the subject matter of the motion is not properly before the Commissioner since the issue of final grades is not material to a resolution of the issue raised in her petition, namely, L.H.'s right to attend Rutherford High School. In support of this it cites N.J.A.C. 1:1-12.6(a) which states that applications for emergent relief are only permitted where the remedy sought is connected with the contested case. It does go on to state, however, that if the Commissioner desires to render a decision on the motion, the motion should be denied because petitioner has not demonstrated that there exists a substantial likelihood that she would succeed on the merits of her claim.

The Board strenuously objects to petitioner's motion arguing that it is incumbent upon the Commissioner to reject a request for an order requiring it to administer final exams and issue final grades. The reasons provided in support of this position are summarized below.

Upon L.H.'s removal from the Rutherford School District, petitioner did not enroll her in the Hasbrouck Heights School District notwithstanding the following:

- the efforts of the Hasbrouck Heights district to compel L.H.'s attendance (Exhibit A);
- the ALJ's decision of May 22, 1987 denying emergent relief which determined that Hasbrouck Heights had a sufficient educational program for L.H. (Exhibit B);
- the federal district court judge's decision of June 2, 1987 which admonishes petitioner to send L.H. to school (Exhibit C); and

- The Commissioner's June 2, 1987 order directing petitioner to comply with the compulsory attendance laws.

Moreover, the Board asserts that it was not until after Hasbrouck Heights filed a truancy complaint against petitioner and she had to appear in municipal court that petitioner finally enrolled L.H. in that district. This, however, was too late to result in L.H. attending any classes since they had concluded on or before her date of enrollment. As a result of petitioner's actions, L.H. did not attend any classes in any school district or receive instruction from May 6, 1987 to the end of the 1986-87 school year.

Further, the Board avers that since L.H. was in its district for only 19.5 days, she did not receive instruction in the Rutherford School District for a sufficient period of time to be eligible to take final examinations and receive final grades. In support of this, it cites its attendance policy concerning student attendance which denies credit to a student absent over twenty days for a full school year or over ten for a semester (Exhibit E). As to this, it maintains that it is well established that local school districts may adopt attendance policies that deny credit for failure to attend classes a determined number of days. Monroe v. Ramapo Indian Hills Regional High School District, decided State Board June 4, 1986; L.P. v. Board of Education of Jackson Township, 1980 S.L.D. 1049; Wheatley et al. v. Burlington City Board of Education, 1974 S.L.D. 851

Moreover, the Board argues that had petitioner acted timely, Hasbrouck Heights could have administered examinations and final grades. As such, the failure of L.H. to receive final grades for 1986-87 is attributable to petitioner's refusal to enroll L.H. in the school district in which she temporarily resided. Therefore, the Board cannot and should not be blamed for M.H.'s conduct and criticized for applying its attendance policy and only conferring grades upon students who have satisfied the district's attendance policy.

Upon review of the motion for emergent relief, the Board's response, and the supporting papers of the parties, the Commissioner determines that (1) the motion is properly before him as the issue/relief is connected with the contested matter and (2) the motion shall be denied for the following reasons.

There is no legal basis whatsoever to compel the Board to provide final examinations and grades to L.H. On the day that petitioner discontinued her temporary residence in Rutherford, the Board's legal responsibility ceased under N.J.S.A. 18A:38-1(d). As determined earlier with respect to the Petition of Appeal, no legal mandate existed under any other statute either which would compel the Board to educate L.H. Thus, the Board was within its legal rights to discontinue her enrollment at Rutherford High School on May 5, 1987.

Moreover, the Board's decision to deny L.H. admittance under its policy for nonresident tuition students has been determined to be a reasonable exercise of its discretionary authority.

The Commissioner is in full agreement with the Board's position that it is under no obligation, legal or otherwise, to provide final examinations and final grades to a pupil enrolled in its district for a total of 19.5 days. Had L.H. been enrolled in Hasbrouck Heights in May, grades for her sophomore year would have been issued. As driver education falls under health, she could have received credit in that course even in the absence of the driver education course. That she may have lost credit for German does not alter the above determination.

Moreover, petitioner must bear sole responsibility for the consequences of her continued refusal to enroll L.H. in the Hasbrouck Heights School District. Despite being repeatedly told that the responsibility for L.H.'s education rested with that district she steadfastly refused (as enumerated in the Board's response cited above) to enroll L.H. until June 17, 1987, the virtual end of the school year.

Petitioner chose to ignore the June 2, 1987 directive of the Commissioner to comply immediately with the compulsory attendance laws of New Jersey when denying her emergent relief request. She likewise chose to ignore the urging of the federal judge to avail herself of the educational opportunities in Hasbrouck Heights when he denied her request for injunctive relief because, inter alia, she failed to demonstrate irreparable harm because education was available to L.H. in Hasbrouck Heights. (Exhibit C, at pp. 21-23)

For the Board to deny a request to provide final examinations and final grades, given the circumstances of this matter, cannot in any light be deemed arbitrary and capricious when:

(1) L.H. was enrolled in its district for a total of 19.5 days;

(2) Its legal responsibility to her had ceased even prior to May 5, 1987 under N.J.S.A. 18A:38-1(d);

(3) Another district was by law responsible for L.H.'s education under that statute; and

(4) Petitioner deliberately and through her own fault prevented L.H. from being educated in the district responsible for her education.

Accordingly, the Commissioner hereby denies the Motion for Emergent Relief and deems all issues in this controversy dismissed.

COMMISSIONER OF EDUCATION

October 20, 1987

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3015-87
AGENCY DKT. NO. 56-4/87

THEODORE R. MURNICK,
Petitioner,
v.
ASBURY PARK BOARD OF EDUCATION, AND W. FRANK JOHNSON, DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING SERVICES,
Respondents.

Alfred L. Ferguson, Esq., for petitioner; **Gary T. Hall**, Esq., on the brief (McCarter & English, attorneys)

Peter Kalac, Esq., for respondent Asbury Park Board of Education (Kalac, Newman & Lavender, attorneys)

Nancy Kaplen Miller, Deputy Attorney General, for respondent W. Frank Johnson (W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: August 5, 1987 Decided: September 18, 1987

BEFORE **DANIEL B. MCKEOWN**, ALJ:

INTRODUCTION

Theodore R. Murnick (petitioner), a non-resident property owner and taxpayer in the City of Asbury Park, seeks to invoke the authority of the Commissioner of Education under N.J.S.A. 18A:6-9 to hear and determine a controversy between and among him, the City of Asbury Park Board of Education (Board), and the Director of the Department of Education's Bureau of Facility Planning Services, W. Frank Johnson (Department). The

controversy centers upon the determination of the Board to exercise its authority at N.J.S.A. 18A:20-4.2 to acquire through condemnation property owned by petitioner in Asbury Park for school construction the Bond Street property, and whether, towards that end, the Board secured valid prior approval from the Department as required under State Board of Education regulations at N.J.A.C. 6:22-1.2 before securing voter authorization to acquire the property at a referendum held in October 1986. Petitioner claims the Board did not secure the necessary prior approval and that, accordingly, the Board is not authorized to acquire his property. In addition, petitioner claims that any purported approval issued by the Department of Education for this site acquisition is null and void, or unauthorized for failure of the site to meet the requirements of State regulations. Petitioner demands a formal hearing into the matter as he claims is his right under N.J.A.C. 6:22-1.7.

After the Commissioner transferred the matter to the Office of Administrative Law on May 5, 1987, as a contested case, a prehearing conference was scheduled and conducted on July 1, 1987. Prior to the prehearing, petitioner filed a Notice of Motion to Amend the Petition on June 29, 1987, in order to secure a stay of Department of Education approval to the Board for another site acquisition, the Bradley Street site. At the prehearing conference, the issues in the original Petition were settled and a hearing was scheduled. Thereafter, the Board and the Department objected to petitioner's Motion to Amend the Petition and, by leave granted, moved to dismiss the Petition on the asserted failure of petitioner to have standing and for summary decision on the merits through the application of collateral estoppel. Alternatively, the Board and the Department moved to limit the triable issues should the matter proceed to plenary hearing. The Board and the Department in this latter regard contend whatever issue petitioner seeks to raise regarding the Bradley Street site is untimely under the 90-day rule at N.J.A.C. 6:24-1.2(b). The hearing originally scheduled was adjourned pending disposition of the various motions.

For the reasons which follow, I **FIND** and **CONCLUDE** that petitioner has standing before the Commissioner, that the issue sought to be raised by petitioner regarding the Bradley Street site is untimely under N.J.A.C. 6:24-1.2(b), that the Commissioner lacks subject matter jurisdiction over the Bond Street site and the application of the administrative rule thereto and that the Board and respondent Johnson are entitled to summary decision on the merits through the application of collateral estoppel.

BACKGROUND FACTS

A review of the pleadings, exhibits, and affidavits attached to letter memoranda of the parties establish the following background facts while the respective memoranda show these facts are not in dispute. The following recitation of background facts is patterned after the facts set forth in the letter memorandum of the Department.

Petitioner owns several properties in the City of Asbury Park, one of which is the former Bond Street school property. On or about July 9, 1985, the Board adopted a resolution by which it designated the Bond Street property as a site for a proposed new school building. It appears that at the same meeting, the Board also selected another site for a proposed new school building which is the Bradley Street site. Soon after, the Board sought and secured approval from the Department's Bureau of Facility Planning Services for the acquisition of the Bond Street site and the Bradley Street site. Nevertheless, the Board's referendum by which it sought authority to acquire both sites and for the construction of schools on both sites was defeated by its electorate on October 8, 1985. The referendum was, I infer, worded in the conjunctive so that unless the voters approved the acquisition of both properties, the Board would not be authorized to acquire either property.

In or about June 1986, the Board again designated the Bond Street and Bradley Street sites for acquisition for new school facilities. No formal resubmission for approval of the two sites was made by the Board to the Department's Bureau of Facility Planning Services. The referendum which followed on October 7, 1986, was presented as two separate proposals which allowed the voters to vote independently on each school site. Both proposals were approved by the Board's electorate.

Thereafter, petitioner requested on or about November 13, 1986, after the referendum was approved, an informal hearing pursuant to N.J.A.C. 6:22-1.7(a) before W. Frank Johnson, the Director of the Bureau of Facility Planning Services. Petitioner argued before Johnson that the prior approval granted the Board by the Bureau in October 1985 was no longer valid and that the Board was required to resubmit the proposed sites for new approval in 1986. Finally, petitioner argued that the Bond Street site did not comply with the requirements of N.J.A.C. 6:22-1.2.

The cited regulation, N.J.A.C. 6:22-1.2, became effective October 21, 1985. See, 17 N.J.R. 2540. The regulation provides in part as follows:

> (a) No district board of education may conduct a referendum for land acquisition . . . without prior approval of the Bureau of Facility Planning Services of the Department of Education.

N.J.A.C. 6:22-1.7 provides that the manager of the Bureau of Facility Planning Services may provide an informal fair hearing regarding Bureau actions. The rule also provides that "In the event of an adverse decision after such an informal hearing, appellants may request a formal hearing pursuant to N.J.S.A. 18A:6-9, 18A:6-24, and 18A:6-27." The formal hearings, according to the regulation, are to be governed by the provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and 52:14F-1 et seq. Finally, the regulations provide that the Bureau Manager may grant variances to the educational facility standards provided that the spirit and intent of the standards are observed.

On January 14, 1987, Johnson advised petitioner that in his view the Board was not obligated to seek new approval for the very same sites it had had approved in 1985. Johnson also addressed petitioner's remaining arguments and found those arguments insufficient to warrant a change in his determination that the Board had proper approval to seek acquisition of the Bond Street property. The decision by Johnson forms the basis for the present Petition of Appeal which was filed before the Commissioner on April 1, 1987.

Following the filing of the instant Petition, the Board filed a Verified Complaint in Condemnation in the Superior Court of New Jersey, Law Division, Monmouth County, to obtain the Bond Street site which is owned by petitioner. Petitioner was named as a defendant in that action.[1] Petitioner was ordered to show cause on June 19, 1987, why judgment should not be rendered appointing commissioners to fix compensation to be paid

[1]The State of New Jersey was also a named defendant in the condemnation proceeding filed pursuant to N.J.S.A. 20:3-8. New Jersey Court Rules, at R. 4:73-2(a), requires in condemnation proceedings that the record owner and such other persons appearing of record to have any interest in the property shall be parties to the proceeding. Whatever interest the defendant State of New Jersey, different from respondent Department of Education here, had in the subject property is not disclosed in this record.

him by the Board for his property. Petitioner filed an Answer to the Complaint and raised as affirmative defenses that the action to condemn was ultra vires and that the condemnation was arbitrary and capricious. The condemnation proceedings were stayed pursuant to N.J.S.A. 20:3-11.

On June 19, 1987, the return date for the Order to Show Cause, petitioner elected not to present witnesses. According to the transcript of the hearing held on June 19, 1987, petitioner's counsel advised the Honorable John A. Ricciardi, J.S.C., as follows:

> Your Honor, as you know, sometime early in this week we advised your Honor that on the return date of this plenary hearing we would not be presenting witnesses, rather we would be submitting a brief and making essentially what I believe to be purely legal arguments regarding preemption and the exhaustion of administrative remedies.
>
> On April 1, 1987, Mr. Murnick [petitioner here; defendant there] filed a petition with the Commissioner of Education seeking relief before an administrative law judge to declare null and void the department's approval of the Bureau of Facilities' Bond Street School site which took place in 1985 and also to declare null and void and reverse Dr. Frank Johnson's 1986 approval based upon the earlier 1985 approval, and further seeking to have the Board of Education pursuant to the regulations of the Department of Education begin the approval process for the Bond Street site or whatever site they seek to build a school upon and to comply with the regulations in that regard.
>
> That administrative proceeding is pending. There is a pre-hearing conference scheduled on July 1, 1987.
>
> This is a condemnation action, of course. However, because it involves the selection of school sites and school law issues, it became incumbent in our view upon the Board of Education to get the approval of the Bureau of Facilities for the selection of these sites before they could even think about, number one, the referendum, and, number two, the condemnation which was necessary to acquire the sites they wanted to build the schools on.
>
> All of the issues that I can see which would affect the authority, the propriety of the selection of the Bond Street site, whether all of the I's were dotted and T's were crossed and whether all the regulations were complied with are now pending before the OAL, are brief which I know Why your Honor has had an opportunity to review recites a body of law to the effect that in school law matters the Commissioner of Education is empowered by our statutes to have jurisdiction over those matters and the cases indicate that in school law matters, because the commissioner has the expertise required to determine these very fact-sensitive educational issues, that the doctrine of exhaustion of administrative remedies in primary

education should prevent a court of law from deciding those educational issues until all administrative remedies have been exhausted before the commissioner and the appellate process which follows that period.

THE COURT:. . . [Y]ou are saying this Court stops having the authority to proceed with the condemnation or allow the condemnation to proceed until the administrative remedy is exhausted?

MR. RAGNO [Petitioner's Counsel]: That's essentially it.

THE COURT: In every case, just about.

MR. RAGNO: Yes, sir.

THE COURT: All you have to do is challenge it, file a petition and that stops everything . . .

Thereafter, Board counsel presented to the court his objections to the legal arguments being raised by petitioner. Board counsel's essential thrust to the court was that pursuant to N.J.S.A. 20:3-5 it had the authority to decide the condemnation issue and all matters incidental thereto and arising therefrom. Accordingly, in the Board's view, the court had jurisdiction over the entire controversy and should not defer to the administrative agency. While the court reserved opinion on the legal arguments raised, it did hear testimony presented by the Board from W. Frank Johnson, a named respondent here, Milton G. Hughes, the Monmouth County Superintendent of Schools, and from Richard M. Kaplan, the Director of Compliance for the Department of Education. It is noted that the Division of Compliance participates in the State certification of local school district process and is particularly involved in Level III monitoring, a status signifying serious deficiencies in a school distict.

As noted earlier, petitioner filed a Notice to Amend the Petition in the instant matter on June 29, 1987. Petitioner seeks to raise an issue regarding the Bradley Street site which was not raised in the original Petition. Petitioner seeks a stay of the approval already received by the Board from the Department regarding the Bradley Street site until the Commissioner renders a determination on the Bond Street challenge.

Judge Ricciardi issued an oral decision on July 6, 1987, regarding petitioner's legal arguments earlier presented. It is noted at this juncture that the Eminent Domain Act of 1971, L. 1971, c. 361, par. 1, codified at N.J.S.A. 20:3-1 et seq., provides at N.J.S.A. 20:3-5 that the Superior Court of New Jersey "shall have jurisdiction of all matters in

condemnation, and all matters incidental thereto and arising therefrom, including, but without limiting the generality of the foregoing, jurisdiction to determine the authority to exercise the power of eminent domain . . . ." Judge Ricciardi's oral opinion, handed down on July 6, 1987, is in part as follows:

> Once a condemnation matter has been commenced, N.J.S.A. 20:3-5 provides the Court with jurisdiction "of all matters in condemnation and all matters incidental thereto."
>
> A challenge to the condemnor's authority to condemn requires a stay in the condemnation proceedings until the issue has been finally decided under N.J.S.A. 20:3-11. Going back to N.J.S.A. 20:3-5, that statute further provides specifically that the Court shall have "jurisdiction to determine the authority to exercise the power of eminent domain."
>
> At the hearing on June 19, 1987 before this Court, it was incumbent upon the defendant to present its case challenging the presumptive authority of the board to condemn. The burden rests with the objector to go forward with evidence in support of its challenge to the exercise of condemning the power of the board, under 18A:20-4 [citation omitted].
>
> The defendant failed to produce any evidence at all at the hearing in support of its position and thus there was a failure of proof requiring the finding that the objection should be, and is, dismissed. The board may proceed with condemnation action.
>
> In addition, it was the Board who produced witnesses at the hearing. Assuming that the Board had the burden of proof at the hearing, this Court finds that the burden has been sustained.
>
> The main thrust of the defendant's objection is that the Board failed to obtain approval from the Bureau of Facility Planning Services of the State Board of Education prior to October of 1986, in violation of the State Board of Education rules and regulations, specifically N.J.A.C. 6:22-1.2.
>
> Dr. Johnson, manager of the Bureau, testified that his office thoroughly reviewed the plans and the site in October of 1985, prior to the enactment of the regulations, after those plans had been submitted by the Board of Education in Asbury Park and this site was approved.
>
> The defeat of the referendum in October of 1985 did not affect the approval of the site, notwithstanding the implementation of Regulation 6:22-1.2 in the interim. The approval, he stated, was still valid since there were, in fact, no changes in the plans by the Board.
>
> Dr. Johnson testified that, notwithstanding this, the Board did ask whether the plans should be resubmitted and he, in the exercise of his

authority to pass upon such plans, followed the long standing policy, in 20 years of the Bureau, in advising the Board that resubmission was not necessary, since the plans were the same. It was his testimony that, as of this date, Asbury Park, and this date meaning the date of the hearing, Asbury Park had site approval from his office.

The decision of Dr. Johnson was challenged by the defendant at an informal hearing. His position was rejected. The position of the defendant was rejected by Dr. Johnson, see P-2 in evidence, the letter from Dr. Johnson.

Dr. Johnson stated that he personally went to the site, approved it for size and it is still an approved site as of this date.

The other witnesses testified as to the very pressing need to provide additional facilities for the children of the City of Asbury Park and the severity of the problem. I am impressed with the necessity of this matter and that this matter proceed without further delay. The need is clearly acute. The testimony at the hearing convinces me beyond any doubt that the problem in Asbury Park is severe; that the board did all that was required of it to proceed with haste in resolving the problems by moving to acquire the Bond Street site that the Bureau has given its approval, as required, and; that that approval is still valid; that the objections to the procedure, in my opinion, are specious and without merit; that the authority to condemn by the Board is without question; . . . . Therefore, the objection is dismissed and the condemnation matter may proceed.

Judge Ricciardi thereafter specifically addressed petitioner's argument that the court was without jurisdiction to proceed because of the pending Petition before the Commissioner. Judge Ricciardi ruled regarding this issue in the following manner:

[Defendant Murnick argues that the commissioner's authority under N.J.S.A. 18A:6-9] includes challenges to the authority of a Board of Education to condemn, notwithstanding the specific language of N.J.S.A. 20:3-5 giving the jurisdiction to the Courts.

That statute, 20:3-5, does not accept from the Court's jurisdiction the power to determine the authority to exercise eminent domain in matters involving Boards of Education. The language is specific, it is clear and it is not subject to any other interpretation except that the Courts, not anyone else, has the jurisdiction to hear this kind of a challenge.

On the other hand, the jurisdiction of the Commissioner, in my opinion, is questionable as to the issues involved here. It is not every conceivable matter in which a Board of Education is involved that mandates action by the Commissioner with the only criteria for invoking his powers that there is a dispute or a controversy that exists. It is only where school laws are in question. I do not perceive such a situation to exist here.

The ambiguous nature of the Commissioner's jurisdiction in this matter in the matter involved here, coupled with the clear jurisdictional authority in the Court leads me to conclude that the legislative purpose was to vest the full authority in the Court to decide the full issue that is before us here, to wit: the authority to condemn. .

Additionally, the "preference for exhaustion of administrative remedies is one of convenience not of indispensible precondition." See, Abbott v. Burke, 100 N.J. 269, p.297 (1985). . . .

Here the issues are clearly not fact sensitive and do not relate primarily to areas needing specialized educational expertise. The pressing need to expedite this litigation and allow the board to get on with its business providing a thorough and efficient education for the children of Asbury Park compels the Court to proceed with the matter.

There is clearly an overriding public interest calling for a prompt judicial decision. According to the witnesses who testified at the hearing, the situation in Asbury Park is severe.

Mr. Hughes, Monmouth County Superintendent of Schools, found the facility previously existing to be totally unacceptable. He stated that the problem was severe. He found the Bond Street site to be the most able to meet the needs.

Double school sessions are now in effect because of the lack of facilities. Asbury Park is a level number three and are now being monitored by the New Jersey Department of Education, Division of Compliance. Asbury Park has filed a corrective action plan. If they don't comply with that plan because of any reason, including the delay in the litigation, the clear impression that this Court has from the testimony is that the State can come in and take over control of the entire district. All this so that the children can be properly educated.

There can be no more overriding public interest calling for prompt judicial review than this scenario.

It is clear to me that the defendant's substantive arguments challenging the authority of the Board to condemn are void of merit. . .

Accordingly, for all the reasons expressed herein, the Court finds that the Board has the authority to condemn and the matter will proceed forthwith to condemnation. . . .

Petitioner has appealed Judge Ricciardi's decision. This concludes a recitation of background facts which also form the relevant facts necessary for disposition of the various motions.

ARGUMENTS OF THE PARTIES REGARDING THE VARIOUS MOTIONS

I

STANDING OF PETITIONER IN THIS ADMINISTRATIVE FORUM

The Board argues alone that petitioner, as a nonresident taxpayer, does not have standing to invoke the Commissioner's authority to hear and determine the instant dispute. The Department, it is noted, takes no position on the issue of standing. The Board, in arguing against petitioner's standing, cites three cases decided by the Commissioner wherein standing, as an interested person, was denied resident taxpayers in Goore v. Board of Education of the City of East Orange, 1977 S.L.D. 622, where the taxpayer attempted to challenge the qualifications of Board employees and two other cases, unpublished by the Department of Education, wherein standing was to have been denied resident taxpayers in challenges to staff appointments and to budget reductions. Consequently, the Board argues that if resident taxpayers are denied standing to challenge matters such as the qualifications of Board employees, staff appointments, or budget reductions, should a nonresident taxpayer have standing to challenge the discretionary action of a Board at N.J.S.A. 18A:20-4.2 to acquire property through condemnation for purposes of a school construction.

Petitioner, while noting the Department itself does not challenge his standing in the matter, claims standing on several grounds. One, petitioner notes that he owns property in Asbury Park which the Board seeks to acquire for purposes of school construction. Two, petitioner owns property adjacent to the proposed school and that property would be directly affected, he claims, if a school were to be constructed. Third, as a taxpayer in the City of Asbury Park, petitioner claims standing to challenge any asserted violation of law by pubic bodies, including the Board of Education. Four, the Department of Education's own rules governing controversies and disputes requires only that a petitioner in controversy or dispute who seeks to invoke the authority of the Commissioner be an interested person. N.J.A.C. 6:24-2.1. Petitioner further notes that an interested person is defined as one who will be substantially, specifically and directly affected by the outcome of a controversy before the commissioner. N.J.A.C. 6:24-1.1. Finally, petitioner relies upon N.J.E.A. v. Essex Cty. Ed. Services Comm., 5 N.J.A.R. 29, 36 (1981) which holds that principles of standing should be applied with great flexibility in the field of administrative law, in order to make it easier rather than more difficult for a matter of public interest to come before a responsible public official in a way which requires him or

her to act as quickly as the need for reflective determination allows. 5 N.J.A.R. at 37. Petitioner also notes that judicial principles governing standing in our courts are liberally applied and cites Silverman v. Board of Ed. Tp. of Millburn, 134 N.J. Super. 253 (Law Div. 1975), aff'd 136 N.J. Super. 435 (App. Div. 1975) regarding the standing of a bond holder to challenge the Board's action in closing a school and leasing it to the Department of Education and other cases which need not be recited here. Finally, petitioner claims that the administrative decisions cited by the Board are fully distinguishable from the instant matter.

II

MOTION TO AMEND THE PETITION

The Board and the Department contend that petitioner seeks to amend the Petition to include a claim that in essence challenges the Board's decision to select in June 1986 the Bradley Street site. They rely upon N.J.A.C. 6:24-1.2 which provides that any petition filed before the Commissioner ". . . must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested." The Board and the Department note that subsequent to the reaffirmation of the Bradley Street site during June 1986, a public referendum was approved by the voters on October 6, 1986. In their view, the effort of petitioner to tack on an issue regarding the Bradley Street site to the initial Petition of Appeal seeks to create an issue which is significantly out of time. Accordingly, the Board and the Department request that the Motion to Amend the Petition be denied.

Petitioner claims that the issue regarding the Bradley Street site would, if allowed, present factual allegations regarding relevent events which have occurred subsequent to the filing of the initial Petition and a stay of the implementation of the proposed Bradley school would provide an appropriate remedy for the requested invalidation of the Bond Street school site approval. Petitioner contends that given the circumstances of the total matter, the 90-day rule should not be applied in this circumstance because the initial Petition pleaded that neither the Bond Street nor Bradley Street site received proper approval from the Department. That being so, and in light of N.J.A.C. 1:1-6.2(a) which allows for amendments to pleadings in the interest of efficiency, expediency and over technical pleading requirements, his motion to amend the Petition must be granted.

III

COLLATERAL ESTOPPEL AND SUBJECT MATTER JURISDICTION

The Board and the Department contend that Judge Ricciardi's decision in the condemnation proceeding is dispositive of the issues attempted to be put in controversy before the Commissioner by petitioner. Accordingly, they contend that the petitioner is collaterally estopped from relitigating the very same issues in this administrative forum upon which Judge Ricciardi has already entered judgment. Essentially, the Board and the Department contend that petitioner challenged before Judge Ricciardi his assertion that the Board did not have the necessary approval from the Department to use the Bond Street site for school construction. They point to Judge Ricciardi's decision wherein he found and concluded that "'The testimony at the hearing convinces me . . . that the board did all that was required of it to proceed with haste in resolving the problems by moving to acquire the Bond Street site that the Bureau has given its approval, as required and; that that approval is still valid. . .'"

Noting that the parties in the Superior Court proceeding were the Board as plaintiff, and petitioner as well as the State as defendants while the parties here are petitioner and the Board and Johnson as respondents, the Department explains that complete identity of the parties is not necessary for collateral estoppel to apply and cites State v. Gonzales, 75 N.J. 181, 188-189 (1977).

Petitioner argues that the proceeding in condemnation does not impair his right to a full plenary hearing in this administrative forum for several reasons. One, petitioner contends because he has appealed Judge Ricciardi's decision that that decision is not a final decision and, as such, cannot be given collateral estoppel effect. Petitioner reminds this forum that collateral estoppel, as a judicial procedural doctrine, cannot be transported in toto into this administrative arena and cites in this regard Hackensack v. Winner, 82 N.J. 1 (1980) and Forgash v. Lower Camden County School, 208 N.J. Super. 461 (App. Div. 1985). In large measure, petitioner's argument against the application of collateral estoppel here is that Judge Ricciardi committed reversible error in deciding his allegations that the administrative rule at N.J.A.C. 6:22-1.2 was violated by Johnson over which issue the Commissioner alone has primary jurisdiction. In support of his argument that the Commissioner's jurisdiction over the issue of the administrative rule is primary, petitioner cites Hinfi v. Matawan Regional Board of Education, 77 N.J. 514 (1978) and Board of Ed., Plainfield v. Cooperman, 105 N.J. 587 (1987).

IV

LIMITATION OF ISSUES SHOULD SUMMARY DECISION BE DENIED AND IF PETITIONER HAS STANDING

The Board claims that if the matter proceeds to hearing, the sole issue to be adjudicated is whether proper approval was granted it by the Department of Education in order to proceed to a referendum. The Board is opposed to any effort by petitioner to create an issue regarding alternative sites which the Board may have selected within the City of Asbury Park and relies on the well-established principle that the Commissioner will not substitute his judgment for that of a local board.

Petitioner to the contrary contends he should not be unduly restricted at the time of hearing with respect to the issues because he must be granted the opportunity to demonstrate that the Bond Street site simply does not meet minimum requirements of the administrative rule at N.J.A.C. 6:22-1.2. Noting that the regulation took effect after the Bond Street site received its initial approval, petitioner contends that there have been material changed circumstances including a downward reversal in enrollment trends, new development trends within Asbury Park and changing demographics all of which directly impact upon future school facility needs. Accordingly, petitioner strenuously argues that he must presently be given the opportunity to establish the truth of those contentions in this record in order to show that there are other alternative sites within Asbury Park other than the Bond Street site which is more appropriate for school construction. Petitioner contends that he is not attempting to pursuade the Commissioner to substitute his judgment for that of the Board; rather, as in Board of Education of City of South Amboy v. Bureau of Facility Planning, 1977 S.L.D. 777, he seeks to demonstrate the inadequate size of the proposed site and the existence of preferable alternative sites. Accordingly, petitioner pleads not to have the issues be limited at the hearing to which he claims entitlement.

DISCUSSION AND CONCLUSIONS

I

STANDING

The facts in this case establish, I **FIND** and **CONCLUDE**, sufficient interests of petitioner in the controverted property to provide him with standing before the Commissioner of Education. Under Department of Education rules governing controversies and disputes, "interested person" is defined at N.J.A.C. 6:24-1.1 as ". . . a person(s) who will be substantially, specifically and directly affected by the outcome of a controversy before the commissioner." Clearly, petitioner will be substantially, specifically, and directly affected by the outcome of the controversy he presents to the Commissioner. Accordingly, I **FIND** and **CONCLUDE** that petitioner has standing to bring the Petition of Appeal before the Commissioner of Education.

II

COLLATERAL ESTOPPEL AND SUBJECT MATTER JURISDICTION

The present Petition of Appeal has its genesis in the earlier asserted failure of the Board to have acquired approval from the Department's Bureau of Facility Planning Services to acquire the Bond Street site as required by N.J.A.C. 6:22-1.2 prior to the time of the successful October 1986 referendum. The Board and the Department contend, to the contrary, that the 1985 approval the Board had received had continuing validity into the 1986 year for purposes of the successful referendum held during October 1986. Petitioner seeks in this case to offer proofs to demonstrate that new 1986 approval was necessary for the Board to have sought authorization to acquire the Bond Street site and that that approval under the cited regulation could not have been validly granted by the Department for failure of the site to meet minimum requirements of the regulation. When the Board, having received authorization from its electorate to acquire the Bond Street and Bradley Street sites, it exercised its authority at N.J.S.A. 18A:20-4.2 to "Purchase, take and condemn" at least the Bond Street site. It did so under the requirements of N.J.S.A. 20:3-8 by filing a verified complaint in the Superior Court of New Jersey, Law Division, in Monmouth County.

In matters of Eminent Domain, the Legislature at N.J.S.A. 20:3-5 vests the Superior Court of New Jersey with:

> . . . jurisdiction of all matters in condemnation, and all matters incidental thereto and arising therefrom, including, but without limiting the generality of the foregoing, jurisdiction to determine the authority to exercise the power of eminent domain. . .

Once the matter proceeded to Superior Court, the statute is clear that that court has subject matter jurisdiction regarding the exercise of a local board of education's authority to "Purchase, take and condemn lands." N.J.S.A. 18A:20-4.2. That subject matter jurisdiction vested in Superior Court over matters in condemnation extends to incidental subject matter jurisdiction by virtue of the legislative expression recited at N.J.S.A. 20:3-5.

Clearly, the Court exercised its jurisdiction over the condemnation proceeding and granted petitioner the opportunity to present evidence regarding "all matters incidental" to the condemnation proceeding. Petitioner, according to the evidence in this record, elected not to present such evidence in the judicial forum; rather, petitioner persisted before the Court to assert the claim that the Commissioner had primary jurisdiction over the application of the State Board Rule at N.J.A.C. 6:22-1.2. Clearly, the court disagreed with that assertion and entered findings on the issues petitioner argued to the court and presently seeks to raise here. In this regard, Judge Ricciardi ruled that the testimony he heard convinced him ". . . beyond any doubt that the problem in Asbury Park is severe; that the board did all that was required of it to proceed with haste in resolving the problems by moving to acquire the Bond Street site that the Bureau has given its approval, as required and; that that approval is still valid; that the objections to the procedure, in my opinion, are specious and without merit. . ."

Petitioner seeks to persuade this forum that Judge Ricciardi should have abstained from ruling on the issue of whether the Board needed or had required approval and remand those issues to the Commissioner. The plain fact of the matter is that Judge Ricciardi was not persuaded by petitioner's argument before him and proceeded to exercise the jurisdiction vested in him. Neither this forum nor the Commissioner of Education, both of whom are in the executive branch of government, are in any manner authorized to assert subject matter jurisdiction regarding a dispute when that very same dispute was decided within the jurisdiction of our State judiciary. Nor does a State administrative agency

have authority to review in an appellate or collateral manner a decision of the judicial branch of government.

Accordingly, I **CONCLUDE** that in this instance the Commissioner of Education does not have subject matter jurisdiction in light of the exercise of subject matter jurisdiction over the very same dispute by the Superior Court of New Jersey. Accordingly, for this reason the Petition of Appeal is dismissed. But even if the Commissioner of Education had subject matter jurisdiction over the present dispute, summary decision on the merits must be entered on behalf of the Board and the Department through application of the doctrine of collateral estoppel. The doctrine of collateral estoppel generally acts as a bar to relitigating an issue which has already been tried between the same parties. Generally, in New Jersey the doctrine precludes relitigation only of questions distinctly put in issue and directly determined adversely to the party against which the estoppel is asserted. Eatough v. Bd. of Medical Examiners, 191 N.J. Super. 166, 175 (App. Div. 1983). It is recognized that in the condemnation proceeding the parties were somewhat different, though not substantially, from the parties in this Petition of Appeal. As noted by the Department, State v. Gonzalez, supra, more than adequately disposes of that seeming bar to apply the doctrine here. While Gonzalez is a criminal case, Justice Pashman had the opportunity to review the history of collateral estoppel in a civil context and he specifically addressed the traditional insistence upon mutuality of estoppel prior to the application of the doctrine. Justice Pashman, in noting that the modern trend is away from the mutuality requirement, noted as follows:

> This Court has recently adopted the modern view in United Rental Equipment Co. v. Aetna Life & Cas. Ins. Co., 74 N.J. 92, 101 (1977). We quoted from the tentative formulation by the American Law Institute restatement, Judjments 2d ¶, which is set forth at length at footnote 5 below [footnote 5 omitted here]. We had earlier foreshadowed that approach in McAndrew v. Mularchek, 38 N.J. 156, 161 (1962), saying:
>
> > Generally, the question to be decided is whether a party has had his day in court on an issue, rather than whether he has had his day in court on that issue against a particular litigant . . .

In this case, petitioner has had his opportunity for his day in court before Judge Ricciardi. Petitioner elected not to take advantage of the opportunity he had had. Judge Ricciardi exercised his jurisdiction to decide the issues of approval under N.J.A.C. 6:22-1.2. The very same issues Judge Ricciardi ruled upon, petitioner seeks to reopen here.

The doctrine of collateral estoppel is applicable to administrative proceedings, though not in a mechanical fashion as noted by petitioner citing City of Hackensack v. Winner, 82 N.J. 1, 31 (1980). Nevertheless, given the circumstances of this case wherein Judge Ricciardi has already entered findings that the public interest of the pupils of Asbury Park is being seriously impaired by the delay of the Board in providing suitable school facilities, that the Board had all necessary and required approval to proceed to referendum, it is time to put to rest the factual dispute regarding an administrative rule that petitioner seeks to litigate here. Repose and finality are desirable goals in an administrative arena. Petitioner's assertion that because he appealed Judge Ricciardi's decision that that decision is not a final decision and, accordingly, cannot be given collateral estoppel effect, I **CONCLUDE** is without merit. One must remember that Judge Ricciardi's decision is the law of the case until and if it is reversed on appeal by a higher judicial court. Insofar as this administrative forum is concerned, Judge Ricciardi's judgment is final for purposes of collateral estoppel in this administrative proceeding. If of course the Appellate Division reverses on the grounds that Judge Ricciardi should have deferred jurisdiction on the issue of approval to the Commissioner of Education, then and only then would that issue be heard in the administrative arena and by virtue of judicial action would the jurisdiction over the subject matter be vested in the Commissioner.

For all the foregoing reasons, I **FIND** and **CONCLUDE** petitioner is barred through collateral estoppel from seeking to relitigate the very same issues before the Commissioner which have already been decided by the Superior Court of New Jersey. Accordingly, summary decision is entered on behalf of the Board and the Department on the issue of the application of N.J.A.C. 6:22-1.2 and the issue of approval prior to the time of the referendum.

III

TIMELINESS OF THE MOTION TO AMEND PETITIONER

N.J.A.C. 6:24-1.2 provides at par. (b) that petitions of appeal to the Commissioner must be filed ". . . no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing."

In this case, petitioner challenges the validity of the successful board referendum held during October 1986 regarding authorization to acquire the Bradley Street site. He seeks to stay authorization the board received from the voters.

Had petitioner desired to challenge the propriety of the Bradley Street site, the Petition had to have been filed within 90 days from that date in June 1986 when the Board redesignated the Bradley Street site, along with the Bond Street site, as properties it intended to acquire for school facility purposes. If the 90 days did not run from June 1986, the date which triggered the running of the 90 days surely had to have been October 7, 1986 when the electorate of Asbury Park voted on the referendum. Petitioner seeks to amend the Petition to include the Bradley Street site by an amendment filed June 29, 1987 in an effort to relate back to the date of April 1, 1987 when the Petition was initially filed.

In my view, the Bradley Street site is entirely different from the Bond Street site and there is nothing in the initial Petition of Appeal which would manifest an intention by petitioner at that time to include the Bradley Street site as a site in contention.

The Commissioner has repeatedly applied the 90-day rule strictly. Riley v. Hunterdon Central High School Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980). There are no circumstances presented here which would establish a basis upon which the 90-day rule should be relaxed. Accordingly, the Motion to Amend the Petition of Appeal is **DENIED** for failure to have filed the cause of action stated within the amended Petition in a timely manner contrary to the provisions of N.J.A.C. 6:24-1.2.

In summary, I **FIND** and **CONCLUDE** on the evidence in this record that petitioner has standing to bring the action; the Motion to Amend the Petition is untimely; the Commissioner of Education lacks subject matter jurisdiction over the Petition; and, the Board and respondent Johnson are entitled to summary decision on the merits. There is no need in light of the foregoing conclusions to decide the issue of limitation of issues.

Accordingly, the Petition of Appeal is **DISMISSED WITH PREJUDICE.**

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

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

September 18, 1987
DATE

Daniel B. McKeown
DANIEL B. MCKEOWN, ALJ

OCT 18 1987.

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 23 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

lt

THEODORE R. MURNICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, AND W. FRANK JOHNSON, DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING SERVICES,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions and replies thereto were timely filed by the parties as prescribed by N.J.A.C. 1:1-18.4. Petitioner's lengthy exceptions object to three areas of the initial decision, including those portions of the statement of background facts set forth in the initial decision and the ALJ's omission of any reference to the exhibits submitted by the parties; the ALJ's conclusions of law, except for his finding that petitioner has standing to pursue his claims in this forum; and also to the proposed disposition of the matter as rendered by the ALJ, dismissal with prejudice.

More specifically, petitioner avers he was denied an opportunity to present evidence demonstrating that approval of a site at the Bond Street location, "which is slightly more than half the size of the minimum requirements, would be detrimental both to the students and to the entire community." (Petitioner's Exceptions, at p. 3) He sets forth in his exceptions ten proffers of evidence in support of his contention that the Bond Street site is inadequate for the needs of the student and community populations and further avers said site was approved in a manner which denies him a formal administrative proceeding wherein such concerns might be fully aired. Petitioner further contends that, contrary to the ALJ's conclusions, "there is no legal principle which bars further administrative proceedings in this matter because of the adverse decision in the separate condemnation case.***" (Id., at p. 6) Petitioner claims:

> Instead, the cases establish that the Commissioner has the continuing and unimpaired authority fully to exercise jurisdiction over the present controversy arising under the school laws. *** Finally, this exercise need not result in significant delays, since this matter can be remanded to the Office of Administrative Law for

> the expeditious completion of discovery and a prompt final hearing on the merits of petitioner's claims. (Id., at pp. 6-7)

Exceptions as to Factual Matters

Petitioner contends that the ALJ's statement of background facts, while purportedly based on the pleadings, exhibits and affidavits submitted by the parties, did not include a listing of those exhibits upon which his background fact findings were based. "***[A] fair representation of the record should include a complete list of the documentary exhibits which were submitted without objection by the parties and which were considered by Judge McKeown." (Id., at p. 7) Petitioner annexed to his exceptions a proposed exhibit list, which the Commissioner notes. He also notes the ten specific proffers of evidence mentioned above.

As to the specific factual exceptions petitioner makes to the initial decision, the Commissioner recites them verbatim, below:

1. Judge McKeown has mischaracterized the nature of the present controversy (at pp. 1-2). This controversy solely involves a challenge to the actions of the Bureau in approving the Bond Street site as a school site. The challenged actions were taken by the Bureau long before the Board decided to initiate condemnation proceedings. This controversy does not "center upon" the Board's determination to exercise its condemnation power under N.J.S.A. 18A:20-4.2; petitioner has not asserted any claims under that statute.

2. The reference to the school site approval by the Bureau in 1985 (at p. 3, para. 2) ignores the fact that at the time of that approval there were no regulations in effect to govern the approval process, since the prior regulations had expired as of July 1, 1984. See 17 N.J.R. 650. The Initial Decision does note (at p. 4, para. 1) that the present regulations became effective on October 21, 1985. However, this was after the 1985 Bureau approval and rejection of the referendum by the voters. No formal submission as required by the regulations subsequently was made.

3. Although paragraph (a) of N.J.A.C. 6:22-1.2 is quoted in part (at p. 4, para. 1), there is no reference to paragraph (b). The latter paragraph is far more important,

since it contains the detailed procedural and substantive requirements governing the school site approval process which were not followed in this case. This regulation must be considered in full in order to understand petitioner's claims.

4. We object to the unsubstantiated statement at (p. 4 para. 2) that "the regulations provide that the Bureau Manager may grant variances to the educational facility standards provided that the spirit and intent of the standards are observed." Although no specific regulation was cited, the quoted statement was apparently based upon N.J.A.C. [6:]22-1.7(b). Assuming that to be the case, we object to the characterization of that regulation, since it only applies to "variances to the educational facility standards of the Department of Education (N.J.A.C. 6:22-2.4) and the State Uniform Construction Code (N.J.A.C. 5:23-1.1 et seq.)." This listing of the specific regulations for which variances could be granted is unambiguous, and it does not include variances from school site standards, which are contained in N.J.A.C. 6:22-1.2. Thus, the authority of the Bureau to grant variances from the school site requirements is a significant disputed legal issue; it is not an established fact.

5. The discussion of the decision rendered in the informal hearing process omits any reference to the supplemental decision set forth in the Bureau's letter of February 18, 1987. See Newman Certification, Exhibit C.

6. The lengthy quotation concerning the legal position of petitioner's counsel in the condemnation action (at pp. 5-6) is incomplete and potentially misleading. There are two significant omissions. First, although not clearly indicated by the quotation, it omits two intervening statements. See T6-5 to 15. Second, the quotation omits the response of petitioner's counsel to the final quoted statement of the court. See T7-1 to 12. Therefore, we request that you review the pertinent pages of the actual transcript (Newman Certification, Exhibit D) in order to obtain an accurate understanding of petitioner's position.

7. The testimony of respondent Johnson is mentioned in the Initial Decision (at p. 6, para. 1), but no mention is made of his testimony relevant to the substantive issues in the present proceeding. The portion of the transcript of the court proceeding covering Johnson's testimony is included in the abbreviated version of Exhibit D to the Newman Certification and we respectfully request that this testimony be reviewed. Several aspects of Johnson's testimony are noteworthy. First, he readily acknowledged that the Bond Street site is significantly smaller than the minimum size required by the regulations. See T42-10 to 44-3. Second, Johnson's testimony indicates that site size variances would be more readily granted for urban districts than for suburban districts, notwithstanding the fact the minimum site size standards already account for the distinction between urban and suburban areas by imposing smaller minimum site size requirements for areas with higher population densities. See T40-12 to 41-14; T46-9 to 23; see also N.J.A.C. 6:22-1.2(b)(4). The testimony of the Bureau Manager provides direct evidence that petitioner's claims involve significant public education issues which must be fully addressed.

8. The Initial Decision (at p. 8, para. 1) mischaracterizes petitioner's argument as being a contention that the condemnation court was without jurisdiction. Petitioner's position should be accurately characterized as an argument that the court was required by the doctrine of primary jurisdiction to defer to the concurrent jurisdiction of the Commissioner over the site approval issue.

9. The summary statement of petitioner's position on the issues of collateral estoppel and subject matter jurisdiction (at p. 12) is incomplete and inaccurate, since it fails to acknowledge petitioner's argument that the Commissioner has the independent authority and obligation to assess his jurisdiction over this school law controversy, notwithstanding the contrary decision in the separate condemnation action.

> 10. The summary statement of petitioner's position on the issue of the limitation of issues (at p. 13) omits any mention of petitioner's argument that the issue of alternative sites must be considered since approval was given for a site which is admittedly significantly smaller than the minimum site size required by the regulations.
> (emphasis in text)(Exceptions, at pp. 8-10)

Exceptions as to Legal Conclusions

Petitioner submits a copy of his brief in opposition to respondents' motions to dismiss and/or limit the issue in excepting to all of the ALJ's legal conclusions except that concerning standing. Said brief is incorporated herein by reference. More specifically, however, petitioner cites the absence in the initial decision of "any legal authority for the proposition (at p. 15, para. 4) that the decision in the condemnation action automatically deprived the Commissioner of any authority to assert jurisdiction over the present school law controversy.***" (Exceptions, at pp. 10-11) Petitioner claims the matter before the Commissioner is not one involving jurisdiction, but rather involves the doctrines of res judicata and collateral estoppel. Citing City of Hackensack v. Winner et al., 82 N.J. 1 (1980) and Forgash v. Lower Camden County Regional, 208 N.J. Super. 461 (App. Div. 1985), petitioner contends the above doctrines "cannot be applied mechanically to administrative appeals***." (Exceptions, at p. 11) He cites to his brief at pages 24-28 for further explication of his position in this regard and adds that "the assertion of the Commissioner's jurisdiction over the present school law controversy would not result in any irreconcilable conflict with the decision in the separate condemnation proceeding." (Id.) He takes the position that:

> Although the trial court's determination that the Board of Education is authorized under the condemnation laws to proceed with the condemnation cannot be reversed by the Commissioner, that fact does not negate the Commissioner's independent jurisdiction to enforce the school laws and decide controversies arising thereunder, even if the exercise of that jurisdiction might require the Board of Education to resubmit or modify its request for school site approval. Although that result necessarily would require the Board to withdraw or hold in abeyance its condemnation action, it would not represent an infringement upon the condemnation court's jurisdiction.***
> (Id.)

Petitioner again cites Hackensack, supra, for this proposition. Petitioner argues that the decision as to whether the Commissioner of Education should assert jurisdiction "must be based upon due

consideration of the importance and public interest character of the claims asserted by petitioner, rather than upon petitioner's individual interests." Petitioner posits that viewed from this perspective, "*** the Commissioner must conclude that the petition involves significant claims which can and should promptly and fully be adjudicated in an administrative forum under his jurisdiction." (Id., at p. 12)

Petitioner submits that the initial decision should be rejected, and a new decision entered denying respondents' motions to dismiss and/or limit the issues. Petitioner further prays for the expeditious completion of discovery and the scheduling of a prompt hearing on the merits of petitioner's claims.

Respondent State of New Jersey (State), in its reply exceptions, relies primarily on the letter memorandum it filed with the Office of Administrative Law but, in addition, addresses several of petitioner's exceptions specifically, as follows.

Initially, the State notes that reply exceptions do not address the preliminary statement contained in the exceptions in which petitioner presents evidence that he would allegedly proffer at hearing. The State avers that such evidence "is clearly immaterial to the legal issue to be presently determined and its inclusion in the Exceptions is inappropriate. Moreover, the factual exceptions presented by the Petitioner are also irrelevant to the legal issue to be decided." (State's Reply Exceptions, at p. 1, in footnote)

The State would affirm the ALJ's decision. "If, as Petitioner's Brief in Opposition to Respondents' Motion to Dismiss suggests, see Brief at 28-37, Petitioner is requesting that this forum review Judge Ricciardi's decision regarding primary jurisdiction and exhaustion, clearly this forum is without jurisdiction." (State's Reply Exceptions, at p. 2) The State contends that the only recourse for disagreement with Judge Ricciardi's decision is with the Appellate Division. Moreover, the State argues that the ALJ also correctly concluded that petitioner is barred from litigating the matter in this administrative forum by the doctrines of res judicata and collateral estoppel. Averring that the fundamental issue in the case pending herein is "the necessity of reapproval of the Bond Street site by the Bureau prior to holding a second referendum on the site" (Reply Exceptions, at p. 3), the State claims that question was decided by Judge Ricciardi. The State cites to the transcript of Judge Ricciardi's decision at page 6 for this proposition. Said transcript, which has been provided, in toto, by the Board as part of its reply exceptions, is incorporated herein by reference.

Moreover, the State avers that, even assuming arguendo that petitioner is not estopped from resubmission of the matter for exhaustion of the administrative remedy, the petition must be dismissed for untimeliness pursuant to N.J.A.C. 6:24-1.2(b). The

State seeks to persuade the Commissioner that any challenge to the Bureau's approval should have been raised in 1985, when the approval was granted. The State further contends:

> Petitioner also never raised a timely challenge to the Board's reselection of the site in June, 1986. At some point litigation must be foreclosed and potential defendants must be granted repose. Since no resubmission was required and no timely challenge to the 1985 Bureau approval or the 1986 Board reselection was made, the respondents in the instant case should be granted that repose.
>
> (State's Reply Exceptions, at p. 3)

Further, the State submits that the cases relied upon by petitioner to support the contention that the Commissioner is not bound by a Superior Court judge's decision are inapposite. The State argues that neither Hackensack, supra, nor Forgash, supra, addresses the issue in this case as to "whether a judicial decision has preclusive effect in a subsequent administrative proceeding. Both cases instead deal with the preclusive effect of decisions rendered by administrative agencies. *** The decision rendered by Judge Ricciardi, however, was a judicial decision. These cases, therefore, have no applicability." (State's Reply Exceptions, at p. 4) The State argues that the resolution of the issue by Judge Ricciardi is binding on the Department of Education "unless and until it is reversed by an appellate court." (Id., at p. 5)

In conclusion, the State submits that the initial decision should be adopted and further requests that the Commissioner address the matter as expeditiously as possible.

Respondent Asbury Park Board (Board) also filed timely reply exceptions. A summary of its replies follows, in pertinent part.

The Board suggests that the voters of Asbury Park, by duly held election, approved the construction of a school at a particular site, the Bond Street site. "To grant the ultimate relief the petitioner here seeks, the Commissioner of Education must, in the final analysis, set aside the election of October 6, 1986 which approved the site acquisition and the school construction. It is respectfully submitted there is no basis for such action." (Board's Reply Exceptions, at p. 2)

In reply to petitioner's Preliminary Statement wherein he avers that the Bond Street school site is undersized, the Board replies that "perhaps the Commissioner of Education should take public notice of those schools in the State of New Jersey wherein the facility is constructed on a less than 'standard' sized site." (Id.)

In reference to petitioner's exceptions as to factual matters beginning on page 7 of the exceptions, the Board objects to "an abbreviated submission of an exhibit." (Board's Reply Exceptions, at p. 3) Concerned that Exhibit D to the Newman Certification, which includes the transcript of the proceeding in the condemnation action heard by Judge Ricciardi, was cited by petitioner in his exceptions by including only two portions of the transcript, the Board attached to its reply exceptions the entire transcript of the hearing in Superior Court, less there result an "out-of-context reference." (Id.) Said transcript is incorporated herein by reference in toto.

Further, the Board challenges petitioner's contention that the Bureau of Facility Planning Services cannot approve a variance for a proposed school site in the event the proposed site does not meet the requirements of N.J.A.C. 6:22-1.2. It submits that the law is clear that "Boards of education must provide a thorough and efficient system of schools. Among the elements of what constitutes a thorough and efficient system of schools is 'adequately equipped, sanitary and secure physical facilities...' N.J.S.A. 18A:7A-5f." (Board's Reply Exceptions, at p. 3) The Board contends that these types of facilities are not now being provided the students of Asbury Park and cites the County Superintendent's testimony from the transcript of the condemnation hearing in Superior Court for this proposition. The Board contends, "The building program, which this litigation continues to delay, will ultimately provide the facilities to meet the above cited statutory requirement." (Id.)

The Board further avers, "To suggest that the statutory and constitutional mandate of providing a thorough and efficient educational system can be frustrated because an exception to an administrative rule or regulation cannot be made, is to stand logic on its head." (Id., at pp. 3-4) It cites Upper Freehold Regional, 86 N.J. 265 (1981) in support of this argument, suggesting that the Supreme Court in that case "dispensed with statutory voter approval for a capital project when the issue of providing adequately equipped, sanitary and secure physical facilities for students was at stake." (Id., at p. 4)

Regarding petitioner's legal exceptions to the initial decision, the Board concurs with the ALJ's findings and conclusions thereto and refers to its post-hearing brief in regard to its arguments concerning petitioner's legal exceptions.

Finally, the Board requests that the Commissioner expedite the filing of his decision and would ask for affirmance of the initial decision.

Initially, the Commissioner will address the preliminary statement advanced by petitioner in his exceptions in which he proffers "evidence" that he alleges "would be elicited from educational and planning experts if this matter were remanded for a full hearing***." (Petitioner's Exceptions, at p. 3) He will also

consider first the exception petitioner raises that the ALJ "did not provide a listing of those exhibits [upon which he relied to establish the background facts] and indeed, the final page of the Initial Decision indicates that there were no exhibits." (Exceptions, at p. 7) Annexed to petitioner's exceptions, it is noted, is a proposed exhibit list for the Commissioner's consideration.

In considering these two exceptions, it must be noted that this case is currently before the Commissioner on a Motion for Summary Decision, among others. N.J.A.C. 1:1-12.5(b) states in pertinent part:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.***
> (emphasis supplied)

Because the discovery to date in this case was submitted in the moving and responsive papers to the Motion for Summary Decision, and because petitioner did not voice objection to said submissions at the time of hearing on said motion, no obligation existed for the ALJ below to admit said documents into evidence as exhibits as if the matter were before him at the plenary hearing stage. Moreover, the "evidence" petitioner advances "would be elicited from educational and planning experts if this matter were remanded for a full hearing" is not pertinent to the primary legal issue now before the Commissioner, that is, the effect of the Superior Court decision rendered by Judge Ricciardi concerning the condemnation action taken pursuant to N.J.S.A. 20:3-5 on this forum's proceedings. (Petitioner's Exceptions, at p. 3) The Commissioner therefore dismisses as meritless the procedural exception discussed above, as well as the preliminary statement raised in petitioner's exceptions.

Further, based upon his independent review of the record before him, the Commissioner concurs with and adopts as his own the findings and conclusions of the Office of Administrative Law dismissing the instant petition for the reasons expressed in the initial decision of ALJ Daniel McKeown.

To the ALJ's cogent and thorough disposition of the issues presented the Commissioner would add that he disagrees with the exception to the initial decision wherein petitioner avers that this case "is not a jurisdictional issue as asserted by Judge McKeown. Instead, it involves the doctrines of res judicata and collateral estoppel." (Petitioner's Exceptions, at p. 11) The Commissioner finds and determines that the ALJ was correct in addressing not only

the matters of res judicata and collateral estoppel but also the issue of the Commissioner's jurisdiction. He agrees with the statement of the State in this regard, as suggested in its reply brief:

> If, as Petitioner's Brief in Opposition to Respondents' Motion to Dismiss suggests, see Brief at 28-37, petitioner is requesting that this forum review Judge Ricciardi's decision regarding primary jurisdiction and exhaustion, clearly this forum is without jurisdiction. Regardless of the correctness of Judge Ricciardi's decision not to defer to the administrative forum, the only recourse for disagreement with that decision is in the Appellate Division not in the administrative forum. (State's Reply Exceptions, at p. 2)

The Commissioner agrees that absent on Appellate Division decision overturning the decision of the Superior Court, Law Division, in this matter, the decision of Judge Ricciardi is binding on this administrative forum. Judge Ricciardi's judgment, as stated by the ALJ,

> is the law of the case*** and *** is final for purposes of collateral estoppel in this administrative proceeding. If of course the Appellate Division reverses on the grounds that Judge Ricciardi should have deferred jurisdiction on the issue of approval to the Commissioner of Education, then and only then would that issue be heard in the administrative arena and by virtue of judicial action would the jurisdiction over the subject matter be vested in the Commissioner. (Initial Decision, ante)

Moreover, the Commissioner concurs with the State that Hackensack, supra, and Forgash, supra, are inapposite to the instant matter because those cases dealt with concurrent jurisdiction in administrative tribunals. The instant matter concerns the question of the court's primary jurisdiction over administrative review.

Accordingly, for the reasons stated therein as supplemented herein, the recommended initial decision of the Office of Administrative Law is adopted in toto. Consequently, the Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

October 26, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT-ORAL
INITIAL DECISION
OAL DKT. NO. EDU 4447-87
AGENCY DKT. NO. 141-5/87

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,
Petitioner,
v.
MAYOR AND COUNCIL OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY
Respondent.

185 Washington Street
Newark, NJ 07102
Friday, September 4, 1987
3:00 p.m.

William R. Miller, Esq., for petitioner
(Miller & Kinney, attorneys)

Jacob Green, Esq., for respondent
(Green and Dzwilewski, attorneys)

Record Closed: September 4, 1987 Decided: September 4, 1987

This is a transcript of the administrative law judge's oral initial decision rendered pursuant to N.J.A.C. 1:1-18.2.

BEFORE STEPHEN G. WEISS, ALJ:

This is a budget appeal in which the Board of Education of the Township of Irvington has moved pursuant to N.J.S.A. 1:1-12.5 for summary decision alleging that the respondent, Mayor and Council of the Township of Irvington, failed in its obligation to set

forth a detailed statement with supporting reasons for the reductions that the Council directed be made in the Board's 1987-88 school budget with respect to monies to be raised by local tax levy for current expenses and capital items. The Board filed its petition of appeal with the Department of Education on May 18, 1987, and the answer of the Mayor and Council was filed on June 25, 1987. On that same date the file was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On August 17, 1987, the respondent filed an amended answer setting forth that on June 23, 1987, the counsel had adopted a resolution which essentially rescinded its earlier resolution of April 28, 1987 in order to correct an error it had made regarding the debt service aspect of the budget. In the meantime, after the case had been transmitted to OAL in late June, the Board, of course, had moved for summary decision and had filed in connection with that motion a brief and an affidavit in support. That motion was pending during August.

A prehearing conference had been conducted by Administrative Law Judge Reiner on July 28, 1987, and she issued a Prehearing Order the following week. In that Order the issues to be resolved were identified by her as follows:

A. Is the budget as fixed by the governing body sufficient to carry out the mandate for a thorough and efficient system of public schools?

B. Was the action of the governing body in reducing the budget arbitrary and capricious, either procedurally or substantively?

Hearings were scheduled to take place on October 19 through October 23, 1987. However, the Prehearing Order also made reference to the fact that petitioner previously had moved for summary decision and, accordingly, a schedule for the receipt of the respondent's answering brief and any reply to that answer from the Board was also set forth. I believe ultimately that schedule was somewhat modified. However, briefs and affidavits and reply affidavits from the Board ultimately were filed. In a cover letter accompanying the filing of the respondent's answering memoranda and affidavits, counsel for respondent noted that the total amount of the reductions set forth in the Prehearing

Order with respect to the current expense and capital outlay should be modified to comport with the figures set forth in its amended answer. Specifically, according to the respondent, the correct amount of proposed reductions as certified by the Council to the County Board of Taxation should be $6,390,700 consisting of a $6,049,000 reduction in the current expense portion and $341,700 in the capital outlay portion of the Board's 1987-88 proposed budget. With respect to the pending motion, oral argument was scheduled by me to take place on September 3, 1987, which did occur. As I indicated, as of the date of yesterday's oral argument, I had received and reviewed the moving papers of the Board, the reply by the Council and then a response by the Board to the Council's reply, all in the form of memoranda and various affidavits.

In support of its motion the Board takes the following essential position: That the respondent failed to provide specific reasons for any of its suggested line item reductions at the time it took action to reduce the budget in April 1987, and that as a matter of law, this neglect constituted a fatal defect since it violated the principles laid down in several decisions, including the landmark case of East Brunswick Board of Education v. The Township Council of East Brunswick, 48 N.J. 94, decided in 1966. Thus, according to the Board, no genuine issue of material fact is in dispute and summary decision is warranted. The Mayor and Council, in response, took the position that the spirit, if not the letter of the principles laid down in East Brunswick and other cases was indeed met by it, and that summary decision is distinctly inappropriate. The Mayor and Council further argued that substantial and material issues of fact have been raised by the pleadings and the affidavits, and that fully militates against entry of a summary decision. Finally, the Mayor and Council argue that even if a summary decision otherwise was appropriate; nevertheless, there is a legitimate fact question respecting the reasonableness of the amount of the Board's unexpended 1986-87 free balances and that the Commissioner, if not the undersigned, ought properly to address that issue before any final determination can be made as a matter of law.

In its reply brief filed on August 26, the Board vigorously disputed the respondent's claim that a material fact issue exists. Beyond that, the Board further pointed out that the very credibility of the respondent's entire case was cast in doubt because the reply

affidavits, consisting of the affidavit of Joseph P. Galluzzi, the Council's financial consultant, and Anthony Zappulla, the Council president, were false in that they represented that Mr. Galluzzi was present at and participated in one of two critical meetings held by the Board representatives with Council representatives prior to the April 28 resolution certifying the reduced amount to be included in the tax levy. It is my intention, of course, today to address those issues. It is clear there are certain matters of fact which are not in dispute and I therefore find them to be as follows:

1. Petitioner in this matter is the Board of Education of the Township of Irvington. Respondent is the Mayor and Council of the Township of Irvington.

2. On April 7, 1987, the Board presented its proposed 1987-88 school district budget to the electorate, pursuant to the provisions of Chapter 22 of Title 18A.

3. The budget was defeated at the polls and, pursuant to N.J.S.A. 18A:22-37, copies of the budget were delivered on April 8, 1987 to the Township Clerk of the Township of Irvington by the acting secretary of the Board. That proposed budget which had been defeated called for a total tax levy for both current expense and capital of $15,323,493.

4. On April 21, 1987, representatives of the parties met at the Board offices to discuss the defeated budget.

5. On April 23, 1987, representatives of the parties held a second meeting on the same subject.

6. On April 24, 1987, the acting Board secretary, Mrs. Marilyn Furze, sent a letter to the president of the Council setting forth certain information pertaining to the Board "surplus" in existence as of April 23, 1987, in what she described as "the spirit of cooperation and clarification." In her communication, Mrs. Furze noted that in accordance with an attachment to

the letter, the total balance as of April 23, 1987, was $2,409,000, consisting of $1,501,000 in respect to current expense and $907,600 in respect to capital outlay.

7. With respect to the current expense surplus as of April 23, 1987, she indicated in a summary that of that amount approximately one and one-half million dollars represented the balance remaining from $6,919,000 which had existed as of the end of the 1985-86 school year. She explained that the reductions during 1986-87, between July 1, 1986 through April 23, 1987, consisted of the appropriation out of that amount of $1,250,000 to the 1986-87 budget, a transfer of $1,895,000 for purchase of land approved at referendum, $72,344 representing other transfers during the 1986-87 school year, and $2.2 million representing an amount which the Board unanimously had agreed to set aside as a reserve in connection with the first year of a certain lease-purchase arrangement. Mrs. Furze represented in her April 24 letter that the figures had been reviewed and approved by the Board's auditors as of that date. With respect to the capital outlay balance, approximately $908,000, she indicated that this represented a decrease of $57,500 from the amount which had been available as of July 1, 1986, and that difference was explained by a transfer that had been made during the school year for a certain "pre-building program." Thus, she represented to the Council that the total available surplus as of the date of her letter was approximately $2,409,000. She did take note of the fact that there was in addition a surplus for certain special projects of $868,000 and a surplus for debt service of $294,000 on the books of the Board as of June 30, 1986, but that these funds, she said, were unavailable since they had been committed for other designated purposes. Later in a letter to counsel for the respondent, dated August 27, 1987, and as a result of the ongoing nature of the pending motion and of the issues involved, Ms. Furze updated that data and explained that as of June 30, 1987, which was approximately nine weeks in addition to the April information she had given, the unappropriated free balance which at that point was unaudited, and may

still be, actually totaled $3,984,000 consisting of $2,747,762 for current expense and $1,237,038 for capital outlay.

8. In addition to the letter that she sent to the Council on April 24, on that same date Mrs. Furze also delivered to the Township Clerk at the request of respondent's consultant, Mr. Galluzzi, the 1983-84, 1984-85 and 1985-86 Board audits, a 1981 memorandum from Assistant Commissioner Calabrese regarding line item transfers, an April 1986 memorandum from Assistant Commissioner Calabrese regarding overexpenditure of funds, and a tear sheet from the New Jersey Register of March 1987 which contained proposed rule N.J.A.C. 6:20-2.14, and also I believe she included a copy of the provisions of Title 18A dealing with budgets. The regulation cited by Mrs. Furze thereafter was adopted by the Department of Education. It provides that any board of education filing a request to exceed its budget cap pursuant to N.J.S.A. 18A:7A-25 was required to appropriate all available current expense free balance in excess of three percent of the current expense budget for the budget year the request was made, unless an exception was requested from the Commissioner.

9. On April 27, 1987, Mr. Galluzzi, the certified public accountant engaged by the respondent as its financial consultant, reported at a public meeting to the Mayor and Council. That evening he presented to each council member a packet prepared by him which consisted of certain worksheets and which were attached to a cover letter in which he made certain recommendations. In that presentation Galluzzi recommended line item decreases totalling $3,049,000, which essentially consisted of proposed reductions in the Board's expenditures for salary and wages of administrative, instructional, attendance and health, transportation and operations personnel, which Galluzi characterized as large percentage increases. He also recommended decreases in other "cost centers" based upon his review of 1985-86 expenditures for those areas and what he believed to be an historical pattern of savings in prior years. Approximately 85 percent of the total recommended by way of reduction by Galluzzi related,

I believe, to the salary and wage area where he knew the Board had asked for increases ranging from 12 to 27 percent and which he had reduced to increases of 8 to 10 percent. With respect to maintenance, Galluzzi recommended that a proposed increase by petitioner of $1,275,270 for contracted services be reduced by $850,000 since that represented the cost of a complete rewiring of electrical service at the high school which Galluzzi considered to be a "major renovation" and more properly represented a capital rather than a current expense item and should have been considered part of a proposed privatization building plan. He recommended that the capital outlay portion of the proposed budget therefore be reduced from $814,370 to $341,700 since the lower amount was the total of the items which he said were identified in correspondence received. Thus, Galluzzi concluded that adjustments of $3,049,000 should be made in current expense, and that $380,000 be added to the capital outlay for a net appropriation adjustment of $2,669,000. He then further recommended that the current expense surplus of the Board be reduced by $3 million and the capital outlay surplus by $900,000.

11. At the meeting of the Council that evening, the president, following Galluzzi's presentation, made a motion to incorporate in any budget resolution the budgetary recommendations made by Galluzzi with respect to reductions in the Board's budget proposals and to include "the recommendations outlined in some of the paper work as an addendum." That motion was seconded and approved unanimously. The following day, April 28, 1987, the Township Council adopted its resolution determining that the amount necessary to be raised by way of current expense for the budget of the Board of Education through local tax levy, including debt service, should be $8,847,012, which amount took into account the $6,049,000 reduction from the amount requested by the Board. The resolution further provided that the sum of $1,194,370 be raised by local tax levy for capital outlay. Subsequently, on June 23, 1987, the respondent adopted a corrective resolution which modified the April 28, 1987, resolution. Specifically, the amount to be raised for current expenses was reduced by $85,781 since the earlier figure, according to the respondent,

erroneously had included that amount for debt service. Accordingly, the amendatory resolution set out the debt service portion of the tax levy separately. In addition, the amendment deleted in its entirety approval of any tax levy for capital outlay purposes for reasons which I will discuss further in this opinion. Thus, the total amount certified by the respondent to the County Board of Taxation as of the June modifiction of the April resolution was actually $4,466,396.50, which was one-half of the total, and of course the balance was to be picked up from the previous school year.

13. On May 18, 1987, between the first resolution of April and the second resolution of June, the Board had filed its petition of appeal with the Commissioner challenging the respondent's reductions as of April as arbitrary and capricious and alleging that unless they were set aside, the Board would be deprived of its ability to operate a thorough and efficient system of free public schools for the 1987-88 school year as required by law. The Board in its petition therefore requested restoration of the full amount of the reduction and asked the Commissioner to order that to be certified to the County Board of Taxation. The total amount of the tax levy if that relief were granted would be $15,323,493.

14. On May 1, 1987, three days or so after the Council adopted its resolution certifying the reduced amount to the County Board, President Zappulla wrote to Mrs. Furze with regard to the Board's budget. In that communication, he thanked the Board for the courtesies extended to the Council through the information it had provided during their meetings. However, he indicated in that letter that a question had arisen in his mind which had not yet been answered to his personal satisfaction. He referred to the Board's determination to reserve $2.2 million from its unexpended free balance. According to Mr. Zappulla, at neither of the meetings held in April between representatives of the parties was this item mentioned, and he therefore asked for back-up data as to when the Board reserved that amount and how they arrived at the figure. He closed with the observation that "your usual fine

cooperation and timely response will be of immeasurable assistance in this regard." Of course, by then the respondent had already passed its resolution reducing the budget. On May 11, 1987, in a reply letter, Mrs. Furze advised Mr. Zappulla that the reservation had been designated for the purpose indicated in her April 24 letter upon the advice and instruction of the Assistant Commissioner of Education and the Essex County Superintendent of Schools, who had approved the 1987-88 budget only upon being assured that those funds would be available. She noted that the precise amount of the reservation, $2.2 million, was an estimated figure derived from applications received from various underwriters.

15. As noted, the Board filed its petition of appeal on May 18, and Council filed its answer on June 25, which it later amended to conform to the amendatory resolution of June 23. That answer denied the essential allegations and set forth six separate defenses. With regard to the capital outlay levy which had been reduced to zero, in that answer, or in accompanying data, the Council explained that the Board did not need to raise any monies for capital after all since $850,000 had been taken out in lieu of current expense by the Council that was for electrical service repair, and that a combining of available surplus and anticipated receipt of state aid was more than enough to make up the difference which ordinarily would be needed for capital outlay. I mention that because there seems to be in this case, I don't know if there still exists, and maybe I'm confused, and I don't think it's that important at this juncture, but there seems to be some confusion over the precise amounts of the dollars that we're talking about and what they relate to and why.

DISCUSSION

I have sketched out the foregoing findings of fact as what I believe to be the essential undisputed aspects of this case. However, at this point they do not answer the major underlying issues which essentially are as follows: (1) Taken as a whole, did the respondent, in certifying to the Essex County Tax Board on April 28, 1987 amounts to be

raised by local tax levy for school purposes satisfy the requirements of the law with regard to its obligation specifically to identify by line item where reductions should be made and to enunciate the reasons therefor; and (2) was the respondent provided by the Board with opportunity that the law anticipates it should be given with respect to information being made available for it to make reasoned judgments in the first place as to proposed reductions? And finally I certainly have to address as part and parcel of those two issues, if not independently, are there genuine issues of material fact involved in those two issues or otherwise which militate against entry of summary decision. The starting point, of course, is the language from the East Brunswick decision, the essential portion of which I suppose is required to be cited because it always is, and I'm not going to break the pattern now, as follows:

> A governing body may, of course, seek to affect savings which will not impair the education process, but its determinations must be independent ones properly related to educational considerations rather than verbal 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 view 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. This is particularly important since, on the board of education's appeal under R.S. 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in teh budget the governing body found could properly be eliminated or curbed and on what basis it so found. . . . East Brunswick at page 106.

Having stated the major guideline, I would note that both sides have filed comprehensive memoranda of law together with substantial affidavits in support of their respective positions. In those briefs, many, if not most, of the potentially pertinent decision are mentioned and, where appropriate, specific portions are quoted verbatim. Both sides, of course, rapidly agree that the foundation case to be considered is the East Brunswick decision, but their respective positions then immediately diverge in a substantial way. Before, however, I consider the legal arguments made by the parties

with reference to some of the cases upon which they rely, I am required, I believe, to deal with an issue which arose late in the proceedings regarding the credibility of respondent's major affiant, Mr. Galluzzi. The Mayor and Council filed their responsive affidavits on August 17, 1987 and Galluzzi and Zappulla were the two affiants whose affidavits were submitted at that time that touch upon this issue. According to Galluzzi, he attended the April 21, 1987 meeting with the Board representatives and in preparation for that meeting had reviewed data previously provided to the Township consisting of a letter of transmittal, a cover letter, budget cap worksheets and the advertised proposed school budget. More importantly, he maintained in his affidavit that during the course of that April 21 meeting, which took about one hour, the Board representatives "made no detailed presentation of the proposed budget; indeed, they did not make an attempt to discuss the budget in even general terms." He went on to note that the Board's representatives were extremely noninformative with respect to providing answers to questions raised and made no effort to explain various areas of concern to the Council. Galluzzi said that he was in attendance at the follow-up meeting of April 23, 1987, which lasted about two hours, and in preparation for that meeting he drafted worksheets calculating the proposed increases in various accounts and which analyzed the accumulation of surplus. He said he distributed copies of those worksheets that night and there was a discussion of his views with the persons present.

Mr. Zappulla's affidavit also represented that Galluzzi was present at the April 21, 1987 meeting, together with two other Council members, as well as a member of the municipal legal department. He said the meeting also took about one hour and was taken up by a general discussion of the information provided by the Board earlier that month. However, like Galluzzi, Mr. Zappulla also alleged that the Board representatives failed to provide specifics to support the various requested increases with the exception of reference to the $850,000 appropriation for electrical work which, as I have noted, the Council believes should have been an item of capital outlay.

Several reply affidavits filed by the Board on August 26, 1987 in response to the Galluzzi and Zappulla affidavits take vehement issue with the contention that Mr. Galluzzi was even present at the April 21 meeting. Specifically, Sandra Fox, president of

the Board, Robert Scanelli, vice president, Elizabeth Fenchel, a Board member, Anthony Scardarvile, superintendent of schools, Mrs. Furze, Robert Burman, finance director of the Board, and Michael Steele, assistant Board secretary, unanimously asserted that although they were present during that entire meeting, Mr. Galluzzi was not there at all. Thus the Board takes the position that Galluzzi's affidavit testimony as well as the worksheets which constitute the major prong of respondent's defense are totally unworthy of belief and that this falsity therefore colors any claim respondent can make that it was essentially stonewalled or prevented by the Board from obtaining the necessary information in order to make reasoned judgments.

Thus, before considering the substantive aspects of the competing affidavits and the law in this area, I am obliged to make a determination with respect to the credibility question which has been raised. At oral argument, attorney for the respondent in response to my questions maintained that as far as the respondent was concerned, their position was that Messrs. Galluzzi and Zappulla were right and that Mr. Galluzzi was present. In reviewing those affidavits, I have made a special effort to consider this issue, and I have come to the conclusion that Mr. Galluzzi was not at that meeting as he claimed in his affidavit. I find it doubtful in the extreme that the memories of all seven or eight of the Board's witnesses can be so erroneous. However, I am also constrained to conclude that the contrary assertions made by Messrs. Galluzzi and Zappulla as to the former's attendance was the product of a mistake by them in their respective recollections and was not intended to mislead the Board or the undersigned law judge insofar as the substantive issues in this case are concerned. As has been noted by the Commissioner, and as I will discuss later on, the process following a budget defeat and leding up to certification by a municipal governing body of a reduced amount, if that be the case, takes place rapidly and is complex. There is not always sufficient time allowed for as much reflection and consideration as one might wish in a more perfect setting. As part of that process, there is a rush of business which takes place. Review of documents, arranging for meetings, informal discussions, telephone and other conferences and a host of other activities. In my judgment, it is understandable that given the fast and furious pace that takes place, such mistakes can be made. Accordingly, I cannot agree with the Board's argument that because Mr. Galluzzi represented he was at the meeting, and he was not, that his entire

affidavit testimony must be rejected. While mistakes stemming from such inconsistencies certainly may be relevant to credibility, standing alone they do not make the testimony prima facie unworthy of belief. Each case, and this one is no exception, has to be considered on an individual basis.

Thus, turning to the major issues which I find to be extemely interesting and vital ones, the first item to be considered is the question of the extent to which specificity as to the proposed line item reductions and the respective obligations of the parties during the period between the defeated budget and the certification of the tax levy took place in this case, and whether or not the respondent's activities met the legal standards. Many cases speak to this issue, and I cannot say that any particular one standing alone can answer every possible aspect of it.

As I have noted, the East Brunswick case lays out the guiding principles with regard to the budget appeal process and stressed the need for a municipal governing body to reveal in timely fashion why it did what it did when it made reductions. The language used in East Brunswick was, "a detailed statement setting forth the governing body's underlying determination and supporting reasons." Many decisions by the Commissioner and the State Board have reiterated the East Brunswick requirements. The most recent that counsel and the court could find being the decision in Board of Education of Deptford v. Mayor and Council of Deptford, decided by the Commissioner, April 27, 1987, affirmed by the State Board of Education, August 7, 1987. What the State Board said in Deptford bears repeating, at least in some small part, and it is as follows:

> "We conclude that the language of the court clearly requires that a governing body provide reasons for its reductions at the time it acts, pursuant to N.J.S.A. 18A:22-37. Further, we emphasize that the Commissioner has long held that the rationale for the reductions must be provided at that time, e.g. Union Township Board of Ed. v. Township Committee, decided by the Commissioner, July 9, 1981, and we fully concur with the Commissioner that the failure of the governing body to know, identify and set forth the specific line items of the budget and to enunciate supporting reasons at the time of the reduction renders the reduction an arbitrary act. Union Township, supra. We also agree that such arbitrariness is not negated by the subsequent submission of information or subsequent construction of a rationale. Id. We therefore affirm that the failure of the Council in this case to provide reasons for its line item reductions either at the time of its original tax levy certification or of its amended certification invalidated the reductions so as to warrant restoration of the total amounts. To hold otherwise would ignore the primary obligation a governing body's acting pursuant to N.J.S.A. 18A:22-37 to act conscientiously at every step to effect savings that do not impair the educational process. Deptford, decision of the State Board at 3-4.

The State Board went on to note that the significance of the governing body's failure to provide the Board with a rationale for the reductions is reinforced by the fact that the statute places a very short time limit upon the Board to decide whether it wishes to appeal and that to allow a governing body to act without providing that rationale at the time the reductions are made places an undue burden on the Board and would force boards of education to file appeals in the absence of any indication from the governing body as to why it concluded the reductions were justified in the first place. This, said the State Board, results in unnecessary litigation and undermines the Commissioner's ability to determine quickly on what basis the governing body, in fact, made its judgments. Deptford, the Union Township case which is cited in Deptford and a whole host of other decisions stand for this same essential principle. However, as I noted, in every instance, no less in this case, a close examination of the underlying circumstances is in order to discover whether or not there was compliance with these salutary principles. Also, a corollary inqury has to be addressed in this case; namely, whether, if there are deficiencies, they are due to the failure of the Board fairly and reasonably to provide the governing body with adequate data. In the case of Board of Education of Monmouth

Regional High School District v. Township Committee of Shrewsbury, 1967 S.L.D. 155, the Commissioner addressed that issue and said as follows:

> "to consider an extremely complex matter and to reach a decision which will have important and far-reaching effects in a very short period of time, it is incumbent upon the governing body to discharge such a duty properly, and to do so, it must have the advantage of as much information as can be useful to it in arriving at a sound determination. The Board of Education should, therefore, take the initiative to supply detailed data and helpful information for the governing body's use and should be prepared to consult and assist in any helpful way. The governing body, in turn, should take as much time as possible to digest the information supplied and to consult with the Board with respect to the problems and educational needs to be made."

Board of Education of Monmouth Regional at 157.

In fact, the East Brunswick decision the year before had cautioned that the Board of Education should not set adrift a municipal governing body in this process essentially to fend for itself. This is intended to be a cooperative effort.

According to the Mayor and Council, when it took its action on April 28, 1987, its action was, in fact, accompanied by the sort of specific detail which East Brunswick and its progeny anticipate is necessary to meet the minimum requirements, at least, of the law. Although the particular format chosen by the respondent was not as preferable as others might have been; nevertheless, respondent claims that it has met its legal obligation, at least insofar as resisting a summary decision motion is concerned. In support of that claim, the respondent Mayor and Council point to the fact that the resolution incorporated by reference had had attached to it four separate pages of numerical data prepared by Galluzzi to aid in an analysis of the budget. The second, third and fourth pages of that packet of documents specifically identified line item accounts and specifically made recommendations with respect to decreases in each such line item. The first worksheet page had identified other sorts of categories. The total of the proposed reductions as set forth on those worksheets was $3,049,000. So it is clear enough to me from the worksheets that the recommended reductions by line item were

specifically set forth, and I'm not even sure that the Board in this case really takes issue with that. However, there does remain for consideration whether or not the obligation, even given such identification, to offer supporting reasons or a rationale was accomplished. Merely setting forth specific amounts with conclusionary references normally is not enough. According to the Board, the Mayor and Council ignored this mandate and that no amount of subsequent backing and filling can plug up that fatal gap. Council argues that what the law actually requires is that the governing body merely have reasons, and its brief maintain that even under East Brunswick it was not necessary that they be articulated at the time action was taken. Beyond that, the respondent maintains that even if the law is construed to require that the governing body's reasons be provided at the time it acts, that requirement was met in this case and that the Board of Education certainly knew from the worksheets not only the specific current expense and capital outlay items which were subject to reduction, but it was also aware of the Council's reasons. According to the Mayor and Council, as a result of the combination of its meetings, as a result of the public presentation by Galluzzi on the evening of the 27th, as a result of comments made on the 28th when the resolution was adopted, the Board was well aware of the concern over the continuing increase in appropriations over prior years, the carrying of a surplus and an increasing amount of surplus every year, the concern over the unwholesome nature of salary increases. According to the respondent, although Galluzzi's cover letter of April 27 was not attached to the resolution itself, that was an oversight and I should consider it as part and parcel of the context of articulated reasons being made at the time the Council acted.

If I have not already done so, let me quickly state that I categorically must reject respondent's argument that East Brunswick only stands for the proposition that supporting reasons be enunciated at the time of the reduction is a suggestion. I think the cases since then, if not East Brunswick itself and the spirit of East Brunswick dictate the contrary. At the time the action was taken is the critical area in my judgment of the focus of attention. The Council either sets forth its reasons as required by East Brunswick and the cases at that time, or else the defect in not doing so is fatal.

What then did the respondent do in this case with respect to compliance with its obligation to articulate those reasons? As I have noted, insistence is made by the Council that the articulation of reasons consists of the worksheets attached to the resolution of April 28, the packet in its entirety that Galluzzi presented at the public meeting the night before and presumably discussed in public, and the commments of Mr. Zappulla and Council President Schwartz about the action being taken that night. In those comments publically by Zappulla and Schwartz, reference was made to the meetings that had taken place and to the Council's concern over what it deemed to be an extremely generous surplus that the Board could grab anytime it wanted. While they agreed a substantial amount of reduction was being certified to the Board of Taxation, they stressed that taking into account the amount of the surplus and the huge percentage increase in salaries, it was justified. Whether or not I can consider those comments as action by the Council at the time it passed the resolution will be discussed shortly. I only mention it because it is part and parcel of the insistence by the respondent that it should be taken into account in order to back up its identification of reasons. Galluzzi's worksheets and his cover letter make reference to the fact that there was money available from the surplus, although not in so many words. Although counsel made reference to the fact that the Township Council was concerned over the historical data and what it showed, and the Board's practice to underexpend its budget in various areas on a regular basis, that particular language and those reasons do not appear in the resolution itself. The worksheets which were attached only show that for the J-1 through J-8 accounts as a whole the budget by the Board was about 17 percent more than the previous year.

In none of the cases that I have reviewed do I find a specific delineation by the Commissioner, the State Board or any other entity as to exactly what is required for a municipal governing body to establish sufficient articulation of reasons. The Deptford case, the Union Township case, the Union Beach case, the Paterson case and all of the other such cases mentioned by the Board deal with the specifics of each case, and all that they say really is that conclusory statements and judgments are not enough.

I have carefully scrutinized the pleadings, the affidavits and the Board's resolution, and based upon my review and consideration of that data, and even including my

consideration of the competing nature of the assertions in the affidavits and bearing in mind that in the context of a motion for summary decision the burden is upon the movant to establish the absence of any genuine issue of material fact, I have concluded that a genuine issue of material fact does not exist with respect, in the first instance, to the cooperation question. In my judgement, two meetings of the representatives of the parties took place covering a total of two and one-half to three hours or so. While each side has their own view of what took place, which is at a variance with one another, according to the affidavits of Galluzzi and Zappulla with respect to both the April 21 and 23 meetings, the Board representatives made no genuine attempt to discuss the budget. I am constrained to conclude, nevertheless, that there was adequate information given to the Council which was sufficient for it to have acted to analyze and to articulate specific detailed reasons when it acted on April 28 to adopt its resolution.

The affidavits of Furze and Scardarville, putting aside the dispute over the attendance of Mr. Galluzzi on April 21 set forth, and I do not believe this is rebutted, that a computer print-out of the Board's line item budget was made available to the Council representatives on April 21 and that an offer was made to go over that budget line by line even though it would take a good deal of time. They further assert in their affidavits that they were told that this would not be necessary. In her reply affidavit of August 26, 1987, Furze asserted that during the meetings, several inquires were made regarding salaries from Council members present or other representatives and responses were made to all of them. In his affidavit of August 26, Mr. Scardarville corroborates those assertions by Furze with regard to the events of the meeting and in particular confirming her assertion that an offer to go line item by line item which was available that night was declined.

Since Mr. Galluzzi was not present at the April 21 meeting as I have found, nothing he says that occurred there can be considered. In my judgment, Ms. Furze's assertions as to what occurred, as corroborated by Scardarville must be adopted, and I do so. In particular, her assertions in paragraph 6 through 17 of her affidavit of August 26, 1987 are adopted by me as to what took place at the two meetings. I would note that also present at the April 21 meeting were Councilmembers Gotworth and McNally, as well as a member of the Township's legal department, none of whom filed any affidavits herewith.

While that does not necessarily prove anything, I think in connection with a motion for summary decision, particularly when an issue has been raised as to what actually took place, and that is critical in analyzing the principles to be applied, that the absence of those affidavits certainly can be considered. In short, given the obvious absence of Galluzzi from the April 21 meeting and my determination as to the credibility of the Board's affidavits respecting the events that took place that night, combined with the absence of affidavits from the three others I mentioned, and given the absence of any evidence of any complaint from the respondent prior to the filing of its answer in late June as to any alleged lack of cooperation, and given Mr. Zappulla's acknowledgment of the Board's cooperation in its May 1 reply to Ms. Furze, a combination of all those factors, I believe that it can be said that no genuine issue of material fact exists as to the aspect of cooperation by the Board. I would refer counsel in this connection as well to the decision in Board of Education of Old Bridge v. Mayor and Council of Old Bridge, decided October 30, 1987, OAL Dkt. No. 4026-85. The facial dispute which the affidavits would appear to raise in my judgment simply disappeared upon close analysis, and I think I would be hiding my head in the sand if I concluded on the basis of what I seen and heard that the Board representatives went there and sat practically mute as alleged by the respondent.

With regard to compliance with the mandate of East Brunswick concerning articulation of reasons, I have concluded that the respondent did not at the time it acted on April 28, 1987 provide the Board with the sort of detail having an educational base for its reductions that East Brunswick and the other cases require. Even if Galluzzi's worksheets be considered as such, there is lacking, in my opinion, any adequate articulation linking the proposed reductions to any valid educational concerns. Surely, the message that flows from Deptford, Union Township, Old Bridge, South River and the many other cases cited by the Board is at least that a proposal to cut a budget without even making a stab at providing a detailed statement of supporting reasons articulating valid educational concerns simply cannot be tolerated. Even if I try to extrapolate from the worksheets, and consider the public statements of Zappulla and Schwartz, and Galluzzi's April 27 letter to be the source of information, I am still left with the conclusion that the Council's problem as articulated was a fiscal one without any connection to the educational concerns at all. I would also note in this regard that even under the new rules

adopted by the Office of Administrative Law as of July 1, 1987 for budget hearing appeals, N.J.A.C. 1:6-1.1 et seq., a governing body is expected to provide "a copy of the statement of supporting reasons for each of the reductions and a certification stating the date on which these documents were originally given to a district board of education." I do not think, even though I have mentioned it, that a letter which does not get attached to a resolution, and statements which are made after a resolution is passed, and worksheets which are made up later on which have additional data, can be taken into account in the present context. The only possible exception that I can find to a statement of reasons for a particular reduction in a line item relates to the $850,000 which respondent asserts should have been a capital outlay item. Even here the need educationally for that change is not challenged. It is really an accounting question. Nevertheless, I believe that as a matter of law, the item being a repair is properly allocated to the 700 series, maintenance of plant, and I would refer counsel to the decision of the Commissioner in Board of Education of Orange v. Board of School Estimate and City Coucil of Orange, 1986 S.L.D. _____, decided March 31, 1986, OAL Dkt. No. EDU 4324-85.

At oral argument, the Board of Education placed heavy reliance upon the November 20, 1986 decision of the Commissioner in Board of Education of South River v. Mayor and Council of South River, and I believe rightly so. That case seems to me to clearly hold that particular reasons must be articulated by the governing body at the time it acts and that given what I have already said, this simply did not occur in the present case.

Finally, the following language from the Initial Decision in the Union Township case, which is often cited, is particularly appropriate. This is from the Initial Decision, but the decision of the Commissioner affirmed it, so I consider it to be tantamount to the decision of the Commissioner. And I quote from Union Township 1980 School Law decisions, Judge Glickman's Initial Decision of June 1981:

> The Township is required to know at the time it reduces the Board's budget that the savings will not impair the educational process and are, in fact, properly related to educational considerations. The Township has an obligation to fix a budgetary amount sufficient to provide for a thorough and efficient education for the youngsters in the district.

He went on to observe that:

> The harm that is inherent in such a procedure is that the governing body at the time of its reduction lacks knowledge of the effect of its reduction on the Board's ability to provide for a thorough and efficient education. The failure of the governing body to know, identify and set forth the specific line items of the budget and to enunciate supporting reasons therefor at the time of the reduction becomes an arbitrary, capricious and unreasonable act. The submission of such information at a later date does not cure the defect. The governing body must have the rationale for its reductions at the time it acts and shall not be permitted to subsequently construct one in a "boot-strap" manner.

With respect to the possible existence of a genuine issue of material fact over the amount of the Board's unexpended free balances, I must deny the contention of the Township in this case that a genuine issue does, in fact, exist given the posture of the proofs. The August 27, 1987 letter from Mrs. Furze which updated her earlier information, even looked at in its best light from the respondent's view, reveals that there is an estimated total surplus of about $6,185,000. That is giving the benefit of the doubt to the respondent that the $2.2 million was not reserved. First of all, no linkage has been shown between any proposed reduction by the respondent of any amount of that surplus. There has been simply a directive to take $3 million because you do not need that much, and I belive specific line item identification is required since there is no educational validation as to why that reduction will not impair the Board's ability to carry out its constitutional mandate. I believe as with the line items for current expense and capital outlay, a linkage based upon valid educational concerns has to be articulated, and this was not done. I would note that even $6.2 million is only about eight percent of the total proposed budget. Whether or not that is reasonable I suppose arguably could be a fact question, but given the total context of this case, I do not believe it is necessary for me to explore since I am going to be granting summary decision to the Board. If the Commissioner thinks its necessary, he is certainly capable of taking it upon himself, as he has done in the past. I do not think that it is a genuine issue in dispute in this case, however. In addition, I would note that if the $2.2 million actually is committed to a reserve, and I strongly suspect that it is, the percentage of the unexpended free balance

shrinks to about five percent, which in a district of this sort is not excessive. The fact that surpluses have in the past been carried and even increased and that is a reason why the present surplus should be cut to me is not a reason to do so. The fact that the Board has deferred dipping into it in the past may come home to roost with the Board. They may have deferred spending money that they should have. But although there is some surface appeal to the claim that it should not keep increasing surplus if it is for contingencies and it is not used because you obviously do not need that much, I do not think that that necessarily flows and it does not in this case. In essence, as Administrative Law Judge Campbell observed in his Initial Decision in Old Bridge, citing Pierce v. Ortho Pharmaceutical Corporation, 84 N.J. 58 (1980), motions for summary judgment are intended to be means by which actions are officially disposed of and excessive caution in granting them undercuts that salutary purpose. I think there is a trend in recent both state and federal decisions to point that proposition out.

In this matter, I am left with a firm conviction, after considering the pleadings, the affidavits, the briefs and after entertaining oral argument, that as a matter of law for the reasons I have stated, the proposed reduction by the respondent in the Board's 1987-88 school budget were under the circumstances of this case arbitrary, caprious and unreasonable in that the respondent, although given free opportunity to do so, failed to provide adequate supporting reasons of an educational nature for those reductions at the time it took its action and that this failure was a deficiency which, under East Brunswick and its progeny, is fatal. Accordingly, I **CONCLUDE** that there being no material issue of fact genuinely in issue in this case, the Board is entitled to summary decision as a matter of law and to full restoration of the reductions made in its budget. Since I am rendering a summary decision in favor of the Board, under our rules it is a final decision, and I would add the following language.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act within the time allowed by law following his receipt of my decision, and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

I, Angela M. Nicholson, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Stephen G. Weiss's oral decision rendered in the above matter on September 4, 1987.

Sept. 14, 1987
DATE

Angela M. Nicholson
Angela M. Nicholson

Receipt Acknowledged:

SEP 16 1987
DATE

Stephen G. Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 17 1987
DATE

Ronald I. Parker K.S
FOR OFFICE OF ADMINISTRATIVE LAW

amn

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MAYOR AND COUNCIL OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY, RESPONDENT.	:	

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

It is observed that Council's exceptions to the initial decision and the Board's reply to those exceptions were filed in accordance with the extended times for filing requested by the parties and approved by the Commissioner. At this juncture the Commissioner finds it necessary to summarize below the correct current expense and capital outlay tax levy reductions imposed by Council as the result of its original and amended tax levy certifications made on April 28 and June 23, 1987 respectively:

	Proposed by Board	Certified by Council	Reduction
Current Expense	$14,896,012	$8,847,012	$6,049,000
Capital Outlay	341,700	-0-	341,700

Amount of reduction in dispute before the Commissioner:

Current Expense	$6,049,000
Capital Outlay	$ 341,700

In its exceptions to the initial decision Council continues to maintain that it did, in fact, provide its reasons for its current expense line item reductions totaling $3,049,000 at the time of its action to certify the local tax levy for school purposes on April 28, 1987. Council asserts that it is an undisputed fact that, to effect its current expense reduction in the amount of $3,049,000, it relied upon a packet received from its budget consultant at its public meeting held on April 27, 1987. Council points out that the ALJ's findings establish that the packet which it received from its budget consultant consisted of work sheets and a cover letter of the same date identifying and explaining the recommended current expense line item reductions set forth above.

In this regard Council argues in its exceptions in pertinent part:

> It is therefore clear that at the time it acted, the Irvington Township Council had written reasons for the reductions and based its decision on those reasons. The Council therefore complied with the requirement that it "know, identify and set forth the specific line items of the budget and ... enunciate supporting reasons therefor at the time of reduction...." Union Township Board of Education vs. Township Committee of Union, [decided by the Commissioner July 9, 1981], slip op. at p. 5. The specific line item reductions were identified on the work sheets prepared by Mr. Galluzzi, and the reasons for the reductions were set forth on Mr. Galluzzi's accompanying cover letter dated April 27, 1987. These documents were relied upon by the respondent and incorporated by reference into its resolution certifying the reduced amount to the Essex County Board of Taxation.***
>
> Mr. Galluzzi's April 27th letter was inadvertently not included with the packet of materials forwarded with the resolution to the petitioner. Under all of the circumstances of this controversy, this fact alone should not prove fatal to the respondent's opposition to petitioner's Motion for Summary Judgment.
>
> (Council's Exceptions, at pp. 2-3)

The Commissioner observes that while it appears that the Board did, in fact, receive the budget work sheets identifying the specific current expense line item reductions totaling $3,049,000 in a timely manner from Council, there is no evidence to suggest that the Board received the budget consultant's accompanying letter of April 27, 1987 until such time as Council filed its original answer to the Petition of Appeal on June 25, 1987, approximately two months after Council had made its original tax levy certification on April 28, 1987.

Moreover, a review of the contents of the packet submitted by the budget consultant reveals that the "reasons" adopted by Council for its reductions amounting to $3,049,000 in current expense appropriations and $341,000 in capital outlay appropriations during the 1987-88 school year appear below as follows:

> President Zappulla and Members:
>
> Recommended Decreases
>
> J-1

The line item recommended decreases were based on the large percentage requested increases in the Salary and Wage categories in each cost center, ranging from 12% to 27%.

Administration:	Salary and Wages reduced down to 10% increase
Instructional:	Salary and Wages reduced down to 8% increase
Attendance and Health:	Salary and Wages reduced down to 10% increase
Transportation:	Salary and Wages reduced down to 10% increase
Operations:	Salary and Wages reduced down to 10% increase

All other Cost Centers were reduced based on 85-86 expenditures and historical savings in prior years' budgets.

Items that reflect new purchases and/or acquisitions were reduced to an amount that represents more than what was previously expended in prior periods.

Maintenance Budget

Line 83 Contracted Services reflects an increase of $1,275,270. of which $850,000. represents a complete rewiring of the electrical service at the High School. This most definitely represents a major renovation and should be classified as a capital outlay, and part of the proposed privitization building plan.

Capital Outlay reflects a budget request of $814,370. of which only $341,700. of repair or replacement items are identified on page 2 of correspondence received from Board.

Recommendation is to eliminate the difference of some $470,000. (Exhibit A, Council's Answer)

However, it is important to point out that Council has also reduced the current expense tax levy an additional $3,000,000 and the Board's capital outlay tax levy request by the entire $341,700. Council in effecting these additional reductions in the tax levy maintains that these amounts could be funded by the Board's

anticipated unappropriated free balances in current expense and capital outlay for 1986-87 and applied to the 1987-88 school budget reductions set forth above.

With regard to its application of the Board's unappropriated free balances to its tax levy reductions of $3,000,000 (current expense) and $341,700 (capital outlay) respectively, Council argues that:

> It is beyond dispute that a municipal governing body, in its review of a defeated school budget, may consider the board's anticipated income and unappropriated free balance in reaching its determination of the amount to certify for taxation. Bd. of Educ., Tp. of Branchburg vs. Tp. Committee of Tp. of Branchburg, 187 N.J. Super. 540, 545 (App. Div. 1983). And it is also "clear that a board has an obligation to account for surplus funds and investment income in planning its budget for the ensuing year." Id.
> (Council's Exceptions, at p. 25)

Consequently, Council rejects the ALJ's finding and conclusion that it was required to identify specific line items to which the surplus was to be applied. Council maintains that it did determine that the Board's unappropriated free balances of $6,918,664 in current expenses and $965,074 in capital outlay as of June 30, 1986 could be applied in part to offset 1987-88 tax levy reductions in current expense and capital outlay by $3,000,000 and $341,700 respectively. Council avers that where as here it has determined that both line item reductions and a reduction of the Board's unappropriated free balance is warranted, its determination must stand provided that such determination was neither procedurally or substantively arbitrary. In Council's opinion the only basis for substantive arbitrariness in a surplus reduction is when such reductions will leave the school district with too small a reserve to cover reasonable unexpected contingencies. Council maintains that inasmuch as a factual dispute exists between the Board and Council with regard to the actual amount of the Board's unexpended free balance for the 1986-87 school year to be applied to its tax levy reductions for the 1987-88 school year, the ALJ erred in granting summary judgment in the Board's favor. Council argues that this matter should be remanded to the ALJ for a full hearing for the reason stated above and also for the reasons stated by Council in excepting to the ALJ's consideration of the credibility of the affidavits submitted on motion by the parties with respect to the accounts of the respective participants as to what did or did not transpire during the preliminary budget meetings held on April 21, and April 23, 1987.

In rejecting Council's exceptions to the initial decision, the Board relies upon those findings and conclusion reached by the ALJ in the initial decision as supplemented by its replies to Council's exceptions which are incorporated herein by reference.

Upon review of the exceptions to the initial decision filed by Council and the Board's reply thereto, the Commissioner is unpersuaded by Council's arguments that the Board's Motion for Summary Judgment should be reversed and remanded for a hearing on outstanding issues of material fact.

In the Commissioner's view, the ALJ properly found and determined that Council failed to provide the Board with its reasons for those tax levy reductions amounting to $6,049,000 in current expense and $341,700 in capital outlay to be raised for school purposes during the 1987-88 school year.

In reviewing the record of this matter, it is clear that the Board was not provided with the letter of April 27, 1987 from Council's budget consultant which sets forth what Council has claimed were its reasons on April 28, 1987 for effecting a current expense tax levy reduction of $3,049,000 in the Board's budget proposal for the 1987-88 school year. Although the Board may have received the disputed letter prior to the time it filed its Petition of Appeal on May 18, 1987, the only evidence in the record that establishes that the letter had been transmitted to the Board appears in the attachment to Council's answer filed with the Commissioner on June 25, 1987.

Moreover, even assuming that such letter had been provided to the Board by Council when it acted on April 28, 1987, the Commissioner considers those "reasons" set forth in the letter of April 27 not to be in compliance with the court's directive in East Brunswick, supra, when Council acted on April 28, 1987, expressly for those reasons stated by the ALJ in the last paragraph of the initial decision, ante.

Neither can the Commissioner accept that argument advanced by Council in its exceptions which relies on the factual differences of the parties in their opposing affidavits to the Board's motion as a basis for denying summary judgment herein. Council may not attempt to use preliminary budget discussions which took place on April 21 and April 23, 1987 between representatives of both parties as the basis to establish that it did, in fact, through such discussions provide the Board with the reasons for its budget reductions. The time line for such action by Council in order to be in accord with the precepts in East Brunswick, supra, and Union Township, supra, was triggered on April 28, 1987 when Council adopted its resolution determining the amounts to be raised in the local tax levy for current expenses and capital outlay.

Finally, the Commissioner agrees that Branchburg, supra, stands for the proposition that a municipal governing body, in the review of a defeated school budget, may consider the Board's anticipated income, the unappropriated free balance and investment income in reaching its determination as to the amount of taxes necessary to provide a thorough and efficient system of education. However, the Commissioner does not agree that any reduction of the

tax levy through the required appropriations of such revenue items can be directed by the municipal governing body in an arbitrary manner.

In order to direct such further appropriation for the purpose of tax levy reduction, the municipal governing body is obligated to specifically delineate its reasons why it believes those revenue items are in excess of the Board's needs. Clearly, in the instant matter Council has not met that burden.

The Commissioner hereby adopts as his own the findings and conclusions set forth in the initial decision as supplemented above.

Accordingly, the Board's Motion for Summary Judgment is granted and it is ordered that the additional amounts of $6,049,000 in current expense and $341,700 in capital outlay can be and are hereby certified to the Essex County Board of Taxation. These amounts when added to the previous tax levy certifications in current expense and capital outlay in the School District of the Township of Irvington for the 1987-88 school year shall be $14,896,012 in current expenses and $341,700 in capital outlay.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 30, 1987

Pending State Board

JOSEPH PEZZULLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Jeffrey A. Bartges, Esq.

For the Respondent, James P. Granello, Esq.

This matter is under consideration by the Commissioner as a result of the filing of a Petition for Declaratory Judgment by petitioner and the subsequent filing of motions for summary decision by petitioner and by the Board.

Background Facts

The filings in this matter, both for declaratory judgment and the motions for summary decision, arise out of a decision rendered by the Commissioner on January 23, 1987 entitled Joseph Pezzullo v. Board of Education of the Township of Willingboro (Pezzullo I). In that case Petitioner Pezzullo requested a declaratory ruling on the provisions of N.J.S.A. 18A:28-5, 18A:29-4.3, N.J.A.C. 6:8-4.2(c), 4.3(b), and 6:11-3.6. More specifically, he sought a declaratory ruling that:

1. the underlying duties and responsibilities he performed under the title Coordinator of the Alternate School were those of a principal;

2. he is tenured as a principal;

3. any seniority determinations to be made recognize this; and

4. he be paid according to the salary guide for principals.

The initial decision rendered by the ALJ first determined that any request for retroactive salary relief was time-barred. He also denied the relief sought by petitioner regarding tenure and

salary as a principal because he found the position to be that of a supervisor. This determination was based on his findings that:

1. The alternate school must be seen as part of the whole program of regular high schools of the district, that is, the alternate school may not be seen as a separate school.

2. The duties petitioner performs are not the sum and substance of the duties of the position of principal.

3. Although he suspended students as the situation warranted, he knew his position title was not principal.

4. Although the Board required him to have principal's endorsement, this is of no assistance to him since a board can establish greater requirements for positions than the minimum standards for teacher certification in a particular area.

5. Being required by the Board to possess a principal's certificate does not lead to the inescapable conclusion that he was a de facto principal.

Upon review of the record, the Commissioner adopted the ALJ's determination that retroactive salary was time-barred under the provisions of N.J.A.C. 6:24-1.2 and by laches. Moreover, the Commissioner found that even if it were determined that petitioner was tenured as a principal, this does not mean that he has a statutory right to be placed on the salary guide for high school principals. N.J.S.A. 18A:29-4.3 allows for the adoption of more than one salary schedule. Thus, the precise salary schedule petitioner is placed upon pursuant to that statute is a matter subject to negotiation, not a right derived from school law. Hyman et al. v. Bd. of Ed. of Twp. of Teaneck, decided by the State Board March 6, 1985, aff'd N.J. Superior Court, Appellate Division, February 26, 1986, cert. den. N.J. Supreme Court June 27, 1986

As to the issue of whether petitioner's position is one of a principal vs. a supervisor, the Commissioner rejected the ALJ's determination that the position required a supervisor's endorsement vis-a-vis that of a principal because the provisions of N.J.A.C. 6:11-3.6 vest the authority to reach such a determination with the county superintendent. As such, it is the county superintendent who must examine the provisions of N.J.A.C. 6:11-10.4, 10.8 and 10.9 (authorization and requirements for supervisor and principal endorsements) in light of a Board-approved job description to determine whether a supervisor's endorsement alone is required or whether a principal's endorsement is necessary if more than supervision of instruction is involved.

As to the development of a job description, the Board was ordered to act immediately to develop and adopt an accurate and thorough job description delineating precisely what actual duties and responsibilities must be fulfilled/performed as Coordinator of the Alternate School. The Board was warned that this did not constitute "an opportunity for the Board to cast the job description as the Board might like to see it in the future, but rather to reflect the actual duties expected of petitioner in the past." (emphasis supplied) (Pezzullo I, at p. 22)

Moreover, the county superintendent was ordered to review the job description forthwith.

Thus, while determining that petitioner was a tenured teaching staff member on the basis of Spiewak v. Bd. of Ed. of Rutherford, 90 N.J. 63 (1982) in the position titled "Coordinator of the Alternate School," the Commissioner deferred to the county superintendent a determination as to what the required endorsement might be for such a position as fulfilled by petitioner.

Further, the Commissioner did not accept the ALJ's determination that the alternate school is not a school within the intendment of N.J.A.C. 6:8-4.3(c)1. This was based on the fact that one need not reach to that issue. It is not required that one be in charge of a building/school to be determined a principal. Luppino v. Bd. of Ed. of the City of Bayonne, 1980 S.L.D. 1028

On February 4, 1987 the Board's attorney sent a letter to the Board enclosing the Commissioner's decision and he informed the Board, inter alia, of the obligation to "immediately adopt a job description which accurately reflects the current actual job duties***" petitioner performs. (emphasis in text) He also requested that the Board take action on the job description.

On May 13, 1987 the county superintendent received a letter from the Board President which stated:

> This is to inform you that the Willinboro (sic) Board of Education has decided that no action should be taken by you on the job description of the Coordinator of the Alternate School until such time as the Board of Education reviews and approves the job description submitted.

In response to the above, the county superintendent sent a letter dated May 28 which reiterated the Commissioner's order relative to the immediate development of an accurate and thorough job description. Further, it stated in pertinent part:

> Your letter which directs me to disregard the instructions in the Commissioner's decision until such time as the Board decides to act, is difficult to comprehend in light of your own

> attorney's advice to the contrary. Your attorney's advice is correct. The Board does not have any latitude to delay but is to act immediately.
>
> If the Board fails to comply with the Commissioner's decision immediately, I will request the Commissioner to take whatever action is necessary to enforce this decision.
>
> (emphasis in text)

Meanwhile, on April 28, 1987 petitioner filed a second Petition for Declaratory Judgment in the instant matter (Pezzullo II), concerning the application of N.J.S.A. 18A:28-5 and N.J.A.C. 6:3-1.10 as a result of the abolishment of his position as Coordinator of the Alternate School effective June 30, 1987. The Board's answer was received on May 5, 1987. The date of June 30, 1987 was in error, however, and petitioner subsequently amended his petition on May 13, 1987 to correct the date to be June 30, 1986. The Board did not seek to amend its answer.

In Pezzullo II, petitioner seeks a declaration that the Board wrongfully withheld his salary for a period of two months, i.e., from June 30, 1986 when it abolished his position to August 30, 1986 when it recreated it. With respect to this, he claims that given the Commissioner's decision in Pezzullo I that he is tenured, the Board was under a duty to assign him to another position in the district when his position was abolished. Therefore, he seeks an order that the Board pay him for July and August 1986, make appropriate reports to the Teachers' Pension and Annuity Fund and such other relief as the Commissioner may deem equitable and appropriate.

On June 9, 1987 the parties were informed by the Commissioner that the matter was not susceptible to a declaratory ruling at that time because it had not yet been established which endorsement was necessary for the position. The Commissioner further stated:

> To that end I have directed the county superintendent of schools to require the board to submit without further delay its job description for the position in question. This matter therefore will be held in abeyance until such time as a determination with respect to petitioner's appropriate certification can be ascertained by the county superintendent. Thereafter further proceedings may be reactivated by either party upon notification in writing to me. (emphasis supplied)

On June 22, 1987 the Commissioner received a letter from the Board's then-attorney informing him that on June 15, 1987 the Board took action to accept his recommendation to proceed to develop a job description called for in the January 1987 decision in Pezzullo I. He then stated:

> As you might appreciate, such a task will require some time to complete, since the Board's personnel committee will be actively engaged in the development of the job description.
>
> Naturally, I cannot say exactly when this task will be completed, but I have urged the Board to complete it as expeditiously as possible.

In response to this, a letter was sent by the Director of the Department of Education's Bureau of Controversies and Disputes on June 30, 1987 which read in pertinent part:

> ***[S]ince this matter has been in abeyance since January, I would strongly urge that the Board be counseled not to procrastinate in this matter.
>
> I would further point out to you that the purpose of the Commissioner's directive was to obtain a description of the duties actually performed by petitioner so that the Burlington County Superintendent might carry out his responsibility of determining the appropriate certificate endorsement under which the petitioner served.
> (emphasis in text)

On July 10, the county superintendent wrote to the Board President the following letter:

> Last January the Willingboro Board was ordered to immediately develop a job description delineating the duties and responsibilities which must be fulfilled by the Coordinator of the Alternate School. The Board was further cautioned not to cast the job description as the Board might like to see it --- but to reflect the actual duties of the petitioner in the past.
>
> On May 7th a letter from you indicates that I should wait on the Board "until such time" as it decides to act.
>
> On May 28th I advised the Board to act immediately to fulfill the order in the Commissioner's Decision. On June 9th the Commissioner wrote to your attorney that he was directing me to require the Board without further

delay to submit the job description. On June 30th the Director of Controversies and Disputes reminded the Board that this matter has been delayed since January and not to procrastinate in this matter.

As of this date, I have still not received the job description in question. Therefore, I am once again directing the Board of Education to develop and adopt a precise and thorough job description for the position of Coordinator of the Alternate School. This description should be developed, adopted and sent to me by July 27, 1987.

Please be advised that in order for me to properly ascertain that the job description follows the criteria established in the Commissioner's Decision; i.e. it must be attested to be accurate and "reflect the actual duties expected of the petitioner in the past," the job description must be attested to as accurate, thorough and reflecting actual duties by those most responsible and/or knowledgeable.

Therefore, given the Board's long term reluctance to comply with a task which appears rather straight forward; i.e. to recast the job description of a long term employee from what actually was done by that employee; and, having no basis to ascertain that the submitted description does indeed accurately reflect what was actually done, the job description must be attested to as accurate, thorough and reflecting the actual duties expected by the Superintendent, the Assistant Superintendent, and the Director of Secondary Education.

On July 13, 1987 the Board acted to adopt a job description for the Coordinator of the Alternate School which delineates the following:

Position: Coordinator of Alternate School

Responsibilities: The Coordinator of the Alternate School shall be directly responsible to the Director of Secondary Education, the Assistant Superintendent, and the Superintendent of Schools.

Function: The Coordinator of the Alternate School shall organize, plan, direct and supervise the Alternate School in the Willingboro Public

School District in conformance with the New Jersey State Statutes and the policies and rules and regulations of the Willingboro Board of Education.

Duties

1. Makes sure that curriculum of the Alternate School is well planned and executed.

2. Schedules teachers into appropriate classes and provides for orientation of staff concerning the routine of the Alternate School program.

3. Schedules students into appropriate classes and provides for orientation of students concerning the routine of the Alternate School program.

4. Insures that the condition of facilities is adequate at all times.

5. Maintains appropriate supplies, textbooks and equipment for the performance of the program, which will include the conducting of inventories as necessary.

6. Makes sure that the policies of the Willingboro Board of Education are executed.

7. Makes sure that school regulations for the Alternate School are executed.

8. Makes sure that appropriate guidance procedures are available to students where necessary. This includes referrals to outside or in-district agencies when required.

9. Conducts required evaluations of staff assigned to the Alternate School program as mandated by New Jersey Statutes, Title 18A.

10. Plans and submits annual budget for Alternate School program, and supervises expenditures for the Alternate School program.

11. Maintains control over petty cash fund.

12. Prepares and submits reports to the Director of Secondary Education, the Assistant Superintendent, and Superintendent, and Board of Education, and County and State officials, as required.

13. Handles all complaints concerning the Alternate School and actively seeks satisfactory solutions to problems. Greets visitors to the Alternate School and provides information on the Alternate School program as requested.

14. Oversees testing programs for assigned curriculum areas.

15. Takes active role in promoting community involvement, and acts as resource person for community efforts regarding the Alternate School program (newsletters, attendance at meetings, and speaking engagements).

16. Is directly involved with the interviewing and hiring of staff candidates.

17. Performs other duties as assigned.

On August 6, 1987 the county superintendent issued the following determination with respect to the disputed position and the Commissioner's order of January 1987 to develop a job description of duties petitioner performed in the past:

> I received the job description for Coordinator of the Alternate School. However, the job description was not attested to by the Superintendent, Assistant Superintendent and Director of Secondary Education as accurately reflecting the actual duties of Mr. Pezzullo when he served as Coordinator of the Alternate School.
>
> Therefore, in order to ascertain whether the job description did indeed reflect the job as done by Mr. Pezzullo, I did the following:
>
> 1. Analyzed the Elementary and Secondary Principals job descriptions against the Coordinator of the Alternate School job description.
>
> 2. Listed from Mr. Pezzullo's sworn testimony which was given "without contradiction from the Board" his duties and responsibilities as Coordinator of the Alternate School.

3. Interviewed the Superintendent, Assistant Superintendent and Director of Secondary Education to determine whether the duties in the job description as submitted reflected the actual duties performed by Mr. Pezzullo.

4. Reviewed records to substantiate Mr. Pezzullo's duties.

My findings were:

1. That twenty-one of forty-five Secondary Principal's duties and nineteen of the thirty-four Elementary Principal's duties were included in the Coordinator of the Alternate School job description.

2. That, of seventeen duties which Mr. Pezzullo testified to doing as Coordinator of the Alternate School, the following nine duties were not included in the job description submitted by the Board of Education:

   - Conducts two fire drills per month and files reports to the Board Secretary.
   - Submits work orders.
   - Maintains daily attendance records.
   - Attends principal's meetings.
   - Carries out directives issued to principals by the Director of Secondary Education.
   - Recommends non-renewal of employment of non-tenured teachers.
   - Suspends pupils.
   - Recommends expulsion of pupils.
   - Conducts parent conferences on pupil suspensions.

3. That the Superintendent, Assistant Superintendent and Director of Secondary Education all attest to the fact that Mr. Pezzullo did, in fact, perform the duties in the job description and the nine duties from his testimony which were not included in the job description.

4. That a review of Willingboro records over several years indicates that Mr. Pezzullo did, in fact: suspend students, conduct and report monthly fire drills, supervise maintenance of the Alternate School Wing, submit work orders, attend principal's meetings, carry out directives issued to principals by the Director of Secondary Education, recommend non-renewal of non-tenured teachers, recommend expulsion of pupils, conduct parent conferences on pupil suspensions.

In light of the above facts, I can only conclude that the Willingboro Board deliberately delayed carrying out an order of the Commissioner of Education by failing to comply with the order to immediately develop and adopt a job description reflecting actual duties of the Coordinator of the Alternate School. This failure by the Willingboro Board to carry out a court directive reflects a disdain for the laws of New Jersey which should not exist in any responsible body. The Willingboro School Board was established by New Jersey State Law and is expected to act in a responsible, law abiding way at all times. It is indeed unfortunate whenever any governmental agency appears to view itself as above New Jersey State Law and direction. I would remind the Willingboro Board members that they have a sworn obligation to uphold the laws of the United States and of the State of New Jersey.

The Board has prevented me from carrying out my responsibilities as ordered by the Commissioner.

Therefore, since it appears that the Board seeks to delay and resist the Commissioner's order I have on the basis of the above submitted job description, the testimony of the Superintendent, Assistant Superintendent and Director of Secondary Education, the testimony of Mr. Pezzullo under oath, and a review of the records determined that the certificate required by the unrecognized title of Coordinator of the Alternate School is that of a principal. Mr. Pezzullo is, therefore, by law entitled to tenure and seniority in the category of principal. (emphasis in text)

As a result of this determination by the county superintendent, a letter from the Board was received by the Commissioner on August 20, 1987 requesting that the Pezzullo I matter be reactivated

pursuant to the June 9, 1987 letter of the Commissioner.* In its letter of request the Board took the position that the county superintendent had erred in his determination that the disputed position called for a principal's endorsement and that he had exceeded his authority. The Board sought an order to reverse the county superintendent and to remand the case to the Office of Administrative Law for further hearing to determine the nature and extent of petitioner's duties and responsibilities.

On August 26, 1987 a conference call was conducted with the Director of the Bureau of Controversies and Disputes, petitioner's attorney, and the Board's current attorney at which time it was determined that the issue of appropriate endorsement for the contested position would be reviewed by the Commissioner by way of motions for summary decision in the instant matter (Pezzullo II). See letter of August 27, 1987 from Seymour Weiss to the attorneys.

While the Board initially sought reactivation of Pezzullo I, its brief was submitted for summary decision in Pezzullo II. Further, while petitioner's brief was submitted for summary decision in Pezzullo I, he simultaneously submitted a request to reactivate Pezzullo II.

For the purposes of rendering a determination on the issue of the appropriate endorsement for the disputed position, the matter is deemed to be an issue subsumed within a reactivation of Pezzullo II, not a reactivation of Pezzullo I, given the Board's agreement to submit the issue to the Commissioner under the latter case. See Board's reply brief of September 11, 1987, at page 4.

As to petitioner's request for declaratory judgment with respect to salary entitlement for a two-month period during the summer of 1986, the Commissioner determines that the issue is time-barred and he will therefore not grant the relief sought for the following reasons.

For petitioner to prevail on his claim, it would have to be determined that he was improperly reduced in force pursuant to N.J.S.A. 18A:28-9 and 28-10 and N.J.A.C. 6:3-1.10. Such a claim must have been filed within 90 days of being notified that he was the subject of a reduction in force. N.J.A.C. 6:24-1.2 He did not do this. Nor did he seek to amend his petition for declaratory judgment in Pezzullo I to include the relief sought. The matter was before the Office of Administrative Law during the 90 day filing period imposed by N.J.A.C. 6:24-1.2. A declaratory ruling by the Commissioner in the January 1987 Pezzullo I case indicating that petitioner was tenured did not create a new opportunity for petitioner to file a claim of improper RIF nearly ten months after it became effective.

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* It is noted for the record that the June 9, 1987 letter was in reference to reactivating Pezzullo II, not Pezzullo I.

Notwithstanding the above, the Commissioner will address the certification determination reached by the county superintendent as it would have bearing on any RIF arising after the filing of the instant petition for declaratory judgment. It does not have bearing on the reduction in force petitioner was subject to in 1986 because a seniority determination must be made anew as each RIF occurs based on the regulations in effect at the time of the given reduction. Erica Cohen v. Emerson Bd. of Ed., decided by the Commissioner September 3, 1985, rev'd State Board June 3, 1987

Positions of the Parties

Petitioner's Position

Petitioner argues that the county superintendent appropriately carried out his responsibilities under N.J.S.A. 18A:7-8 and N.J.A.C. 6:11-3.6(b) and the duty imposed on him by the Commissioner in the Pezzullo I decision. He maintains that there is a broad scope of authority and review inherent in the position of county superintendent which suggests wide and flexible latitude even without the additional delegation of responsibility to the county superintendent by the Commissioner when he directed him "to review this matter [of endorsement] forthwith so as to fulfill his statutory authority.***" (emphasis supplied) (Pezzullo I, at p. 22) Moreover, petitioner contends that a county superintendent has been previously called upon to determine appropriate certification "after the fact" as seen in a case he considers "strikingly similar" to his. Cohen v. Bd. of Ed. of the Twp. of East Brunswick, 1982 S.L.D. 957; aff'd State Board, 1983 S.L.D. 1514

The other two points raised by petitioner have to do with the confusion that existed as to whether Pezzullo I was being reactivated or Pezzullo II and therefore will not be addressed. However, the Commissioner will note for the record that notwithstanding the fact the Board did not appeal Pezzullo I to the State Board, this does not preclude a review of the county superintendent's determination resulting from the directive in that prior decision. Further, the county superintendent's certification decision, although binding on future seniority determinations, is not free from or immune to review by the Commissioner if a controversy results from it. Moreover, even if the issue did not surface in the instant matter, either petitioner or the Board could have filed a petition of appeal as a result of the county superintendent's determination if either disagreed with the outcome.

The Board's Position

The Board argues that the county superintendent's authority was limited to taking facts from and making his certification determination based upon the job description approved by the Board, citing in support of this German v. Bd. of Ed. of Cape May County Voc-Tech School, decided by State Board August 8, 1984 and Freehold Regional H.S. Education Association and Holcomb v. Bd. of Ed. of the

Freehold Regional H.S. District, 1978 S.L.D. 960. It also argues that when reviewing the Commissioner's directive in Pezzullo I, he merely directed the county superintendent to review the job description. Further, the Board asserts that N.J.S.A. 18A:7-8 and N.J.A.C. 6:56 delineate the powers and duties of a county superintendent yet none, in the Board's view, even implicitly includes the power to engage in fact-finding or to assume an investigatory role on a job description submitted under N.J.A.C. 6:11-3.6(b) for determination of certification.

The Board also challenges the county superintendent's position that the job description had to be attested to by the superintendent, assistant superintendent and director of secondary education since there is no requirement in law for this. Further, it asserts that even with the lack of attestation by the secondary education director, the county superintendent had no jurisdictional authority as to the accuracy of the job description in that his authority is limited to the job description itself. It likewise asserts that the county superintendent acted without authority and unreasonably to determine the Board was delaying in the matter. As to this, it asserts that even if he has the jurisdiction to determine any legal delay, much of the time is excusable and explainable.

The Board also argues that even if the county superintendent acted within his jurisdictional authority and reasonably in ascertaining petitioner's job duties, his substantive determination was unreasonable when finding that a principal's certificate was required. More specifically, it avers that (1) he considered only the duties of elementary and secondary school principals that petitioner performed but not the many he did not; (2) he did not compare petitioner's duties to those of supervisors; and (3) the nine duties which the county superintendent determined petitioner performed which were not expressly listed on the job description were actually nominally covered in it and were not even critical or distinctive principals' duties.

Of this, the Board avers, among other things, that (1) the county superintendent failed to state just which duties were those of principal; (2) even if correct, they comprise less than 47% of the high school principal's duties and only 55.8% of an elementary's; and (3) those principal's duties he did perform were to a much lower degree and/or quality than are performed by the principals. It points to the fact that petitioner did not perform many duties of a principal as found by the ALJ in Pezzullo I and his duties were confined to a facility of only a limited number of students and staff.

As to the allegation that the county superintendent failed to review supervisory job descriptions, the Board points out that 56% of petitioner's duties are also contained in supervisor job descriptions. Further, as to the nine "unlisted" duties, the Board avers that although the ALJ and county superintendent may have

determined petitioner performed them to certain degrees, it must be thoroughly emphasized that neither of them found he performed the functions pursuant to lawful authority delegated by the Board. It cites Wilson v. New Brunswick Bd. of Ed., 1977 S.L.D. 555 in support of the proposition that a teaching staff member cannot claim entitlement to a position by performing duties which the school board never authorized the person to perform.

Lastly, the Board argues that the county superintendent's review reflects an unfair bias in favor of petitioner. It contends it is apparent from his August 6, 1987 opinion the county superintendent had taken an adversarial approach to the Board even before conducting his review of petitioner's duties as indicated by his:

1. going out of his way and exercising extra-jurisdictional steps to search for and find fault with the Board's job description when there is no indication he ever did such a thing before;

2. going out of his way to adjudge the Board was illegally delaying when neither the Commissioner nor petitioner had raised the issue;

3. expressing no consideration or deference to the ALJ's findings and determinations;

4. comparing petitioner's duties only to principals and supervisors; and

5. comparing only principal-like duties.

Discussion of Law and Conclusions

First to be addressed will be the allegations that the county superintendent exceeded his authority by going beyond the job description approved by the Board at its July 13, 1987 meeting. The pertinent general statutes and regulations regarding the powers and duties of a county superintendent which must be considered in this dispute include the following:

N.J.S.A. 18A:7-8. General powers and duties

Each county superintendent shall:

a. Visit and examine from time to time all of the schools under his general supervision and exercise general supervision over them in accordance with the rules prescribed from time to time by the state board;

b. Keep himself informed as to the management, methods of instruction and discipline and the courses of study and textbooks in use *** in the local districts under his general supervision, and make recommendations in connection therewith;

c. Advise with and counsel the boards of education of the local districts under his general supervision and of any other district of the county when so requested, in relation to the performance of their duties***.

N.J.A.C. 6:56-1.2 Schools

(a) Each county superintendent of schools shall visit the schools under his jurisdiction as often as may be necessary. He shall render such supervisory service as he may deem desirable with respect to problems of school administration and supervision, school and classroom organization and management, methods and materials of instruction, curricula, programs of guidance, in-service training of teachers, appraisal of education results, the appropriateness and adequacy of school sites, building and equipment, and shall insofar as possible make his office a service bureau for the schools in his county.

More specific regulations pertinent to the instant matter include N.J.A.C. 6:11-3.5 and 3.6 as well as N.J.A.C. 6:56-1.3.

The regulations contained within N.J.A.C. 6:11 place a direct responsibility on the county superintendent to assure that no individual is employed in a New Jersey district unless he or she has the appropriate certificate as indicated in N.J.A.C. 6:11-3.5 which reads:

6:11-3.5 Enforcement

(a) The local Chief School Administrator shall ascertain if professional staff members are properly certificated and shall report to the appropriate district board of education those who are not certificated.

(b) The county superintendent shall take measures necessary for the enforcement of the State law requiring district boards of

education to employ only those professional staff members who are properly certificated for the positions held.

(c) The county superintendent shall notify the appropriate district board of education and the Commissioner of Education immediately when he or she learns of a professional staff member holding a position in violation of the State certification laws and rules.

Moreover, N.J.A.C. 6:11-3.6 vests the county superintendent with the duty and authority to review and approve unrecognized titles and to determine the appropriate certification for such a title. This regulation not only enables the county superintendent to fulfill his or her enforcement responsibilities under N.J.A.C. 6:11-3.5 but it also has bearing on seniority determinations. It reads:

6:11-3.6 Assignment of titles

(a) District boards of education shall assign position titles to teaching staff members which are recognized in these rules.

(b) If a district board of education determines that the use of an unrecognized position title is desirable, or if a previously established unrecognized title exists, such district board of education shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his or her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year. Decisions rendered by county superintendents regarding titles and certificates for unrecognized positions shall be binding upon future seniority determinations on a case-by-case basis.

In addition to the above, there is yet another regulation which has bearing on the instant matter as the issue is rooted in

specific orders of the Commissioner in Pezzullo I. This regulation reads:

> N.J.A.C. 6:56-1.3 School law decisions
>
> The county superintendent shall ascertain whether the judgements and orders of the Commissioner of Education and the State Board of Education in controversies arising under the School Laws of the State or under the rules and regulations prescribed by the State Board of Education are obeyed, and shall inform the Commissioner of Education fully concerning the action taken by the parties with respect to such judgments and orders.

A reading of these legal mandates and a thorough examination of the record in this matter leads the Commissioner to determine that the county superintendent did not exceed his authority or engage in illegal fact-finding and investigation in this matter. In Pezzullo I the Commissioner unequivocably ordered the county superintendent to forthwith execute his duties under N.J.A.C. 6:11-3.6(b). He likewise unequivocably ordered the Board to immediately adopt a job description which thoroughly and accurately delineated petitioner's duties as fulfilled in the past, not as the Board would like to see it. Under the Pezzullo I decision and N.J.A.C. 6:56-1.3, the county superintendent had a legal obligation to take whatever steps he deemed necessary to see that compliance with that decision immediately occurred.

Contrary to the Board's arguments, the county superintendent was not limited to a review of the job description given the factual circumstances of this matter. N.J.A.C. 6:11-3.6(b) is intended for county superintendent review and approval prior to an unrecognized title being used. Thus, in this particular matter, additional responsibilities were placed on the county superintendent when acting under that regulation. He was directed to ascertain based on past duties performed whether or not a principal's certificate was needed for the position and not merely the lesser certificate of supervisor.

The Pezzullo I decision contained a series of undisputed duties carried out by petitioner. Thus, it was incumbent upon the county superintendent to assure that any job description submitted for his review and approval included all of the duties addressed in the Pezzullo I decision as directed by the Commissioner. For the county superintendent to require attestation by the district administrators well-versed and knowledgeable of the actual duties performed by petitioner is not deemed arbitrary, unreasonable or illegal. It must be remembered that this was no ordinary, a priori review of a job description under N.J.A.C. 6:11-3.6(b) but was a review being carried out as a result of an adversarial proceeding wherein the Board argued vigorously that the disputed position was

not one requiring a principal's certificate. As such, its position can hardly be characterized as impartial. Moreover, the Board was specifically warned that it was not to use the Commissioner's order to recast the job description. Again, it was to reflect past duties.

That the county superintendent chose to limit his review of district job descriptions to those of principals is likewise deemed reasonable and appropriate. The specific order of the Commissioner was to ascertain if a principal's certificate was necessary for the position. As such, he can see nothing illegal or inappropriate in the county superintendent reviewing and comparing the job descriptions for principals to aid him in his decision making.

Moreover, the Commissioner finds as reasonable, appropriate and justified the county superintendent's conclusion that the Board had delayed and failed in its duty to carry out the Commissioner's order in Pezzullo I. This was not an order to develop a job description for a new position. It was an order for immediate approval of a job description for a position with duties that had been carried out for more than a decade. It is simply ludicrous to suggest that any board of education would need six months to carry out the order. The Commissioner finds totally meritless the Board's arguments that its delay was excusable and explainable.

Having determined that as a matter of fact and law the county superintendent acted appropriately and within his jurisdictional powers in carrying out his duties, the substantive issue of certification will now be addressed.

As correctly noted by the ALJ in Pezzullo I, there are very few duties prescribed by law or regulation to be fulfilled by a principal. See N.J.S.A. 18A:25-5, the filing of annual reports with the superintendent; N.J.S.A. 18A:37-4, the authority of principals to suspend; N.J.S.A. 18A:40-7, the authority of the principal to exclude ill pupils; N.J.S.A. 18A:41-1, the mandate for a principal to conduct fire drills. As already determined in Pezzullo I, it is not necessary for one to be in charge of a building or school for a principal's certificate to be required in a position. Luppino, supra Nor does a limited number of students and staff in a building necessarily preclude a principal's certificate from being required of a position. There are some school districts in New Jersey which have just as few students and staff as herein. Thus, a determination in this matter hinges on whether the scope and nature of the duties are sufficiently "principal-like" (to use the Board's terminology) to require the higher level certificate of principal as opposed to that of a supervisor.

Upon a thorough examination of the record in this matter, it is determined that the county superintendent's designation of a principal certificate is reasonable and appropriate.

Even accepting, arguendo, the lowest calculation of a principal's duties advanced by the Board, 38% of petitioner's duties, and the calculation of 56% of a supervisor's duties, it is not unreasonable for the county superintendent to ascertain that a position which has a substantial portion of a principal's duties requires a principal's certificate. This is particularly true given that some of those duties are by law authorized for principals only. That the Board did not expressly authorize petitioner to carry out those duties does not nullify the county superintendent's determination. It was undisputed in Pezzullo I that the Board, despite the absence of an approved job description, required petitioner to hold a principal's certificate. Further, it is clear that the Board never assigned any other person appropriately certified as principal to carry out those duties which only a principal by law could carry out in the Alternate School.

Accordingly, the Commissioner determines that the county superintendent's certification is reasonable and appropriate. Such determination means that tenure has been acquired in the position of principal. This determination does not alter the Commissioner's determination in Pezzullo I that there is no legal entitlement under N.J.S.A. 18A:29-4.3 to salary placement on the high school principals' guide as that is a matter of negotiation. Hyman, supra

Having determined that the appropriate certificate for the unrecognized title of Coordinator of the Alternate School is that of principal and that petitioner enjoys tenure as such, the question of seniority must now be addressed. To repeat, the determination will be limited solely to any reduction in force occurring after the filing of the instant petition for declaratory judgment because petitioner never timely filed a claim of an improper RIF in 1986 under N.J.S.A. 18A:28-9-12 or N.J.A.C. 6:3-1.10.

A review of N.J.A.C. 6:3-1.10(1) indicates the appropriate seniority category for petitioner's service is that of high school principal. However, as petitioner neither applied for nor received a principal's certificate until 1978 (see Pezzullo I) his seniority is to be counted from the date that certificate was issued. Sydnor v. Board of Education of the City of Englewood, 1976 S.L.D. 113; Fischbach v. North Bergen Bd. of Ed., 1983 S.L.D. 1418, aff'd State Board July 11, 1984, aff'd New Jersey Superior Court, Appellate Division November 15, 1985; Linda Ledwitz v. Bd. of Ed. of Manalapan-Englishtown, decided September 16, 1987.

If, as a result of this decision, petitioner has been improperly subject to a reduction in force at any time subsequent to April 28, 1987, he is to be reinstated immediately to a position to which his seniority entitles him along with all emoluments and benefits flowing from that entitlement.

COMMISSIONER OF EDUCATION

November 5, 1987

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 2044-87
AGENCY DKT. NO. 39-3/87

FRANK D'ALONZO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

Wayne J. Oppito, Esq., for petitioner

Samuel A. Christiano, Esq., for respondent
(Christiano and Christiano, attorneys)

Record Closed: September 16, 1987 Decided: September 30, 1987

BEFORE **STEPHEN G. WEISS**, ALJ:

The petitioner in this matter, Frank D'Alonzo, an assistant principal at a junior high school in West Orange, brought suit against his employer, respondent Board of Education of West Orange, claiming that its failure to appoint him as of February 1987 to a vacancy in the position of assistant principal at West Orange High School constituted a violation of his seniority rights under N.J.S.A. 18A:28-9 et seq. and N.J.A.C. 6:3-1.10.

D'Alonzo's petition was filed with the Commissioner on March 11, 1987. Following the filing of an answer by the Board later that month, the matter was transmitted to the

Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted by the undersigned administrative law judge on June 1, 1987, where it was agreed that the following issues would be addressed:

(A) Was respondent's failure to appoint petitioner to the position of high school assistant principal a violation of his seniority rights and, if so, to what relief is petitioner entitled; and

(B) Is the petition in this matter barred by virtue of the application of the doctrines of res judicata and/or collateral estoppel and/or laches?

Since both sides agreed the case was susceptible to disposition by way of summary decision, a briefing schedule for cross-motions was established for this purpose. Thereafter, cross-motions with supporting briefs were filed, together with a joint stipulation of facts, and the following constitutes my determination in connection with those motions.

FINDINGS OF FACT

The parties have filed a joint stipulation of facts which, as modified, is herewith adopted as my findings of fact and is set forth below (Exhibit J-1):

1. Respondent, the West Orange Board of Education, is responsible for the administration and organization of the West Orange School District.

2. Petitioner, Frank D'Alonzo, has been employed as a teaching staff member by the Board since September, 1959.

3. From on or about July 1, 1966 to June 30, 1972, D'Alonzo was employed in the position of high school assistant principal.

4. For the 1972-73 school year, D'Alonzo was assigned to the central office as an administrative assistant to the superintendent.

5. For the 1973-74 school year, D'Alonzo was assigned as a junior high school assistant principal and served in that position until June 30, 1983.

6. For the 1983-84 school year, D'Alonzo was assigned as an "acting" high school assistant principal. On February 15, 1984, petitioner was advised that he would be reassigned the following school year (commencing July 1, 1984) to a position as assistant principal of a junior high school.

7. For the 1984-85 school year, the Board reorganized the school district, closing one of its two high schools, and D'Alonzo was assigned as an assistant principal of a junior high school.

8. On July 3, 1984, D'Alonzo filed a petition of appeal to the Commissioner in which he challenged his reassignment to the junior high school as violative of his tenure and seniority rights. That case eventually was decided in D'Alonzo v. Bd. of Ed. of West Orange, N.J. App. Div., Nov. 13, 1986, A-780-85T1 (unreported).* In its decision the Appellate Division affirmed the decision of the State Board of Education which, in turn, had affirmed the decision of the Commissioner that since D'Alonzo's petition of appeal was not filed until July 3, 1984, it was time-barred under the 90-day rule contained in N.J.A.C. 6:24-1.2.

9. As of September 1986, the pertinent senior administrative staff at West Orange High School was:

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*Unless the context otherwise requires, the prior case will be referred to hereafter as "D'Alonzo I."

Joseph Tylus—principal
Gerald Tarnoff—assistant principal
Frank Vogt—assistant principal
Vaughn Avedian—assistant principal

10. In December, 1986, Avedian resigned, thereby leaving a vacancy in one of the positions of high school assistant principal.

11. The seniority list for high school assistant principals, dated October 1983, accurately reflects the pertinent seniority in terms of total service as of that date of petitioner, Tarnoff and one Kenneth Bernabe as follows:

D'Alonzo	16.8 years
Tarnoff	10.8 years
Bernabe	4.0 years

12. In a letter dated December 18, 1986, D'Alonzo advised the superintendent that since he was first on the seniority list for high school assistant principals, he was entitled to be appointed to fill the vacancy created by Avedian's resignation.

13. In a letter dated January 28, 1987, the superintendent, on behalf of respondent, advised D'Alonzo that he was not entitled to claim the high school assistant principal position. No reason was given for that denial.

14. On January 27, 1987, the Board appointed Bernabe to fill the position of high school assistant principal left vacant by Avedian, said appointment to become effective February 9, 1987.

15. On or about March 10 or 11, 1987, the petition of appeal in the instant matter was filed by D'Alonzo in which he challenged the Board's failure to appoint him, rather than Bernabe, to the high school assistant principal position.

16. On March 24, 1987, the Board reorganized the administrative structure of the school district and two of the three positions of high school assistant principal (then held by Tarnoff, Vogt and Bernabe) were eliminated, effective July 1, 1987.

17. As a result of this reorganization, Bernabe was the subject of a reduction in force effective June 30, 1987, and Vogt was reassigned. Thus, as of July 1, 1987, the high school has only one assistant principal, Gerald Tarnoff.*

POSITIONS OF THE PARTIES

A. Petitioner

According to petitioner, the Board's failure to appoint him to the vacant position of high school assistant principal created by the Avedian resignation was a violation of his tenure and seniority rights, particularly given the concession by the Board that he has greater seniority than Tarnoff or Bernabe. Thus, relying upon the decision in Fallis v. South Plainfield Board of Education, OAL DKT. EDU 5934-84 (Jan. 16, 1985), affirmed, Comm'r of Ed. (March 4, 1985), affirmed, State Board of Ed. (September 4, 1985), D'Alonzo maintains that the Board's continuing failure to appoint him to the sole remaining assistant principal position at the high school cannot be sustained.

In Fallis the petitioner was "bumped" from a high school assistant principalship and transferred to a junior high school as the result of a reorganization. A vacancy in the former position later arose when the person who had "bumped" Fallis retired. When the board failed to appoint Fallis to fill the position, he filed a petition challenging that action. The Commissioner held that Fallis was entitled to be appointed to the vacancy by virtue of N.J.A.C. 6:3-1.10(i) since his assignment to the junior high school, contrary to the board's assertion, resulted from a "reduction in force" and was not a "transfer."

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*At my direction, Tarnoff was advised by counsel of the pendency of this case and was offered an opportunity to intervene. Counsel for the Board advised that Tarnoff declined the invitation. Counsel's letter of September 11, 1987, has been marked "Court Exhibit 1." Bernabe earlier had advised the undersigned, through counsel, that he did not wish to intervene.

D'Alonzo also disputes respondent's assertions that his entitlement is barred by the doctrines of res judicata, collateral estoppel and/or laches. This aspect of the case relates, of course, to the fact that as the result of the 1984 administrative reorganization D'Alonzo had brought a suit similar to the present one which, as noted, ultimately was dismissed because he failed to meet the 90-day time requirement of N.J.A.C. 6:24-1.2. The four decisions in that case are attached to the joint stipulation as Appendices A through D. The initial decision by Judge Young dismissed the petition on the basis of laches. The Commissioner modified that initial decision and determined, instead, that the petition was untimely pursuant to N.J.A.C. 6:24-1.2. The State Board affirmed the Commissioner and its decision subsequently was affirmed by the Appellate Division.

According to D'Alonzo, since the instant appeal independently challenges the consequences of a new administrative reorganization announced in January 1987, whereas the previous matter involved a totally separate set of circumstances, there obviously is a clear lack of identity between the two cases and neither the doctrine of res judicata nor the doctrine of collateral estoppel applies. Petitioner also observes that in any case the critical substantive issue, his entitlement by virtue of seniority to a high school assistant principalship vacancy, was never decided in D'Alonzo I.

Finally, with regard to the laches defense, D'Alonzo maintains that this "issue" should not even be addressed since the 90-day limit contained in N.J.A.C. 6:24-1.2 is a "statute-of-limitations" type regulation which, if met, overrides any equitable doctrine tied to an alleged "delay." In other words, if the present action is not time barred under the 90-day rule, it cannot be "too late" under any theory.

B. The Board

The Board initially argues that whether petitioner has greater seniority than Tarnoff is not properly in issue in this case since there has not been any "reduction in force," a necessary prerequisite to consideration of any seniority issue. In support of this argument, the Board cites Fazan v. Board of Ed. of Borough of Manville, OAL DKT. EDU 3359-84 (Sept. 7, 1984), rejected, Comm'r of Ed. (Oct. 24, 1984). In essence, since

petitioner has been maintained in his position as a junior high school assistant principal since July 1984, and he has never been affected in that position by any reduction in force (i.e., "bumped"), whatever took place thereafter at the high school with regard to vacancies and/or the Board's elimination of assistant principalships has no bearing on his status at all.

Beyond that, the Board maintains, of course, that D'Alonzo's petition is barred by the doctrines of laches and/or res judicata and/or collateral estoppel. With respect to laches, the Board points out that in 1972 petitioner was transferred, without objection, from a high school assistant principalship to the central office and, in the following year, to a position as junior high school assistant principal. Since it was not until 1984, 11 years later, that petitioner first brought suit claiming entitlement by virtue of seniority to the high school position, it is the Board's position that this lengthy "delay" bars the claim now. This same argument was raised by the Board in D'Alonzo I and was adopted by Judge Young in his initial decision (Exhibit J-1, Appendix A).

The Board also argues that the instant petition is barred by res judicata and/or collateral estoppel, pointing out that: (1) the parties are identical to those in D'Alonzo I; and (2) petitioner's claim is "essentially the same" as that previously pursued (entitlement to a vacancy in an assistant high school principalship by reason of seniority). Thus respondent argues that D'Alonzo is attempting to relitigate the very same issues which were involved in that earlier matter.

C. Discussion

My review of the facts in this case leads me to conclude that none of the separate defenses raised by the Board, laches, res judicata and/or collateral estoppel, apply. With respect to laches, the Commissioner in D'Alonzo I never ruled upon the administrative law judge's recommendation as to that issue, and the subsequent history of the case pointedly omits reference to the laches issue. In any event, I do not find laches appropriately to apply since no prejudice has been cited by the Board, no less supported by any proofs, to demonstrate an inability to defend, even assuming there has been an "unexplained" delay. See, e.g., Lavin v. Bd. of Educ. of Hackensack, 90 N.J. 145 (1982).

With respect to res judicata and/or collateral estoppel, I must reject these defenses as well. The context giving rise to the instant matter is a failure to appoint D'Alonzo to a vacancy in 1987. While "similar" in a very broad sense to the 1984 case, nevertheless it is materially distinct for purposes of these defenses. First, D'Alonzo's present petition clearly met the 90-day requirement of N.J.A.C. 6:24-1.2, and the Board does not argue otherwise. Thus, the critical procedural "issue" addressed in D'Alonzo I, upon which that case turned, does not even exist here. In fact, as I read the decisions in D'Alonzo I, it is obvious that the underlying substantive issue was never addressed.* Thus, consideration here of that issue clearly would not constitute "...a wasteful and unnecessary fragmentation ... and duplication of proceedings." See, City of Hackensack v. Winner, 162 N.J. Super. 1, 25 (App. Div. 1978), mod. 82 N.J. 1 (1980). Under the circumstances, neither the doctrine of res judicata nor the doctrine of collateral estoppel is pertinent to these proceedings. See also, Charlie Brown of Chatham v. Bd. of Adjustment, 202 N.J. Super. 312, 327 (App. Div. 1985).

The other point raised by the Board is that the present controversy is not even "ripe," since petitioner has not been the subject of a reduction in force and he therefore cannot even raise any seniority claim. My review of the Commissioner's decision in Fazan, upon which the Board relies, convinces me that this argument has substantial merit. The petitioner, like Fazan but unlike Fallis, was not the subject of a reduction in force vis-a-vis the high school assistant principalship, either in 1984 or in 1987. In his initial decision in Fallis, the administrative law judge pertinently referred on several occasions to the accepted proposition that seniority applies only where there is a question concerning "an employee's bumping rights upon a reduction in force" and that "seniority is a concept which comes into play only when a reduction in force is necessary." Fallis at 9, 10. Thus, since there had been a reduction in force in 1981 which resulted in the transfer of Fallis from high school assistant principal to assistant principal at a middle school, there was in that case a legitimate basis to consider petitioner's seniority status.

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*While the administrative law judge in D'Alonzo I did observe that D'Alonzo's claim to seniority "is not properly based on the 1984-85 reduction in force" (Joint Exhibit 1, App. A, p.6), the Commissioner did not adopt that finding. Neither the State Board nor the Appellate Division decision refers to the issue at all.

To the contrary in this case, at no time was petitioner moved from one category to another or otherwise affected as the result of any reduction in force. In adopting the determination by the administrative law judge in Fallis, the Commissioner found that, unlike here, a reduction in force did occur and the issue of seniority had to be considered pursuant to N.J.A.C. 6:3-1.10.

Simply put, the situation in which D'Alonzo finds himself in the case sub judice is not one which involves a reduction in force which is a necessary condition prerequisite for consideration of one's seniority entitlement under the statutes and the regulations. During 1983-84, D'Alonzo was an acting high school assistant principal. His assignment for the 1984-85 school year was as a junior high school assistant principal, where he remained since then. Nothing occurred in 1987 which would constitute a reduction in force impacting upon him. Given the decisional authority, D'Alonzo therefore has no entitlement to the position held by Tarnoff by virtue of seniority.

Accordingly, I **CONCLUDE** there is no material fact genuinely in issue in this matter since petitioner was not the subject of a reduction in force resulting in his movement to the position of assistant principal at the junior high school, and the respondent therefore is entitled to entry of summary decision as a matter of law. Pursuant to N.J.A.C. 1:1-12.5(b), respondent's motion for summary decision is granted and petitioner's cross-motion is denied, and it is **ORDERED** that the petition of appeal be **DISMISSED**.

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

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

September 30, 1987
DATE

STEPHEN G. WEISS, ALJ

OCT 2 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

FRANK D'ALONZO,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner pursuant to N.J.A.C. 1:1-18.4.

Petitioner objects to the ALJ's conclusion that he was not subject to a reduction in force in 1984 and points to the court decision in D'Alonzo I, which reads in pertinent part:

> Additionally, the record shows that D'Alonzo did not file his petition with the Commissioner within 90 days after being notified of the action taken by West Orange as required by N.J.A.C. 6:24-1.2. On February 15, 1984, D'Alonzo received written notice stating that West Orange had abolished the position of Acting Assistant Principal at West Orange High School and had approved his transfer from that position to Assistant Principal at Roosevelt Junior High School, effective July 1, 1984. D'Alonzo was therefore required to file his petition with the Commissioner within 90 days of February 15, 1984. In fact, D'Alonzo's petition was not filed until July 3, 1984, more than 144 days after he had received notice of the action taken by West Orange. Moreover, petitioner's filing a formal grievance with the principal of West Orange High School on June 16, 1984, did not relieve him of the obligation to file a petition in accordance with N.J.A.C. 6:24-1.2. (Slip Opinion, at p. 3)

Petitioner argues that this clearly demonstrates he was in fact subject to a reduction in force as noticed thereof on February 15, 1984. He further argues that all D'Alonzo I stands for is that his petition of appeal was time barred. Consequently, petitioner avows that it was he, and not Mr. Bernabe, who should have been recalled in December 1986 when a vacancy arose in the high school vice-principal category. As to this, it is petitioner's position that when the Board acted in March 1987 to abolish an assistant principal position, had he been filling the position, as

opposed to Mr. Bernabe, petitioner would have continued as the only assistant principal at the high school as his seniority in that category is greater than Mr. Tarnoff, the current assistant principal.

Upon review of the record including petitioner's exceptions, the Commissioner concurs with and adopts the findings and legal conclusions of the ALJ that this matter is not barred on the basis of res judicata or collateral estoppel. The vacancy that occurred in December 1986 which prompted the petition in this matter constituted a new cause for action. Thus, if petitioner believed his rights were transgressed as a result of the Board's failure to appoint him to the vacant assistant principal's position, he was entitled to file a Petition of Appeal over the action.

As to the issue of whether or not petitioner was subject to a reduction in force in 1984, the Commissioner fully agrees that while the ALJ in D'Alonzo I concluded he had not been, that substantive issue was never addressed by the Commissioner, the State Board, or the appellate court because the matter was dismissed on procedural grounds. Notwithstanding petitioner's arguments to the contrary, the appellate court's reference to petitioner's position as acting assistant principal being abolished is not tantamount to a declaration that he had in fact and in law been subject to a reduction in force within the meaning of N.J.S.A. 18A:28-9 through 12 and N.J.A.C. 6:3-1.10. That specific issue is the gravamen of the case herein, i.e., was petitioner subject to a reduction in force in 1984 which triggered his seniority rights in the category of high school assistant principal?

Upon careful consideration of the issue, the Commissioner concludes, as did the ALJ, that petitioner was not subject to a reduction in force in 1984 and, thus, his seniority rights in that category remain inchoate. This conclusion is based on the fact that petitioner was specifically assigned as an acting high school assistant principal for 1983-84, an assignment given by the Board for one year only whereupon petitioner was to return to his junior high school assistant principal position. With respect to this, the ALJ in D'Alonzo I found in pertinent part that:

> The following represents the chronology of events leading to this controversy based on admissions in pleadings, credible testimony of witnesses, and documentary evidence:
>
> ***
>
> The current Superintendent of Schools was appointed to that position in January 1982. In anticipation of and preparation for the implementation of the Board's plan to consolidate its two high schools into one beginning with the 1984-85 school year, the Superintendent recommended

temporary reassignments into administrative positions. The Board approved and acted at its regular public meeting on September 13, 1983 as follows:

1) appointed Stewart Weinberg [high school assistant principal] as Transition Manager, effective September 1, 1983 through June 30, 1984 [creating vacancy in position of high school assistant principal].

2) appointed Frank D'Alonzo, petitioner, high school acting assistant principal, effective September 1, 1983 through June 30, 1984 [creating vacancy in position of assistant junior high school principal, which was held by D'Alonzo].

3) appointed Marcia Bossart, acting assistant junior high school principal, effective September 1, 1983 through June 30, 1984.(R-2)

It is noted that the minutes of that meeting (R-2) also states (sic): "All of the above are ten (10) month appointments and the appointees will go back to their old positions for the 1984-85 school year." There were no known objections by any transferees.

D'Alonzo was noticed of the Board's action in a letter from the Superintendent under date of September 14, 1983. The notice clearly communicates the appointment as "Acting Assistant Principal at West Orange High School..., effective September 1, 1983 through June 30, 1984." See R-1.

Relevant personnel assignments in 1982-83 were as follows:

Edison Jr. H.S.	-	Frank D'Alonzo, assistant principal
Mountain H.S.	-	Jerry Tarnoff, principal
	-	Frank Vogt, assistant principal
	-	Vincent Mirandi, assistant principal
West Orange H.S.	-	Joseph Tylus, principal
	-	Stewart Weinberg, assistant principal
	-	Kenneth Bernabe, assistant principal

In the 1983-84 school year, the above assignments remained except as follows:

Edison Jr. H.S.	-	Marcia Bossart, acting junior high school assistant principal
West Orange H.S.	-	Frank D'Alonzo, acting high school assistant principal
Superintendent's office	-	Stewart Weinberg, transition manager

The consolidation plan went into effect in the 1984-85 school year. At its February 14, 1984 meeting, the Board abolished the positions of acting assistant principal at Edison junior high school and the West Orange high school, effective July 1, 1984 and acted to "transfer Mr. Frank D'Alonzo to his previous position at the junior high school level. Mr. D'Alonzo will be assigned as Assistant Principal at Roosevelt Junior High School, effective July 1, 1984."***

Weinberg left the school district at the conclusion of the 1983-84 school year for other employment. (D'Alonzo I, at pp. 2-4)

Thus, the factual circumstances in this dispute indicate the Board's intent was to appoint petitioner on an acting basis to Mr. Weinberg's assistant principal's position as he had been named transition manager for the merging of the two high schools during the 1983-84 school year.

As such, the Commissioner concludes that rather than petitioner being subject to a reduction in force in 1984 (which would have triggered his seniority rights in the category of high school assistant principal), his interim assignment as acting high school assistant principal expired just as the Board specifically designated it would when the interim appointment was made. As such, petitioner's seniority rights in the high school assistant principal category remain inchoate and will remain as such until he is subject to a reduction in force through abolishment of his "regular" position of junior high school assistant principal, not through the abolishment of an "acting" position he was assigned for one year only.

Accordingly, the Commissioner adopts the initial decision as the final decision in this matter for the reasons expressed by the ALJ and herein. Consequently, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

November 10, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS EDU 2774-87 and
EDU 2775-87
AGENCY DKT. NOS. 73-4/87 and
59-4/87
CONSOLIDATED

BOARD OF EDUCATION OF PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF OLDMANS AND BOARD OF EDUCATION OF BOROUGH OF WOODSTOWN,
Respondents.

ANN C. CHEVREUIL, et al,
Petitioner,
v.
BOARDS OF EDUCATION OF TOWNSHIP OF OLDMANS AND OF PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT,
Respondents.

Ann C. Chevreuil, petitioner, pro se

John P. Morris, Esq., for respondent Board of Education of Oldmans Township (Horuvitz, Perlow, Morris and Baker, attorneys)

Gary D. Wodlinger, Esq., for respondent Board of Education of Penns Grove-Carneys Point Regional School District (Lipman, Antonelli, Batt & Dunlap)

Record Closed: August 18, 1987 Decided: September 30, 1987

BEFORE NAOMI DOWER-LABASTILLE, ALJ:

Petitioner, Ann C. Chevreuil, parent and resident in Oldmans Township (Oldmans), on her own behalf and for hundreds of participating parents, filed a complaint seeking to preserve past practice in Oldmans of permitting children to have a choice between attending the Woodstown and Penns Grove High Schools. Penns Grove-Carneys Point Regional High School (Penns Grove) filed a complaint against the Oldmans Board to compel the Board to send more of its high school students to Penns Grove, claiming violation of an implied sending-receiving contract or violation of allocations mandated by N.J.S.A. 18A:38-12. The Board of the Woodstown Borough School District, although named in the complaint, opted to take no position and waived appearance. The Commissioner of Education transmitted the consolidated matters to the Office of Administrative Law, on April 27, 1987, as a contested case, pursuant to N.J.S.A 52:14F-1 et seq.

Prior to the hearings, on July 20 and 21, 1987, in Pilesgrove Township, I determined an interim relief motion, granting the Chevreuil group maintenance of the status quo during the 1987-88 school year. The order, which the Commissioner did not reverse, permitted all children currently enrolled in Woodstown High School to continue attendance there and required that the two students who were denied enrollment in ninth grade at Woodstown be permitted to enroll for the 1987-88 school year. At hearing, I supplemented my order by adding a third student of whose application I was unaware at the time of the earlier order. In fact, a total of two students will enter ninth grade at Woodstown High as a result of that order, since one of the three covered by my order opted to attend Penns Grove. Just prior to hearing, the Chevreuil group added an additional issue concerning transportation of high school students. The other parties did not object to adding this issue belatedly since it would avoid a separate petition on the related question of transportation for the affected students. The record closed with receipt of briefs on August 18, 1987. A list of exhibits entered into evidence is appended to this decision.

FACTUAL DISCUSSION

The Pedricktown (now Oldmans) Board minutes of 1907 to 1941 evidence the initial relationships of the three districts (Oldmans, Penns Grove and Woodstown). In 1907, Pedricktown determined to send its students to out-of-district high schools and sought offers of favorable tuition rates from nearly districts. On September 7, 1907,

Oldmans voted to send Pedricktown students to Penns Grove and to send Auburn (southern) area students to Woodstown High. In the 1920s, some Oldmans students in the more northernly area asked, and were granted, registration at Woodstown High, if their parents paid the difference in cost of tuition. Three bus transportation routes—two from Pedricktown to Penns Grove High and one from Auburn area to Woodstown High—were established by 1925. In the 1930s, the minutes indicate continuance of the sending-receiving relationship with both Penns Grove and Woodstown High Schools. The bus routing changed little, despite occasional parental requests that bus stops be made available closer than one or more miles from their residences. The above facts were not disputed. Additionally, the parties stipulated that in the 1943-44 school year, 79 percent, (50), of Oldmans students attended Penns Grove High, and 21 percent (13) attended Woodstown High. The count was obtained from the September 30th monthly enrollment report filed in 1943.

John E. Cashner, Salem County School Superintendent, testified that he knew of no formal sending-receiving agreement between the Boards. They simply continued historical sending-receiving patterns established since the turn of the century. He stated that the "Tuition Contract Agreement" supplied by Penns Grove (Exhibit PG-13) was prepared each year to reflect current enrollment and cost and was not the kind of formal sending-receiving agreement filed with him of which only one is currently in force in Salem County. Cashner caused county records to be reviewed back to 1936 and did not find any agreement. Oldmans school assignment Policy #2120 (Exhibit PG-2) and zone map were never filed in the county office.

Cashner assumed that Oldmans students in the Pedricktown area attended Penns Grove and those in the Auburn area attended Woodstown but, since reading Oldmans Policy #2120, he is aware that the Board provides for "crossovers." Cashner reads the policy to provide that crossovers may occur only when both Boards agree. He himself recalls that when he was principal of Woodstown High (about 1970), those students residing in Oldmans came from the Auburn area. Cashner met with the parties to mediate the sending dispute in November 1986. In Cashner's opinion, to the extent that Oldmans' representatives subsequently indicated their belief that "crossovers" were wrong, it had resulted from their counsel's having brought to their attention the existence of N.J.S.A 18A:38-12, mandating continuance of 1943-44 pupil allocation.

James Clancy served as a consultant and interim superintendent to Penns Grove in 1986-1987. He was present at the November 1986 meeting between

representatives of the Boards at which time Oldmans administrative principal, Maurice Madden, mentioned the Oldmans zone map for each high school. Clancy was not aware of the Oldmans zone map prior to 1986. Clancy learned that the trickle of crossovers wanting to attend Woodstown was beginning to become a flow and Penns Grove was concerned with incurring increasing losses in tuition payments in light of Oldmans declining population projections (Exhibit PG-6). Prior to 1986-1987 school year, Clancy had not known that the decline in the number of pupils sent to Penns Grove resulted from a dramatic shift in crossovers. Clancy's understanding of the alleged agreement between the Boards was based entirely on the Oldmans zone map and Policy #2120 as revealed in fall 1986 and early spring 1987. Penns Grove files contain no documentary evidence of a zone-based agreement between the parties, although files were searched back to 1975-76 school year.

Penns Grove was aware that students had occasionally transferred between Penns Grove and Woodstown High Schools. The 1985-86 school year had the first significant number of crossovers. Clancy did not know that in school year 1978-79, Penns Grove was the beneficiary of crossovers: of thirteen Oldmans students residing in the Woodstown zone, five went to Penns Grove High. He was also unaware of the number of students who made crossovers in Penns Grove's favor each year, but admitted that such crossovers had occured. Clancy has no actual knowledge of student's motivations for wanting to attend each school but thought that in the 1960s and prior to the last several years, high school football at Penns Grove might have drawn students, whereas recent criticism of the school in the past two years is now having a reverse effect and the number of crossovers has increased.

Robert Hayes, Penns Grove financial director since 1970, testified that he had an "understanding" that Oldmans students residing in the Auburn area attended Woodstown High and all others attended Penns Grove. He knew of no written agreement; it was a "gentlemen's understanding" and he knew of no crossovers made between the 1975-76 and 1984-85 school years. Oldmans sent him the figures, which were relatively similar from year to year until 1986, when there was a fairly substantial drop. Tuition changes were $4,100 per student in 1986-87, so that diversion of 25 students over 4 years would mean a loss of $140,000; further erosion in attendance could cause an increase in taxes or cuts in high school programs.

Hayes had never seen the Oldmans zone map or policy before October 1986. Since he does not handle transfer cards, he had no personal knowledge of addresses or

whether or not there were crossovers to Penns Grove High from the Woodstown High zone. Since Penns Grove had no high school construction activity later than 1970, it had no reason to seek a written sending agreement with Oldmans relating construction to reliance on continuance of a sending relationship. Penns Grove had always accepted the figures from the Oldmans Board "in good faith" and it had never checked the addresses to learn the area of Oldmans in which students resided. Hayes stated that he would take a look at pupil projection figures, but he had never compared projection with actual attendance each year.

Thomas Dillon, Penns Grove High School principal for over four years, testified he had never heard the word "zones" with respect to Oldmans until 1986. He would sign or authorize stamping of the pupil transfer cards. The guidance office handles these cards. The Oldmans addresses would have had no meaning to Dillon. Sometimes he would have Oldmans' administrator, Mr. Madden, called to inquire about whether a transfer should be processed. Sometimes Madden would call Dillon's office and notify him of a transfer from Oldmans.

Three of the parents in the Chevreuil group, Linda Alloway, Doris Martin and Pennie Johnson, testified. Alloway described the high school assignment practice of the Oldmans Board. As a part of the counseling program, representatives of both Penns Grove and Woodstown High Schools met with Oldmans eighth graders. The children chose the counselor they wished to see. Since a number of Pedricktown parents had children who wanted to go to Woodstown, they asked the Board to institute another bus or change the existing routes because they had to deliver their children to a bus stop a mile or more away. Although she has lived in Oldmans for 14 years, Alloway was not aware of any Oldmans high school zones until recently. Her daughter had wanted to go to Woodstown High since she was in the third grade. When her child choose Woodstown in 1983 or 1984, Oldmans even made arrangements for her to get to cheerleader tryouts at Woodstown High. Alloway did understand that she would have to bring her child to the bus stop.

Doris Martin bought her Pedricktown house in 1979 from two educators who told her that she had a choice of either high school for her children. She went to a counseling session with her oldest child and was offered a choice of schools. No Board approvals were required. She joined the Chevreuil group when her second child was denied attendance at Woodstown and was told there were no exceptions to the policy as a result of the instant controversy.

Pennie Johnston of Pedricktown is a teacher in the Pilesgrove/Woodstown district. She knew both Madden and the Woodstown school administrators. The latter were aware that Johnston was moving to Pedricktown in 1984 and intended to take her daughter with her to school in Woodstown. None of the school administrators ever told her Oldmans had zone restrictions, and she was sure they would have done so had such restrictions existed. Johnston felt that Penns Grove school authorities were inflexible and insensitive, which was one reason why she had moved to Oldmans Township. The gravamen of her testimony and that of the other parents was that in practice, freedom of choice of high schools had always existed in Oldmans and any change of that policy was arbitrary and unreasonable.

The Oldmans Board's witnesses were its secretary, Gary Moore, and Maurice Madden, it administrative principal. Moore presented Board minutes from 1907 relating to the sending-receiving relationship. These materials spoke for themselves and none of the facts therein could be disputed since no witness had personal knowledge of these remote times. Moore could find no record that Oldmans Policy #2120, which was adopted in 1977, had ever been sent to Penns Grove prior to 1986, when this dispute arose.

Madden drafted Policy #2120 in 1977 to codify his understanding of the existing practice of high school assignments by the Oldmans Board and administrators. The policy was intended for no other purpose, was not sent to receiving school districts and, in fact, there were never any written agreements with other districts. The policy reads as follows:

> **Policy #2120**
>
> **OPERATION OF THE SCHOOL SYSTEM**
>
> **HIGH SCHOOL ATTENDANCE ZONES**
>
> In order that a manageable system exists for the designation of resident students to attend at Woodstown and Penns Grove High School, the following guides shall apply until such time as other solutions are needed:
>
> 1. Those resident students immediately adjacent to Bus Route 1, at or beyond Leonard's Lane, shall attend Woodstown High School without prior Board approval: Route 1 - Auburn Road, Tighe Road, Perkintown Road, Pennsville-Auburn Road, Township Line Road, Courses Landing Road, Auburn Village, Woodstown Road.

2. Those students not immediately adjacent to bus Route 1 shall attend at Penns Grove High School, unless otherwise approved by the Oldmans Board.

3. Those resident students who make arrangements, personally, to ride on Bus Route 1, may attend Woodstown High School upon approval by the respective offices and Boards of Education of the two Districts.

4. Those resident students who make personal arrangements to ride on Penns Grove High School bus routes, may attend at Penns Grove High School, upon approval by the respective offices and Boards of Education of the two Districts.

5. Those resident students who seek transfers between Woodstown and Penns Grove High Schools, may do so after approval by the two high school offices and the Oldmans office. They must make arrangements to get to the appropriate high school on bus routes that already exist.

The practice of high school assignments based on bus routes existed when Madden became an administrator in 1968. If a student lived near the Woodstown bus route (Route #1), that high school was assigned; if a student lived near the Penns Grove routes, the assignment was to Penns Grove; if the parent wanted a transfer or a different assignment, however, the parent had to go to the Board or administrator to request it and had to agree to get the child to the bus stop. Madden recalled no transfer requests prior to 1977, nor did he recall if, in some instances, crossovers were granted without a written request by a parent.

Madden drafted the policy in 1977 because at that time a number of pupils were attending St. James (a private school) and there was some controversy concerning provision of bus transportation for private school students residing near pupils going to Woodstown. (The administrative law judge takes this to mean that at that time, absent a specific policy, the Board might have been obligated to provide additional private school transportation if it transported Oldmans students in the same area to different high schools.) Ten years ago, the bus route (Route #6) was slightly different on Paulsboro-Pennsville Road in order to accommodate St. James students. The Chevreuil group argues that since a route change was made to accommodate parents some years ago, it is unreasonable for the Board not to adjust routes and stops so that they do not have to transport children over a mile to a bus stop.

Madden's testimony showed that the Oldmans policy was at all times for the purpose of holding to the established bus routes and minimizing transportation expense. Crossovers were allowed so long as they did not run contrary to these purposes. Madden admits that there are interpretation problems with the adopted policy, but that he and the Board never intended to suggest that transferring students or crossovers needed the approval of the receiving districts, but rather, that paragraphs 4 and 5 related entirely to bus transportation arrangements. Parents would often call Madden to obtain such approvals. The policy related not to geographical zones, but entirely to bus route accommodations.

Madden testified that crossovers could go either way. Some parents near the Woodstown buses may have attended Penns Grove High and wanted their children to go there. In some years, the crossovers were a "washout" or nearly so. Not until 1985-86 did problems arise. When Madden made his pupil projections for Penns Grove, he did consider where the parents wanted their children to go. After eighth-grade children made a choice, Oldmans teachers prepared a list for each high school and gave the list to that school's counselor. Thus, each high school knew how many students to expect by spring of the preceding year. Some students changed their minds over the summer and, depending on when and how they sought to re-register, these students might be called transfers, but they had never attended the school from which they were listed as transferring. Actual transfers rarely occurred.

It is not only crossovers to Woodstown High which have affected decreased enrollment of Oldmans students in Penns Grove High, however: some students attended St. James, some dropped out, and some moved into or out of the district. The Oldmans student figures thus fluctuated up and down for various reasons. Penns Grove received 85 pupils in 1984-85; 87 pupils in 1985-86; and 70 pupils in 1986-87. In both 1985-86 and 1986-87, Madden's estimates to Penns Grove proved to be exactly right. Madden noted that Oldmans students choosing Penns Grove were fewer; he believes the reason for recent decreases is that Penns Grove school problems have been aired in the newspapers. During some school years, Penns Grove gets 17 Oldmans ninth graders, while in other years, it has gotten 40 pupils. The normal margin of error in predicting has been 0 to 5.

Oldmans Board minutes do not reflect disposition of every parental request for a change of high schools. Sometimes parents will come to the Board orally requesting a transfer because of their child's problems in one high school. They seek a fresh start for

the child. If the Board sees no problem, such a request would be granted. A parental written request was historically for the purpose of authorization to move a cumulative folder to a high school. Bus capacity was the main consideration in granting crossovers. The Oldmans Board did not wish to incur the expense of more than one bus to Woodstown High. In fact, in spring of 1986, the Board believed bus capacity was 44 to 46 students and then discovered legal capacity was only 38, which disrupted its plans. Bus transportation problems and erosion of the number of pupils attending Penns Grove in 1986 led to this dispute.

The hearer has recited much of the above testimony to assure the Chevreuil group parents, who were not represented by counsel, that she did recall and consider all the facts. Many of these facts will not be stated in my findings, however, because they are nonoperative on the issue which Chevreuil has consistently described as "freedom of choice." The Oldmans Board cannot grant full freedom of choice of high schools if the statute prohibits them from doing so. Thus, all facts evidencing past practice of free choice of schools are not operative facts which need to be set forth in formal findings.

FINDINGS OF FACT

1. Oldmans has no high school and has been sending students to Penns Grove and Woodstown High from 1907 to the present time without any written agreement.

2. Since Penns Grove was unaware of Oldmans's internal written policy and bus transportation zone map prior to 1986, they could not have served as the basis for even an oral sending-receiving agreement.

3. The only understanding Oldmans had with Penns Grove was that Penns Grove High School would receive the Oldmans students residing near the Penns Grove bus routes and Oldmans would try to give the receiving district an accurate pupil projection.

4. In school year 1943-44, Oldmans sent 79 percent of its high school students to Penns Grove and 21 percent to Woodstown.

5. Oldmans parents always had free choice between the two high schools, so long as the choice could be accomodated under the current bus transportation arrangements.

6. Parents were not required to get approvals from either of the two Boards which received Oldmans students, both of which accepted any Oldmans students for which Oldmans would pay tuition.

7. The Oldmans Board adopted Policy #2120 in 1977 as an internal guideline to control bus routes and transportation expenses "until such time as other solutions are needed" (PG-2, paragraph one), and the receiving district approvals referred to therein relate only to bus transportation and the authorization to transmit cumulative student records. Madden's interpretation is fully supported by the historical facts and no Oldmans student ever sought or was required to obtain approval from a receiving district's board.

8. When a Pedricktown area student chose to go to Woodstown High or an Auburn area student chose Penns Grove, the nearest bus stop to the chosen school might be further away from the student's residence than a bus pickup for the other school. Although there were several crossover students two miles or more from their bus stop, a number of parents complained of having to take their children to a bus stop a mile or more away.

9. Oldmans bus routes were designed to accomodate students to the extent that this could be done without changes which would increase expenditures, such as the addition of a second bus on the Woodstown route.

10. The following figures show enrollments of Oldmans pupils in the last six years:

Year	Eighth Grade Grads	Ninth Graders at Penns Grove (following year)	79% of Eighth Graders (rounded)	Number of Pupils more or less than 79%
81-82	35	29	27	+02
82-83	36	24	28	-04
83-84	30	19	23	-04
84-85	41	20	32	-12
85-86	29	12	22	-10
86-87	28	15	22	-07

11. The Oldmans Board did not adopt a resolution allocating and apportioning its pupils between Penns Grove and Woodstown High Schools prior to the 1943 - 1944 academic year. It has never done so to the present time.

CONCLUSIONS OF LAW

The facts show that there was never any written sending-receiving agreement between Penns Grove and Oldmans. Penns Grove has been unable to establish facts to show that there was an oral agreement, and I **CONCLUDE** that the only implied agreement which existed was that Penns Grove would receive Oldmans students who resided near the bus routes and Oldmans would give the receiving high schools as accurate a projection of their numbers as possible. Absent a formal contract, the controlling law is N.J.S.A. 18A:38-12, which says:

> Allocation and apportionment of pupils among two or more high schools
>
> Whenever the board of education of a district shall designate two or more high schools without the district for the attendance of its high school pupils it shall, by resolution, allocate and apportion such pupils among the designated high schools and if no such allocation and apportionment has been made prior to the academic year 1943-1944, the actual allocation and apportionment of pupils among said high schools in effect in said academic year shall be effective as such allocation and apportionment but if any board of education of any district which is not now sending pupils to a high school or high schools without the district shall hereafter so

> designate two or more high schools for said purpose and shall fail to allocate and apportion them by resolution among said high schools, the actual allocation and apportionment of high school pupils made in the first academic year of the designation shall be effective as the allocation and apportionment of such pupils.

Since Oldmans sent its students to two high schools outside the district prior to the adoption of N.J.S.A 18A:38 -12 (L. 1944 c. 210) and did not pass a resolution prior to that time, I CONCLUDE the actual 1943-1944 allocation must be continued. If the Oldmans Board wishes to change its designation of high schools or the allocation, it can only do so pursuant to the procedures mandated by N.J.S.A 18A:38-13 and 14.

Penns Grove's position, as stated on the record, is that it does not care where the students from Oldmans reside, but is concerned only that it continue to receive the number of high school pupils to which it is entitled by law. It becomes obvious that the Chevreuil group parents cannot be granted "freedom of choice" of high schools if more than 21% of the Oldmans eighth grade graduates prefer to attend Woodstown High. (The percentage does not include students who opt for special programs, such as agriculture, which are only offered at Woodstown and which are covered under N.J.S.A. 18A:38-15.) The Commissioner addressed this very issue in Board of Education of Asbury Park v. Boards of Belmar and Manasquan, 1967 S.L.D. 275. In that case both the petitioner/receiving district and the sending district had been aware of the statutory mandate at least a few years prior to filing of the complaint, but the receiving school did not press its case earlier because its high school was on double sessions. In the instant case it is clear that all parties acted in good faith and were unaware of the statutory mandate until Penns Grove expressed its concern over declining enrollment. Despite the Asbury Park proofs of a long history of "free choice," the Commissioner held that the statutory mandate to maintain the 1943-44 allocation could not be changed except through his approval upon proper application and proof of good and sufficient reasons. The Commissioner ordered the sending district to reinstate the 1943-44 ratios effective no later than the following academic year.

Counsel for Oldmans, in his brief, attempts to distinguish the Asbury Park case from Board of Education of Township of Liberty v. Board of Education of Belvidere, 1975 S.L.D. 431. He argues that the Oldmans sending allocation and apportionment has always been based on geographic boundaries rather than free choice and that such apportionment "is not unknown in New Jersey." In Liberty, whether or not the existing geographical

boundaries used for high school assignment complied with statutory mandate was not argued, and the Commissioner's decision approving the sending district's petition to send all its children to one high school rendered such issue moot. Despite Oldmans' argument that its parents did not have the kind of free choice discussed in Asbury Park, I have determined that the fact that crossovers had to get themselves to a more distant bus stop is not so significant as to disturb the analogy between the issues in Asbury Park and the one before me. In its practical effects, the results of the policy are similar: the receiving schools experienced a declining enrollment which affected their anticipated tuition revenues.

In 1979, the Asbury Park Board again petitioned the Commissioner, claiming the mandatory number of pupils was not being sent to its high school by Belmar and demanding that all Belmar's high school students be sent to Asbury Park until the mandatory ratio was attained. Board of Asbury Park v. Board of Belmar and Manasquan, 1979 S.L.D. 308 (Asbury Park II). Belmar claimed that the imbalance resulted from dropouts. The nature of the dropouts is not of record. After assignment to the complaining receiving district, some pupils may have gone to private school, some may have transferred after their parents changed their residences, and others may have determined not to continue their high school education. I note this issue because Mrs. Chevreuil herself spoke of sending her child to private school in lieu of forced attendance at Penns Grove.

The Asbury Park II case is also of special interest because it reveals the manner in which Belmar attempted to resolve the high school assignment problem after it was precluded by law from offering parents a free choice of schools. Belmar had adopted a resolution in 1978 providing that the required ratio be maintained and that assignment of the required number of students to Asbury Park would be determined as follows.

1. Siblings would be assigned to the same school currently attended by older brothers and sisters.

2. Students who did not complete a questionnaire in a timely fashion or were late enrollees were assigned to Asbury Park.

3. All other students who did not want to go to Asbury Park had to participate in a lottery in which only the number corresponding to the

ratio entitled to be sent to districts other than Asbury Park could be chosen.

Asbury Park complained that Belmar's method of assigning its students "promoted a divisive feeling that losers go to Asbury Park" (Asbury Park II at 311), which petitioner felt could be precluded by changing the sending-receiving relationship to provide that all Belmar's students attend Asbury Park. The Commissioner refused to invalidate the Board's sibling policy and lottery procedure for selecting pupils, stating that he perceived in it "no deleterious educational result or abuse of the Board's statutory discretionary authority." Id. at 314. He also found "no reason to interpose his judgment for that of the Belmar Board which desires to continue to send a part of its secondary tuition pupils to Manasquan High School." Id. at 315. The Commissioner did force Belmar to send more than the mandatory annual ratio to Asbury Park to compensate for the prior year's deficiency of 23 pupils, but that was because for almost 10 years after the first case, the sending school complied with the Commissioner's decision. Then, in September 1978, it sent 23 fewer pupils, and later in that same school year, adopted the mandatory ratio, which would assure that the large deficency would never be made up. It was for this reason that the Commissioner directed the sending Board to rescind its policy fixing the mandatory ratio: the policy allowed for no adjustment to recover the great deficincy which the Board permitted in that very year.

In accordance with the above analysis, I **CONCLUDE** that the existing policy and practice of Oldmans granting free choice of schools conflicts with the statutory mandate to the extent that it results in failing to meet the 79 percent allocation to which Penns Grove is entitled. Since there has been no bad faith by Oldmans and,indeed, in one or more years Oldmans pupils assigned to Penns Grove exceeded the entitlement, a policy which provides that 79 percent of Oldmans eighth grade graduates are assigned to Penns Grove is legally appropriate at this time.

In Asbury Park II, the Commissioner adopted his hearing examiner's findings, among which was the fact that "additional shortfall resulting from dropouts...may not reasonably be blamed on the Belmar Board." Id. at 312. Thus, if Oldmans assigns 79 percent of its eighth-graders to Penns Grove High but fewer than that number actually attend ninth grade there, or if the percentage of all Oldmans students in grades nine through twelve at Penns Grove is less because of dropouts of any kind, such deficiency cannot be attributed to Oldmans.

Insofar as the manner in which Oldmans determines which pupils it will assign to Penns Grove to fill the entitlement quota, it may do so by means which will not have a deleterious educational result or abuse its discretionary authority. That language chosen by the Commissioner in Asbury Park II points out the legal precept that the Oldmans Board has discretionary authority to adopt an assignment policy. Such action cannot be upset unless "patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1960). The Oldmans Board now has the task of adopting a policy and if the Chevreuil parents group does not agree with it, or believes another policy is more reasonable, it cannot prevail unless it can show that the Board's action is without rational basis, which is a very difficult standard to meet.

Oldmans argues that the geographical basis of its assignment of students should stand because it stems from bus routes which have remained essentially the same since 1925. If the Commissioner agrees with my conclusion herein and orders compliance with the 79-percent Penns Grove entitlement, Oldmans will have to adopt an assignment policy. That policy may include geographical boundaries so long as the final result is consistent with law. As counsel for Oldmans points out, N.J.A.C. 6:21-7.3(c) requires that cost of bus transportation be considered. It is therefore a rational basis upon which the Board can make a discretionary determination, but it would have to remain subsidiary to the statutory entitlement.

The issue of current bus transportation raised by the Chevreuil parents group remains to be decided. At least three of the parents of crossover students report that they live more than two miles from the bus stop: Chevreuil—2.9 miles from the bus stop; Bauer—2.9 miles; Stewart—2.4 miles. Others state reasons why they find distances of a mile or more extremely inconvenient or dangerous. "It is well-established in this state that Boards of Education are required to provide transportation to and from school for all children who reside remote from a schoolhouse." Meyer v. Bd. of Ed. of Montville, 1971 S.L.D. 183, affirmed by State Bd. of Ed. at 196. The Commissioner so held, adopting the rationale of the court in Bd. of Ed. Woodbury Heights v. Gateway Regional High School District, 104 N.J. Super 76 (Law Div. 1968). N.J.S.A. 18A:33-1 requires provision of convenience of access to the public schools.

The State Board defines "remote from a schoolhouse" in N.J.A.C. 6:21-1.3 as "beyond two and one-half miles for high school pupils" and directs the manner in which the

distance shall be measured. N.J.A.C. 6:21-7.3, which fixes the State aid formula for each approved transportation route, defines "miles from school" as the distance "from the pupil's house to his assigned school." That rule does not require buses to leave their main route to pick up high school pupils residing within two miles of the route. I CONCLUDE that the Oldmans Board is not required to provide more convenient bus stops for pupils living less than two miles from the currently established routes. Thus, the Chevreuil parent group's request for such transportation must be denied. The Board may, however, provide such transportation and change the routes if it desires to do so; I have no authority in the circumstances of this case to require that the Board do so since the matter lies within the discretionary power of the Board.

With respect to the three crossover students who reside in Pedricktown and attend Woodstown High and who live over two miles from the bus stop, a question arises as to which high school is their "assigned school" for bus transportation purposes. If and when the Oldmans Board adopts a new policy to assign students so as to meet Penns Grove's pupil entitlement, the issue will be clarified. Although Policy #2120 is inconsistent with law to the extent that it does not result in satisfying the statutory entitlement of Penns Grove, it is a validly adopted policy insofar as assigning students to attend specific schools in accordance with their residence near long-established bus routes. It clearly purports to assign students to each high school, since it says they "shall attend" a specific school, but they "may attend" the other if they make arrangements to get to the appropriate bus stop. I CONCLUDE that, for crossover students, their assigned school is in accordance with Policy #2120 and if they request attendance at a high school to which they are not assigned, Oldmans is not required to change its bus routes in order to accommodate them, although it may do so if it wishes.

If a new policy is eventually adopted to implement the Commissioner's decision in this case, the Board should give due consideration to this aspect of the transportation issue. Since Penns Grove must be assigned 79 percent of the eighth-graders, Woodstown must be assigned the remaining 21 percent. If a final determination in this case reflects this result, then all those students attending Woodstown High when the determination is implemented will indeed be "assigned" to that school, and bus routes may have to be changed to accommodate those residing more than two miles from a bus pickup for their assigned school.

DISPOSITION

It is therefore **ORDERED** that:

effective school year 1988-1989 and in future school years, Oldmans Board of Education shall assign 79 percent of its pupils graduating from eighth grade to attend Penns Grove Regional High School;

the Oldmans Board shall adopt policies to effectuate implementation of the mandatory statutory entitlement;

no child currently attending Woodstown High School in school year 1987-88 shall be affected by this order, and

the petition of the Chevreuil parents group for changes in the current bus transportation routes be **DENIED.**

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

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

September 30, 1987
DATE

Naomi Dower LaBastille
NAOMI DOWER LABASTILLE, ALJ

Receipt Acknowledged:

OCT - 1 1987
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 2 1987
DATE

Ronald J. Plenk
OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	
BOARDS OF EDUCATION OF THE TOWNSHIP OF OLDMANS AND THE BOROUGH OF WOODSTOWN, SALEM COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENTS.	:	DECISION
ANN C. CHEVREUIL ET AL.,	:	
PETITIONERS,	:	
V.	:	
BOARDS OF EDUCATION OF THE TOWNSHIP OF OLDMANS AND THE SCHOOL DISTRICT OF PENNS GROVE-CARNEYS POINT REGIONAL, SALEM COUNTY,	:	
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The exceptions submitted by the Oldmans Township Board were timely filed pursuant to N.J.A.C. 1:1-18.4. The exceptions filed by Petitioner Chevreuil and by the Board of Education of Penns Grove-Carneys Point Regional School District (Penns Grove Board) were untimely, however. The Penns Grove Board's reply exceptions were timely received.

The Oldmans Board excepts to the ALJ's conclusion that

> "the actual 1943-44 allocation must be continued" since Oldmans Township "did not pass a resolution prior to that time" and also takes exception to the conclusion at page 14 "that the existing policy and practice of Oldmans [see Board policy No. 2120 at Exhibit PG-2] granting free choice of schools conflicts with the statutory mandate to the extent that it results in failing to meet the 79 percent allocation to which Penns Grove is entitled." (Exceptions, at p. 1)

In lieu of those findings, the Oldmans Board proffers the following findings:

1. Since Oldmans Board's designation of which students would attend which high school dates back to 1907 and was based on geographic apportionment, and since the designation by resolution was not required until passage of Chapter 210, Laws of 1944, said statute "***cannot be applied to Oldmans Township since its method of designation was effective under the 1929 and 1933 predecessor statutes and at the time of passage of the 1944 statute, adoption of a resolution 'prior to the academic year 1943-44' was not possible." (Id., at pp. 1-2)

In the alternative the Oldmans Board submits the following:

> (2) If the 1907 designation by the Oldmans Township Board of Education is invalid because not made by resolution (see Exception (1) above) the actual allocation and apportionment by Oldmans Township as of 1943-44 was based on geographic zone - bus routes and not on any percentage or ratio of students and the actual allocation and apportionment for Oldmans Township should be based on its Auburn-Woodstown and Pedricktown-Penns Grove zones, and,
>
> (3) To the extent that the Oldmans Board Policy No. 2120 varies from the geographic zone - bus route allocation and apportionment by permitting crossovers from one zone to the other, that Board Policy is in violation of N.J.S.A. 18A:38-12 and paragraphs 3 and 4 of said Board Policy (Exhibit PG-2) are stricken from that Policy.
>
> (Id., at p. 2)

In discussing its exceptions, the Oldmans Board avers that

> While it is true that there was a stipulation that in the 1943-44 school year there were a total of 63 Oldmans students attending high school with 50 of those attending Penns Grove and 13 attending Woodstown, there was no understanding by anyone in Oldmans Township that the division of students between Penns Grove High and Woodstown High was based on any percentage or ratios. Rather, as was historically the situation since 1907, Auburn students attended Woodstown High School and Pedricktown students attended Penns Grove High School although there were requests in 1924 an thereafter for permission to crossover to one high school or the other.***
>
> (Id.)

The Oldmans Board claims that the statutory language, "allocation or apportionment" (see N.J.S.A. 18A:38-12), does not require that such process be done on a ratio or percentage basis. The Board would distinguish Board of Education of Asbury Park v. Boards of Belmar and Manasquan, 1967 S.L.D. 275, on which the ALJ relied and instead would rely on Board of Education of the Township of Liberty v. Board of Education of Belvidere, 1975 S.L.D. 431.

The Oldmans Board claims that in the Asbury Park decision:

> [T]here was no argument with respect to allocation or apportionment and in fact the Belmar Board Policy which supposedly existed as of 1941-42 and thereafter was to grant pupils "free choice" of high schools. In contrast, Oldmans as of 1907 established two high schools for receipt of its students and divided the students between the high schools based on the area of residence.*** (Id., at p. 3)

Further, the Oldmans Board avers that in Asbury Park, there were three high schools which received Belmar students as of 1943-44 and that there was no other method to allocate Belmar's high school students other than by use of ratios for the three high schools.

By contrast, claims the Oldmans Board, in the Liberty Township case, apportionment of pupils to the high schools had been established by geographic boundaries since at least 1925. The Board of Oldmans Township further suggests that in the Liberty Township case:

> [T]he Commissioner made his determination based on the standards found in N.J.S.A. 18A:38-13 [that is, whether the grounds for seeking change of designation constituted good and sufficient reasons] implicity (sic) establishes that he assumed the validity of a geographic apportionment for designation of high school students by Liberty Township and that that apportionment was valid and in accordance with N.J.S.A. 18A:38-12.*** (Id., at p. 3)

The Board claims that Liberty Township "implies that the Commissioner in fact accepted that a geographic apportionment would be valid as a designation for a high school under N.J.S.A. 18A:38-12." (Id.) Moreover, the Oldmans Township Board attaches to its exceptions the predecessor statutes of N.J.S.A. 18A:38-12 and avers that the language in the earlier versions of the law further support its contention that geographic apportionment-division of students was the norm in the earlier part of this century, whereas the language "allocation or apportionment" did not appear in the statutes until 1944. The Board suggests that the ALJ's assumption that a ratio or

percentage allocation was all that was permissible under N.J.S.A. 18A:38-12 is misplaced, and that a review of the history of that legislation establishes otherwise.

The Oldmans Board further argues that to impose a resolution requirement now on the Township that had a designation, albeit without a resolution, prior to the 1944 statute is inequitable.

> "Actually, consideration of the 1929 and 1933 statutes, in light of Oldmans Township's designation of high schools in 1907 suggests that the equitable consideration and harmonious reading of all of the statutes would be to accept Oldmans' designation as of 1907 even though such designation may have been without resolution. (Id., at p. 4)

Further, the Oldmans Board avers that:

> [I]n addition to considerations of equity, constitutional guaranties (sic) of due process (i.e., notice and an opportunity to be heard) would indicate that the 1944 statutory requirement of a resolution prior to the 1943-44 school year would be unconstitutional because in violation of either the federal or state due process clause. (Id.)

Finally, the Oldmans Board avers that a determination by the Commissioner to allocate on geographics will obviate additional problems on the part of all its students:

> If *** the original zones are retained as the appropriate "allocation or apportionment" of Oldmans High School students, there will be no need for additional problems or drafting of policy language so as to accomodate (sic) percentage ratio and attendant bus transportation problems thereafter. (Id.)

In summary, the Oldmans Board submits:

> [T]he history and practice in this township since 1907, the statutory and decisional law, and the convenience of implementation of the zones for the "allocation or apportionment" of Oldmans Township all militate for reversal of Judge LaBastille's determination of a percentage or ratio allocation and in its stead, return to the Auburn-Woodstown High School and Pedricktown-Penns Grove High School zones as existed at the beginning of the century. (Id., at p. 5)

The Penns Grove Board's reply exceptions dispute the Oldmans Board's conclusion that the correct means of apportioning students would be according to the bus zones previously enacted. Should this position be upheld, avers the Penns Grove Board,

> the logical extension to this argument is that the Penns Grove Board would be entitled to the damages requested in petitioner's brief as follows: 1. all of the students from the zone earmarked for the Penns Grove system, and 2. additional students to make the petitioner whole for those students stripped from the Penns Grove "zone" and sent to the Woodstown school.*** (Reply Exceptions, at p. 1)

The Penns Grove Board avers that this is exactly the issue it raised and discussed in Points 3 and 4 of its trial brief. Said submission is incorporated herein by reference.

The Penns Grove Board further replies that as to the conclusion raised by the Oldmans Board regarding the 1907 designation by geography:

> [A] review of this statement reveals that not only is there a less than crystallized demarcation zone but also there is no viable system for the implementation of the policy at present. A review of the minutes of Oldmans Board meetings from 1907 to 1941 reveals that the rule of sending students according to zones was subject to so many crossover allowances as to have been recognized more often in the breach of the rule than in its being honored.*** (Id.)

The Penns Grove Board claims that because of the lack of defined geographical zones and the arbitrary enforcement of the 1907 agreement, it is unreasonable to maintain such agreement now. The Penns Grove Board would require enforceability of N.J.S.A. 18A:38-12 as applied by the ALJ. "The statute not only reduces the apportionment to a pre-determined figure but also eliminates the confusion, arbitrary enforcement and lack of defined geographical boundaries, created by the 1907 agreement." (Id.)

The Penns Grove Board of Education submits that the initial decision should be upheld.

Upon a careful review of the record before him, the Commissioner must remand the instant matter for further findings of fact and clarification as follows. Since the 1907 apportionment clearly delineated that the students who resided in Pedricktown attend Penns Grove High School and those who resided in Auburn attend Woodstown High School respectively, the Commissioner believes it essential to

a final determination of this matter that testimony be taken and evidence of proofs adduced as to exactly what the precise geographic boundaries of Pedricktown and Auburn, as part of Oldmans Township, were in 1907.

Accordingly, the matter is remanded for further action consistent with this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 12, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1862-87
AGENCY DKT. NO. 22-2/87

NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
WILLIAM BREECE,
Respondent.

Anthony B. Vignuolo, Esq., for petitioner (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Stephen E. Klausner, Esq., for respondent (Klausner, Hunter & Oxfeld, attorneys)

Record Closed: August 28, 1987 Decided: October 13, 1987

BEFORE DANIEL B. MC KEOWN, ALJ:

On February 3, 1987 the North Brunswick Township Board of Education (Board) certified charges of conduct unbecoming, incapacity, and "irrational conduct" against William Breece (respondent), a teacher who had acquired a tenure status in its employ. The Commissioner of Education transferred the matter on March 19, 1987 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted in the matter on April 21, 1987 before Steven C. Reback, ALJ, who subsequently recused himself because of a "long-standing acquaintanceship with counsel for respondent." The matter was subsequentely reassigned this judge.

On June 16, 1987, the date scheduled for a plenary hearing into these administrative tenure charges was scheduled to commence, a status conference was held at the Middlesex County Courthouse with counsel to the parties. The plenary hearing was not conducted, nor is one necessary in light of the following facts.

Subsequent to the certification of these administrative tenure charges against respondent by the Board on February 3, 1987, respondent was indicted for distribution of a controlled dangerous substance in violation of N.J.S. 24:21-19(a)(1). On March 13, 1987 respondent entered a plea of not guilty. On June 2, 1987 respondent retracted the plea of not guilty and entered a plea of guilty. At the status conference conducted June 16, 1987 counsel advised that respondent was to be sentenced on the crime of distribution of a controlled dangerous substance sometime before the end of July 1987. Counsel also advised that respondent, as part of his negotiated plea, agreed to permanently terminate his employment relationship with the Board and further agreed never to become an employee of any other board of education. Counsel was advised by this judge "My concern is that [respondent] would continue to be in possession of a certificate to teach as issued by the New Jersey State Board of Examiners. I am further concerned that to my knowledge there is no provision in Education Law, N.J.S.A. 18A:1-1 et seq., nor the rules and regulations of the State Board of Education codified at N.J.A.C. 6:1-1 et seq., for the voluntary surrender of a certificate to teach." (Letter, June 17, 1987).

On August 27, 1987 Board counsel submitted a Judgment of Conviction entered against respondent by the Honorable Joseph F. Deegan, Jr., J.S.C. Judge Deegan sentenced respondent as follows:

> [T]o a five (5) year term of Probation, continue mental health counseling as required by the Probation Department until medically discharged; permanently terminate his employment relationship with the North Brunswick Board of Education; and a penalty of $30 payable to the Violent Crime Compensation Board.

Attached to the Judgment of Conviction is Judge Deegan's statement of reasons for the sentence as required by R. 3:21-4(e). Judge Deegan's statement of reasons are reproduced here in full:

1. This was a negotiated plea.

2. The aggravating factors are the nature of the offense in that here the defendant, a school teacher, at a Christmas party of school personnel deliberately dropped a pill containing a narcotic drug into the principal's drink. This was observed by a Sayreville detective assigned to protect the principal who had learned the day before that defendant had intended to spike the victim's drink at the party. There is a risk that he'll commit another offense. He received a conditional discharge for possession of marijuana under 25 grams in 1982. There is a need to deter defendant and others.

3. In mitigation defendant did not contemplate that his conduct would cause or threaten serious harm although this offense could have endangered the life or well-being of another person who was in a supervisory capacity over him. He has a history of mental health problems.

Defendant has, per the plea bargain, agreed to continue mental health counseling as required by Probation until medically discharged, agrees to permanently terminate his employment relationship with North Brunswick Board of Education and agrees to never become an employee of any other Board of Education.

Respondent's employment as a teacher with the Board is terminated by operation of his sentencing by the court on the charge to which he pled guilty. A material condition to the plea bargain is that the employment relationship between the Board and respondent be permanently terminated. Accordingly, by respondent's agreement to that condition and the court's imposition of that condition upon the agreement, the employment relationship between respondent and the Board is and was terminated July 27, 1987. Furthermore, respondent is foreclosed from becoming an employee of any other board of education by virtue of his acceptance to the court imposed condition for the acceptance of his plea bargain.

Accordingly, I **CONCLUDE** that no plenary hearing is necessary in this case. I further **CONCLUDE** that respondent has been terminated from his employment as a teacher with a tenure status with the North Brunswick Township Board of Education. Accordingly, the administrative tenure charges against respondent are **DISMISSED** as being moot.

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

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

October 13, 1987
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

OCT 13 1987
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

OCT 16 1987
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE :
HEARING OF WILLIAM BREECE, SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF NORTH : DECISION
BRUNSWICK, MIDDLESEX COUNTY. :
:

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

Upon review of the record in this matter, the Commissioner concurs with the findings and determination of the Office of Administrative Law which establish that by operation of his plea bargain as defined herein, respondent has forfeited his tenured position with the petitioning Board of Education. The tenure charges in this matter having become moot, the instant Petition of Appeal is dismissed with prejudice. Moreover, in light of the seriousness of the offense to which respondent pled guilty and was thereupon sentenced by the Honorable Joseph F. Deegan, Jr., J.S.C., the Commissioner directs that this matter forthwith be referred to the State Board of Examiners for revocation proceedings of respondent's teaching certificate(s) pursuant to N.J.S.A. 18A:6-38 and N.J.A.C. 6:11-3.7.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 12, 1987

DATE OF MAILING - NOVEMBER 13, 1987

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY, PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, VINCENT B. CALABRESE, ASSISTANT COMMISSIONER, RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondents' exceptions and the Board's reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

Respondents object to the ALJ's decision as to its Findings of Fact and to its application of the relevant law. They acknowledge that he correctly stated N.J.S.A. 18A:7B-12 governs district of residence determinations such as in the instant matter, but they further contend he misapplied it and the regulations promulgated thereunder.

More specifically, respondents point to N.J.S.A. 18A:7B-12(b) which reads:

> b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, private schools or out-of-state facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.*** (emphasis supplied)

As to this, respondents aver that in order to determine the "present district of residence" one needs to look to N.J.A.C. 6:20-5.3(a)(2), not N.J.A.C. 6:20-5.3(a)(1) as relied upon by the ALJ, since that section pertains to district of residence determinations for pupils placed in residential State facilities. Respondents point out that although H.T.'s placement was residential, it was a private school placement, not a placement in a residential facility. Therefore, N.J.A.C. 6:20-5.3(a)(2) should have been referenced, not 5.3(a)(1).

N.J.A.C. 6:20-5.3(a)(2) provides that the present district of residence of a child placed by a State agency in a private school shall mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency.

Respondents except to the ALJ's finding that H.T.'s initial placement by the Department of Human Services, Division of Youth and Family Services (DYFS) was September 12, 1985, pointing to N.J.S.A. 18A:7B-12(a) in support thereof which states, "If a child in a foster home is subsequently placed in a State facility or by a State agency, the district of residence of the child shall then be determined as if no such foster placement had occurred." As such, respondents argue that January 8, 1986 is the date of DYFS' initial placement and that N.J.A.C. 6:20-5.3(a)(2) controls in making a district of residence determination.

As to this, respondents aver that:

> ***The evidence before Judge Young indicates that Jr.'s address on January 8, 1986 was 340 Thomas Blvd., Orange, (see J-1 in evidence). Judge Young himself recognized this in his Initial Decision when he stated "the attendance officer testified that Jr.'s mother provided shelter for her homeless son at least during the period from September 1985 to January 1986" (see Initial Decision, p. 3).
>
> (Respondents' Exceptions, at p. 2)*

Finally, respondents argue that the ALJ was obligated to dismiss the matter as the Board failed to meet its burden of proof, since it presented no residuum of legally competent evidence in support of its claim. They request that their post-hearing brief be incorporated by reference in their exceptions.

The Board disagrees that the ALJ misapplied the statute stating that:

> N.J.A.C. 6:20-5.3(a) provides that the "present district of residence" of a child in a residential State facility as defined in N.J.S.A. 18A:7A-3 and referred to in paragraph one of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey District of residence of the child's parent(s) or guardian(s) of the last school day of September of the pre-budget year. Paragraph b of N.J.S.A. 18A:7B-12 refers to a placement by a state agency. The child in this case was placed by a State agency. Therefore, the determination of Judge Young was correct.
>
> (Board's Reply Exceptions, at p. 1)

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* Jr. refers to H.T.'s father, not to the pupil H.T.

Further, the Board argues that regardless of what date is used, the record does not establish that the father's residence was Orange. It avers that the mere fact that evidence may indicate something does not establish it to be in fact the case. With respect to this, the Board maintains that respondents themselves provide no evidence whatsoever establishing the father's true residence. It also argues that the exceptions filed by respondents are not entitled to consideration as they do not comport with the requirements of N.J.A.C. 1:1-18.4 in that they fail to set forth specific findings of fact, conclusions of law or disposition proposed in lieu of and in addition to those reached by the ALJ.

N.J.S.A. 18A:7B-12 is the statute which controls determinations on districts of residence for school funding purposes. It reads in pertinent part:

> District of residence; determination
>
> For school funding purposes, the Commissioner of Education shall determine district of residence as follows:
>
> a. The district of residence for children in foster homes shall be the district in which the foster parents reside. If a child in a foster home is subsequently placed in a State facility or by a State agency, the district of residence of the child shall then be determined as if no such foster placement had occurred.
>
> b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, private schools or out-of-state facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.
>
> If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.

N.J.A.C. 6:20-5.3(a) delineates the specific method and criteria for determining the district of residence. It reads in pertinent part:

Method of determining the district of residence

(a) The district of residence for school funding purposes shall be determined according to the following criteria:

1. The "present district of residence" of a child in a residential State facility defined in N.J.S.A. 18A:7A-3 and referred to in paragraph one of N.J.S.A. 18A:7B-12(b) small mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day of September of the pre-budget year.

2. The "present district of residence" of a child placed by a State agency in a group home, private school or out-of-state facility also referred to in paragraph one of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in 1, above.

3. The "district of residence" referred to in paragraph two of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence in which the child resided with his or her legal guardian immediately prior to his or her initial admission to a State facility or placement by a State agency.

A careful review of the record in this matter reveals that N.J.A.C. 6:20-5.3(a)(1) does not apply to H.T. as determined by the ALJ because the method and criteria contained in that section of the regulations applies to pupils in State facilities as defined by N.J.S.A. 18A:7A-3. It does not apply to pupils in private schools placed by DYFS. Prior to April 23, 1986, N.J.S.A. 18A:7A-3 defined State facility as follows:

> "State facility" means a State residential facility for the retarded; a day training center which is operated by or under contract with the State and in which all the children have been

> placed by the State including a State residential youth center; a State training school or correctional facility; a State child treatment center or psychiatric hospital.
>
> The post-April 1986 definition reads:
>
> "State facility" means a State residential facility for the retarded; a day training center which is operated by or under contract with the State and in which all the children have been placed by the State, including a private school approved by the Department of Education which is operated under contract with the Bureau of Special Residential Services in the Division of Developmental Disabilities in the Department of Human Services; a State residential youth center; a State training school or correctional facility; a State child treatment center or psychiatric hospital.

H.T. does not fall under either definition.

Thus, it is determined that the ALJ erred in applying the method and criteria contained in N.J.A.C. 6:20-5.3(a)(1) rather than N.J.A.C. 6:20-5.3(a)(2) which, contrary to Finding of Fact No. 1 in the initial decision, ante, does make the 340 Thomas Boulevard address in Orange relevant to the controversy. To repeat, N.J.A.C. 6:20-5.3(a)(2) reads:

> 2. The "present district of residence" of a child placed by a State agency in a group home, private school or out-of-state facility also referred to in paragraph one of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in 1, above.
>
> (emphasis supplied)

Pursuant to the last sentence in the above-captioned regulation, the method of determining district of residence contained in N.J.A.C. 6:20-5.3(a)(1) does not come into play until the school years subsequent to the child's initial placement in an educational placement by a State agency.

Moreover, contrary to the ALJ's Finding of Fact No. 4, September 12, 1985 is not considered the date upon which H.T.'s

placement by DYFS commenced. Thus, that date has no bearing on a funding determination in this matter.

H.T.'s foster placements by DYFS do not come into play in determining district of residence for the funding of the tuition costs associated with the educational placement at Somerset Hills made by DYFS because N.J.S.A. 18A:7B-12(a) states that if a child in a foster home is subsequently placed in a State facility or by a State agency, the district of residence shall then be determined as if no such foster placement had occurred. Thus, January 8, 1986 is deemed to be the relevant date for arriving at a district of residence determination in this matter as dictated by N.J.A.C. 6:20-5.3(a)(2) since this is the date of H.T.'s initial placement in a private school by a State agency.

In order to ascertain the district of residence for funding purposes, a determination must be made as to whether or not it was proper for respondents to designate 340 Thomas Boulevard, Orange, as H.T.'s father's residence. This necessitates an independent review of the record and fact-finding by the Commissioner since the ALJ found that address "irrelevant."

N.J.A.C. 6:20-5.3(b) requires that the Commissioner shall determine the "present district of residence" or "district of residence" referred to in N.J.S.A. 18A:7B-12(b) based upon the address submitted by Department of Human Services.

A review of the record and the transcript in this case leads the Commissioner to find that H.T.'s father resided with H.T.'s grandmother in Orange on the date of his placement in a private school by DYFS. It is clear from the truant officer's testimony that the grandmother admitted that H.T.'s father was residing with her. It was only upon being told it was a violation of the Housing Authority and that she could be evicted that she retracted her statement as testified to below by the truant officer:

Q What did you find out as a result of your inquiry of [the grandmother's] attendance there?

A That she lived alone there in the apartment.

Q Now, did you actually enter the apartment?

A Yes, I did.

Q Did you speak to anyone in the apartment?

A Yes, I did.

Q To whom did you speak?

A To [the grandmother].

Q Did you tell her the purpose of your visit?

A Yes, I did.

Q What did you tell her?

A I told [her] I was investigating a son that was supposed to be living with her using this address.

Q Did she make any response to that?

A She finally suggested and admitted to me at that time that her son was living there and after I told her there was a violation of the law of the Housing Authority, she admitted that the son never lived there.

Q This resulted from a direct conversation you had with her?

A Yes, sir.

Q Do you recall approximately when it was that you had that conversation?

A I would say in the middle of January 1986.

Q Was there anyone else in the apartment that you could see?

A No.

Q Did you ask to inspect the apartment?

A Yes.

Q Did she permit you to inspect the apartment?

A Yes.

Q What did the apartment consist of?

A A small living room with colonial type furniture and one bedroom and a kitchenette.

Q Who occupied the bedroom?

A [The grandmother].

Q Did you ask her if her son had occupied any portion of that apartment?

A Well, in the beginning she indicated to me he slept on the couch.

Q Was there a couch?

A Yes.

Q You say in the beginning?

A Yes.

Q Then what happened?

A When I told her that she had a chance of being evicted from the Housing Authority for having unauthorized personnel in her apartment, she then admitted her son was only using the address for school purposes.

Q Did you then render a report to your superior based on that?

A Yes. (Tr. 9-10)

and,

Q You stated that you were aware that only senior citizens may be bona fide tenants of 340 Thomas Boulevard?

A Yes.

Q And you so advised [the grandmother] of that fact when you interviewed her?

A Yes, I indicated that she was violating the Housing Authority rules and regulations.***

Q ***She did state when your first interviewed her that her son was residing with her?

A Yes.

Q She only changed her answer when you told her that she was violating the Housing Authority law?

A Yes. (Tr. 19)

It must be emphasized that the statute and regulations controlling in this matter do not require a determination of domicile, merely a determination of residence for H.T.'s father based on information supplied by the Department of Human Services.

In making its determination, Human Services had available to it the foster care agreement (R-4) and a certified mail receipt (R-3) each bearing the 340 Thomas Boulevard, Orange address for H.T.'s father.

When asked to reverify the information by the Department of Education, the Department of Human Services/DYFS provided the August 20, 1986 interoffice memo (R-5) which relates that H.T.'s sister confirmed the father resided in Orange, albeit contrary to the housing regulations.

Moreover, the Commissioner finds meritless the argument that the address was given "for school purposes." That address was given by the father in September 1985 when signing the agreement to place H.T. in foster care, a factor which resulted in Orange having no educational responsibility whatsoever for H.T. Thus, the father would have nothing to gain by fabricating an Orange residency. As to this, the Commissioner agrees with the ALJ's observation, "So I don't know why the father would seek Orange out to saddle [it] unless he had some vendetta against Orange and said I'm going to soak them with the tuition" (Tr. 72), a highly unlikely and preposterous suggestion which would require a knowledge of the school funding laws and regulations for children placed by Human Services and a foreknowledge that a private residential placement would be necessary.

Lastly, the fact that H.T.'s father may have resided at the 340 Thomas Boulevard address contrary to senior citizen housing regulations is of no moment in making a determination of residence for school funding purposes under N.J.S.A. 18A:7B-12 and N.J.A.C. 6:20-5.3. The possibility of one being an illegal resident in a municipality does not interfere with a child's right to free public schooling. I.C. and M.C. on behalf of J.C. v. Bd. of Ed. of Paterson, 1983 S.L.D. 218

Accordingly, the Commissioner concludes that the Division of Finance's determination of residence for the purposes of school funding to be Orange was reasonable and proper, based on the information provided by Human Services. N.J.S.A. 18A:7B-12 and N.J.A.C. 6:20-5.3(a) through (e). Consequently, the findings and conclusions of the ALJ are set aside and the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

November 13, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 4223-87
AGENCY DKT. NO. 136-5/87

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,
Petitioner,
v.
MAYOR AND CITY COUNCIL OF THE CITY OF ASBURY PARK,
Respondents.

J. Peter Sokol, Esq., for petitioner (McOmber & McOmber, attorneys)

Donald J. Pappa, Esq., for respondent

Record Closed: September 14, 1987 Decided: October 13, 1987

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

The Asbury Park Board of Education (Board) appealed to the Commissioner of Education the April 28, 1987 determination of the City Council of Asbury Park (Council) to fix an amount to be raised by local tax levy for school purposes for the 1987-88 school year that is $650,000 less than the amount to be raised by local tax levy contained in the Board's 1987-88 budget as originally submitted to the electorate.

After notice, a prehearing conference was held on July 29, 1987, at which the issue and procedures were settled. The issue to be determined is whether the municipality acted reasonably and with full regard for the State's educational standards and its own obligations to fix a sum sufficient to provide a thorough and efficient system of public schools. The matter was set down for hearing on October 21 and 22, 1987, in the Marlboro Township Municipal Court.

On August 19, the Board filed a notice of motion for summary judgment with supporting letter brief. I received the Council's responsive papers on September 14.

The Board argues that the Council failed to supply line item reductions and the reasons for line item reductions at the time it made cuts in the Board's budget. The Board cites Old Bridge Township Board of Education v. Township of Old Bridge, OAL DKT. EDU 3951-86 (Nov. 17, 1986), adopted, Comm'r of Ed. (Feb. 4, 1987); Board of Education of the Township of Union v. Township Committee of the Township of Union, OAL DKT. EDU 2788-81 (June 5, 1981), adopted Comm'r of Ed. (July 9, 1981); Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966).

The Board further represents that it first saw reasons for the Council's reductions on or about September 14. Therefore, as a matter of law, the Board should prevail on this motion for summary judgment and the reductions made by the Council should be replaced in their entirety.

On September 14, I received responsive papers from the Council. The city manager states in an affidavit that the Council certified to the Monmouth County Board of Taxation an appropriation of $5,133,122 to provide a thorough and efficient system of schools in Asbury Park. The amount certified to the Board of Taxation was $650,000 less than the amount presented by the Board of Education to the voters.

The Council then sets forth the supporting reasons for the reductions made in the school budget by resolution dated April 28.

The question before this tribunal is not whether the reasons for the Council's determination are adequate, but whether they may be considered at all.

N.J.S.A. 18A:22-37 requires that, if the voters reject any of the budget items submitted at the annual school election, the board of education must deliver the proposed budget to the governing body. The governing body then, after consultation with the Board and by April 28, shall determine the amount which, in the judgment of the governing body, is necessary to be appropriated for each item appearing in the budget, to provide a thorough and efficient system of schools in the district. The governing body must then

certify to the County Board of Taxation the total amount determined to be necessary to be raised by local tax levy for school purposes for the ensuing year.

A board of education, of course, may appeal the governing body's decision to the Commissioner under powers to hear controversies granted to the Commissioner by the Legislature. N.J.S.A. 18A:6-9.

The New Jersey Supreme Court in East Brunswick stated at 105 and 106:

> 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 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 view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and the 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. This is particularly important since, on the Board of Education's appeal under R.S. 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found. [Emphasis added.]

As the Commissioner made clear in Union Township, above, "The Commissioner deems it proper that such decisions be made at the time of the reduction and not on contingency basis only, if and when the budget reduction is appealed by the Board to the Commissioner." (Slip opinion at p. 8.)

The Board's moving papers allege that the Board twice requested reasons for the reductions Council effected. Nothing in the Council's submission refutes the allegation. It appears that the reasons set forth in the certification of September 10 and received by

the Board and this judge on September 14 were the Council's first expression of reasons for the cuts it made on April 28. In short, I agree with the Board that it must prevail in this case as a matter of law.

Having reviewed the record and carefully considered the arguments of the parties, I **FIND** that there is no issue of material fact in contention. The matter, therefore, is ripe for summary judgment. I further **FIND** that the reasons ultimately put forth by the Council for the reductions it effected and the changes in appropriations it made are untimely as a matter of law.

I **CONCLUDE** that the Council has advanced no meritorious legal argument against the Board's motion and that the Board is entitled to summary judgment as a matter of law.

I also **FIND** that the Council effected the $650,000 reduction in its resolution of April 28 as follows:

1.	Elimination of certain items from the Capital Outlay Budget			$100,000.00
2.	Increase Rates - Computer Center to offset Current Expenses			$100,000.00
3.	Use of Surplus			$100,000.00
4.	Current Expenses			$350,000.00
	J 100	Administration (Salaries)	$ 30,000.00	
	J 212	Supervising Personnel (Salaries)	45,000.00	
	J 213	Instruction (Salaries)	60,000.00	
	J 215	Instruction Secretary & Clerical	10,000.00	
	J 216	Instruction - Other (Salaries)	25,000.00	
	J 610	Operations (Salaries)	30,000.00	
	J 710	Maintenance (Salaries)	30,000.00	
	J 730	Equipment Replacement	100,000.00	
	J 800	Fringe Benefits	20,000.00	

It is **ORDERED** that $550,000 be certified to the Monmouth County Board of Taxation for current expense school purposes for the 1987-88 school year in addition to the amount already certified so that the total amount for current expense school purposes for the 1987-88 school year shall be $5,581,395, and it is **ORDERED** that $100,000 for capital outlay purposes for the 1987-88 school year be certified to the Monmouth County

Board of Taxation in addition to the amount already certified so that the total amount for capital outlay shall be $201,727 and so that the total amount to be raised by tax levy for the 1987-88 school year shall be $5,783,122.

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

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

13 OCTOBER 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

OCT 14 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 16 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, PETITIONER, V. MAYOR AND COUNCIL OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The Commissioner has reviewed the record of this matter including the initial decision granting the Board's Motion for Summary Judgment rendered by the Office of Administrative Law.

It is observed that the only exceptions filed with the Commissioner to the initial decision were submitted by the Board pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board's exceptions were technical in nature insofar as they pointed out that the ALJ erred on page 4 of the initial decision wherein it is stated that $550,000 shall be restored to the local tax levy for current expense purposes and $100,000 shall be restored to the local tax levy for capital outlay purposes. The Board relies on Council's resolution of May 21, 1987 attached to its current expense appropriations for the 1987-88 school year.

The Commissioner concurs with the exceptions filed by the Board and hereby modifies the specific finding in the initial decision to reflect that a total restoration of $650,000 has been recommended to be certified in the local tax levy for current expense purposes for the 1987-88 school year.

Upon further examination of those findings and conclusions set forth in the initial decision, the Commissioner determines that the ALJ correctly concluded that there were no relevant outstanding factual issues in dispute to preclude his recommending the award of summary judgment in favor of the Board.

In the Commissioner's judgment the record of this matter clearly establishes that Council's failure to provide the Board with specific reasons for each of its current expense line item reductions when it resolved to certify the 1987-88 school tax levy on May 21, 1987 warrants a reversal of Council's action of that date. The Commissioner hereby adopts as his own those findings and conclusions in the initial decision which hold that for the reasons stated in the initial decision as supplemented above Council's action complained of herein is violative of the provisions of N.J.S.A. 18A:22-37 as enunciated by the Court in East Brunswick and are hereby set aside. See also: Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford,

Gloucester County, decided April 27, 1987, aff'd State Board August 7, 1987; Board of Education of the Township of Woodbridge v. Mayor and Council of the Township of Woodbridge, Middlesex County, decided September 11, 1987; Board of Education of the Borough of Middlesex v. Borough Council of the Borough of Middlesex, Middlesex County, decided October 14, 1987.

Accordingly, the Commissioner hereby grants the Board's Motion for Summary Judgment and directs the Monmouth County Board of Taxation to include in the local tax levy an amount of $650,000 for current expense purposes to be made available to the City of Asbury Park School District for the 1987-88 school year. This amount when added to the amount of $4,931,395 in current expense appropriations previously certified by Council for the 1987-88 school year shall total $5,581,395.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 16, 1987

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3771-87

AGENCY DKT. NO. 150-5/87

FARMINGDALE BOROUGH BOARD OF EDUCATION,

Petitioner,

v.

FARMINGDALE BOROUGH COUNCIL,

Respondent.

Kenneth B. Fitzsimmons, Esq., for petitioner (Sinn, Gunning, Fitzsimmons, Cantoli, West & Pardes, attorneys)

John W. O'Mara, Esq., for respondent

Record Closed: September 1, 1987 Decided: October 14, 1987

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

The Farmingdale Board of Education (Board) appeals from the action of the Farmingdale Borough Council (governing body) taken pursuant to N.J.S.A. 18A:22-37 by which the Council certified to the Monmouth County Board of Taxation a lesser amount to be raised by local taxation for current expense costs of the school district for the 1987-88 school year than the amount proposed by the Board to and rejected by the voters at the annual school election held April 7, 1987. After the Commissioner of Education transferred the matter to the Office of Administrative Law on May 29, 1987 a prehearing conference was scheduled and conducted by way of telephone conference call July 2, 1987. During that conference, counsel to the parties agreed to submit the dispute for disposition by way of cross motions for summary decision. The record closed September 1, 1987, having granted the governing body sufficient time to respond to a supplemental

letter received here from the superintendent of schools on August 17, 1987. The record on the motions consists of the initial pleadings, the respective motions for summary decision, a supporting affidavit executed jointly by the superintendent, the Board president and the Board secretary, the Board's underlying documentation as required at N.J.A.C. 1:6-11.1 in support of its need for the monies reduced by the governing body from its proposed current expense budget, the governing body's specific reductions imposed, and a certification executed by counsel to the governing body which purports to show the governing body's underlying reasons for its reductions.

FACTS OF THE PROCEDURAL HISTORY

The facts which establish the procedural history of the matter as discerned from the record developed thus far is as follows. At the annual school election conducted in the Farmingdale school district on April 7, 1987 the Board proposed to raise by local taxation for the 1987-88 current expense costs of the school district the amount of $511,199. After the voters defeated that proposal, the Board submitted its budget to the governing body on April 8, 1987 as required at N.J.S.A. 18A:22-37. A meeting was conducted April 21, 1987 between the Board and the governing body. The governing body advised the Board on April 24, 1987 that in its judgment the amount necessary to be raised by local taxation for 1987-88 current expense costs of the school district is $499,849. This amount, it is noted, represents a reduction of $11,350 from the amount originally proposed by the Board to its electorate.

The governing body's resolution by which the Board was advised of the reductions, and as attached to the Board's motion for summary decision, provides in full as follows:

RESOLUTION

WHEREAS, the 1987-88 Budget for the Farmingdale Board of Education was defeated by the voters,

WHEREAS, the Mayor and Council of the Borough of Farmingdale has reviewed the 1987-88 Budget of the Farmingdale Board of Education,

WHEREAS, the Governing Body after conferring with the Farmingdale Board of Education has determined that the following amounts are necessary to appropriate for the items designated in order to provide a Thorough and Efficient School System. The

Governing Body has further determined that no changes in appropriation are necessary for those items not designated herein:

Account #	Account Title	Reduction	New Line Title
130-A.1	Dues	$ 500.00	$ 2,000.00
130.A-2	Conference/Workshops	400.00	2,000.00
130-A.4	Other Expense	300.00	500.00
130-B.1	Office Expenses	500.00	500.00
130-B.2	Dues	100.00	550.00
130-B.3	Workshops/Conf.	300.00	700.00
130-F.1	Offense Expense	500.00	700.00
130-F.3	Workshops & Meeting Costs/Other	500.00	700.00
130-D	School Elections	500.00	500.00
130-M	Printing and Publishing	500.00	500.00
230-E	Other Library Exp.	500.00	500.00
250-B	In-Service & Workshops Tchrs.	400.00	1,600.00
520-A.1	Private Schools To/From FRHS	2,000.00	2,500.00
520-A.2	In Lieu of Transportation FRHS	500.00	1,500.00
520-C	Contracted Field Trips	500.00	2,500.00
640-B	Sewer	100.00	650.00
660-D.1	Rental Custodial Equip/Oth. Exp.	250.00	250.00
720-A	Contracted Services, UpKeep Gro.	3,000.00	500.00
		$11,350.00	

NOW, THEREFORE, BE IT RESOLVED that the Governing Body of the Borough of Farmingdale does hereby certify to the Monmouth County Board of Taxation the toital amount necessary for the following:

(a) Current Expense: $499,849.00

(P-1)

Thereafter, the Board notified the governing body that it determined at a special meeting held April 27, 1987 to appeal the amount it certified to be raised by local taxation for school purposes for 1987-88. On May 20, 1987, the petition of appeal was filed before the Commissioner of Education while the governing body's answer was filed May 26, 1987.

At a prehearing conference conducted July 2, 1987, it was agreed by the parties that the issue presented for adjudication is as follows:

Whether the Board establishes by a preponderance of credible evidence its need for any or all of the $11,350 reduction imposed by the Farmingdale Borough Council on its proposed 1987-88 current expense budget which was defeated by the voters.

Leave was granted the parties to submit the matter for disposition on cross motions for summary decision. The prehearing order also noted that the Board had already moved for summary decision on the asserted absence of the Borough Council's reasons underlying the proposed reductions in the budget.

Accordingly, the thrust of the Board's motion for summary decision is twofold: one, for judgment in its favor on the grounds the governing body failed to comply with the provisions of N.J.S.A. 18A:22-37 under guidelines established by the New Jersey Supreme Court in Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94, 105-106 (1966); two, that its written documentation establishes its need for all the reductions imposed by the governing body upon its proposed 1987-88 current expense budget.

The governing body opposes the Board's motion for summary decision. In this regard the governing body relies solely upon the certification filed on August 3, 1987 by its counsel regarding the purported underlying reasons for the reductions it imposed. In this certification counsel sets forth reasons for each of the reductions imposed by the governing body upon the Board's 18 specific line item areas set forth above. These reasons are based upon counsel's certified "knowledge, information and belief." (Certification, para. 7, p. 6). Counsel does not certify he attended any meeting at which the governing body adopted the purported reasons as its reasons for the reductions it imposed, nor is there any official resolution adopted by the governing body in this record which would establish that counsel's reasons are its reasons.

The governing body denies that it violated the provisions of N.J.S.A. 18A:22-37.

This concludes a recitation of the facts which establish the history of the matter. For the reasons which follow, the Board's motion to summary decision is **GRANTED.**

I
Asserted Violation by the Governing Body of N.J.S.A. 18A:22-37

The Board, in regard to its assertion the governing body violated the provisions of N.J.S.A. 18A:22-37, contends that the governing body in response to its Petition of

Appeal failed to submit with its Answer filed on May 28, 1987 the amount certified for each of the major accounts and a line item budget stating recommended specific economies together with supporting reasons. The Board, noting that such documents must, under N.J.A.C. 6:24-7.5, be filed with an Answer in budget disputes, also notes that N.J.S.A. 18A:22-37 provides in part as follows:

> If the voters reject any of the items submitted at the annual school election, the board of education shall deliver the proposed school budget to the governing body of the municipality, or of each of the municipalities included in the district within two days thereafter. The governing body of the municipality, or of each of the municipalities, included in the district shall, after consultation with the board, and by April 28, determine the amount which, in the judgment of said body or bodies, is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district, and certify to the county board of taxation the totals of the amount so determined to be necessary * * *

The affidavit jointly executed by the superintendent, the Board president and the Board secretary reveal that each of the three persons attended a meeting between the Board and the governing body on April 21, 1987 after the budget was defeated by the voters and in accordance with N.J.S.A. 18A:22-37. The affidavit further shows that while the governing body questioned various representatives of the Board regarding the budget there was no discussion of specific economies on a line item basis. The only resolution adopted by the governing body that evening was the resolution which sets forth the reductions in the 18 specific line item categories and as set forth above. The certification filed August 3, 1987 by counsel to the governing body introduces the specific purported underlying reasons for the reductions in the following manner:

> * * *
>
> 2. After consultation with the Board of Education, the Governing Body reduced the current expense portion of the budget by $11,350.00 or approximately two percent (2%) of the defeated proposal of $511,199.00.
>
> 3. The Respondent [governing body] only reduced proposed increases in administrative type line items and approved allocations at least equal to or greater than actual expenditure of the preceding year. [emphasis in original]
>
> 4. The underlying reason for each cut was a determination that with a historically declining school enrollment the petitioner

> [board] should not require increased administrative expenditures. Further, it was felt that adequate surplus existed and would be created during the current years so that the ability to transfer funds among line items would insure sufficient funds for those items required for a thorough and efficient education * * *

The superintendent, in his letter response filed here August 17, 1987 to counsel's certification, points out that counsel misstates actual expenditures for 1986-87 in 13 of the 18 affected line items. The superintendent also notes that in the remaining five line items, counsel misstates facts.

LAW, FINDINGS, CONCLUSION

N.J.S.A. 18A:22-37 requires in part that if the voters reject any of the budget items submitted at the annual school election, the board must deliver the proposed school budget to the governing body of the municipality within two days thereafter. This the Board did. The language of the New Jersey Supreme Court in E. Brunswick, supra, is instructive.

> 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 obligations to fix a sum sufficient to provide a system of local school which may fairly be considered thorough and efficient in view of the make up of the community. Where its action entails a significant aggregate reduction in the budget and the 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.

In Bd. of Ed. Tp. of Union v. Tp. Committee of the Tp. of Union, OAL Dkt. EDU 2788-81 (Jun. 5, 1981), adopted Comm't of Ed. (Jul. 9, 1981), the Commissioner stated:

> In the opinion of the Commissioner * * * the law set forth in E. Brunswick, supra [requires] the municipal government to recommend to the Board the supporting reasons for the reduction or elimination of specific line items which it believes necessary to total budgetary reduction. The Commissioner deems it proper that such decisions be made at the time of the reduction and not on a contingency basis only, if and when the budget reduction is appealed by the Board to the Commissioner.

The State Board of Education in Bd. of Ed. Tp. of Deptford v. Mayor and Council, Tp. of Deptford, 1987 S.L.D. _____, held as follows:

> We conclude that the language of the [East Brunswick court] clearly requires that a governing body provide reasons for its reductions at the time it acts pursuant to N.J.S.A. 18A:22-37. Further, we emphasize that the Commissioner has long held that the rationale for the reductions mut be provided at that time, e.g. Union Township Bd. of Ed. v. Township Committee, decided by the Commissioner, July 9, 1981, and we fully concur with the Commissioner that the failure of the governing body to know, identify and set forth the specific line items of the budget and to [enuncitate] supporting reasons at the time of the reduction renders the reduction an arbitrary act. Union Twp., supra. We also agree that such arbitrariness is not negated by the subsequent submission of information or subsequent construction of a rationale. * * *

In this case, the facts demonstrate that the governing body at no time adopted underlying reasons or rational for the reductions it imposed upon the Board's 1987-88 current expense budget. Even if counsel's purported reasons in his certification can be seen to be the governing body's reasons, the fact remains such reasons were not submitted until August 3, 1987, long after the date of April 28, 1987 when, by statute, the governing body was obligated to have acted from a rational basis regarding reductions it imposed upon the Board's proposed budget. The resolution (P-1) adopted by the governing body on or about April 24, 1987 sets forth no underlying reasons for its reductions. The asserted reasons contained within counsel's certification filed here August 3, 1977 does not negate the arbitrariness of the failure of the governing body to have adopted such reasons and communicated such reasons to the Board by April 28, 1987.

Accordingly, based upon the facts in this case together with the application of the existing law to those facts, I must **CONCLUDE** that the governing body has acted in an arbitrary manner by its failure to enumerate supporting reasons by April 28, 1987 in support of the reductions it imposed upon the Board's proposed 1987-88 current expense

budget. Accordingly, the Board's motion for summary decision based upon failure of the governing body to comply with the provisions of N.J.S.A. 18A:22-37 must be granted. The Farmingdale Borough Board of Education is entitled to summary decision for the failure of the governing body to fully comply with the provisions of N.J.S.A. 18A:22-37. The total reduction of $11,350 imposed by the governing body upon the Board's proposed 1987-88 current expense budget is hereby restored in full.

ORDER

It is **ORDERED** that the sum of $11,350 be and is hereby certified to the Monmouth County Board of Taxation in addition to the $499,849 already certified to the Board of Taxation for current expense purposes of the Farmingdale Borough Board of Education for the 1987-88 school year so that the total amount to be raised by tax levy for current expense purposes for the 1987-88 school year shall be $511,199.

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

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

oct. 14 1987
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

OCT 15 1987

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 19 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE BOROUGH OF FARMINGDALE, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF FARMINGDALE, MONMOUTH COUNTY, RESPONDENT.	:	DECISION

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

It is observed that the parties have not filed exceptions to the findings and conclusions in the initial decision pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

It is further observed that based on those findings and conclusions in the initial decision, the ALJ has recommended that the Board's Motion for Summary Judgment be granted and that the current expense tax levy reduction of $11,300 imposed upon the Board's 1987-88 school budget request be restored.

In the Commissioner's judgment the record of this matter clearly supports the ALJ's findings and conclusion which appear in pertinent part on page 7 of the initial decision as recited below:

> In this case, the facts demonstrate that the governing body at no time adopted underlying reasons or rational (sic) for the reductions it imposed upon the Board's 1987-88 current expense budget. Even if counsel's purported reasons in his certification can be seen to be the governing body's reasons, the fact remains such reasons were not submitted until August 3, 1987, long after the date of April 28, 1987 when, by statute, the governing body was obligated to have acted from a rational basis regarding reductions imposed upon the Board's proposed budget. The resolution (P-1) adopted by the governing body on or about April 24, 1987 sets forth no underlying reasons for its reductions. The asserted reasons contained with counsel's certification filed here

August 3, 1977 (sic) does not negate the arbitrariness of the failure of the governing body to have adopted such reasons and communicated such reasons to the Board by April 28, 1987.

The Commissioner also notes with approval that the ALJ in concluding that Council had violated the provisions of N.J.S.A. 18A:22-37 relies on the language of the Court in East Brunswick, supra, as well as those school law decisions which have followed in Union Township Board of Education, supra, and Deptford Township Board of Education, supra. See also: Board of Education of the Township of Woodbridge v. Municipal Council of the Township of Woodbridge, Middlesex County, decided by the Commissioner September 11, 1987 and Board of Education of the Borough of Middlesex v. Borough Council of the Borough of Middlesex, Middlesex County, decided by the Commissioner October 14, 1987.

Accordingly, the Commissioner adopts as his own the findings and conclusions in this initial decision as supplemented above.

It is therefore ordered that the Board's Motion for Summary Judgment be granted and that the Monmouth County Board of Taxation be directed to restore $11,350 in the local tax levy in addition to the $499,849 already certified to it by Council for current expense purposes in the School District of the Borough of Farmingdale for the 1987-88 school year.

These amounts when incorporated in the local tax levy for current expense purposes for the 1987-88 school year shall be $511,199.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 17, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 5833-87
AGENCY DKT. NO. 277-8/87

VOGEL BUS COMPANY, INC. AND RAHWAY BUS COMPANY,
Petitioners,
v.
UNION COUNTY REGIONAL BOARD OF EDUCATION, DISTRICT #1; DR. VITO A. GAGLIARDI, UNION COUNTY SUPERINTENDENT OF SCHOOLS; SCOTCH PLAINS-FANWOOD BOARD OF EDUCATION; SUMMIT BOARD OF EDUCATION; PLAINFIELD BOARD OF EDUCATION; BARKER BUS COMPANY; SQUIRE BUS COMPANY, a/k/a SQUIRES TRANSPORTATION, BRUNNER BUS SERVICE; DR. SAUL COOPERMAN, COMMISSIONER, DEPARTMENT OF EDUCATION, individually; and DEPARTMENT OF EDUCATION,
Respondents.

Thomas V. Manahan, Esq., for petitioners
(Bury, Czarnecki & Manahan, attorneys)

Frank J. Skok, Esq., for Union County Regional Board of Education, District # 1, respondent
(Johnstone, Skok, Loughlin & Lane, attorneys)

Arlene Goldfus Lutz, Deputy Attorney General, for Dr. Vito A. Gagliardi and Dr. Saul Cooperman, individually, and Department of Education, respondents
(W. Cary Edwards, Attorney General of New Jersey, attorney)

Casper P. Boehm, Jr., Esq., for Scotch Plains-Fanwood Board of Education, respondent

Steven B. Hoskins, Esq., for Summit Board of Education
(McCarter & English, attorneys)

Victor E. D. King, Esq., for Plainfield Board of Education, respondent
(King, King and Goldsack, attorneys)

Hayward F. Day, Jr., Esq., for Barker Bus Company, respondent

Robert Giegerich, Jr., Esq., for Squire Bus Company, a/k/a Squires Transportation, respondent

Gerald S. Rotunda, Esq., for Brunner Bus Service, respondent
(Harvey R. Poe, attorney)

Record Closed: September 10, 1987 Decided: October 20, 1987

BEFORE **EDITH KLINGER**, ALJ:

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law on August 31, 1987 as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The matter was brought on an emergent basis upon an Order to Show Cause on September 1, 1987. Petitioners sought temporary relief as set forth in their verified complaint. This relief was denied when petitioners failed to establish their entitlement. The matter was set down for September 10, 1987 for further hearing on preliminary relief and respondents' motion to dismiss petitioners' verified complaint for lack of standing.

Upon consideration of the briefs and arguments of counsel, a summary opinion was rendered from the bench dismissing petitioners' verified complaint for lack of standing.

For purposes of this decision, the facts set forth in petitioners' brief are accepted as true and are set forth in their entirety below.

STATEMENT OF FACTS

There is currently pending an investigation into possible anti-trust violations in school bus operations. The office of the Director of the State Division of Criminal Justice is particularly concerned with the subletting of school transportation contracts (See Certification of Bradford Bury). In the extant matter. Plaintiffs assert that the assignment of various transportation contracts violates public policy, denying the public the benefit of unfettered competition and future encouraging collusive arrangements between would-be bidders.

On various dates, Defendant Brenner [sic] Bus Service, pursuant to invitation, bid on certain bus routes within Union County. Those bus routes were in the City of Plainfield, City of Summit, Township of Scotch Plains, Borough of Fanwood, Township of Springfield, Borough of Kenilworth, Borough of Garwood, Township of Clark, Township of Berkeley Heights, Town of Winfield and the Borough of Mountainside (Verified Complaint paragraphs 14 and 15). The aforementioned routes were awarded to the Defendant, Brenner Bus Service and Transportation Contracts were signed between Defendant, Brenner Bus Service and Defendants, Union County Regional Board of Education District No. 1, Scotch Plains/Fanwood Board of Education, Summit Board of Education and Plainfield Board of Education and approved by Defendant, Dr. Vito A. Gagliardi the Union County Superintendent of Schools (Verified Complaint paragraph 15).

Thereafter, the Defendant, Brenner Bus Services was purchased or is currently under Contract for Purchase by Defendant, Barker Bus Company. Defendant, Scotch Plains/Fanwood Board of Education, Summit Board of Education and Plainfield Board of Education have assigned or are in the process of assigning the Contract rights under the aforementioned Transportation Contract with Defendant, Brenner Bus Service to Defendant, Barker Bus Company without reopening bids (Verified Complaint paragraphs 17).

The Union County Superintendent of Schools, Defendant Vito A. Gagliardi, has approved or is the process of approving the transfer of these routes to Defendant, Barker Bus Company without reopening bids for these routes. These Transfer Agreements cover the 1987-1988 school year (Verified Complaint paragraph 18).

Defendant, Squire Bus Company pursuant to invitation, also bid on certain bus routes located in the City of Plainfield, Township of Scotch Plains and Borough of Fanwood (Verified Complaint, paragraphs 19 and 20). The aforementioned routes were awarded to Defendant, Squire Bus Company and Transportation Contracts were signed between Defendant, Squire Bus Company and Defendants, Plainfield Board of Education and Scotch Plains/Fanwood Board of Education. Same were approved by Defendant, Dr. Vito A. Gagliardi the Union County Superintendent of Schools (Verified Complaint paragraph 21). Subsequent thereto, the Squire Bus Company was purchased or is under contract for purchase by Defendant, Barker Bus Company. Defendants, Plainfield Board of Education and Scotch Plains/Fanwood Board of Education with the approval of Defendant, Dr. Vito A. Gagliardi have transferred or are in the process of transferring these Transportation Contracts for these routes to Defendant, Barker Bus Company without reopening bids for these routes. These Transfer Agreements cover the 1987-1988 school year (Verified Complaint paragraph 23).

Defendant, Dr. Saul Cooperman, Commissioner of the Department of Education and Defendant, Department of Education have allowed in the past and have sanctioned the practice of assignment of bus routes. Those Defendants have further formulated a standard form to facilitate that practice (Verified Complaint paragraph 25, Exhibit A).

In the verified complaint, petitioners seek the following relief.

a) Voiding the transfer of all pupil transportation contracts between the defendant Boards of Education and the defendant, Barker Bus Company as approved by defendant, Dr. Vito A. Gagliardi, in his capacity of Union County Superintendent of Schools; and/or

b) Enjoining defendant Dr. Saul Cooperman, Commissioner of Education, the New Jersey Department of Education, the defendants Boards of Education and defendant, Dr. Vito A.

Gagliardi, in his capacity as Union County Superintendent of Schools from approving the assignment of any transportation contracts between the defendants Board of Education and defendant Barker Bus Company now and in the future; and

c) Requiring that the defendant Boards of Education reopen for bids these bus routes; and

d) For such other relief as the Commissioner of Education and/or Court deems appropriate.

As grounds for this relief, petitioners allege that the assignment of the bus routes does not benefit the taxpayers, is not for the public good, denies the public the benefits of unfettered competition in the area of transportation, encourages collusive arrangements between parties who would be bidders on contracts and results in economic hardship to petitioners and others similarly situated.

They further allege that if relief is not granted, petitioners and the general public will suffer irreparable harm both now and in the future.

At the time of hearing, petitioners modified the ultimate relief sought to include recision of all prior assignments of bus contracts.

PRELIMINARY RELIEF

Crowe v. DeGioia, 90 N.J. 126 (1982) sets forth clearly what criteria must be met to obtain preliminary relief. After stating that preliminary relief should be granted under "the most sensitive exercise of judicial discretion," the court enunciated and explained the criteria to be met for entitlement to such relief. Id. at 132 through 134.

First, preliminary relief should be granted only to prevent some imminent and irreparable harm from occurring before plenary hearing. This harm is restricted to a type which cannot be remedied by pecuniary damages. Second, the legal right on which petitioner bases its claim must be one settled in law. Third, preliminary relief should be

granted only if the material facts are uncontroverted. Finally, when granting such relief, the court should balance the equities to determine the relative weight of any hardship caused to the parties.

In applying these criteria to the present facts, petitioners have failed to meet these standards for preliminary relief. They are unable to demonstrate that they have a reasonable probability of success on the merits of the case.

Petitioners have not shown that they will suffer imminent and irreparable harm if they are forced to await the outcome of a plenary hearing. If the relief they seek is granted and the assignment of all pupil transportation contracts prevented or voided, the bus companies operating under existing contracts would merely continue to provide service to the school districts. An order to reopen the bidding would at best provide only speculative relief to petitioners since there is no guarantee that they would be successful bidders. Petitioners base their allegations of harm primarily on being denied the right to bid for these contracts. However, they do not allege that there was anything improper in the way the contracts were originally awarded nor do they allege that they made any attempts to bid on them. Taking the facts as presented by petitioners, it would be inappropriate to reopen the bidding at this time.

In any case, it is clear that whatever injury petitioners might suffer from awaiting a final decision can be remedied only by money damages if at all. Since the non-pecuniary relief sought will not benefit petitioners, it follows that they will suffer no imminent or irreparable harm if relief is denied. I **FIND** therefore that petitioners cannot satisfy the first criterion in Crowe above.

Secondly, petitioners have not demonstrated that their claim is based upon legal rights settled in law. Not only are their legal rights not settled, it appears that the law is apparently otherwise than as presented by petitioners. There is nothing in the statutes or in the case law prohibiting assignment of pupil transportation contracts. Specifically, the bidding laws are silent with regard to assignment of awards. (See, N.J.A.C. 6:21-16.5 on the award of contracts.) In addition, New Jersey common and statutory law provide that

contracts may be assigned. See, N.J.S.A. 2A:25-1. The cases cited by petitioners are inapposite. They refer to situations involving bidding and address themselves to eliminating potential evils from the bidding process. The present matter involves the assignment of previously awarded bids. No question is raised here as to the award of the contracts; only the assignment is in question. I FIND that petitioners are not entitled to preliminary relief under the second criterion set forth in Crowe.

I FIND that the third criterion of Crowe is essentially satisfied: The material facts in this case are uncontroverted at least at the time of the present application.

Finally, I FIND that any interference with or disruption of existing contracts or assignments would create more injury to respondents than it would provide benefit to petitioners. There is no basis in the facts for ordering a reopening of the bidding since no challenge has been made to the initial award of the transportation contracts. As discussed before, enjoining assignment of the existing contracts will result in no benefit to petitioners, while causing major inconvenience to respondents. On balance, the equities are clearly in favor of respondents.

Based upon the above, I CONCLUDE that the petitioners are not entitled to the preliminary relief sought.

THE QUESTION OF STANDING

In an administrative setting, the Uniform Administrative Procedure Rules do not specifically set forth the criteria necessary to establish standing.

Judge Kestin in N.J.E.A., et al. v. Essex Cty. Ed. Services Comm., 5 N.J.A.R. 29, 36 (1981), aff'd Comm'r of Ed. (1981) stated that agency regulations should control the disposition of the issue. In his discussion, Judge Kestin referred to section 1:1-1.1 of the Uniform Administrative Procedure Rules which reads in part,

> Procedural rules formerly adopted by the agencies, including those adopted prior to the creation of the Office of Administrative Law,

> shall continue to apply to the extent they are not inconsistent with this chapter. . .
>
> Judge Kestin said:
>
> By the terms of N.J.A.C. 1:1-1.1(a), therefore, the rules of the Commissioner of Education which were extant when the Uniform Rules were adopted may be looked to in determining the outcome of such an issue.
>
> Under N.J.A.C. 6:24-2.1 any interested person(s) may petition the commissioner for a declaratory ruling...." N.J.A.C. 6:24-1.1 defines interested person(s) as those "having a direct and substantial interest in the subject matter of controversy. . . and whose rights, status or legal relations will be affected by a determination thereof." (Emphasis added.) (Id. at 36).

Thus, the requirements for standing in the administrative setting are not dramatically different from those of the courts. In fact, in addressing the issue of standing, administrative decisions have relied on the criteria used by the courts to determine who is an "interested person." E.g., Ricciardelli v. Kittrels and Newark Bd. of Ed., OAL DKT. EDU 1894-79 (Sept. 21, 1979), adopted, Comm.'r of Ed. (Nov. 16, 1979); Kenwood v. Montclair Bd. of Ed., OAL DKT. EDU 8858-81 (April 23, 1982) adopted, Comm'r. of Ed. (June 14, 1982).

The New Jersey Constitution does not confine the exercise of judicial power to actual cases and controversies. N.J. Const. (1947), Art. 6, §5, par. 3 and §3 par. 2. As a result, New Jersey courts have taken a more generous approach towards recognition of standing. Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98 (1971). However, in Crescent Park Tenants Ass'n, the New Jersey Supreme Court made clear that threshold requirements must be met before a potential plaintiff may be heard. The court noted that it would not render advisory opinions or entertain proceedings by plaintiffs who were mere intermeddlers, interlopers or strangers to the dispute. The court stated that it had appropriately confined litigation to those situations in which litigants concerned with the subject matter evidenced a sufficient stake and real adverseness. Id. at 107. Thus, petitioners here must show both (1) a sufficient stake in the outcome of the proceedings; and (2) that their position is adverse to that of respondents. Home Builders League of So. Jersey, Inc. v. Berlin Tp., 81 N.J. 127, 132 (1979); Kenwood v. Montclair Bd. of Ed.

In the instant matter, the Board of Education, pursuant to N.J.A.C. 6:21-15.2, is authorized to entertain bidding and award contracts for pupil transportation. Petitioners contend that the subsequent practice of assigning bus routes facilitates corruption and undermines competitive bidding statutes.

The issue of standing with respect to public bidding has been decided and reaffirmed by our courts on several occasions. There are a number of cases in New Jersey which hold that an unsuccessful bidder has no standing whatsoever to contest previously unchallenged bidding specifications or procedures. See, Waszen v. Atlantic City, 1 N.J. 272 (1949); Interstate Waste Removal Co. v. Comm. Bordentown, 140 N.J. Super. 65 (App. Div. 1976); Lenox Awards, Inc. v. Div. of Purchase and Property, 1 N.J.A.R. 99 (1980), modified on other grds., Div. of Purchase and Property (1980).

In Interstate Waste Removal Co., the court denied standing to an unsuccessful bidder and held that the action could not be maintained by one who would not be entitled to the contract even if the defendant were disqualified. In denying standing to unsuccessful bidders, the courts have relied on the premise that if a bidder believes there is something unlawful about any bidding specifications or procedures he should challenge them before he takes part in the bidding process rather than afterwards. The Court in Waszen reaffirmed this notion when it explained, ". . .one cannot endeavor to take advantage of a contract to be awarded under illegal specifications and then, when unsuccessful, seek to have the contract set aside." Id. at 276. Thus, the Court in Waszen concluded that, "[s]ince they were unsuccessful bidders they therefore have no standing to challenge the award of the contract to a rival bidder or to attack allegedly illegal specifications." Id. at 276 (citations omitted), Accord, Lenox Awards, Inc.

Petitioners in the present action refer to language in Trap Rock Industries, Inc. v. Kohl, 59 N.J. 471 (1971) which confers standing to bidders and taxpayers who challenge bidding procedures. Id. at 479. However, if it were not for the suspension of their

"qualifications," the respondents in Trap Rock would have been the lowest bidders for the contract, the "successful" bidders. Thus, when the Court addressed the issue of standing it was referring only to bidders who can show entitlement to the award, such as the low bidders on contracts. The Court went on to state that a "low bidder is sometimes said to have acquired a 'status'." Id. at 479. Thus, it is clear from the Court's language in granting standing that it referred to bidders who would have won the award were it not for some extraneous factor rather than to bidders who were merely unsuccessful. To distinguish the present case, petitioners did not even bid on the transportation contracts. They therefore cannot claim to have as much status as an unsuccessful bidder, who, as the authorities agree, has none, even under Trap Rock.

In fact, petitioners' reliance upon the bidding cases is misplaced. The cases relied upon by petitioners address themselves to eliminating evils which may taint the process of bidding for public contracts. However, petitioners have not challenged the initial award of the contracts; it is the assignment of the contracts which they seek to enjoin and nothing in the statutes or case law prohibits these assignments. There is a provision in the contracts themselves which makes them assignable and a procedure in the State Department of Education for recognizing the transfer.

Petitioners claim that they are injured by the assignment process by being barred from the bidding process. In reality, legitimately awarded contracts were legitimately extended pursuant to N.J.S.A. 18A:39-3. This statute provides for annual extensions of an existing transportation contract without the need for competitive bidding as long as the cost of the extensions is maintained within given limits. The approval of the county superintendent of schools is made a condition of the extensions. Petitioners do not allege that the cost of the extensions renders them illegal and there is every reason to believe that these extensions have been or will be given the approval of the county superintendent. There has apparently been no need to require the advertisement and letting on proposals or bids for transportation contracts in the respondent districts.

It is this statutory allowance for extensions of existing transportation contracts, presumably to provide for efficiency and continuity of service to the school districts, which prevents petitioners from bidding. Since this is the case, petitioners' quarrel is with the statute, N.J.S.A. 18A:39-3, and their petition should be addressed to the Legislature which designed the statutory scheme. If competition is limited by the statute, it is presumably the legislative intent to create this result.

Petitioners have relied upon the holdings in Waszen and Trap Rock to claim standing as taxpayers to challenge the assignments as being against public policy.

In Waszen v. Atlantic City, an unsuccessful bidder challenged a contract awarded under imprecise specifications which operated to restrict competitive bidding. Although the court denied standing to an unsuccessful bidder, it nevertheless addressed the merits of the case because it found that a co-plaintiff, who was a taxpayer of the municipality, had standing to challenge the specifications.

Petitioners have not asserted that they are taxpayers in the respondent school districts. The mere assertion of paying taxes is not sufficient. Furthermore, they have failed to explain the public interest to be protected by voiding assignment of the contracts. Petitioners refer to the competitive bidding statutes whose purpose is to prevent corruption, but they fail to explain or establish how the assignment of these contracts creates a suspicion of corruption. It is true as stated in Trap Rock that competitive bidding statutes exist to benefit taxpayers and should be construed with sole reference to the public good, Trap Rock at 479, but there is no harm to the public alleged here. This case involves only the assignment of contracts legitimately awarded by competitive bidding, to a party which has been or will be approved by the county superintendent of schools, presumably after suitable investigation.

Since petitioners have not alleged that they are taxpayers in the respondent districts and since they have not shown that there is any public interest to be protected, I FIND that petitioners have no standing as taxpayers to challenge the assignments.

I FIND based upon the facts in their petition that petitioners have demonstrated no injury as potential bidders or as taxpayers because of the acts of respondents in this matter. They have therefore shown no entitlement to pecuniary damages. I further FIND that they have not demonstrated that the non-pecuniary relief they seek will benefit them in any way. It therefore follows that petitioners have not shown the sufficient stake in the outcome of the proceedings or adversity to the position of respondents to establish standing to bring the present action. Crescent Park Tenants Ass'n. Accordingly, I CONCLUDE that petitioners have no standing to maintain the present action.

ORDER

It is ORDERED that the appeal of petitioners be and hereby is DISMISSED WITH PREJUDICE.

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

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

October 20, 1987
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

10/22/87
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 23 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

PAR/e

VOGEL BUS COMPANY, INC. ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL SCHOOL DISTRICT NO. 1 ET AL., UNION COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by petitioners pursuant to N.J.A.C. 1:1-18.4 as were the exceptions/reply exceptions filed by Respondents Commissioner of Education, Union County Superintendent of Schools and the Department of Education. Respondent Scotch Plains-Fanwood Board of Education (Scotch-Plains) filed timely exceptions and replies to the exceptions filed by petitioners. Respondent Board of Education of the City of Plainfield's reply exceptions were timely, although its primary exceptions were untimely. Similarly, the primary exceptions submitted by respondent Barker Bus Company were untimely, although its reply exceptions were timely. The Commissioner notes that he will consider only those arguments that are clearly indicated as reply exceptions to petitioners' exceptions among those respondents whose exceptions and reply exceptions were embodied in the same document and filed by the later date acceptable only for reply exceptions.

Initially, petitioners aver that there is "an inherent conflict with Dr. Saul Cooperman, Commissioner of Education rendering a final decision in this matter as he is a party along with the Department of Education." (Petitioners' Exceptions, at p. 1) Petitioners further except to a final decision being rendered in this matter until a transcript of ALJ Klinger's oral decision, including petitioners' oral arguments, have been reviewed.

In addition to the above, petitioners except at page one as follows:

> PETITIONERS WERE DENIED DUE PROCESS IN THAT ANY DECISION AS TO STANDING WAS PREMATURE ABSENT A FULL AND COMPLETE HEARING.

Petitioners except to the ALJ's conclusion as found on page twelve of the initial decision that they have no standing to bring the instant matter. Petitioners aver they were provided no opportunity to present witnesses, documents or other evidentiary items to establish that there is a public interest to be protected and, further, that they would and did suffer injury both as

taxpayers and in their capacities as public bus transportation companies. "The Court decided the standing issue by, in effect, deciding the ultimate issue without the benefit of a plenary hearing." (emphasis in text) (Id., at p. 2)

Petitioners also aver that as they engage in the public bus transportation business, any procedure which impacts upon the bidding process has an impact upon them. They except to the ALJ's determination that they demonstrated no injury as potential bidders or taxpayers. Citing Home Builders League of South Jersey, Inc. v. Berlin Township, 81 N.J. 127, 132 (1979), petitioners argue:

> [I]f one is in the business of bidding on public transportation contracts and a practice is engaged in or tolerated which would eliminate competition in the bidding process in some manner, they would have a sufficient stake and an adverseness to those who would participate in the offending practice. (Id., at p. 3)

Petitioners further submit that the information before the ALJ was more than sufficient to provide standing to them, "especially in light of the generous approach toward standing recognized by our Courts." (Id.) Petitioners cite Crescent Park Tenants Association v. Realty Equity Corporation, 58 N.J. 98 (1971) in support of this proposition. Additionally, petitioners cite to their brief in support of the Order to Show Cause, wherein they refer to several cases discussing the meaning of the bidding statutes and the public interest.

Based on the above, petitioners take exception to both the findings of the ALJ concerning standing and also to the findings of the ALJ in that her findings "were accomplished without the benefit of a plenary hearing." (Id.)

As to the ALJ's findings in regard to preliminary relief, petitioners acknowledge that the ALJ properly recited the standard for preliminary relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). However, petitioners except to the ALJ's conclusion at page six of the initial decision wherein she states that "not only are the legal rights of petitioners not settled, but '***it appears that the law is apparently otherwise than as presented by petitioners.'***" (Id., at p. 4) Petitioners aver that they did not lead the ALJ to believe that the assignment of contracts was prohibited by statute but, rather, what they argued was that the statutes were silent and "neither prohibited nor allowed for the assignment of pupil transportation contracts." (Id.) Moreover, petitioners disagree with the ALJ that the cases they cited are inapposite. It is petitioners' contention that the assignment of previously awarded bids will bring about the evils contemplated by the cases they cited. Petitioners contend that this argument "goes to the heart of the petitioners' argument and is a basis for the relief sought." (Id.)

Petitioners submit that the initial decision should be rejected.

The State respondents' exceptions are in support of the decision rendered in this matter and in opposition to the exceptions filed by petitioners.

The State respondents aver that petitioners' allegation that the Commissioner cannot decide a matter in which he or his agency is a party has no basis. They aver, inter alia, that N.J.S.A. 18A:6-9 confers such authority on the Commissioner.

As to petitioners' concern regarding a transcript, the State respondents contend:

> [T]here is no need for a transcript at this time because the threshhold [sic] issue below, whether the petitioners had standing to bring this matter before the court, was a legal issue and not a factual one. *** Since the legal argument below may be reiterated in exceptions there is no need for transcripts in this matter.
> (State Respondents' Exceptions, at p. 2)

As to petitioners' argument that they lacked opportunity to present evidence on the issue of standing, the State respondents claim that at the initial hearing the ALJ ordered the parties to file submissions on the issues of a stay and of standing. The State respondents claim that petitioners' failure to so include any evidence sustaining their claim to standing must be deemed an admission that they lacked such documentation. Moreover, the State respondents argue that petitioners' attempts to gain standing in this matter go beyond the limit of the generous approach recognized in New Jersey.

> The mere fact that the actions complained of herein may impact generally on the business they happen to be in does not afford them the 'direct and substantial interest' required by our courts in order to have standing. See brief for respondents, on issue of standing, which is attached hereto and incorporated herein.*** (Id.)

The State respondents claim that the examples provided by petitioners in their attempts to gain standing are speculative at best and, further, that they have failed to demonstrate that their allegations of improprieties in school transportation matters are relevant to the instant matter.

The State respondents submit that the initial decision should be affirmed.

Scotch Plains also submits that the initial decision is correct in all respects. Specifically, Scotch Plains avers that there were no facts presented by petitioners which would give them standing in this forum to raise the issues presented. Scotch Plains avers that petitioners failed to meet their burden to so allege said facts, despite ample opportunity to do so before ALJ Klinger.

Scotch Plains incorporates in its exceptions its brief filed before ALJ Klinger, as well as the legal arguments and citations cited by the other respondents in their respective briefs before ALJ Klinger. It submits that the initial decision should be affirmed.

The Plainfield Board's Reply Exceptions add that petitioners' failure to satisfy Crowe v. DeGioia, supra, concerning the prerequisites for emergent relief, renders their exceptions to be of no merit. "Petitioner (sic) just never presented sufficient proof that they would suffer irreparable harm; that their legal rights were settled in law or that they had a reasonable probability of success on the merits." (Plainfield Board's Reply Exceptions, at pp. 1-2) Moreover, concerning the Commissioner's jurisdiction to render a fair and impartial decision in the instant matter, the Plainfield Board cites Green Village Road School Association et al. v. Board of Education of the Borough of Madison, 1976 S.L.D. 700, stay denied and remanded by State Board, 1976 S.L.D. 716.

Finally, the Plainfield Board suggests that any question relative to public policy interests regarding pupil transportation should be "the subject of an in-depth study by the agency head followed by a recommendation to the legislature for changes in the law." (Plainfield Board's Reply Exceptions, at p. 2) The Plainfield Board urges affirmance of the initial decision.

Barker Bus submits its brief in opposition to petitioners' application as its reply exceptions. It, too, urges affirmance of the initial decision. Said brief is incorporated herein by reference.

Having carefully reviewed the record in the instant matter, including the exceptions and replies thereto that were timely filed, the Commissioner adopts the findings and conclusion of the Office of Administrative Law for the reasons expressed therein as supplemented below.

The Commissioner notes petitioners' argument suggesting that "there is an inherent conflict with Dr. Saul Cooperman, Commissioner of the Department of Education rendering a final decision in this matter as he is a party along with the Department of Education." (Petitioners' Exceptions, at p. 1) Said exception is deemed to be entirely without merit. N.J.S.A. 18A:6-9 grants the Commissioner of Education jurisdiction as agency head to decide controversies and disputes arising under school law not relating to higher education as well as those rules of the Commissioner and the State Board. Moreover, should a party be less than satisfied with

the decision of the Commissioner for any reason, said party may appeal that determination to the State Board of Education, thus providing yet another neutral forum for adjudication of his petition of appeal. Because the instant matter arises under the education statutes of the State of New Jersey, the Commissioner is duty-bound to perform his function as agency head, not as a party respondent, to determine said controversy in a neutral manner. See, generally, Bd. of Ed. of the School District of South Orange-Maplewood, Essex County v. Saul Cooperman, decided by the Commissioner April 25, 1985 aff'd State Board September 4, 1985, dis. N.J. Superior Court March 6, 1986. Accordingly, petitioners' exception in this regard is dismissed.

Concerning petitioners' exception averring that not all of their oral arguments were included in nor discussed by the ALJ in her initial decision, thus requiring that the Commissioner delay his decision until a transcript is provided, it is noted that no transcript has been made a part of the record before him. Responsibility for so requesting a transcript falls upon the parties, not upon the agency head reviewing the hearing below. See, N.J.A.C. 1:1-14.11. To delay his decision to await any such transcript would be in violation of the requirement that the Commissioner file his decision within 45 days of the receipt of the initial decision. See, N.J.A.C. 6:24-1.16 and N.J.A.C. 1:1-14.11. Moreover, the Commissioner agrees with the State Respondents' reply to this exception:

> Since the legal argument [as to standing] below may be reiterated in exceptions there is no need for transcripts in this matter.
> (State Respondents' Exceptions, at p. 2)

Accordingly, the Commissioner dismisses as being without merit the above exception.

In affirming the initial decision, the Commissioner would add his accord with the ALJ's finding that petitioners have failed to present proof of any entitlement to standing in the instant matter. Although petitioners' claim in their posthearing submissions and in exceptions that they are both bidders and taxpayers, the Commissioner, like the ALJ, is unpersuaded by their assertions since they present no proof, even so much as an affidavit, to establish said facts.

It is clear from the ALJ's decision that the only possible standing petitioners might claim is on the basis that they are taxpayers in the municipalities wherein the controversy exists. See Waszen v. Atlantic City, 1 N.J. 272 (1949); see also Trap Rock Industries, Inc. v. Kohl, 59 N.J. 471 (1971). The ALJ specifically addressed the matter of petitioners' assertion that they are indeed taxpayers, but she concluded, as does the Commissioner, that a mere allegation of being taxpayers is inadequate to establish the fact of being taxpayers in the respondent school districts. Having failed to present such proofs at the oral hearing, petitioners are then

placed in the position of having an affirmative duty to bring such evidence to bear in their posthearing submissions and/or exceptions. As noted by the State respondents' counsel:

> If petitioners had a legitimate basis to claim standing, they could have apprised the court thereof by way of affidavit attached to their brief. They did not, notwithstanding that they had included a certification to verify their brief in support of their Order to Show Cause. Indeed, they failure to include any evidence sustaining their claim to standing must be deemed an admission that they lacked such documentation.
> (State Respondents' Exceptions, at p. 2)

Such lack of evidence brought to the record leads the Commissioner to conclude petitioners are taxpayers in the most general sense, not taxpayers in the particular districts concerned herein. Having determined that petitioners lack standing to bring the instant Petition of Appeal, discussion of petitioners' other exceptions becomes moot.

Accordingly, for all the reasons expressed in the initial decision, as supplemented herein, the recommended initial decision of the Office of Administrative Law is adopted in toto. Motion for Emergent Relief is denied and the instant Petition of Appeal is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 2, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3856-87
AGENCY DKT. NO. 128-5/87

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY,
Petitioner,
v.
COUNCIL OF THE CITY OF PERTH AMBOY,
Respondent.

Alfred D. Antonio, Esq., for petitioner (Antonio & Flynn, attorneys)

Robert P. Levine, Corporation Counsel, for respondent

Record Closed: September 9, 1987 Decided: October 20, 1987

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

The Perth Amboy Board of Education (Board) appeals the action of the City of Perth Amboy (City) by which the City certified to the Middlesex County Board of Taxation a lesser amount of appropriations for current expense school budget purposes for the 1987-88 school year than the amount proposed by the Board in its budget that was rejected by the voters on April 7, 1987.

The issue to be determined is whether the municipality acted reasonably and with full regard for the State's educational standards and its own obligations to fix a sum sufficient to provide a system of local schools that may be fairly considered thorough and efficient.

The City's reductions derived from, and are limited herein to, a decrease of $50,000 in Account J730, a decrease of $10,000 in Account J130, and an increase in free balance appropriated forward of $260,000. The governing body also reduced proposed capital outlay by $40,000, but that amount is not here appealed.

The matter was opened and joined before the Commissioner of Education who, on June 3, 1987, transmitted it to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on July 13, 1987, at which the above-recited facts and issue were settled.

UNCONTESTED FACTS

The following evidence is uncontested and is **ADOPTED AS FACT.**

At the school election held on April 7, 1987, the Board submitted to the electorate the following proposed amounts to be raised by local taxation for 1987-88:

Current Expense	$11,310,262
Capital Outlay	$ 40,217

These proposals were rejected by the voters. Subsequent to the reduction, the Board submitted its proposal to the City for review and determination pursuant to N.J.S.A. 18A:22-37. The City certified to the Middlesex County Board of Taxation $10,990,262 for current expense and $217 for capital outlay. Thus, the City reduced the Board's proposed budget for current expense by $320,000 and for capital outlay by $40,000.

PAROL AND DOCUMENTARY EVIDENCE

Pursuant to N.J.A.C. 1:6-10.1(c), the City and the Board submitted their respective statements of supporting reasons for their contentions in the form of written testimony.

The superintendent states that, following defeat of the school budget, formal and informal discussions took place between certain councilmen and representatives of the Board. In addition, there were two public meetings between the groups.

Following discussion of the school budget on April 24, the City voted to reduce the school budget. In a letter dated July 15, addressed to the Board's attorney, the City enumerated its reductions and stated its reasons for those reductions. Board's exhibits 15, 16.

The superintendent contends the City erroneously made a reduction from the J130 Account for attendance by faculty at conferences. Appropriations for this purpose are budgeted in Account J250. In addition, Account J130 as presented to the voters on April 7 contained a total of $6,500 for Board members' and central administrators' conference expenses. The remaining $67,850 in this account was for other expenses as set forth in the Department of Education's Chart of Accounts. Board's exhibit 17 is a summary of the status of the J130 Account and demonstrates a proposed expenditure in 1987-88 of $17,145 less than was expended in 1985-86 and $13,678 less than was expended in 1986-87. It is necessary for Board members and central administrators to attend educational conferences in order to keep informed and abreast of requirements in education today. A total appropriation of $6,500 for nine lay Board members and three central administrators over a school year cannot be construed as unreasonable or excessive. The City actually made a reduction of $10,000 for conferences in this account. Board's exhibit 16. That reduction is $3,500 over the total amount set aside for this purpose in the account.

The Board currently has equipment valued in excess of $8,000,000 for replacement purposes. Board's exhibit 18. Obviously, equipment must be replaced as it becomes worn out, obsolete and damaged. New equipment is necessary, from time to time, to expand educational programs as well as to provide a more efficient operation in the district. The district has historically reduced Account J730 during the budget preparation process to an absolute minimum, taking into account the size and scope of the educational enterprise.

The original budget amount for 1987-88 was $111,346, of which $56,346 represented replacement and $55,000 represented new equipment. The new equipment

line was broken further as $30,000 for noninstructional equipment and $25,000 for instructional equipment. The superintendent contends that this is "less than T and E" demands. The district lags in computer instruction. Some funds were earmarked for computer education. In addition, he perceives needs for computer equipment at the vocational level and has been advised by local businesses concerning the types of computer equipment pupils should learn about and to operate.

All individuals concerned with budget review have been kept informed by the school administration concerning estimates of what free balance would be as of June 30, 1987. Board's exhibit 19. That exhibit was part of the information forwarded to the City on April 9. The Board also made known to the City contingencies known to it but not budgeted for in the 1987-88 proposal. The Board was particularly concerned with health insurance costs. 1986-87 payouts were running quite high. All full-time employees are covered by the health insurance program. The superintendent stated that the Board was "paying out at the cap figure" and determined it would need some $200,000 more to cover the balance of the year. The Board believed that it could use $200,000 from unappropriated free balance to cover that unanticipated cost. The Board did transfer $200,000 to the health insurance account before June 30, 1987, and used all but $28,100 of that amount to cover claims.

The superintendent estimated the unaudited free balance as of June 30, 1987 to be $126,562, taking into account the $260,000 reduction by the City. The Board's ability to meet any expense or emergencies not budgeted for the 1987-88 school year would be limited to that amount. This is approximately one-half of one percent of the Board's current expense budget and cannot be considered reasonable. The amount of $386,562 that existed before the City's reduction is approximately one and one-half percent of the current expense budget. That amount was barely sufficient to cover possible unanticipated expenses.

The Board must rent outside classrooms; that is, classroom space outside of existing public schools. The teachers' contract, which had not been settled at the time the budget was formulated, has now been negotiated. However, administrators' and secretaries' contracts have not yet been resolved.

The Board expended $559,604 on utilities in 1986-87. The 1987-88 allocation is only $554,740. Unanticipated telephone and electricity charges in 1986-87 required the Board to transfer from within the operating budget, not from free balance, to cover those costs. That cannot be done this year because the Board anticipates no account with an overage.

The superintendent represented that the $73,000 increase for utilities in the present budget is based on the Board's estimate of utility rates while recognizing that it cannot anticipate extraordinary events. The superintendent also mentioned a potential shortfall in out-of-district special education tuition.

A councilman and the City's auditor also testified. The councilman stated that he believed, when considering the defeated school election in April, that it was possible the Board would have a current expense surplus at the end of the 1986-87 school year of over $527,000 and that there could be additional revenues of $25,000. The councilman said he was aware that the Board was concerned about certain exposures to this balance in the approximate amount of $323,000. Therefore, the City determined that the "free balance" could be reduced by $260,000 without jeopardizing the thorough and efficient system of education in Perth Amboy.

In addition, the City was aware that there was $111,000 allocated in Account J730 for equipment and $74,350 in Account J130 for expenses of administration. The City determined that Account J730, equipment, could be reduced by $50,000 and Account J130, administration other expenses, could be reduced by $10,000 without affecting a thorough and efficient system of education in Perth Amboy.

The witness also stated the City wanted no reduction in the number of teachers. The council also discussed an athletic trainer position and decided to restore monies for that position. Council members generally had their auditor's advice and relied on it, but not on the questions of the athletic trainer or the number of teachers.

A representative of the firm that audits for the City testified that he reviewed the budget at the direction of the mayor and council. He discussed with the superintendent and secretary all 1986-87 expenditures. He also reviewed exposures and liabilities. His review was based on the March 31, 1987 statement of accounts. He

concluded that the anticipated balance on June 30, 1987, would be $527,880. He included health benefits in his calculations.

The witness reported his findings and conclusions to the City, but made no specific recommendations. Having heard the testimony of the superintendent, he still would make no recommendations. His report, if made today, might be different but he still would report facts rather than make recommendations.

DISCUSSION AND DETERMINATION

N.J.S.A. 18A:22-37 in part provides:

> The governing body of the municipality, or of each of the municipalities, included in the district shall, after consultation with the Board, and by April 28, determine the amount which, in the judgment of said body or bodies, is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district, and certify to the county board of taxation the totals of the amount so determined to be necessary. . . .

I am required to apply the standard sets forth in E. Brunswick Tp. Bd. of Ed. v. E. Brunswick Tp. Council, 48 N.J. 94 (1966), to each reduction:

> [T]he Commissioner in deciding the budget dispute before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated "thorough and efficient" . . . school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budgetmaking body under R.S. 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness. [Id. at 107.]

Account J130

I **FIND** the superintendent's testimony concerning other expenses for administration to be straightforward and convincing. It appears the City has made a reduction it believed would touch only conference and travel expenses for administrators and Board members. However, the decrease of $10,000 exceeds the amount budgeted for those purposes. The additional monies would have to come from line items such as other expenses for school elections, other expenses for legal services, advertisement for bids for supplies and equipment and the like.

I further **FIND** that the total of $6,500 for Board members' and central administrators' conference expenses is prudent in light of the great amounts of information of which these persons must try to stay abreast. While it is true that great savings may be realized from the aggregation of many small savings, it is also true that the amount in question here is a minute part of the total budget. I **FIND** and **CONCLUDE** that $10,000 shall be restored to Account J130.

Account J730

In the 1986-87 school year, $132,320 was budgeted in this account and $168,448 actually was expended. During the budget process, the Board reduced initial requests of $175,000 made by the administration to $111,346. This figure is more than $57,000 less than was expended in 1986-87. The City's additional reduction of $50,000 would limit expenditures to considerably less. I **FIND** that a planned appropriation of $111,346 for equipment in a K-12 school system with approximately 6,000 pupils, 698 employees and 11 operating buildings with present equipment valued in excess of $8,000,000 is neither unreasonable nor excessive.

I **FIND** and **CONCLUDE** that the amount of $50,000 shall be replaced in Account J730.

Unappropriated Free Balance

The Board appears to have kept a close eye on its unexpended balances, by line and in aggregate, throughout the 1986-87 school year. The Board provided to the City information concerning contingencies known but not budgeted for in the 1987-88 school year as part of the materials the Board submitted to the City following defeat of the budget. I am satisfied that the free balance as of June 30, 1987, taking into account the City's $260,000 reduction, is approximately $126,500. This, as the superintendent testified, is approximately one-half of one percent of the Board's current expense budget. Although the Commissioner of Education has refrained from specifying what percentage of a school budget represents a reasonable unappropriated free balance, it may fairly be said that "reasonable" in this context could be considered to be three percent because that percentage is exempt under the cap formula.

I **FIND** and **CONCLUDE** that prudent fiscal management of a budget in excess of $28,000,000 demands that the sum of $260,000 be replaced in unappropriated free balance as protection against vagaries and contingencies that cannot be foreseen at this time.

ORDER

It is **ORDERED** that the additional amount of $320,000 be certified to the Middlesex County Board of Taxation for the current expense school purposes of the Perth Amboy Board of Education for the school year 1987-88. The total amount to be raised by local tax levy for current expense school purposes now shall be $11,310,282.

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

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

20 OCTOBER 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

OCT 22, 1987
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 23 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY,

PETITIONER,

V.

COUNCIL OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-18.4.

Having carefully reviewed the record herein, and the parties having voiced no exceptions to the findings and determination of the ALJ thereto, the Commissioner concurs with the ALJ in establishing the local tax levy for the 1987-88 school budget in Perth Amboy as follows:

	Amount Certified	Amount Restored	Total
Current Expense	$10,990,262	$320,000	$11,310,262

While the Commissioner recognizes that Board of Education of the Township of Branchburg v. Township of Branchburg, Somerset County, 1981 S.L.D. 1230, aff'd St. Bd. 1983 S.L.D. 1504, rem. N.J. Superior Court, Appellate Division 1505, dis. St. Bd. on remand 1509 stands for the proposition that a governing body may consider not only the appropriations side of the budget in making its determination as to the amount necessary for providing a thorough and efficient education, but also that any determination to reduce expenditures can be made by the requirement that the unappropriated free balance be appropriated for purposes of reducing the tax levy. To do so, the governing body's determination must also meet the standard enunciated by the Supreme Court in E. Brunswick Tp. Bd. of Ed. v. E. Brunswick Tp. Council, 48 N.J. 94 (1966).

Upon his careful and independent review of the record, including the exhibits and affidavits submitted by the Board of Education as well as the arguments of the parties submitted in their respective post-hearing submissions, the Commissioner notes there is a dispute among the parties as to the exact dollar figure as of June 30, 1987 concerning the unappropriated free balance. Using the Board's figures, such balance would be approximately $386,500. Council projected said balance would be approximately $527,880.

In the Commissioner's view, whichever figure was proven by audit to be accurate, neither represents an inappropriate free balance for the year in question given a budget in the Perth Amboy district of $28,000,000. The Commissioner notes that while not a formula for resolving, in all situations, what a reasonable unappropriated free balance should be, in the instant matter, wherein Perth Amboy's school budget for the school year 1987-88 is in excess of $28,000,000, a three percent surplus represents a reasonable unappropriated free balance for the year in question. See N.J.S.A. 18A:7A-25 and N.J.A.C. 6:20-2.14 which permit a local school district to exempt three percent of its total current expense budget when requesting a cap waiver. Further, the Commissioner, as did the ALJ, has determined from the papers before him that there exists a sufficient degree of evidence that the above-cited amount of $260,000 need be replaced in the unappropriated free balance as protection against contingencies that cannot currently be foreseen.

Accordingly, the initial decision is affirmed for the reasons expressed therein. The Middlesex County Board of Taxation is hereby directed to make the necessary adjustment set forth above to reflect a total amount of $11,310,262 to be raised in the tax levy for current expense purposes for the school year 1987-88.

IT IS SO ORDERED this 2nd day of December 1987.

COMMISSIONER OF EDUCATION

December 2, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1861-87
AGENCY DKT. NO. 29-2/87

ROSE NORTHEY AND IRIS WILLIAMS,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON,
MERCER COUNTY,
Respondent.

Scott A. Krasny, Esq., for the petitioners (Schragger, Schragger & Lavine, attorneys)

Hope R. Blackburn, Esq., for the respondent (Lemuel H. Blackburn, Jr., attorney)

Record Closed: September 21, 1987 Decided: October 29, 1987

BEFORE BEATRICE S. TYLUTKI, ALJ:

This matter concerns the petitioners' allegations that the Board of Education of the City of Trenton (Board) improperly and illegally deducted monies from their salaries for certain sick leave benefits, in violation of N.J.S.A. 18A:30-2.1. The respondent denied the allegations and the matter was transmitted to the Office of Administrative Law on March 19, 1987, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

At the prehearing conference on May 20, 1987, the parties agreed that the issues in this matter are:

(1) Whether the petitioners properly received payment for certain sick days pursuant to N.J.S.A. 18A:30-2.1.

(2) If one or both of the petitioners received excess benefits pursuant to N.J.S.A. 18A:30-2.1, whether the Board is entitled to recoupment.

(3) If the Board is entitled to recoupment, whether the schedule established by the Board is reasonable.

(4) Whether the petition was filed in a timely manner.

Also at the prehearing conference, the parties agreed that a hearing would not be necessary and that the matter could be disposed of based on a stipulation of facts and briefs.

Thereafter, on August 4, 1987, I received a motion for summary judgment and brief from the petitioners. On the same day, I received a motion for summary judgment and brief from the respondent. On September 21, 1987, I received the stipulation of facts, with attached documents, signed by both parties. The record in the matter closed on September 21, 1987.

STIPULATION OF FACTS

1. Petitioners, Rose Northey and Iris Williams, are employees of the respondent, Trenton Board of Education.

2. Petitioner, Iris Williams, sustained two injuries during the course of her employment with the Trenton Board of Education on April 15, 1981 and February 10, 1982.

3. Petitioner, Rose Northey, sustained a work-related injury on January 20, 1982.

4. Both petitioners filed workers' compensation claims which were settled in accordance with the Orders for Judgment (J-1).

5. Their work-related injuries caused the petitioners to be absent from work, and as a result of this, they were paid their full salaries in accordance with N.J.S.A. 18A:30-2.1.

6. Petitioner, Rose Northey, received periodic benefits for absences under N.J.S.A. 18A:30-2.1, from February 23, 1982 through November 9, 1983.

7. Petitioner, Iris Williams, received periodic benefits, pursuant to N.J.S.A. 18A:30-2.1, from February 10, 1982 through December 22, 1983.

8. Petitioner, Rose Northey, received payment for 98 days beyond the aniversary date of her January 20, 1982 injury. At the time she had 47 sick days available to her. The parties disagree with respect to the number of days of overpayment. Respondent, Trenton Board of Education, contends that petitioner, Rose Northey, received 51 days of overpayment in 1983. Petitioner, Rose Northey, asserts that she received 38 days of overpayment.

9. During the 1983-84 school year, petitioner, Rose Northey, was paid for 45 days. She was entitled to 15 sick days. This resulted in a 30-day overpayment (J-2).

10. Petitioner, Iris Williams, was paid for a total of 54 days beyond the anniversary date of her injury, which was February 10, 1982. At the time she had 34 available sick days. This left an overpayment of 20 days during the school year 1982-1983.

11. Petitioner, Iris Williams, received a total of 72 sick days paid during the 1983-84 school year. She was entitled to 15 sick days. This left an overpayment of 57 days (J-3).

12. Petitioner, Rose Northey, was overpaid $3,020.40, which is calculated as follows: 51 days at $61.50 = $3,136.50; 30 days at $65.88 = $1,976.40; Total = $5,112.90 minus $2,092.50, which was already deducted for compensation, leaving a total of $3,020.40.

13. Petitioner, Iris Williams, was overpaid a total of $4,519.50, calculated as follows: 20 days at $49.37 = $987.40 for 1982-83, and 57 days for $3,532.10 for 1983-84. Her balance owed is $3,532.10.

14. On or about April 29, 1985, petitioner, Rose Northey, was notified by the Business Services Office of Trenton Board of Education that overpayments made under N.J.S.A. 18A:30-2.1 would be recouped from her biweekly paychecks, based on the decision in Williams v. The Board of Education of the Township of Deptford, 192 N.J. Super. 31 (App. Div. 1983), affirmed on other grounds, 98 N.J. 319 (1985).

15. On or about April 29, 1985, the Business Services Office of the Trenton Board of Education mailed to petitioner, Iris Williams, at her last known address, the first notice that overpayment made under N.J.S.A. 18A:30-2.1 would be recouped from her biweekly paycheck based on the decision in Williams v. The Board of Education of the Township of Deptford.

16. On or about June 10, 1986, the Business Services Office issued the petitioner a second notice in the form of departmental memo, attached to which was the notice sent April 29, 1985.

17. The overpayment for Rose Northey has been recouped in increments of $50.00 per paycheck, beginning May 3, 1985 (J-4).

18. The overpayment to Iris Williams has been recouped in increments of $50.00 biweekly, beginning May 17, 1985 (J-5).

CONCLUSIONS OF LAW

The threshold issue in this matter is whether the petition filed on behalf of Ms. Northey and Ms. Williams is untimely and barred by N.J.A.C. 6:24-1.2(b), which regulation provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

The facts clearly show that the petition in this matter was not filed within the 90-day period. In April 1985, and again on June 10, 1986, the petitioners were notified by

the Board of the alleged overpayment of benefits pursuant to N.J.S.A. 18A:30-2.1. The petition was not filed with the Commissioner of Education until February 19, 1987.

In its brief, the Board argues that N.J.A.C. 6:24-1.2 is applicable even though the matter involves a statutory right, and cites in support of its position the decision in Polaha v. Buena Regional School District, 212 N.J. Super. 628 (App. Div. 1986). The petitioners argue that the time limitation contained in N.J.A.C. 6:24-1.2 is not applicable because the matter involves a statutory entitlement, and cite in support of their position the decisions in Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982), and North Plainfield Ed. Assn. v. Bd. of Ed. , 96 N.J. 587 (1984). Also, the petitioners argue that the matter is distinguishable on the facts from the Polaha case.

Having reviewed the arguments of the parties, I **CONCLUDE** that N.J.A.C. 6:24-1.2 is applicable and that the petition is barred.

In the military service credit case, Lavin, the New Jersey Supreme Court stated:

> Whether the benefit flowing from a statute is to be considered a statutory entitlement or a term of the public employee's contract of employment depends upon the nature of the benefits and its relationship to the employment.
>
> . . . .
>
> Where the benefit is not directly related to the employment service, but is being awarded for a totally unrelated reason, the recipient is truly the beneficiary of a statutory entitlement quite apart from the employment as such [Id. at 150.]

The Supreme Court found that the legislature intended the military service credit to be a "bonus" not related to teaching services and, as such, decided it was a statutory entitlement which could not be foreclosed by the statute of limitations. However, the court then applied the doctrine of laches and barred the retroactive recovery for military service credit for the period prior to the initiation of the case, based on the inequitable financial burden such a retroactive application would have on the Board and ultimately on the taxpayers that support the school district.

The New Jersey Supreme Court in the North Plainfield case considered the statutory entitlement concept used in the Lavin case to determine whether the 90-day rule barred a petition involving two teachers' claims for salary increments, pursuant to

N.J.S.A. 18A:29-8, for time spent on sabbaticals. In deciding that the 90-day rule was applicable, the Supreme Court held that the annual salary increment is "in the nature of a reward for meritorious service to the school district" and, as such, is not a "statutory entitlement" or "statutory right" and can be denied for "inefficiency or other good cause" [Id. at 593-594.]

The Polaha case concerns the allegation of a former community education director that his termination after the elimination of his position was in violation of his statutory tenure rights. In this case, the court concluded that the 90-day rule contained in N.J.A.C. 6:24-1.2 was applicable, and remanded the matter to the Commissioner in order to determine whether there was reason to relax the 90-day rule pursuant to N.J.A.C. 6:24-1.17. In reaching this discussion, the court recognized that Lavin was the only reported case which found a benefit to constitute a "'statutory entitlement' so as to be unaffected by the statute of limitations" and that this determination was based on its decision that military service credit "is an emolument which bears no relationship to the service to be rendered as a teacher" [Id. at 633.] The court held that the facts in Polaha were distinguishable from Lavin in that tenure is directly related to teaching service, and that to the facts were similar to those in the North Plainfield case.

The rationale expressed by the court in Polaha is equally applicable to this matter. The sick leave benefits provided by N.J.S.A. 18A:30-2.1 are directly related to teaching services and are not automatic or continuous. These benefits are awarded only if the teacher qualifies pursuant to the criteria set forth in N.J.S.A. 18A:30-2.1

Most certainly, the facts in this matter are comparable to those in a number of cases where the teacher is informed of a local board's action and is foreclosed from pursuing the matter if the petition is not filed within the 90-day period, Riely v. Bd. of Ed. of Hunterdon Central H.S., 173 N.J. Super. 109 (App. Div. 1980).

Further, I **CONCLUDE** that based on the stipulated facts, there is no reason to relax the 90-day rule pursuant to N.J.A.C. 6:24-1.17.

In view of my determination that the petition is barred by N.J.A.C. 6:24-1.2, it is not necessary at this time to consider the other issues raised by the parties at the prehearing conference and in their respective briefs.

Therefore, I **ORDER** that the Board's motion for summary judgment be granted for the reason stated herein, and I **ORDER** that the petition in this matter be DISMISSED WITH **PREJUDICE.**

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

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

October 29, 1987
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

OCT 29 1987
DATE

Receipt Acknowledged:
Seymour Ellis
DEPARTMENT OF EDUCATION

NOV 4 1987
DATE

Mailed To Parties:
Ronald L. Parker /ks
OFFICE OF ADMINISTRATIVE LAW

bc

ROSE NORTHEY AND IRIS WILLIAMS, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Upon review of the record, including petitioners' exceptions, the Commissioner is in full agreement with the determination of the ALJ that the matter was untimely filed pursuant to N.J.A.C. 6:24-1.2. Her analysis of the relevant legal issues is well reasoned and accurate. Consequently, the initial decision is adopted as the final decision in this matter for the reasons expressed therein. The Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

December 7, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6113-87
AGENCY DKT. NO. 263-8/87

MARIANNE CARVER, JAMES CLARK AND ALEXANDRIA CLARK, AS REPRESENTATIVES FOR THE PARENTS OF AND STUDENTS PREVIOUSLY ENROLLED AT THE CLIFFORD A. BALDWIN SCHOOL,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN,
Respondent.

Marianne Carver and **James Clark**, petitioners, pro se

James F. Maloney, Esq., for respondent (Maloney & McCafferty, attorneys)

Record Closed: October 16, 1987 Decided: October 29, 1987

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

The petitioners allege and the Pennsauken Township Board of Education denies that the Board arbitrarily and capriciously transferred pupils from one school to another. The petitioners sought to stay the Board's action temporarily, to adjudicate the matter fully and to secure an order of the Commissioner of Education permanently returning the transferred pupils to the Clifford A. Baldwin School.

The petition of appeal was filed with the Commissioner of Education on August 17, 1987. It was answered on September 8 and transmitted on the same day to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The petition contained a motion for stay of the Board's action. I heard oral argument on the motion for the stay on October 2, 1987, at the Office of Administrative Law, Trenton. On October 5, I denied the motion and ordered that the matter proceed to plenary hearing on an expedited basis on October 16, 1987.

On the appointed day, the petitioners presented three witnesses. Sixteen documents were entered into evidence, ten by consent and six over the continuing objection of the Board's counsel.

The petitioners presented testimony tending to show that parents had received a letter on May 22 concerning the transfer (P-7). The letter announced a meeting on the subject to be held on May 28. Many parents attended the meeting. The Board took the parents' comments under advisement. Parents asked the Board to make a decision before the end of the school year. The parents also "accepted a Board member's challenge" to come up with a better alternative.

A small group met with the Director of Elementary Education on June 4. She shared information, answered questions and was most helpful. The Board had considered another plan, called Plan A, that was less disruptive in the parents' opinion. The Board, however, adopted Plan B.

A larger group of parents then met and shared ideas. Their concern was with the closing of a neighborhood school. The parent group gave its plan to the Board on or about June 10.

At the June 11 meeting, the parents asked the Board not to vote on the transfer that night although they had earlier requested the Board to make a decision before the end of the school year.

The parents asked the Board to create a Board-parent committee. There was no response to the request and the Board voted the controverted transfer at the June 11 meeting.

One of the parents wrote several letters to various persons in the New Jersey Department of Education (P-14, P-15, P-19). She also wrote to political figures (P-16, P-17, P-18). The writer acknowledged that all responses to her said, in effect, that pupil attendance areas were the Board's province.

The writer also presented five potential plans to the superintendent on June 10. He distributed these to the Board. Administrators studied the parents' proposals and said they were not viable.

A Board member testified she believes the present redistricting is a short-term answer at best. There could be more transfers next year. The district needs a long-term solution.

The witness believed the Board needed classrooms for prekindergarten handicapped children in a one-story school. The Baldwin School is a small, one-story building.

The Board member believes the administrative staff to be competent persons. Each had input as the problem was considered. The Board had the opportunity to discuss the various options but did not exercise that opportunity.

At the conclusion of the petitioners' case, the Board moved to dismiss on the ground that the petitioners had not carried the burden of persuasion.

After a brief recess, I issued the following oral decision:

> In the matter of Marianne Carver, et als. v. Board of the Township of Pennsauken, the petitioners have put in their case in chief and rested and upon that rest, the Board moved to dismiss.
>
> We have heard testimony today that parents were notified of the May 28 meeting conducted by the Board of Education on the question that has become the subject of this hearing; that is, the Baldwin School and how it should be utilized in the 1987-88

school year. We have heard credible testimony that the Board heard the parents on that night and that at least one Board member was affected by the recitations of the parents and indeed it affected her vote. We heard testimony the parents requested the Board to create a study committee. It is undisputed that no action was taken on that request. I am obligated to point out that the Board was under no obligation to create such a committee.

The Board did defer action on May 28 at the parents' request, although it was not obliged to, and scheduled another meeting on June 11. In the interim, more likely than not on June 10, the Board received alternate plans from the parents which plans were studied by agents of the Board; that is, administrators who by the testimony of one witness are all competent professional persons. It has also been established that the Board had an immediate problem to confront and that at least two consultant reports had underestimated special education enrollments.

The petitioners' concerns are legitimate, particularly that the constant movement of children and the elimination of community schools may impinge on the quality of the educational process.

It is black letter law that motions to dismiss are granted sparingly. However, making all fair inferences in favor of the party not the maker of the motion, not the moving party, I still cannot find in the record enough to require the Board to put on its case. I am mindful that lay participants in administrative proceedings should not be held to a standard of legal precision in their language. Lowenstein v. Newark Board of Education, 35 N.J. 94 (1961). But the pro se litigant, just as the represented litigant, still must make a case. Here, although I

have no doubt of the sincerity of the petitioners, it cannot be said that this burden has been carried.

In Tolliver et al. v. Metuchen Board of Education, 1970 S.L.D. 415, the Commissioner clearly set the standard to be applied in cases of this type. At page 421 he said, "The school law vests the management of the public schools in each district in the local boards of education and unless they violate the law, the exercise of fair discretion in the performance of their duties imposed upon them is not subject to interference or reversal." As was stated in Riccio et al. v. Board of Education, an OAL case, Dkt. No. EDU 8111-84, affirmed by the Commissioner of Education on July 8, 1985, there are certain questions that arise in the life of the community which generate high feelings. No matter how emotional the question, however, the petition still must meet the standard outlined in Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965). That standard may be briefly stated, "When an administrative agency created and empowered by legislative fiat acts within its authority its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable."

Neither the boundary plan or its adoption is educationally unsound, contrary to law or the result of caprice, bias, prejudice or bad faith. I so **FIND**. I further **FIND** that whether the Commissioner of Education or this tribunal would have implemented the boundary changes or attendance patterns differently is immaterial. The standard against which I must measure the petitioners' case is that set out in Thomas and Tolliver.

Having found insufficient showing that the Board's action was unreasonable under the Thomas and Tolliver standards, I

CONCLUDE that the Board's redistricting in plan does not violate any applicable statute, administrative code provision, or case law holding. Accordingly, the petition of appeal is dismissed.

This decision will be reduced to writing. It will be sent to each party and to the Commissioner of Education. Each party will have the opportunity to present written exceptions to this decision to the Commissioner of Education for his consideration before final decision. My written decision will be rendered within 45 days from today. We are adjourned.

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

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

29 OCTOBER 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

OCT 29 1987
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

NOV 4 1987
DATE

Mailed To Parties:
Ronald L. Lee
OFFICE OF ADMINISTRATIVE LAW

ds

OAL DKT. NO. EDU 6113-87

MARIANNE CARVER ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a careful review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Pennsauken Board did not act in an arbitrary or capricious manner with respect to the redistricting plan it adopted.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

December 7, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1822-87
AGENCY DKT. NO. 24-2/87

BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,
Petitioner,
v.
ROBERT IOMAZZO and MARY ANN IOMAZZO,
Respondents.

Mark G. Sullivan, Esq., for petitioner
(Sullivan & Sullivan, attorneys)

Noel E. Schablick, Esq., for respondent
(Nochimson, Schablik, Kessler & Finestein, attorneys)

Record Closed: October 5, 1987 Decided: October 30, 1987

BEFORE **PHILIP B. CUMMIS**, ALJ:

The Saddle River Board of Education (petitioner) seeks tuition from respondents for a period of 99 days. The Board contends that respondents and their child who attended the school system were not residents (physically present) of Saddle River and the respondents knew in September 1986 that it was the Board's written policy to require tuition payment from nonresident pupils who do not move into or physically reside in the district within 30 days of commencement of a given academic year. The petitioner seeks tuition at the rate of $31.48 per day for 99 days or a total amount of $3,116.52.

The petition was filed on February 11, 1987, with the Bureau of Controversies and Disputes of the Department of Education. Respondents' answer to the petition was filed on March 16, 1987. Thereafter, the Commissioner of Education transmitted the matter to the Office of Administrative Law on March 18, 1987, for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held at the Office of Administrative Law on May 29, 1987 and an order entered establishing inter alia hearing dates of September 21 and 22, 1987. For the convenience of all parties, the hearing dates were subsequently adjourned to September 29 and 30, 1987. On September 4, 1987, prior to the hearing dates, the respondents moved for summary judgment and an answer brief was filed on September 28, 1987, and received by the Office of Administrative Law on October 2, 1987. All parties thereafter agreed that a hearing would be unnecessary and the matter could be decided on the papers submitted. The record was there fore closed on October 5, 1987.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties have stipulated to the following:

1. As of March 31, 1986, respondents and their child were residing in Wayne, New Jersey. On that date, respondents entered into a contract with Ziyad Manayair to purchase their current home and domicile at 153 East Allendale Road, Saddle River, New Jersey.

2. The respondents had every intention of establishing the Saddle River premises as their domicile prior to the commencement of the 1986-87 school year.

3. On May 12, 1986, the respondents entered into a contract for sale of the Wayne property with Mark and Eunice Borofsky.

4. In May 1986, the respondents enrolled their daughter A.I. in the

fourth grade at Wandell School, Saddle River, for the upcoming school year.

5. On July 1, 1986, the respondents took title to their current home and domicile at 153 East Allendale Road, Saddle River, New Jersey. Since July 1, 1986, the respondents have paid all mortgage, real estate taxes, water, sewerage and other municipal charges on the aforementioned residence.

6. On August 21, 1986, the respondents conveyed title to their previous home and domicile in Wayne, New Jersey.

7. In June 1986, the respondents retained architect Bill Brown of Indyck and Terry, 666 Godwin Avenue, Midland Park, New Jersey 07432 to prepare plans for remodeling the upper level of their Saddle River home. Respondents approved the aforementioned plans in June and retained general contractor, Russell Anderson of Anderson Construction Co., 285 Midvale Street, Ridgewood, New Jersey 07450 to complete the renovations.

8. On July 1, 1986, after receiving title to their home at 153 East Allendale Road, Saddle River, New Jersey, the respondents' contractor immediately began to remodel the upper level with the completion expected no later than September 1, 1986. At this time and prior to the beginning of said construction, the respondents had every intention of residing in their Saddle River home before the beginning of the school year. However, once construction began, the builder encountered severe structural flaws, including, but not limited to the following:

   a. The heating ducts collapsed.

b. The air-conditioning ducts were old and antiquated and had to be replaced. (Later it was determined that the entire system would have to be replaced because there were no parts available, due to the age of the system.)

c. The fireplace was tested and was found to leak smoke throughout the house and was unsafe. (In fact, they were told that the first fire in the fireplace would probably cause their own home to burn down!)

d. The support beams in one section were found to be deficient.

9. In late July, due to the unexpected construction problems and delays, the respondents were advised that the September 1, 1986 completion date would be postponed to October. With the August 1986 closing on their home in Wayne, New Jersey, the respondents were forced to locate temporary housing and to rent on a month-to-month basis.

10. The respondents' first choice for temporary housing, for obvious considerations of convenience and practicality, was Saddle River. The respondents contacted several realtors in Saddle River. Joan Quigg Realty was the only agency to have rental property available in Saddle River on a month-to-month basis. Unfortunately, the single available rental property was too small and unfit for the respondents' needs. In fact, the respondents were recently advised that this particular property will be torn down due to its age and uninhabitability. After

many days searching with various realtors to secure a rental on a month-to-month basis, the respondents found a townhouse in the bordering community of Washington Township, at 218 Pond Terrace.

11. The respondents were not aware of any reason to notify Wandell School of these circumstances, since the respondents considered Saddle River to be their permanent address. In light of the fact that the respondents 1) owned the Saddle River property and house as of July 1, 1986; 2) paid taxes for the use of the school system and other municipal services since closing on the Saddle River property on July 1, 1986; 3) made quarterly tax payments through the Citizen's First National Bank of New Jersey as of November 5, 1986; and 4) had every intention of making Saddle River their permanent principal residence as soon as possible. The respondents never suspected that their daughter would be considered ineligible to attend school in Saddle River.

12. During the first week of school, the respondents contacted the school office to advise them of their temporary telephone number in Washington Township. It was as a result of listing this phone number that the principal's secretary inquired of the respondents, and inquired rudely, as to where the respondents were living since the phone number on the school record was not a Saddle River exchange.

13. The respondents submitted the following documents in support of their good faith effort to establish their home

and domicile in Saddle River prior to commencement of the September 1986 school year: 1) proof of address change from their home and domicile at 47 Yellowbrook Road, Wayne, New Jersey; 2) New Jersey Department of Motor Vehicles change of driver and registration records as of September 9, 1986; 3) Orange and Rockland Utilities, Inc., service bill from August 18 to October 16, 1986; 4) Valley National Bank preferred checking statement evidencing their Wayne address effective July 10, 1986 and evidencing their Saddle River address on September 10, 1986; 5) bill from First Fidelity Bank, dated September 29, 1986; 6) invoice from Sears Roebuck Co. for a planned delivery on October 17, 1986; 7) invoice from Anderson Construction Co., Inc., general contractors, dated March 3, 1987 for renovations at 153 E. Allendale Road, Saddle River, New Jersey.

14. All aforementioned invoices, bills, contracts, etc., have been submitted and are annexed as exhibits A through N.

15. The respondents physically moved into the premises located at 153 East Allendale Road, Saddle River, New Jersey on March 27, 1987.

16. The long delay necessitated by the construction work was unforeseen when the respondents contracted for the premises in May of 1986 and was due to circumstances beyond their control.

17. The Board of Education of the Borough of Saddle River had in effect as October 8, 1985, a nonresident enrollment

policy. Robert E. Collins. the Suprintendent of Schools of the Borough of Saddle River, personally advised the respondents in separate meetings with each of them in September 1986 of the Board's policy and of the Board's intent to charge tuition thereunder for nonresidents. (including respondents) who did not move to into the district within 30 days of the commencement of the academic year.

18. The Board did not grant the respondents any exception to this policy. See exhibit PB.

19. Tuition for nonresidents is determined by using the most recent State of New Jersey audit for pupil costs for the Saddle River School District for the 1986-1987 school year and is $31.48 per day per pupil.

16. Respondents have one child, A.I., enrolled in the district for the 1986-1987 school year. The total number of days for which tuition was charged was 99 days between October 12, 1986 and March 22, 1987, amounting to $3,116.54.

17. Demand has been made upon respondents for the payment of tuition and said demand has been refused by the respondents.

RESPONDENTS' POSITION

Respondents argue that they are entitled to summary judgment based upon the fact that there is no genuine issue of material fact in dispute and the legal issue is clear.

Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 167 (1954). The facts set forth above are clearly agreed upon by both parties and I FIND there is no genuine issue of fact and therefore the matter is ripe for summary judgment.

Respondents further contend that they had established their home and domicile in Saddle River before 1986-1987 school year. thereby entitling their daughter to a free public education pursuant to N.J.S.A. 18A:38-1. Respondents aver that all New Jersey children between the ages of 5 and 18 are guaranteed by the New Jersey Constitution a thorough and efficient system of free public education. N.J. Constitution. (1947) Art. VIII §4, par. 1.

Respondents next rely on N.J.S.A. 18A:38-1 which states in part:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> (a) Any person who is domiciled within the school district;***.

In their brief respondents cite. "M.A.M." v. Board of Education of Black Horse Regional School District, 1974 S.L.D. 845, 847.

Black's Law Dictionary, 572 (rev. 4th ed. 1968).

> DOMICILE. That place where a man has his true. fixed and permanent home and principal establishment. and to which whenever he is absent he has the intention of returning Kurilla v. Roth, 132, N.J.L. 213. 915 38A 2d. 862. 864***Not for a mere special or temporary purpose. but with a present intention of making a permanent home, for an unlimited or indefinite period. In re Gilber Estate, 18 N.J. Misc. 540 (1940).

And,

> The established. fixed. permanent. or ordinary dwelling place or place of residence of a person, as distinguished from his temporary and transient through actual place of residence. It is his legal residence, as distinguished from his temporary place of abode; or

> his home, as distinguished from a place to which business or pleasure may temporarily call him.*** [emphasis supplied]

Also, "residence" is defined in part, as follows:

> RESIDENCE. A factual place of abode. Living in a particular locality.***It requires only bodily presence as an inhabitant of a place.***
>
> As "domicile" and "residence" are usually in the same place, they are frequently used as if they had same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in the locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.*** (Ibid., at p. 1473). [emphasis supplied].
>
> ["M.A.M" v. Black Horse Pike at 847, 848.]

Respondents maintain that New Jersey follows the aforementioned definitions and in fact every person has a single domicile but may have several residences or places of abode. Board of Education of the City of Absecon v. "T.F." Commissioner's decision (June 27, 1980).

The respondents further point out that although residence and domicile are parallel in many respects, domicile has the elements of permanency, continuity and kinship with the physical, cultural, social and political attributes which inhere in a home. State v. Benny, 20 N.J. 238, 251 (1955).

Respondents argue that on July 1, 1986 they acquired title to their Saddle River home. Two months before that in May, they advised petitioner they would be living in the community and enrolled their daughter at the Wandell School for the 1986-1987 school year. Through no fault of their own, circumstances made it totally impossible for them to physically move into their residence, although they had every intention to move prior to

the school term on September 1986. From July 1, respondents paid the mortgage on the Saddle River property and also paid the real estate taxes, water sewerage and other municipal charges.

Respondents contend that their circumstances are similar to "M.A.M." v. Board of Education of Black Horse Pike Regional School District, 1974 S.L.D. 845 where the Commissioner of Education concluded that a temporary residence outside the school district did not effect the a student's right to attend the public school district where their father continued to pay mortgage, real estate taxes, water, sewerage and other utility charges on his house. Respondents also contend that the New Jersey Supreme Court in Worden et al. v. Mercer County Board of Elections 61 N.J. 325 (1972) decided that the doctrine of fairness should be applied in order for justice to be done when viewing the concepts of domicile and residence. In the Worden case, a student living away at college was granted voting rights in the town the college was located as opposed to the parents' address. The courts stated:

> The concept of domicil is not constant. It is designed to assure fairness to the individual or to the State or both in a given setting. Its ingredients therefore would vary, depending upon what is just and useful in a given contest. (at 349).

The respondents contend and justice demands that they be found to be domiciled and residents of Saddle River on July 1, 1986, when they physically took possession of the property.

Petitioner's Position

The petitioner states that according to N.J.S.A. 18A:38-3:

> Any person not resident in the school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribed.

Respondents agree that as defined by N.J.S.A. 18A:1-1 "residence" generally means "domicile." Petitioner next alleges that respondents' argument fails because

domicile is established by "residence" and "intention." Kurilla v. Roth, 132 N.J.L. 213. 216, (Sup. Ct. 1944). Since the respondents did not physically reside in Saddle River prior to March 1987, they were not Saddle River domiciliaries prior to that date. Petitioner asks us to note that every "precedent" cited by respondents in their brief. including Black's Law Dictionary shows some actual physical presence occurred sometime prior. See, Board of Education of the City of Absecon v. T.F., Commissioner's decision (June 27, 1980). In T.F., the respondent had been a longtime prior resident and had temporarily relocated during construction of a new residence in the town of Absecon.

Finally, petitioner contends that its policy was known to respondents in September 1986 and the published policy on residency was provided to the respondents.

CONCLUSIONS, FINDINGS AND ORDER

It is indisputed that the Saddle River Board of Education in October 1985 established a written policy on residency requirements. Conclusive within that policy is the last paragraph which states. "Circumstances other than those described above may be considered by the board on an individual basis."

Within its policy memorandum Board of Education has the ability to provide an equitable solution to any problem arising within the district affecting "nonresident" children. It is quite clear to me that equity. fairness and justice require that the respondents' daughter's education be provided for by the Saddle River Board of Education.

If within 30 days of July 1. 1986. respondents had camped out on the floor of their home for one night, they apparently would have met the residency requirements as established by the Board of Education of Saddle River. The physical presence demanded by the petitioner would have been fulfilled by respondents residing in the house for only one night. Respondents would have been considered residents of Saddle River for the purpose of enrolling of their daughter within the school system.

I cannot conceive of a more foolish result. It is quite evident to me that the residency requirement was established to protect the citizens of Saddle River from transients as opposed to people who in fact are homeowners, lease holders or who have other legal status for the purpose of educating their children within the town. The policy should not be interpreted to reach a result which would exclude a family who owned property with the intent of immediate occupancy within the boundaries of the municipality and who were only prevented from doing so by circumstances totally beyond their control. The petitioner cannot claim the loss of revenue because the family in fact paid property taxes from July 1, 1986, and they continue to pay the same taxes to Saddle River.

I therefore **CONCLUDE** that on the basis of equity, fairness and justice, this case should be remanded to the Board of Education to consider the unique circumstances of the case.

I therefore **ORDER** that the petition of the Board of Education of the Borough of Saddle River be and is hereby **DISMISSED**, and the case is hereby remanded for consideration under the Board's policy to consider special circumstances. I do not retain jurisdiction.

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

OAL DKT. NO. EDU 1822-87

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

11/3/87
DATE

PHILIP B. CURTISS, ALJ

Receipt Acknowledged:

NOV - 4 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 5 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

PAR/e

BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
ROBERT IOMAZZO AND MARY ANN IOMAZZO,	:	
RESPONDENTS.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and respondents' reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Board excepts to the ALJ's determination in this matter avowing that he acted contrary to Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966) by substituting his judgment for the Board's. It contends that pursuant to N.J.S.A. 18A:38-3, it did in fact consent to educate respondents' daughter on a tuition basis in accordance with Board policy, since they did not qualify for non-tuition status having, by their own admission, failed to establish residency in Saddle River within 30 school days of the opening of school.

Moreover, the Board alleges that the ALJ wrongfully determined that respondents were domiciled within Saddle River. As to this, it contends that while it is true that domicile is a somewhat fluid concept, respondents cannot be deemed to have been domiciled in the district since (1) they never physically resided there prior to March 1987 and (2) domicile is established by the combination of "residence" and "intention." (Kurilla v. Roth, supra)

Respondents rely on their brief submitted to the ALJ as response to the Board's exceptions.

Upon careful review and consideration of the record and legal arguments of the parties, the Commissioner agrees with the ALJ's recommended decision to dismiss the Board's Petition of Appeal with the following modifications.

Kurilla, supra, Bd. of Ed. of Absecon, supra, M.A.M., supra, and other cases make it clear that while a person may have several residences, there can only be a single domicile. As determined in Kurilla, domicile is that place where a person has his or her true, fixed and permanent home and principal establishment and to which, whenever absent, there is intention to return and from which there is no present intention of moving. Further, domicile is

the relation which the law creates between an individual and a particular locality. More specifically, Kurilla states:

> ***"domicile" and "residence" or "abode" or "usual place of abode" are not convertible terms. "Domicile" is the relation which the law creates between an individual and a particular locality or country. In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. 17 Am. Jur. 588, 590; 28 C.J.S. 3. It is the place with which he has a settled connection for certain legal purposes, either because his home is there or because that place is assigned to him by the law. Croop v. Walton, 199 Ind. 262; 157 N. E. Rep. 275; 53 A.L.R. 1386; Fisher & Van Gilder v. First Trust Joint Stock Land Bank, 210 Iowa 531; 231 N. W. Rep. 671; 69 A.L.R. 1340; Shenton v. Abbott, 178 Md. 526; 15 Atl. Rep. (2d) 906. This is the rule adopted by the American Law Institute. A.L.I. Conflict of Laws, sec. 9. And every person, in all circumstances and conditions, is deemed to have a domicile somewhere; and, in general, a domicile once established continues until superseded by a new domicile, and the old domicile is not lost until a new one is acquired. In re Dorrance Estate, 115 N.J. Eq. 268; affirmed, Dorrance v. Thayer-Martin, 13 N.J. Mis. R. 168; affirmed, 116 N.J.L. 362; 17 Am. Jur. 590, 601. (emphasis supplied) (at 215)

Further, the Supreme Court went on to state:

> A person may have several residences or places of abode, but he can have only one domicile at a time. Domicile of choice is essentially a question of residence and intention -- of factum and animus. It involves an exercise of volition. In re Dorrance Estate, supra. And he may have his residence in one place, while his domicile is in another. Stout v. Leonard, 37 N.J.L. 492; Duke v. Duke, 70 N.J. Eq. 135; affirmed, 72 Id. 434. There are certain legal rights and privileges which pertain to "residence" rather than to "domicile." One's "home" may be relinquished and abandoned, while one's "domicile," upon which may depend certain civil rights and duties, may in legal contemplation remain. 17 Am. Jur. 590, 592, 597. See, also, 148 A.L.R. 1413. The exercise of the

> elective franchise is secured to those in military service by article II, paragraph 1, of the State Constitution. (emphasis supplied)
> (at 216)

In the instant matter, it is clear from the record that respondents considered their newly acquired home in Saddle River their true, fixed, permanent home and principal establishment to which they intended to return and from which they did not intend to move (Kurilla, supra), having taken title and possession of it in July 1986 and having commenced payments for mortgage, water, sewer, and real estate taxes and having changed their permanent address to that home.

That structural deficiences in the home forced temporary relinquishment of it pending necessary repairs does not mean that domicile could not remain. (Kurilla, supra) As stated in that decision, everyone in all circumstances and conditions has a domicile. Wayne no longer was their domicile once respondents acquired their new permanent, principal home/domicile and once they sold their prior permanent home/domicile in Wayne. (Kurilla) Nor could the temporary month-to-month housing in Washington Township pending repairs to their home in Saddle River be deemed to establish domicile in Washington Township as their stay in that locality does not fit the requirements for establishing domicile stated in Kurilla, i.e., it was not a fixed, true, permanent home and principal establishment, etc.

Thus, in keeping with the New Jersey Supreme Court's determination that domicile be a flexible, fluid concept (see the initial decision, ante), it is determined that for the purposes of making a domicile determination pursuant to N.J.S.A. 18A:38-1, respondents did establish their domicile in Saddle River prior to the commencement of the 1986-87 school year, thus entitling their daughter to a free education in Saddle River at that time. As correctly stated by the ALJ in the initial decision, ante, to hold that respondents were required to camp out on the floor of their new home for one night so as to establish physical residence would lead to a foolish result. The fact that circum- stances prevented their physically staying overnight in the home they established as their new domicile should not serve to deflect the child's right to attend school free of tuition. Moreover, it is determined that given the circumstances in this matter, no less of a relief than that granted in M.A.M., supra, or Bd. of Ed. of Absecon, supra, should be forthcoming herein, namely, tuition-free education.

Accordingly, the matter is dismissed. Contrary to the ALJ's order, however, the matter is not to be remanded to the Board for reconsideration of the tuition issue. Having determined that for the purposes of N.J.S.A. 18A:38-1 domicile had been established prior to the beginning of the 1986-87 school year, such action is no longer necessary.

COMMISSIONER OF EDUCATION

December 17, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION TO DISMISS
OAL DKT. NO. EDU 470-87
AGENCY DKT. NO. 417-12/86

THOMAS METZLER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Lawrence S. Schwartz, Esq., for respondent
(Schwartz, Pisano, Simon & Edelstein, attorneys)

Record Closed: October 27, 1987 Decided: November 10, 1987

BEFORE **STEPHEN G. WEISS,** ALJ:

There is presently pending before me in this matter a motion by respondent, the Board of Education of the Township of Bloomfield, Essex County, to dismiss a petition for declaratory judgment which had been filed with the Commissioner of Education in December 1986 by Thomas Metzler, a teaching staff member employed by the Board. The Board's motion rests upon the following grounds:

(1) The Commissioner lacks "primary jurisdiction" to hear the declaratory judgment matter;

(2) Any finding by the trial judge and/or the jury in a pending Superior Court, Law Division, action in which a student who was in Metzler's homeroom class, and her parent, are plaintiffs and Metzler and the Board are co-defendants, will have a res judicata and/or collateral estoppel effect upon the instant administrative proceedings; and

(3) The instant declaratory judgment action is not, in any event, "ripe" for adjudication at this time and should be stayed pending the outcome of the trial in the Superior Court action.

Metzler's petition to the Commissioner involves the applicability of N.J.S.A. 18A:16-6. In it he sets forth that he has been named as a defendant, together with the Board, in a Superior Court, Law Division action, which was filed in late October 1986 by the parents of a female student (S. D.) who, on October 22, 1985, was enrolled at North Junior High School and who was assigned to a homeroom class under Metzler's direction. According to the allegations of the Superior Court complaint, on that date Metzler, "did intentionally and without legal justification threaten and physically and brutally assault the infant-plaintiff." As a result thereof, she alleged she received various injuries and suffered physical, emotional and mental harm for which damages were sought. S. D.'s complaint further alleged that Metzler's action was in "reckless disregard" of her safety and well-being and/or was careless and negligent. The Board, as Metzler's employer, was named as a co-defendant on the basis of agency and a variety of other theories.

According to Metzler's declaratory judgment petition, upon being served in the civil action, he promptly, through counsel, asked the Board to provide an attorney to represent him in the matter and advised that he expected the Board also would be responsible to pay any damages which were adjudged to be due and owing by him to S. D. The stated basis for Metzler's demand and expectation was N.J.S.A. 18A:16-6, which in pertinent part provides that where a civil action is brought against and concerns an act or omission by a

teacher, "arising out of and in the course of the performance" of his or her duties, the board, "shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. . . ."

The petition goes on to allege that in response to the request, counsel for the Board wrote to Metzler's attorney to advise that the Board declined to provide counsel to represent Metzler since his conduct, as alleged in the civil action complaint by S. D., if proven, would, "remove his indemnity under 18A:16-6." Accordingly, Metzler's attorney was advised that the Board, "will not assume any costs for attorneys fees, or expenses, or be responsible for any damages judged against Mr. Metzler." According to Metzler, the Board's response was improper and it should be declared to be responsible for complying with the statute.

The Board's answer to Metzler's petition set forth a variety of separate defenses. They included:

(1) lack of jurisdiction in the Commissioner since only issues of law were involved;

(2) ripeness;

(3) Metzler's conduct was beyond the scope of his employment and therefore unauthorized by the Board;

(4) any damages sustained by Metzler were the result of his own conduct, or that of third parties over whom the Board had no control; and

(5) the Commissioner of Education lacks authority to decide an "ultimate question of fact for a jury."

Following transmittal of the case by the Commissioner to the Office of Administrative Law, a prehearing conference was conducted before the undersigned administrative law judge in May 1987 and six separate issues were agreed upon as follows:

A. Does or should the Commissioner of Education have jurisdiction to hear and decide this matter, or should it more properly be heard and decided in its entirety by the Superior Court wherein the civil action presently is pending?

B. What will be the effect, if any, upon these administrative proceedings of the findings of the judge and/or the jury in the civil action?

C. Is this action ripe for consideration at this time by the Commissioner of Education as one for declaratory judgment under N.J.S.A. 52:14B-8 and N.J.A.C. 6:24-2.1?

D. Is petitioner entitled to a hearing at this time, or should his claim to have his costs and expenses defrayed and to be held harmless against any financial loss await a determination of the civil action at the trial level?

E. Should this matter be stayed during the pendency of the civil action in view of the possibility that the positions the Board might be required to take in this case would conflict with or be inimical to positions the Board may be required to take as a defendant in the civil action?

F. Did any act or omission of petitioner which is a subject matter of the civil action in which he is a defendant arise out of and in the course of the performance of his duties as a teaching staff member for which the Board may be held liable under N.J.S.A. 18A:16-6?

The prehearing order also established a schedule for the contemplated filing of a motion by the Board to dismiss the petition in connection with Issues A through E.

Thereafter, a motion to dismiss was filed, Metzler filed his answering brief and the Board then filed a reply.

The essential facts necessary for me to render a determination in summary fashion in this case are not genuinely in dispute. They are as follows:

1. Petitioner, Thomas Metzler, is a tenured teaching staff member in the employ of the respondent, Board of Education of the Township of Bloomfield.

2. During the 1985-86 school year, Metzler was employed as an English teacher in grades seven and eight at North Junior High School.

3. On or about November 2, 1986, Metzler was served with a complaint and jury demand in an action which had been filed in the New Jersey Superior Court, Law Division, Essex County, Docket No. L-095118-86, in which the plaintiffs were S. D., an infant, by her guardian ad litem, P. D., and P. D. individually. The named defendants were Metzler and the Board.

4. The Superior Court complaint contained six separate counts and set forth that as a result of the conduct alleged therein, both defendants were liable to plaintiff for compensatory and punitive damages arising out of an incident which occurred on October 22, 1985, during a homeroom period which was under the supervision of Metzler. According to the complaint, on that date Metzler physically assaulted S. D., causing injuries to her, and that the Board also is liable as it knew or should have known of the teacher's propensity for such conduct and had failed to take steps to avoid it.

5. On November 13, 1986, private counsel retained by Metzler wrote to counsel for the Board enclosing the civil action summons and complaint and asking the Board to provide an attorney to represent Metzler in that case. In that same letter counsel for petitioner informed the Board's attorney that in his opinion, N.J.S.A. 18A:16-6 was authority for the proposition that if the Board chose

not to provide an attorney for Metzler, then and in that event the attorney fees incurred by his client would have to be assumed by the Board, and that the Board also would be responsible to pay any damages which were adjudged against Metzler.

6. On November 19, 1986, Board counsel replied to that letter to advise that the Board would not provide an attorney for Metzler since the allegations as to Metzler's conduct in the Superior Court action, even if proven, would not justify indemnifying him under the cited statute. Accordingly, Metzler's attorney was informed that if he assumed representation of petitioner, he would be doing so at his own risk and the Board would not be responsible for attorneys fees, expenses or damages.

7. In pertinent part, N.J.S.A. 18A:16-6 provides that whenever any civil action has been brought against a person holding any office, position or employment under the jurisdiction of any board of education for any act or omission arising out of and in the course of the performance of the duties of such office position or employment, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with the cost of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom.

8. As the result of the Board's rejection of Metzler's request, he filed a petition for declaratory judgment with the Commissioner in December 1986, pursuant to N.J.S.A. 52:14B-8 and N.J.A.C. 6:24-2.1. He therein set forth the pertinent background circumstances and requested that the Commissioner declare it to be the Board's obligation to defray all of his costs and expenses in defending in the Superior Court and to hold him harmless from any financial loss as set forth in N.J.S.A. 18A:16-6.

9. Thereafter, the Board filed its answer denying any obligation to Metzler under the statute, and raising several separate affirmative defenses of a legal nature.

DISCUSSION

The first point made by the Board in it's brief in support of the motion to dismiss is as follows. Although the Commissioner concededly has both statutory and regulatory authority to entertain petitions for declaratory judgment, and to make rulings with respect to them, his jurisdiction to do so is not exclusive—there can be concurrent jurisdiction with some other entity which for any number of reasons should hear and decide the issues raised. Thus, with respect to the present case, the Board argues that since the major underlying issue clearly is the liability of petitioner and/or the Board to S. D., which is precisely the question presently involved in the Law Division action, it is the judicial forum which unquestionably has "primary subject matter jurisdiction," and the Commissioner ought to defer to it and await the outcome there before determining whether he should further entertain the declaratory judgment petition. In support of that position the Board points out that jurisdiction to entertain a declaratory judgment petition, and to make a ruling on it, is discretionary by the very terms of both the statute and the applicable regulation, and the Commissioner freely may elect to abstain from processing such a petition. See, e.g., Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407 (App. Div. 1982). Thus, since the Superior Court action was filed first, and that forum thereby acquired jurisdiction over the entire subject matter, deference should be accorded to it with respect to a complete determination of the controversy, including all of its constituent elements. See, e.g., Hinfey v. Matawan Reg. Bd. of Ed., 77 N.J. 514, 528-529 (1978).

An adjunct to the same point is that the "entire controversy doctrine" further dictates that such deference be shown to the Superior Court. See, Pascucci v. Vagott, 71 N.J. 40 (1976). Thus, instead of "splitting up" the litigation between the same parties in two different places, especially at the same time, it is more appropriate, if not required,

to encourage adjudication of all pertinent matters in controversy between them by one entity capable of doing so. To this end, the Board observes that the particular issues raised by Metzler's petition to the Commissioner require no special application of agency expertise since the basic question simply involves a determination as to the scope of petitioner's employment. As the Board then observes, there have been several prior occasions wherein determinations have been made with respect to that very same issue by courts, without any need to defer to the Commissioner for his view. See, e.g., Titus v. Lindberg, 49 N.J. 66 (1967); Hartmann v. Maplewood School Transportation Co., 106 N.J. Super. 187 (Law Div. 1969), aff'd, per curiam, 109 N.J. Super. 497 (App. Div. 1970). See also, Powers v. Union City Bd. of Ed., 124 N.J. Super. 590 (Law Div. 1973), aff'd 127 N.J. Super. 294 (App. Div. 1974), which involved indemnification for a Board member following acquittal on criminal charges under N.J.S.A. 18A:12-20.

As the Board puts it in its brief, "the Law Division first obtained subject matter jurisdiction; the Law Division is fully competent to decide the statutory indemnification issue; the Commissioner's concurrent jurisdiction is not mandatory; the petitioner will not be prejudiced in any way by a dismissal of his present petition without prejudice; the matter would be needlessly bifurcated if the Commissioner decides the instant matter, and there is a distinct possibility of inconsistent decisions which clearly ought to be avoided" (Brief of Respondent, at 8-9).

Petitioner, in response, maintains that it is the Commissioner who has primary jurisdiction over the dispute since it directly involves the interpretation of a school law, and the claim for idemnification arises directly under that statute. Thus, Metzler argues that it is the Commissioner who, under N.J.S.A. 18A:6-9, is best suited to hear and decide the controversy since both by statute and regulation his authority both to entertain and rule upon declaratory judgment petitions is recognized expressly.

Insofar as the "interference" a proceeding before the Commissioner would have on the pending Superior Court action is concerned (i.e., the "entire controversy" doctrine argument), petitioner maintains that a determination as to the applicability of the indemnification statute would not have that result since it involves an issue which is

wholly separate and distinct from the liability and damages claims. Thus, Metzler argues that the Board's reliance on the decision in Hinfey, in particular, is not apt since that case had to do with conflicting administrative forums insofar as a factual dispute was concerned. See also, City of Hackensack v. Winner, 82 N.J. 1 (1980).

Metzler also argues that the propriety of the procedure he suggests, to permit both matters to proceed simultaneously, was expressly recognized as an appropriate course by the Public Employment Relations Commission in its decision in Black Horse Pike Regional Board of Education, 9 N.J.P.E.R., para. 14017 (PERC 1982). In that case a tenured teacher gave the Board only two weeks advance notice of her resignation. The Board alleged this to be in violation of N.J.S.A. 18A:28-8 and instituted proceedings before the Commissioner to suspend her certificate. The teacher defended upon the ground that the Board's true motivation constituted an interference with her rights under the Public Employment Relations Commission (PERC) Act. It was determined that although there would be only one factual hearing, to be held by PERC, each agency head thereafter would address those issues relating to his or its particular area of jurisdiction.* In short, Metzler's position is that a decision respecting his entitlement to indemnification under N.J.S.A. 18A:16-6 clearly gives rise to a school law controversy which, pursuant to the express statutory jurisdiction of the Commissioner under N.J.S.A. 18A:6-9, can and should be heard without any interference with the Board's ability to defend itself vigorously in the Law Division action.

However, based upon my review and consideration of the competing arguments, I agree with the position urged by the Board. First, reliance upon the procedure followed in the Black Horse case is misplaced. That matter involved two administrative agencies and is a classic instance of intertwined issues which were peculiarly subject to the application of each agency's special expertise. In the instant matter, although a "school law" statute technically is in issue, there is no special agency expertise involved sufficient to dictate

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*This procedure, of course, is expressly anticipated by OAL rules dealing with consolidation and "predominant interest." See, N.J.A.C. 1:1-17.1 et seq. Where multiple agencies are involved, the rules are fashioned explicitly to deal with the procedure to be followed. See, N.J.A.C. 1:1-17.5 through N.J.A.C. 1:1-17.8.

that a declaratory judgment petition be entertained by the Commissioner while the Superior Court action, which might very well resolve the entire matter, is pending. As noted, courts have on several occasions dealt with the very question of whether an act "arises out of and in the course of" one's employment under N.J.S.A. 18A:16-6, and judicial deference to the Commissioner to allow him to decide that issue does not even appear to have been argued, no less decided in any of those cases.

From a technical standpoint, of course, the issue before me may not even be one of "jurisdiction" in the Commissioner, since he certainly may entertain a case like this if he so desires. Rather, considerations of comity and other concerns previously mentioned dictate that the Commissioner should stay his hand pending a resolution of the civil action. There are, of course, a wide range of possible outcomes in that action which conceivably could obviate any necessity further to pursue any claim in the administrative forum at all.

The Board also maintains that any findings in the Superior Court action, either by the judge and/or the jury, potentially would have a res judicata and/or collateral estoppel effect upon the administrative proceedings. I agree. Indeed, there is a real possibility that the outcome with respect to the liability question substantially would resolve the indemnification issue. In any case, prudence dictates that since the Law Division action may obviate any need to address the indemnification issue, the civil action should proceed to its conclusion, whatever that may turn out to be. If any questions still persist at that point which arguably ought to be heard and decided by the Commissioner, the matter can be presented to and, if appropriate, heard by him. As the Board aptly observes in its brief, by permitting the civil action to go forward to a determination, the Commissioner may greatly be aided since he then can have in focus what issues, if any, he ought to decide, as opposed to what issues may have been decided for him. Thus, as the Board notes, "the possibility of inconsistent or divergent holdings is obviated, as well as costly and unnecessary duplication of litigation on similar or same issues between the same parties." (Brief of Respondent, at 15.)

Another point raised by the Board is that the present action is not even "ripe" for adjudication at this time since the extent to which Metzler has or will incur any out-of-pocket costs and expenses in defending in the civil action is unclear. In support of that proposition, the Board refers to the decision in Jerome Pasek v. Board of Education of Garfield, OAL DKT. EDU 0015-80 (May 12, 1980), aff'd Com'r of Ed. (June 30, 1980), aff'd State Bd. of Ed. (Jan. 22, 1981). That case held that reimbursement of legal fees by a board are not to be ordered unless they were true out-of-pocket expenses not otherwise reimbursed by a third party.

In his answering brief, Metzler's counsel asserts that there is no issue regarding the absence of any need to defray costs for attorney fees and expenses, since the N.J. Education Assn. has no policy which would provide Metzler with free legal counsel or indemnification in connection with a private civil action such as is involved here. According to counsel, that benefit is limited to labor relations matters. I will assume, for purposes of this motion, that the Superior Court action in which Metzler is a defendant is not one which gives rise to any entitlement to have his legal expenses paid for by the association.

That issue aside, I nevertheless remain convinced that for the reasons set forth, to permit Metzler to pursue this matter any further before the Office of Administrative Law is distinctly inappropriate. To require the Board to try the case here with respect to whether Metzler's conduct fell within the statutory language potentially could place the Board between "a rock and a hard place" since there are, or may be, issues in the multi-count civil action which conceivably could require the Board to have to take conflicting positions, especially in respect to possible settlement discussions.

Thus, for a variety of reasons, it is distinctly unpalatable for the instant declaratory judgment action to proceed, given the particular context in which it has arisen. Rather, a more appropriate course of action for me to follow is to dismiss the case, without prejudice, however, to the right of Metzler to again seek to pursue his claim in the administrative forum in the event, following whatever result obtains in the Superior Court, he continues to believe there are benefits due and owing to him pursuant to

N.J.S.A. 18A:16-6 which he has not received. However, I should note that given the "entire controversy" doctrine, and the joinder rules applicable in Superior Court (See, R. 4:27-1), it may be that Metzler must pursue his statutory claim against the Board in the pending civil action. See, e.g., Crispin v. Volkswagonwerk, A.G., 96 N.J. 336 (1984); William Blanchard Co. v. Beach Concrete Co., Inc., 150 N.J. Super. 277, 293-294 (App. Div. 1977), cert. den. 75 N.J. 528 (1977). That, of course, is a matter for counsel to consider.

In any case, a dismissal, without prejudice, of the instant proceedings will eliminate what I believe to be a very real threat of confusion and interference with the right of both Metzler and/or the Board thoroughly and competently to prepare their defensive trial strategies in the civil action. No harm will be done by this dismissal without prejudice; whereas, to continue to entertain the declaratory judgment case simultaneous with the pendency of the civil action would be distinctly unwholesome. Although N.J.S.A. 18A:16-6 is a "school law," there is no reason why Metzler's claim must be heard by the Commissioner, especially given the several decisions which I believe clearly militate against such a course of action.

Accordingly, for the foregoing reasons, I **CONCLUDE** that the petition for declaratory judgment filed in this matter should be **DISMISSED**, without prejudice, however, to the right of the petitioner following the determination of the pending civil action, to refile the same in the event any question continues to exist with regard to his rights, if any, against the Board under N.J.S.A. 18A:16-6. In that event the Board may continue to raise all of the separate defenses it believes appropriate, including, in particular, the entire controversy doctrine. In view of this determination the scheduled trial dates of December 7, 8 and 9, 1987, will, of course, be deleted.

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

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

November 14, 1987
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

NOV 13 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 16 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

THOMAS METZLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon a careful review of the record of this matter the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the instant petition for declaratory judgment be dismissed, without prejudice to the right of petitioner following a determination of the pending civil action, to refile the same in the event any question exists regarding his rights, if any, against the Board under N.J.S.A. 18A:16-6. See, generally, Edmond Cilento v. Board of Education of the Township of Hillside, Union County, decided by the Commissioner October 7, 1985.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition for Declaratory Judgment without prejudice and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

DECEMBER 17, 1987

DATE OF MAILING - DECEMBER 17, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6760-86
AGENCY DKT. NO. 313-9/86

PATERSON EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY, AND EDUCATIONAL IN-ROADS, INC.,

Respondents.

Gregory T. Syrek, Esq., for petitioner (Bucceri and Pincus, attorneys)

Robert G. Rosenberg, Esq., for Paterson Board of Education

Joseph M. Gorrell, Esq., for Educational In-Roads, Inc. (Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, attorneys)

Record Closed: October 2, 1987 Decided: November 5, 1987

BEFORE **JAMES A. OSPENSON, ALJ:**

In Count I of a petition of appeal filed with the Commissioner of the Department of Education, the Paterson Education Association, designated majority representative of teachers employed by the Board of Education of the City of Paterson, Passaic County, alleged that on or about June 10, 1986, the Board resolved to approve an instructional services agreement with Educational In-Roads, Inc., to provide Chapter I services in premanufactured mobile units located on nonpublic school property, such nonpublic schools being primarily sectarian in nature. Use of public funds to provide such services in non-public sectarian schools in the manner provided, it was alleged, violated the establishment clause of the First Amendment of the United States Constitution.

Count II of the petition alleged the agreement unlawfully resulted in the subcontracting of educational services to a private, independent organization over which the Board retained no control or authority, the action being, therefore, ultra vires statutory or regulatory powers of the Board. The Association sought declaratory judgment invalidating the agreement for unconstitutionality and/or actions ultra vires powers of the Board and sought such further relief as under the circumstances was just.

The Board admitted adoption and approval of the instructional services agreement but denied the balance of allegations of the petition.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on September 8, 1986. The Board's answer was filed there on September 24, 1986. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on October 8, 1986, for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

In a preliminary prehearing conference order of December 1, 1986, after motion by the Association and for good cause shown, the petition of appeal was ordered amended by the administrative law judge to add in Count III an allegation the Board on September 4, 1986, resolved to extend its instructional services agreement with Educational In-Roads, Inc., for an additional year extending until June 30, 1988, an action the Association alleged was ultra vires and void for lack of authority in the present Board to bind a successor board. Similar appropriate declaratory judgment relief was requested. The Board's answer was deemed amended to deny the allegations in Count III of the amended petition of appeal. The order permitting amendment was under authority of N.J.A.C. 1:1-6.3.

In addition, by consent of the Board and the Association and pursuant to N.J.A.C. 1:1-6.3, the Association was granted thirty days within which to file and serve a further amended petition adding Educational In-Roads, Inc., as a party-respondent. The amended petition of appeal was filed on December 10, 1986. An answer in general denial was filed by Educational In-Roads, Inc., on December 29, 1986.

On February 5, 1987, a further prehearing conference was conducted and an order entered establishing, inter alia, a hearing date on May 4, 1987, a date later adjourned at request and/or with consent of the parties until July 8, 1987. The order took note that paragraphs 1, 2, 3, and 4 of the petition of appeal were admitted by the Board. Paragraph 1 of the amended petition of appeal was admitted by Educational In-Roads, Inc. The parties were ordered to confer for the purpose of fashioning stipulations of all relevant and material propositions of fact in chronological and sequential order, together with appropriate documentation, which were thereafter to be filed in the cause before hearing. Thereafter, unless there remained genuine triable issues of fact, the matters at issue were to be addressed and resolved as if on cross-motions for summary decision on pleadings, admissions, stipulations, documentation, and memoranda of law in accordance with N.J.A.C. 1:1-13.1 et seq. At issue in the matter, it was provided, were the following:

A. Whether petitioner shall have established by a preponderance of credible evidence (1) that agreements of the Board and Educational In-Roads, Inc., for 1986-87 and 1987-88 for provision of Chapter 1 services in premanufactured mobile units located on property of sectarian, nonpublic schools were violative of the establishment clause of the First Amendment to the United States Constitution; and (2) whether such agreements were ultra vires Board powers under statute or regulation to make (or continue so as to bind successor boards);

B. Sufficiency of Board affirmative defenses and defenses concerning petitioner's lack of standing to sue and lack of jurisdiction of the Commissioner to decide constitutional issues; and

C. If relief shall be granted, scope thereof.

Thereafter, the matter came on for evidentiary hearing in the Office of Administrative Law on July 8, 1987, at which time witnesses were heard and the record closed subject to filing of posthearing submissions. Thereafter, such submissions having

been filed, the record closed.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and/or stipulated, I make the following preliminary findings of fact:

1. On July 19, 1986, Educational In-Roads, Inc. (EIR) and the Board of Education of the City of Paterson (Board) entered into a contract by which EIR agreed to provide instructional services in basic skills in mathematics, reding and English as a second language to nonpublic school students who qualify for such services under the Elementary and Secondary Education Act of 1965 (Chapter I) as amended (Exhibit J-1).

2. The initial term of the above agreement was "for two (2) school years commencing September 1, 1986, and terminating on June 30, 1988" but the agrement "shall automatically renew itself for two (2) additional one-year terms unless either party notifies the other of its intention not to renew for the next school year," which "notification shall be in writing and delivered on or before April 20 of the current Contract year."

3. EIR is a corporation of the State of New Jersey. The officers and shareholders of the corporation are Anthony O'Donnell, M.A., and Harold School, Ed.D.

4. EIR is organized to provide inter alia educational services to nonpublic school pupils under contract with local public school districts.

5. On October 23, 1986, EIR was informed in writing by the Department of Education that EIR required no prior approval to provide services under Chapter I (Exhibit J-2).

6. The Education Consolidation and Improvement Act of 1981 (Pub. L. 97-35, Title V, 95 Stat. 464), codified as 20 U.S.C.A. § 3801 et seq., directed the Secretary of Education to "make payments to State educational agencies for grants made on the basis of entitlements created under Title I of the Elementary and Secondary Education Act of 1965." The Act provides that local education agencies shall provide expenditures to educationally deprived children in private schools equal to expenditures of children enrolled in public schools. 20 U.S.C.A. § 3806(a); 20 U.S.C.A. § 3862(b). The Act further provides that if services:

> are not feasible or necessary in one or more such private schools as determined by the local educational agency after consultation with the appropriate private school officials, [the local educational agency] shall provide such other arrangements as will assure equitable participating of such children in the purposes and benefits of this subchapter. 20 U.S.C.A. § 3862(a).

7. Regulations adopted by the United States Department of Education governing Chapter I programs are contained in 34 C.F.R. § 200.1 et seq. Under these regulations:

   a. a local school district must "provide the opportunity to participate in a manner that is consistent with the number and special educational needs of the educationally deprived children in private schools." 34 C.F.R. § 200.70(b).

   b. a local school district shall "exercise administrative direction and control over Chapter I funds and property that benefit educationally deprived children in private schools." 34 C.F.R. § 200.70(e).

   c. services to children enrolled in private schools is to be provided by a public agency or by a contract with a corporation which "is independent of the private school and of any religious organizations." 34 C.F.R. § 200.70(d)(1).

   d. any "contract . . . must be under the control and supervision of the public agency." 34 C.F.R. § 200.70(d)(2).

8. EIR is independent of the private school and of any religious organization.

9. The instructional content for the Chapter I program was formalized during August 1986. It was decided at that time that instruction should be based on the weaknesses identified by standardized tests administered in the Spring of 1986. In order better to organize the effort of addressing the identified weaknesses, it was also agreed that the EIR Math and Reading Curriculum Guides be incorporated in the process.

10. A listing of EIR employees providing Chapter I services in nonpublic schools in Paterson, New Jersey, the areas of certification, experience (prior to the 1986-87 school year) and assignments is admitted as Exhibit J-3.

11. The school principals of the schools listed in paragraph 18 are as follows:

St. Anthony - Sr. Eileen Joseph
St. Brendan - Sr. Anne Donnelly
St. Joseph - Patricia Bonner
St. John - Sr. Inez Solano
St. Mary - Sr. Cecilia Besi
St. Paul - Sr. Diane Marie
St. Stephen - Sr. Eleanor Kalisz
St. Therese - Nicholas Varsalona
Blessed Sacrament - Sr. Patricia Dunham
Our Lady of Lourdes - Sr. Conrad Napolitano
Paterson Catholic High School - Br. Luke Maher

12. In June 1986, the United States Department of Education issued a paper entitled: "Additional Guidance on Aguilar v. Felton[1] and Chapter I of the Educational Consolidation and Improvement Act (ECIA), Questions and Answers" (Exhibit J-4).

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1 473 U.S. ——, 87 L. Ed. 2d 290, 105 S. Ct. 3232 (1985).

13. Prior to entering into the Agreement with EIR, the Board studied whether alternatives to utilizing mobile units for Chapter I services were feasible. The following chronology of events occurred prior to the agreement between the Board and EIR:

1) February 19, 1986 - Status report for providing Chapter I services during the 1986-87 school year submitted to Melindo Persi, Passaic County Superintendent of Schools (Exhibit J-5).

2) March 24, 1986 - Status report providing information relative to the enrollments of public schools within walking distance of nonpublic school students to be served submitted to Melindo Persi, Passaic County Superintendent of Schools (Exhibit J-6).

3) April 11, 1986 - Meeting called by Melindo Persi, Passaic County Superintendent of Schools, to discuss status of Chapter I nonpublic school programs with representatives from Clifton, Passaic and Paterson. Information relative to state approval to utilize relocatable trailers for the 1986-87 school year was not yet available.

4) May 2, 1986 - Special bulletin outlining conditions to involve emergency provisions of the Public School Contract Guidelines from the State Department of Education (Exhibit J-7).

5) May 12, 1986 - Guidelines for the use of trailers for delivery of services to nonpublic school students under Chapter I, ECIA received from the State Department of Education (Exhibit J-8).

6) May 7, 1986 - A meeting was held to consult with nonpublic school principals in accordance with Chapter I regulations regarding services to be provided for 1986-87. The principals strongly recommended that option 3 providing for the utilization of trailers be pursued as

the only feasible method of serving nonpublic school students on an equitable basis.

14. On June 5, 1986, the Board adopted a resolution (Exhibit J-10) authorizing an instructional service agreement with EIR "to provide Chapter I services in premanufactured mobile units located on nonpublic school property in accordance with state regulations." The resolution made the contract "subject to the review and approval of the New Jersey Department of Education" and contained the following finding:

> . . . the assignment of nonpublic school students to public schools for such services would present health and safety hazards for students walking from one school to another and being assigned to unsafe or substandard classrooms.

15. The agreement between the Board and EIR was submitted to the Passaic County Superintendent of Schools, who responded, on July 17, 1986 (Exhibit J-11), that the Board was permitted to contract with a third party to provide Chapter I services, but that the legal propriety of the contract would not be reviewed.

16. On September 4, 1986, the Board adopted a resolution extending the agreement with EIR to provide Chapter I teaching services through the 1987-88 school year.

17. State regulations specifically authorize provision of educational services in premanufactured educational units, vans and/or mobile units. N.J.A.C. 6:22-2.4(a)(33). The units utilized by EIR conform to these requirements.

18. Pursuant to the agreement between EIR and the Board, EIR personnel provide Chapter I services in the following nonpublic schools:

St. Anthony School
151 Madison Street
Paterson, NJ 07501

St. Brendan School
Lakeview Avenue & East First Street
Clifton, NJ 07011

St. Joseph School
279 Carroll Street
Paterson, NJ 07501

St. John School
190 Oliver Street
Paterson, NJ 07501

St. Mary School
95 Sherman Avenue
Paterson, NJ 07502

St. Paul School
Haledon Avenue & Wagaraw Boulevard
Prospect Park, NJ 07508

St. Stephen School
90 Martin Street
Paterson, NJ 07501

St. Therese School
765 14th Avenue
Paterson, NJ 07504

Blessed Sacrament School
277 Sixth Avenue
Paterson, NJ 07524

Our Lady of Lourdes School
186 Butler Street
Paterson, NJ 07514

Paterson Catholic High School
764 Eleventh Avenue
Paterson, NJ 07514

19. EIR provides Chapter I instructional services to nonpublic school pupils in mobile units which are physically separate from the private school. Site plans are attached as Exhibit J-12.

20. EIR uses the following process for hiring individuals who will be providing Chapter I teaching services: Each potential candidate for a Chapter I teaching position was initially screened through a review of his resume. Those individuals recommended for further consideration were then interviewed by the Director of Human Resources. The Director continued the screening process by conducting reference checks on those individuals judged to be acceptable candidates. Only upon receipt of a positive reference check and evidence of a valid New Jersey teaching certificate did the individual receive an offer for a teaching position. All certificates were then recorded at the appropriate county superintendent's office.

21. The immediate supervisors of the teachers employed by EIR and providing Chapter I services in nonpublic schools in Paterson, New Jersey, are James Palumbo, who is employed by EIR as a master teacher, and Anthony Degatano, who is employed by EIR as an associate director.

All teachers employed by EIR and providing Chapter I services in nonpublic schools in Paterson, New Jersey, will be formally observed three (3) times during the school year. Informal observations and evaluations are also conducted. These observations and evaluations will be conducted by Palumbo and Degatano.

22. The following employees of the Board are charged with the responsiblity of reviewing the manner in which EIR provides Chapter I services:

Raymond Leopizzi
Basic Skills Coordinator
Nonpublic Schools
Paterson Board of Education

Joseph Heitzman
Director of Funded Programs
Paterson Board of Education

Copies of their job descriptions are attached hereto as Exhibits J-13 and J-14.

23. Onsite supervision is performed by Leopizzi, who observes the educational instruction provided to pupils in the mobile unit, meets with nonpublic school principals, and meets with EIR staff members. Each mobile unit is visited at least once weekly and is inspected carefully for any evidence of sectarian influence. Leopizzi periodically observes instruction, schedules, and pickup and return of students.

EVIDENCE AT HEARING

Called by the Association, Anthony H. O'Donnell, employed as president of EIR and a vice president of Independent Child Study Teams, described the trailer-type mobile

units employed by his company as approved under the Uniform Construction Code and by the Department of Education. They are constructed of vinyl-covered gypsum and utilize fire-resistant carpeting. There are one to four rooms in the units, which are not self-propelled but are towed to the site. They are moved yearly or semi-yearly for maintenance and service. Their power source is by metered boxes to poles installed by utility companies. No plumbing facilities are required under the code. Pupils stay only 30 to 40 minutes on a pull-out basis. [See N.J.A.C. 6:22-2.4(a)(33), which details educational facility planning standards in conjunction with the Uniform Construction Code, concerning premanufactured educational units, vans and/or other mobile units. The units here were approved thereunder. See J-12.]

Called by the Association, Anthony Degatano, employed by EIR and Independent Child Study Teams, Inc., as director since June 1987, before then was an associate director and was overseer of EIR's Chapter I program. Exhibit P-1 in evidence, he said, was a blank form of a principal/teacher evaluation form that private school principals were asked to fill out for EIR teachers. EIR wanted to know if the principals were satisfied with teacher performance. There were no instances of unsatisfactory performance, he said. Mobile units sited on private school property are required to bear such signs as are indicated in Exhibits RE-1 and RE-2. The required three such signs on each trailer are to identify the units as owned by a private, and not public, agency. Among his responsibilities in operation of the program are hiring teachers and dealing with private school principals. He and another supervisor are responsible to observe their teachers, a function which, he said, is done with written evaluations two to three times each year.

Called by the Association, Raymond Leopizzi testified he is employed by the Paterson Board of Education as basic skills coordinator in charge of services to nonpublic schools. EIR services are remedial services to students qualified as educationally disadvantaged, that is, "needy students." They are screened for academic deficiencies under Chapter I and given such services for reading, mathematics and English as a second language. A district-wide curriculum is established in the same way as in public schools. EIR has no input into curriculum. He said he does not evaluate EIR teachers but rather

only observes them, using his own forms and occasionally making suggestions to their supervisors. EIR provides their own workbooks or textbooks. He did not know if the same materials were used in public schools. Exhibits P-1, P-2 and P-3, he said, were memoranda from him in July 1985, September 1985 and January 1986 to nonpublic Chapter I staff and principals. Exhibit P-5, he said, and in particular section V thereof, was a program description of nonpublic school Chapter I programming as prepared by him and another. It forms a part of the district's yearly application to the Department of Education.

The Association rested.

EIR on its case called Leopizzi as its witness. He holds a bachelor's degree and a master's degree in administration and supervision. He is certified as an elementary school teacher and was so employed until 1980. Leopizzi said that Chapter I services for nonpublic students must be as equitable to those for public school students in terms of class size, time, facility, and teaching stations, though such services need not be identical to those given in public schools. Before the EIR contract, he said, nonpublic school services were rendered by the Board. Before Aguilar, teachers were in place in nonpublic schools. That has changed. As demonstrated in Exhibits J-5 and J-6, there were various options open to the district after Aguilar. The district opted thereafter for vans and trailers on the site of public schools and looked for neutral sites but could find none that were feasible or satisfactory because of long distances and the need for busing, or Saturday sessions. That would not have furnished an equitable option. Before Aguilar, he said, some teachers identified with nonpublic school staff in attendance at retreats, masses or faculty meetings, practices that were stopped. Policing present delivery of services, he said, is easier under the present EIR contract. Contact is lessened. EIR teachers do not identify with nonpublic schools. They approve of the present system by EIR and its affiliate, Independent Child Study Teams, Inc.

Called by the EIR, Dr. Harold M. Scholl testified he is president of Independent Child Study Team (ICST) and a vice president of EIR. The latter was formed after Aguilar. I.C.S.T. is a New Jersey corporation; EIR is a national company.

All parties rested and submitted.

DISCUSSION

Paterson Education Association argued generally that the Board had improperly entered into a contract with EIR for a term of more than one year under N.J.S.A. 18A:18A-42; that Title I services under the Elementary and Secondary Act of 1965, 20 U.S.C.A. 3802 et seq., on premises of nonpublic schools is unconstitutional; that the Chapter 1 program operated by EIR here is not within the "control and supervision" of the Board as required by federal education regulation; and that the subcontracting of such teaching services is improper under N.J.S.A. 18A:11-1 and 27-1.

EIR argued the contracting out of Chapter I services for nonpublic school students to EIR met the First Amendment's mandates for separation of church and state, in that the services were provided in religiously neutral sites and the Board's use of a private contractor to provide the services eliminated entanglement with religion, and the method provided was not within the bar of Aguilar; and that the multi-year contract with EIR was both within federal and state statutory and regulatory limits, if the successor Board's extension of that contract did not already make the EIR's argument of ultra vires moot.

The Board joined in the arguments of EIR.

Historically, as suggested by the parties in argument, Chapter I of the Educational Consolidation and Improvement Act of 1981, 20 U.S.C.A. 3801 et seq. authorized the United States Secretary of Education to provide financial assistance to local education agencies like the Paterson Board to meet the needs of educationally-deprived children. Such services include compensatory education designed to improve basic skills of reading, mathematics and written and oral communication. If given, the local education agencies must provide the services to educationally-deprived children whether the school they attend is public or private. The services provided to children in private schools must be equitable to those provided public school children. Before Aguilar

v. Felton, supra, the Board had been meeting its Chapter I obligation to nonpublic school children by having publicly-employed teachers provide the services inside nonpublic (parochial) schools within its jurisdiction. Aguilar in 1985 struck down a Title I program administered by New York City, which paid salaries of public school employees for teaching in parochial schools in the city, on the ground it would require a permanent and pervasive state presence in the sectarian schools receiving aid. Such pervasive monitoring infringed precisely those establishment clause values at the root of the prohibition of excessive entanglement. Aguilar, 87 L. Ed. 2d, at 300. The First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion. . . ." Federal regulations promulgated under authority of the Education Consolidation and Improvement Act of 1981 permitted and required provision of such services to children enrolled in private schools by employees of a public agency or through contract by the public agency with third parties independent of the private school and of any religious organization. If by contract with the public agency, the contract must remain under the control and supervision of the public agency. 34 C.F.R. 200.71(d).

"Additional Guidance" by the U.S. Department of Education on the impact of Aguilar was given in June 1986 (J-4). Conceptually, Chapter I teachers could consult with instructional staff from the private school in order to coordinate the Chapter I program and to facilitate success of the services rendered, provided such consultation should not occur at the site where the services were rendered. Local education agencies were not forbidden use of mobile vans or other portable units for provision of such Chapter I services. Their use was allowable. LEA's were cautioned the Supreme Court had previously held the establishment clause of the First Amendment is not violated when units are located on public property near the private school, under Wolman v. Walter, 433 U.S. 220, 246-47 (1977). But the Court, read the Guidance, has not ruled on the constitutionality of placing a mobile or portable unit on property belonging to religiously-affiliated private schools. The federal Department of Education believed courts would approve such practice if (1) the property were at sufficient distance from the private school building so that the mobile or portable unit is clearly distinguishable from the private facilities used for regular instruction; (2) the mobile or portable unit were clearly and separately identified as property of the LEA and free of religious symbols; (3) the unit

and the property upon which it is located were not used for religious purposes or for the private schools educational program; and (4) the unit were not used by private school personnel. Before deciding to employ such arrangement, however, the federal administrative Guidance cautioned the LEA to determine that other locations for the services were determined to be unsafe, impracticable, or substantially less convenient for children to be served (J-4, at 3-6).

On February 19, 1986, the Paterson superintendent reported to the Passaic County superintendent that in accordance with delivery of Chapter 1 services under Aguilar, no public school teachers have been reassigned to nonpublic schools. The district's exploration of other options showed the use of self-contained mobile vans or trailers under contract with organizations independent of the Board to be most utile, the trailers to be located on nonpublic school property (J-5, at 1-3). On March 24, 1986, the Paterson superintendent reported to the county superintendent further exploration of alternate options. A pairing of public and nonpublic schools was considered but found unfeasible, as was a Saturday remedial program in public schools (J-6, at 1-3). On May 12, 1986, the New Jersey Department of Education communicated with chief school administrators concerning options for delivery of services to nonpublic school students under Chapter I, including use of premanufactured mobile units. The use was approved provided certain conditions were met (J-8, at 2-4). The guidance was upon advice of the Attorney General of New Jersey.

Thereafter, the Paterson Board undertook contracting for such services in mobile units with EIR. The contract (J-1) was for provision of such services at eight parochial schools in relocatable trailers (J-12). Trailer-site plans showed the trailers located on the parochial school property but separate from church or parochial school buildings (J-12). Signs were posted on the trailers indicating ownership by EIR (RE-1).

The Association argued the plan used in Paterson did not fall squarely into either the Aguilar or Wolman analysis (PB, at 10). All that was created, the Asoociation urged, was a hybrid system that on analysis could be shown to have been unconstitutional under the establishment clause. I disagree.

In my view, the contract for Chapter I services for nonpublic school children as written and applied is not offensive to the establishment clause, and is, moreover, congruent with federal and state guidelines for use of relocatable mobile unit classrooms on nonprivate school property such as the parochial schools here, there having been a reasoned and reasonable determination by the district that other options remained unworkable. I am satisfied from the evidence that those other options were factually so unfeasible as to permit the alternative here employed. The units employed, which are allowable under New Jersey Department of Education facilities planning services, are separate physically and by sign from parochial school buildings and not apparently so placed as to excite confusion, or thus add to a religiously neutral site even if upon private school property and are staffed by certified nonpublic school teaching staff members who utilize instructional materials provided by EIR and whose employees do not mingle with parochial school staff, pupils or religious activities. In other respects, I find, federal and state regulations and guidelines have been observed and not infringed.

Thus, I **CONCLUDE** petitioner, Paterson Education Association, has not established by a preponderance of the credible evidence that the agreements of the Board and EIR for 1986-87 and 1987-88 for provision of Chapter I services in premanufactured mobile units located on the property of the several parochial, nonpublic schools here are violative of the establishment clause of the First Amendment to the United States Constitution, or offend federal or state guidelines expressly recognizing Aguilar v. Felton. I **CONCLUDE** the agreement of the Board and EIR for 1986-87 and 1987-88 was within authority given the Board as a local education agency under the Education Consolidation and Improvement Act of 1981 and N.J.S.A. 18A:46A-7 and 18A:46-19.7; and that the Board had such sufficient supervision and control over agreements for those years as represented compliance with federal requirements of supervision and control. Finally, I **CONCLUDE** that the original contract for more than two years between the Board and EIR, by reason of its having been approved for continuance by a successor board through 1988, has rendered moot the question whether originally it was in abridgement of the generality that no present board can bind successor boards. I specifically **DECLINE** to find from the evidence, as put by the Association in proposed findings of fact, that the Board's Chapter I program for nonpublic school pupils is "correlated to the curriculum

objectives of the individual nonpublic school" (PB, at 3); or to find, as put by the Board in defense, that the Association has no standing to sue under N.J.A.C. 6:24-1.1.

CONCLUSION

For the foregoing reasons, the petition of appeal should be, and is hereby, **DISMISSED.**

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

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

November 5, 1987
DATE

JAMES A. OSPENSON, ALJ

NOV 10 1987

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 10 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

PATERSON EDUCATION ASSOCIATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY, AND EDUCATIONAL IN-ROADS, INC. RESPONDENTS.	:	DECISION

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

The Commissioner observes that petitioner's exceptions to the initial decision and the Board's reply to exceptions were timely pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

The Commissioner has made an independent review of the record of this matter including the transcript of the hearing conducted on July 8, 1987 as it relates to the findings and conclusions of the ALJ and the responses filed by the parties. It is observed that petitioner's exceptions rely on the arguments presented to the ALJ in its post-hearing brief.

In the Commissioner's judgment petitioner's arguments have been addressed at length in the initial decision and are deemed to be without merit precisely for those reasons set forth by the ALJ in the initial decision.

In concluding that petitioner's arguments are without merit the Commissioner hereby adopts as his own the findings and determination in the initial decision.

Accordingly, the Commissioner finds and determines that:

1. Petitioner has failed to establish by a preponderance of credible evidence that the 1986-87 and 1987-88 agreements between the Board and Educational In-Roads, Inc. (EIR) to provide Chapter I services for parochial, nonpublic schools through the use of premanufactured mobile units located on the premises of such schools violate the U.S. Constitution or the federal and state guidelines expressly recognizing Aguilar v. Felton, supra.

2. The agreements between the Board and EIR for 1986-87 and 1987-88 were within the authority granted to the Board under the Education Improvement Act of 1981 and N.J.S.A. 18A:46A-7 and 18A:46-19.7. It is further determined that the Board, in accordance

with federal guidelines has exercised and continues to exercise sufficient control over the supervision of the agreements encompassing the 1986-87 and 1987-88 school years.

3. The controversy with respect to the extension of the original contract for more than two years between the Board and EIR has been mooted by reason of its having been approved for continuance by the successor Board.

4. Petitioner has failed to establish from the evidence in the record that the Board's Chapter I program for nonpublic schools is correlated to the objectives of the participating nonpublic schools.

Finally, it is observed that although the Board initially raised the issues of the Commissioner's jurisdiction and petitioner's standing in its answer with affirmative defenses to the pleadings, however the Board has not pursued these issues further after the prehearing conference was conducted between the parties. Consequently, the Commissioner dismisses these issues raised by the Board without further comment.

Accordingly, the Commissioner, having found and determined that petitioner's allegations are unsupported by the evidence adduced in the record of this matter, directs that the instant Petition of Appeal be dismissed.

COMMISSIONER OF EDUCATION

December 17, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4437-87
AGENCY DKT. NO. 190-6/87

ROSS R. HUGHES,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE,
Respondent.

Mary Jane Cullen, Esq., for petitioner
(Ruhlman, Butrym & Friedman, attorneys)

Samuel A. Christiano, Esq., for respondent

For intervenors Michael C. Cunningham and Elizabeth Garrett
Gregory T. Syrek, Esq., (Bucceri and Pincus, attorneys)

For intervenors Esther Bearg, Marie Farbman and Richard D'Aries
Kenneth I. Nowak, Esq.,(Zazzali, Zazzali & Kroll, attorneys)

Record Closed: November 2, 1987 Decided: November 6, 1987

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

Ross R. Hughes, a tenured teaching staff member employed by respondent since September 1, 1954, alleged a violation of his tenure and seniority rights when the Board of Education of the Township of West Orange (Board) acted to reduce its force for the 1987-88 school year by the abolishment of one of four guidance counselor positions at its middle school, and reassigned him as a teacher of Social Studies.

The Board denied the allegation and asserts that he has the least seniority of those staff members continuing in the remaining guidance counselor positions; and further asserts that Hughes should not be granted seniority credit for the years he worked full time as guidance counselor under a teacher/counselor certificate.

The matter was transmitted to the Office of Administrative Law as a contested case on June 25, 1987 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on August 21, 1987 at which the parties agreed to submit the matter for summary decision. The respondent noticed all guidance counselors of this proceeding and the opportunity to intervene pursuant to N.J.A.C. 1:1-16.6. The applications to intervene from teaching staff members Michael C. Cunningham, Elizabeth Garrett, Esther Bearg, Marie Farbman, and Richard D'Aries were granted. Briefs were submitted by the parties in a timely fashion, as were supplemental briefs on behalf of intervenors, and the record closed with the final submission by Hughes on November 2, 1987.

The employment histories of teaching staff members assigned to guidance counseling responsibilities has been stipulated and are as follows:

STAFF MEMBER	ASSIGNMENT	DATES
Marion Loftus	Guidance Counselor - West Orange HS	September 1, 1960 - present
Suzanne Kyriazes	Guidance Counselor - West Orange HS	September 1, 1961 - June 30, 1983
	Edison Jr. HS	September 1, 1983 - June 30, 1986
	Edison Middle School	September 1, 1986 - present
Sanford Pollack	Guidance Counselor - Lincoln Jr. HS	September 1, 1961 - June 30, 1983
	Roosevelt Jr., H.S.	September 1, 1983 - June 30, 1986
	Roosevelt Middle School	September 1, 1986 - present
Robert Hill	Guidance Counselor - Lincoln Jr. HS	September 1, 1962 - June 30, 1963
	West Orange HS	September 1, 1963 - January 31, 1966
	West Orange HS	February 1, 1966 - June 30, 1970
	West Orange HS	September 1, 1970 - present

Michael Cunninghan	Guidance Counselor -	
	Roosevelt Jr. HS	September 1, 1962 - June 30, 1975
	Edison Jr. HS	September 1, 1975 - June 30, 1979
	West Orange HS	September 1, 1979 - present
Esther Bearg	Guidance Counselor -	
	West Orange HS	September 1, 1971 - present
Elizabeth Garrett	Guidance Counselor -	
	Roosevelt Jr. HS	September 1, 1971 - June 30, 1985
	West Orange HS	September 1, 1985 - present
Marie Farbman	Guidance Counselor -	
	Lincoln Jr. HS	September 1, 1972 - June 30, 1985
	Roosevelt Jr. HS	September 1, 1985 - June 30, 1986
	Roosevelt Middle School	September 1, 1986 - present
Richard D'Aries	Guidance Counselor -	
	West Orange HS	September 1, 1976 - June 30, 1984
	West Orange HS	September 1, 1985 - present
Thomas Shea	Guidance Counselor -	
	West Orange HS	September 1, 1984 - present
Ross Hughes	Teacher Counselor -	
	Roosevelt Jr. HS	September 1, 1961 - June 30, 1983
	Edison Jr. HS	September 1, 1983 - June 30, 1985
	Guidance Counselor -	
	Edison Jr. HS	September 1, 1985 - June 30, 1986
	Edison Middle School	September 1, 1986 - June 30, 1987

Relevant certificates issued to each of the above by the New Jersey State Board of Examiners were either stipulated by the parties or produced as joint exhibits, and are as follows:

STAFF MEMBER	CERTIFICATE	DATE OF ISSUE
Marion Loftus	Counselor (Limited)	December 1961
	Counselor (Permanent)	June 1964
Suzanne Kyriazes	Counselor and Student Personnel Service (L)	April 1960
	Counselor and Student Personnel Service (P)	January 1965

Sanford Pollack	Teacher/Counselor (L)	February 1958
	Counselor	December 1962
	Student Personnel Services (P)	April 1970
Robert Hill	Teacher/Counselor (L)	May 1963
	Counselor (L)	February 1966
	Director of Student Personnel Services (P)	February 1970
Michael Cunningham	Teacher/Counselor (L)	January 1965
	Counselor (P)	January 1966
Esther Bearg	Student Personnel Services (P)	October 1971
	Director of Student Personnel Services	June 1975
Elizabeth Garrett	Student Personnel Services (P)	October 1974
Marie Farbman	Student Personnel Services (Provisional)	November 1972
	Student Personnel Services (P)	February 1974
Richard D'Aries	Student Personnel Services (P)	October 1974
Thomas Shea	Director of Student Personnel Services (P)	August 1979
Ross Hughes	Teacher/Counselor (L)	July 1961
	Teacher/Counselor (P)	June 1964
	Student Personnel Services (Emergency)	August 1985
	Student Personnel Services (P)	November 1985

The gravamen of this dispute is whether Ross Hughes was the teaching staff member properly impacted by the Board's reduction in force because he has the least seniority credit. Since the counseling service of all staff members above was at West

Orange high school and/or Roosevelt junior high school, Lincoln junior high school, Roosevelt middle school, Edison junior high school, and Edison middle school, the parties have stipulated that the secondary category as defined in N.J.A.C. 6:3-1.10(l)15 is the only category at issue.

Petitioner claims the accrual of 26 years of seniority credit in the category of guidance counselor since his service began as a part-time teacher and part-time counselor in September 1961, and he achieved a tenured status in the position of teacher/counselor because he held the position requiring a certificate, he possessed the requisite certificate, and he served the requisite statutory period of time.

Intervenors Bearg, Farbman and D'Aries agree with the Board's determination that Hughes is least senior because Hughes did not possess appropriate certification for full time service as a guidance counselor until he was issued the Student Personnel Services endorsement in November 1985.

Intervenors Cunningham and Garrett seek a denial of summary decision because of the existence of relevant, disputed facts concerning job descriptions and qualifications of staff members when initially appointed to counseling responsibilities.

The briefs of all concerned are incorporated herein by reference and the approximate 30 decisions cited in support of respective positions are omitted from this decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The argument for a denial of summary decision put forth by Cunningham and Garrett will be addressed initially. Their argument lacks merit because of a misperception of the issue herein, but would be valid if it is deemed necessary to rank all teaching staff members in the category of secondary guidance according to the seniority status of each. That would be necessary only if Hughes is determined not to be the least senior.

Hughes also seeks a denial of summary decision in perceiving a need to establish the required qualifications and actual duties performed by him during his 26 years of service. This argument must fall because his teacher/counselor certification limited his assignment to part-time, and his eligibility for a full time guidance position did not come into being until the student personnel services endorsement was issued for the 1985-86 school year.

Case law cited by Hughes to buttress his argument for seniority accrual in his part-time counseling assignments and entitlement to apply same in his claim for the full time counseling assignment is distinguishable. The distinction is the clarity of language in the regualtory scheme which limited the performance of counseling duties to less than full time for one certified as a teacher/counselor. No such limitation existed with the endorsements held by litigants in other disputes, such as, librarians or subject matter teachers.

It cannot be argued any longer that seniority in one or more categories accrues upon the acquisition of tenure in a position, and is triggered only by a reduction in force. Nor can it be argued that the amended regulatory scheme applicable herein and codified as N.J.A.C. 6:3-1.10 became operative in September 1, 1983. The principal thrust of the amendment was to grant seniority credit in categories only in which a teaching staff member actually serves under appropriate certification.

Hughes concedes in his brief at 15 that the "authorization on the Teacher/Counselor certificate" was as follows:

> This certificate is required for any teacher who is assigned at least half-time but not full time in carrying out guidance and student personnel services.

N.J.A.C. 6:11-3.2 states:

> Any contract or engagement between a board of education and a teacher shall cease and be of no effect whenever said board shall ascertain by notice in writing that said teacher is not in possession of a proper teacher's certificate. This rule shall apply even though the term of the contract may not have expired. (N.J.S.A. 18A:27-2)

The enforcement of certification requirements are codified in N.J.A.C. 6:11-3.5.

The only endorsements issued currently for those assigned to perform student personnel services are embodied in N.J.A.C. 6:11-12.12 and N.J.A.C. 6:11-12.13, and eligibility requirements are considerably more stringent than those previously for teacher/counselor or counselor. Compare the 1956 and 1963 Rules Concerning Teachers Certificates at 125, 127 and at 80, 81 respectively.

It has been stipulated that Hughes was not issued endorsements for student personnel services until August 1985 (emergency) and November 1985 (regular). He therefore became eligible to provide student personnel services on a full time basis as of September 1, 1985. Prior to that time he was only eligible to provide those services on a less than full time basis by virtue of the teacher/counselor certification issued in July 1961 and June 1964.

A review of the employment histories and endorsements issued to all staff members assigned to full time responsibilities for student personnel services clearly indicates a minimum of seniority credits as follows: Loftus (26), Kyriazes (27), Pollack (25), Hill (21), Cunningham (21), Bearg (16), Garrett (13), Farbman (15), D'Aries (11), and Shea (8). Credit was not given for questionable periods of qualifications prior to the issuance of an appropriate endorsement.

A review of the employment history and endorsements issued to Hughes reveals that he should be granted 26 years seniority as a teacher/counselor. That seniority accrual, however, only entitles Hughes to preference for an assignment in student personnel services that is less than full time. He should therefore be placed on a preferred eligibility list in the event such a position is ever recreated by the Board.

Concerning seniority accural for full time student personnel services, it is questionable if Hughes has any as he may not have acquired tenure in such a position pursuant to N.J.S.A. 18A:28-6 (a), (b), or (c). This determination need not be reached as I **FIND** all others to have accumulated greater seniority than Hughes.

I further **FIND** the respondent Board to have acted properly as a matter of law when it transferred Hughes to his 1987-88 assignment as teacher of social studies pursuant to N.J.A.C. 6:3-1.10(i).

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

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

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

6 November 1987
DATE

WARD B. YOUNG, ALJ

NOV 10 1987
DATE

Receipt Acknowledged
DEPARTMENT OF EDUCATION

DATE

Mailed To Parties:
NOV 12 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

g

ROSS R. HUGHES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4 as were the exceptions filed by Intervenors Michael Cunningham and Elizabeth Garrett.

Petitioner excepts to the ALJ's conclusion as stated in the initial decision, ante, that petitioner "has 26 years seniority as a teacher/counselor, but that this 'only entitles [him] to preference for an assignment in student personnel services that is less than full time.'" (emphasis in Exceptions) (Petitioner's Exceptions, at p. 1) Petitioner incorporates the Facts and Point Two of his post-hearing brief and his letter reply brief of October 8, 1987 in support of his position in this regard. Said documents are incorporated herein by reference.

Further, petitioner avers that he requested but was denied a hearing to present evidence that his required qualifications and duties performed while assigned under either his teacher/counselor or student personnel services certificate "were essentially the same, and that any distinction between his authorization/qualification, as allegedly represented under either of the two certificates, is without substance, particularly in view of the facts of this case." (Id.) Petitioner contends that the difference between the two certificates he holds is not the nature of the authority granted but the amount of time that the authority may be exercised. Petitioner argues he was improperly denied the right to present the evidence referred to above which is relevant to a consideration of his legal and equitable arguments in this seniority determination.

Petitioner submits that he should be deemed to have 26 years seniority in the performance of counseling/student personnel services. Alternatively, petitioner submits that he should be given a hearing to present additional factual evidence in support of his legal and equitable arguments.

Intervenors Cunningham and Garrett except to two areas of the initial decision. Counsel for intervenors submits in exceptions that at no time did he enter into a stipulation as suggested by the ALJ at page 5 of the initial decision that the secondary category as defined in N.J.A.C. 6:3-1.10(1)(15) is the only category at issue. "Indeed, the brief submitted on behalf of these intervenors explicitly argues that summary judgment would be inappropriate given the lack of any evidence produced by any party regarding the grade levels of the various schools during the assignments of the numerous individuals involved as guidance counselors. Clearly, there was no stipulation on this issue.***" (Intervenors' Exceptions, at p. 1)

Further, intervenors except to the ALJ's setting forth at page 7 of the initial decision a proposed "minimum" seniority level for every individual other than petitioner, claiming that said figures are not dispositive of seniority issues. Intervenors request the decision of the Commissioner set forth a specific statement indicating that the ALJ's seniority figures are estimates and fail to take into account years of service during which individuals were qualified but "did not have a certificate in hand." (Id., at p. 2) Intervenors argue that a hearing should have been allowed to permit the introduction of evidence on this question. They further submit that the initial decision should be modified as set forth in these two exceptions, and that the petition should be dismissed.

Upon a careful review of the record before him, the Commissioner rejects in part and adopts in part the decision of the Office of Administrative Law for the reasons that follow.

The Commissioner notes initially his accord with the finding of the ALJ that summary decision is appropriate in the instant matter, notwithstanding any factual contests as to the credentials held by the other guidance counselors in the district nor based upon the specific qualifications and actual duties performed by petitioner during his years of service under his teacher/counselor endorsement, beyond those stipulated in the record.

As to the function performed during the period from 1964-1985, it is stipulated in the record that petitioner served during that time as a full-time guidance counselor under an endorsement which permitted him to assume duties as a teacher/counselor. (See Petitioner's Brief, at p. 2) However, said endorsement states in plain language on its face that the holder of said endorsement was authorized to assume guidance and student personnel services at least half time but not full time. (See Exhibit J-11.) Therefore, petitioner knew or should have known from the plain language of his endorsement that he was not qualified to assume the duties he undertook on a full-time basis.

The flaw in petitioner's argument that he is entitled to 26 years seniority in the category of student personnel services lies in his mistaken claim that the subject area endorsement of "teacher-counselor" equates with the role of those holders of the

endorsement now known as "pupil personnel services," previously entitled "counselor." This is not the case. When petitioner assumed full-time duties as a guidance counselor in 1964, he ceased to function as a teacher/counselor because that endorsement proscribed a full-time role in student personnel services. Instead, he knowingly agreed to function in a position for which he did not have appropriate certification, in a full-time role restricted to those who held "counselor" endorsement, later "pupil personnel services" endorsement. Since petitioner continued to work in a field where he was improperly certified, he is entitled to no seniority in that position until the date when, in August 1985, he was provisionally certified and thereafter in November 1985 when he became permanently and properly certified as holding a pupil personnel services endorsement on an educational services certificate. The Commissioner so finds having conducted exhaustive research of the teacher certification regulations for the years in question. He finds therein no guidance as to whether the endorsement "teacher/ counselor" survived after the 1966 regulations installed the pupil personnel services endorsement which was made available by the introduction of educational services certificates.

The Commissioner rejects any equitable arguments petitioner raises that by virtue of having performed said duties full time over the course of so many years, he is thereby entitled to the seniority that attaches to such service, following the RIF in the district in 1987. Clearly, petitioner was not qualified to assume such duties full time, since he failed to become properly certificated until 1985. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) Moreover, while the Commissioner deplores the laxity on the part of the Board in failing to ascertain whether petitioner was properly certified at the time it assigned him full-time counseling duties, to grant the relief petitioner asks, that is, to treat him as if he had been properly certified during those years, would inure to the detriment of the other counselors in the district who bore the burden of becoming properly certificated to assume full-time student personnel services. See James D. Hansen v. Runnemede Board of Education, 1983 S.L.D. 1240 (equitable estoppel doctrine did not prevent termination of uncertificated guidance counselor with five years' service where guidance counselor knew of deficiency in certification). Thus, the Commissioner finds without merit petitioner's argument that his qualifications and the duties performed while assigned under his teacher/counselor endorsement "were essentially the same, and that any distinction between his authorization/qualification *** is without substance ***." (Petitioner's Exceptions, at p. 1)

Further, as found by the ALJ, since petitioner did not acquire a pupil personnel services endorsement until August 1985, and based on the limited record which does not indicate whether the guidance counselor position in question was a ten-month or a twelve-month appointment, it is indeed questionable whether petitioner is in fact tenured in the position of student personnel services in respondent's district. See Initial Decision, at p. 8; see also Hansen, supra (guidance counselor who neither possessed nor

was eligible to possess proper certification during five years in the district did not acquire tenure). Spiewak, supra Moreover, he may not have completed the requisite time established by N.J.S.A. 18A:28-6 for the acquisition of tenure in a position to which he was reassigned, since he was riffed in April 1987, effective June 1987.

Based on the above findings, the Commissioner need not reach intervenors' exceptions concerning whether or not the seniority figures established by the ALJ represent a "minimum" entitlement of the other individuals affected by the instant matter since petitioner is clearly the least senior counselor. Similarly, the Commissioner need not reach intervenors' exception regarding whether a stipulation was entered into by the parties concerning whether the secondary category is the only category at issue in the instant matter, since petitioner has failed to establish tenure entitlement in the position of pupil personnel services in the district of West Orange.

Accordingly, the initial decision is reversed insofar as the ALJ deemed petitioner entitled to 26 years seniority in the category of teacher/counselor in that seniority cannot be accrued in a nonexistent category. Even were a part-time position in pupil personnel services to arise in the district in the future, such position could only be claimed by virtue of seniority in the category of pupil personnel services. In all other findings, the initial decision is adopted for the reasons expressed therein.

Consequently, the instant Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

December 21, 1987

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4444-87
AGENCY DKT. NO. 117-5/87

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE,
Petitioner,
v.
MAYOR AND COUNCIL OF THE TOWNSHIP OF NEPTUNE,
Respondent.

Vincent C. DeMaio, Esq., for petitioner (DeMaio & DeMaio, attorneys)

William J. O'Hagan, Esq., for respondent (Stout, O'Hagan & Bass, attorneys)

Record Closed: October 23, 1987 Decided: November 10, 1987

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

The Neptune Township Board of Education (Board) appeals the action of the Township of Neptune (Township) by which the Township certified to the Monmouth County Board of Taxation a lesser appropriation for current expense and capital outlay school budget purposes for the 1987-88 school year than the amounts proposed by the Board in its budget that was rejected by the voters on April 7, 1987.

The matter was transmitted by the Department of Education to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on July 31, 1987. It was determined that the issue was whether the Township acted reasonably and with full regard for the state's educational standards and its own

obligations to fix a sum sufficient to provide a system of local schools that may be fairly considered thorough and efficient. The matter was heard on October 23, 1987, at the Neptune City Municipal Court, and the record closed the same day.

The Township's reductions, pursuant to N.J.S.A. 18A:22-37, total $236,000 in current expense and $50,000 in capital outlay.

UNCONTESTED FACTS

The following evidence is uncontested and is **ADOPTED AS FACT.**

At the school election held on April 7, 1987, the Board submitted to the electorate the following proposed amounts to be raised by local taxation for 1987-88:

Current Expense	$11,504,835
Capital Outlay	$ 65,563

These proposals were rejected by the voters. Following its review of the budget, the Township certified to the Middlesex County Board of Taxation $11,304,835 for current expense and $15,563 for capital outlay. Thus, the Township reduced the Board's proposed budget for current expense by $236,000 and for capital outlay by $50,000.

PAROL AND DOCUMENTARY EVIDENCE

Pursuant to N.J.A.C. 1:6-10.1(c), the Board submitted its contentions in the form of written testimony. The Township made no such submission.

The superintendent states, on behalf of the Board, that the Township fails to recognize the urgent and persistent nature of the Board's fiscal crisis. He refers to the six-year period 1975-80 in which the school tax rate decreased from $3.10 per $100 evaluation to $2.86. This shrinkage occurred because large amounts of money were appropriated each year from free balance. Beginning in 1984, it became apparent that this practice had run its course.

Many efforts have been made to control costs. The Bradley Park School was closed and a school and program reorganization plan was developed. The reorganization plan provides for a net reduction of 25 staff members.

In 1985-86, the system employed manual accounting practices. In May 1986, the Board business administrator notified the new superintendent that the district would end the school year with a deficit of $137,000. In 1986-87, the budget submitted to the voters reflected steps taken to improve the situation. The budget was both prudent and fiscally sound. Unfortunately, it was defeated by the voters and the Board and Township agreed to a reduction of $100,000. During the 1986-87 school year, the employee health benefits insurance programs overran by nearly 100 percent. In order to close the school year without a deficit, the district imposed a spending moratorium, reduced staff positions, accelerated sale of the Bradley Park School, delayed all but emergency repairs, eliminated overtime payment for custodians and secretaries, and requested a state audit to assist its efforts to avoid a deficit.

The Board is under order by the Commissioner of Education to maintain a planned program of school desegregation and integration to correct racial imbalances. The program requires extensive busing of elementary pupils. It also involves some special programs that require a small teacher-pupil ratio.

The school tax rate in Neptune Township has not increased as rapidly as school costs. Because of the cumulative effect of budget problems, the Board has reorganized the district, hired a new certified business administrator, hired an assistant Board secretary-office manager, reorganized the payroll and accounts payable operation, replaced the manual accounting system with a computerized system, changed insurance carriers and secured a health benefits package with an established loss maximum, and authorized the investigation of a reorganization of the school district.

The Board has attempted to reach a settlement with the Township on the defeated budget. However, the Township's insistence on a reduction of $286,000 would preclude the Board's ability to provide a proper education without again facing a deficit. On September 10, 1987, the State Department of Education auditing team reported that the Board should complete the 1986-87 school year with a free balance of less than $10,000.

The superintendent testified that state aid for 1987-88 appears to be a little less than $150,000 over the 1986-87 figure. State aid is decreasing in proportion to the total school budget, especially in such areas as compensatory education.

Concerning specific line items, the superintendent testified that line item J110, salaries, was budgeted at $359,827 because that is the contractual obligation of the district. Although two administrative positions and two secretarial positions were eliminated in 1986-87, and although state aid has been reduced, the clerical work of serving the many pupils in special education and basic skills programs increases.

J120d - Other Contracted Services

The Board budgeted $35,000, its 1986-87 expenditures were $43,963 and the Township reduced the amount budgeted by $10,000. This line encompasses cooperative purchasing services, school board policy manual revision, labor contract negotiations and the substitute teacher caller system. The amount expended last year exceeds this year's appropriation. Negotiations normally begin in September for the teachers' contract. Any reduction in this account would require the elimination of an essential service.

130 - Board Members' Expenses

The 1986-87 expenditures were $31,704. The Board has budgeted $34,000 for 1987-88, based mainly on an anticipated increase in New Jersey School Board's Association dues. Virtually all other subitems remain unchanged.

J211 - Principals

The 1986-87 expenditures were $648,327 and the budgeted amount for 1987-88 is $681,084. The Township has reduced this line by $65,916. The district is contractually obligated to pay the salaries precisely as budgeted in 1987-88. The 1986-87 budget shows a decrease of one principal because the Bradley Park School was closed. There are eight schools in the district: six elementary schools, each with an administrator, and one junior and one senior high school, each with two vice-principals, a reduction from three vice-principals.

J216 - Teacher Aides

Actual 1986-87 expenditure was $98,793. The Board budgeted $123,929, which it is contractually obligated to pay. The Township reduced this amount by $25,000. Decreasing compensatory education and special education aid mandates that the Board pick up the difference. Reduction of personnel would be counterproductive. The elimination of aides in special classes, for example, would require either hiring teachers or paying tuition to another district to provide the mandated services.

J550 - Replacement of Vehicles (Originally shown in J530, in error)

Actual 1986-87 expenditures were $52,813. The Board has budgeted $48,600 for 1987-88 and the Township reduced that by $20,000. For the past five years, a lease program has been in effect to transport special education pupils. Bids are advertised to lease vans for four years. Vans are traded back for market value to reduce cost of leasing replacement vans. Two vans are due for trade-in this year. This cost is fully aided to the district. No reductions in this line item can be effected.

J630 - Heat for Buildings

The Board expended $148,245 in 1986-87. It budgeted $348,000 for 1987-88, which the Township reduced by $50,000. The per-gallon cost of fuel oil was up in 1986-87. It has been estimated that costs will increase an additional 15 percent in 1987-88. The estimated use of fuel oil is based on estimated degree days for 1987-88. The 1986-87 winter was unusually mild. Fuel oil expenditures were less than normal but may reasonably be expected to return to normal levels this year.

J720 - Contracted Services for Repair of Equipment

Actual expenditures for 1986-87 were $73,175. The Board has budgeted only $70,650 for 1987-88. The Township reduced this by another $10,000. Virtually all equipment in the district is under service contract. The 1986-87 line item was underbudgeted. The recent acquisition of computers for computer-assisted instruction has increased maintenance cost.

730A - Replacement of Instruction Equipment

The Board expended $32,859 in 1986-87. It budgeted $76,710 for 1987-88, which the council reduced by $10,000. Although this account shows a substantial increase, a shortage of funds in the 1986-87 budget prevented needed expeditures in this line. The budget reflects normal replacement of business education typewriters, computers, business machines, science, industrial arts, physical education equipment and the like. Individual building requests orginally totaled over $150,000 and were reduced by the Board to $76,710. Replacements have been held to a minimum in prior years and expenditures now are necessary. Transfers out of this account last year to meet the insurance crisis increased the needs for 1987-88.

J1020 - Other Expenses for Student Body Activities

Actual expenditures for 1986-87 were $164,933. The Board budgeted $194,000 for 1987-88, which the council reduced by $10,000. The Board's estimate for 1987-88 is a reasonable one to provide athletic programs, insurance, supplies and all special activities for various school programs and clubs. The Board, on page 26 of its prefiled testimony, breaks down all activities, with a figure for each, and a total of $194,000.

L1220 - Improvement of Sites (Capital Outlay)

The Board expended only $7,665 in 1986-87 and has budgeted $75,000 for 1987-88. The Township reduced that figure by $50,000, leaving $25,000 in the line item.

Capital outlays unfortunately are the easiest items to delay. Continued delays, however, cause a physical plant to deteriorate. In the Board's opinion, the above expenditures are required to repair, maintain and upgrade facilities.

DISCUSSION AND DETERMINATION

The Board's reasons for restoration of all funds to account J110 are realistic and compelling. I accept as **FACT** that contractual obligations for salaries in this account

total $359,827. Accordingly, it is **ORDERED** that the $30,000 deduction effected by the Township be replaced.

I **ORDER** the $10,000 Township reduction to line J120 be replaced. The Board's 1987-88 budget figure of $35,000 is realistic and is $10,000 less than the actual 1986-87 expenditure.

Line 130, Board Members' Expenses, budgeted at $34,000, is a realistic appropriation. Involvement in school boards associations and related meetings, seminars and workshops is essential, especially for lay board members who must try to keep abreast of vast amounts of information, while serving part-time and receiving no remuneration. I **ORDER** the $5,000 reduction restored in full.

The Township reduction of $65,916 to line J211 must be restored in full. It is so **ORDERED.** The district is contractually obligated to pay these salaries in 1987-88. Assisted by the decrease of one principal because of the closing of the Bradley Park School, the increase in this line item is modest, indeed, and is fully justified.

Similarly, the Board is contractually obligated to pay the salaries in the J216 account. I agree that any reudction of personnel in this area, at the present time, would be counterproductive. It is **ORDERED** that the reduction of $25,000 be restored in full.

I **ORDER** that $20,000 be replaced to line item J550b. The Board leases eight vehicles and purchases computerized routing service. The Board's policy of trading back leased vans each four years is a prudent one. In consideration of these circumstances, and in the absence of any reason to the contrary given by the Township, I **ORDER** that the sum of $20,000 be restored to this account.

J630 - Heat for Buildings

As the Board points out, the winter of 1986-87 was unusually mild. The character of the 1987-88 winter is unknowable. Nevertheless, a doubling of the 1986-87 expenditures does not seem reasonable. Even assuming a 15 percent increase in fuel oil prices and a severe winter, the increase in this account is not justifiable. I **FIND** that

$75,000 may be reduced from this account without any danger to school building operations. A reduction of $75,000 is **ORDERED**.

J720C - Contract of Services for Repair of Equipment

The 1987-88 budgeted amount of $70,650 is nearly $3,000 below the 1986-87 expenditures. Prudent operation demands that the maintenance of equipment be kept up. So-called economies in maintenance often cost more in the long run. The Board's statement of the account and budgeted figure are entirely reasonable. I **ORDER** the replacement of $10,000 to the J720 account.

J730 - Replacement of Instructional Equipment

The Board's actual expenditures in 1986-87 for replacement of instructional equipment totaled $32,859. This is an extremely small sum when one considers desks, chairs, appliances for home economics, audiovisual equipment, art and industrial arts equipment, physical education equipment, business education equipment and science equipment for a district this size. I **FIND** that the Board's $76,710 figure for 1987-88 is both extremely conservative and justified. It is **ORDERED** that the reduction of $10,000 be replaced in full to this account.

J1020 - Other Expenses for Student Body Activities

I **ORDER** the replacement of the $10,000 reduction effected by the Township in this account. This account supports more than two dozen pupil activities. The Board's figure seems well-advised and economical in light of the importance of this aspect of the curriculum.

L1220C - Improvement of Sites (Capital Outlay)

All items in this account appear justifiable as to need and reasonable as to cost. Further delay of these projects can only cost more money ultimately. Driveways, parking areas, fences, retaining walls and the like are all essential to the effective use and proper maintenance of physical facilities. Accordingly, I **ORDER** the reduction of $50,000 made

by the Township restored to this account so that $75,000 shall be available for improvement of sites in the 1987-88 school year.

ORDER

In summary, all current expense reductions — except to account J630 — were restored. All capital outlay reductions were restored. The Township already has certified $11,304,835 to the Monmouth County Board of Taxation for current expense purposes. It is **ORDERED** that the additional amount of $160,916 be certified to the Monmouth County Board of Taxation for current expense school purposes of the Neptune Township Board of Education for the 1987-88 school year. The Township has certified to the Monmouth County Board of Taxation the sum of $15,563 for capital outlay purposes. It is **ORDERED** that the additional sum of $50,000 be certified to the Monmouth County Board of Taxation for capital outlay purposes of the Neptune Township Board of Education for the 1987-88 school year.

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

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

10 NOVEMBER 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

September 21, 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 16 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Upon a thorough examination of the record, the Commissioner concurs with the recommended order of the ALJ providing an additional $160,916 to the amount of local tax levy to be certified to the Monmouth County Board of Taxation for 1987-88 current expense school purposes.

The following chart indicates the current expense line item reductions made by the Council, the amount proposed by the Board in the defeated budget, and the amount of restoration or reduction ordered by the ALJ which is adopted by the Commissioner.

CURRENT EXPENSES

Line Item	Amount Proposed	Council's Reduction	Order of ALJ
J120d	$ 35,000	$10,000	+$ 10,000
J130a	34,000	5,000	+ 5,000
J211	681,084	65,916	+ 65,916
J216	123,929	25,000	+ 25,000
J550g*	48,600	20,000	+ 20,000
J630	348,000	50,000	- 25,000**
J720c	70,650	10,000	+ 10,000
J730a	76,710	10,000	+ 10,000

Line Item	Amount Proposed	Council's Reduction	Order of ALJ
J1020	194,000	10,000	+ 10,000
J110	359,827	30,000	+ 30,000
Total Additional Amount			$160,916

\+ = Monies to be restored
\- = Additional monies to be reduced
* = Reported erroneously as J530
** = Total reduction of $75,000

Further, the Commissioner concurs with the ALJ's recommended order to restore the sum of $50,000 to the capital outlay portion of the budget which had been reduced by the Council.

Accordingly, the Commissioner hereby directs the Monmouth County Board of Taxation to certify an additional amount of $160,916 to be raised in the 1987-88 local tax levy for current expense purposes which, when added to the amount of $11,304,835 previously certified, will result in a total current expense certification of $11,465,751. An additional amount of $50,000 is to be certified for capital outlay purposes (specifically for improvement of sites, L1220c) which, when added to the amount previously certified will result in a total certification of $65,563.

Lastly, the following errors in the initial decision are corrected:

1. Page two - $11,540,835 was the amount submitted to the voters for current expense.
2. Page three - (Last paragraph) The amount of reduction was $236,000.
3. Page four - Board Members' Expenses is line item J130a.
4. Page five - Contracted Services for Repair of Equipment is line item J720c.
5. Page seven - (Last paragraph) The $20,000 restoration is to line J550g, leasing of vehicles (see P. 3, page 22).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 21, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2330-87
AGENCY DKT. NO. 49-3/87

AUGUSTUS C. & COLETTE GERDING,
Petitioners,
v.
BOARD OF EDUCATION OF THE
MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT,
Respondent.

Augustus C. Gerding, pro se, for the petitioners

Vincent C. DeMaio, Esq., for the respondent (DeMaio & DeMaio, attorneys)

Record Closed: September 29, 1987 Decided: November 13, 1987

BEFORE BEATRICE S. TYLUTKI, ALJ:

This matter concerns the allegation of the petitioners, Augustus C. and Colette Gerding, that the Board of Education of the Matawan-Aberdeen Regional School District (Board) should pay the tuition for the education of their daughter, Gayle Gerding, at the Red Bank Regional High School (Red Bank) for the 1984-85, 1985-86 and 1986-87 school years.

After the petition and the answer were filed with the Commissioner of the Department of Education (Commissioner), the matter was transmitted to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

During the prehearing conference held on May 22, 1987, the parties agreed that the issues in this matter are:

A. Whether the Board failed to provide the petitioners with information regarding vocational education opportunities available to their daughter.

B. Whether the Board was under any obligation to pay for the education of the petitioners' daughter at Red Bank.

C. Whether the Board's offer to provide a share-time program for the petitioners' daughter starting with the 1985-86 school year was a workable alternative.

D. Whether the petitioners are entitled to reimbursement from the Board for their daughter's tuition for the 1984-85, 1985-86 and 1986-87 school years.

At the hearing, which took place on August 20, 1987, Vincent C. DeMaio, Esq., on behalf of the Board, raised the additional issue of whether any of the reliefs requested by the petitioners are barred by the 90-day rule set forth in N.J.A.C. 6:24-1.2(b).

After receipt of briefs from the parties, the record in this matter closed on September 29, 1987.

FINDINGS OF FACT

The petitioners and their daughter, Gayle Gerding, reside in the Matawan - Aberdeen Regional School District. Gayle Gerding completed the ninth grade at the Matawan Junior High School during the 1983-84 school year, and she was scheduled to complete her tenth through twelfth grades at the Matawan Regional High School (Matawan).

On April 19, 1984, the petitioners' other daughter died, and initially it was believed that her death was drug-related. A local police officer, Detective Kenneth Wicklund, conducted an investigation regarding the death and apparently told students at

Matawan that she died from an overdose of drugs. As a result of her sister's death and the subsequent police investigation, Gayle Gerding became withdrawn and developed psychiatric problems. She started to drink alcoholic beverages and to miss classes. Gayle Gerding received psychiatric treatment, and as part of her therapy, she decided to concentrate on dancing.

Before Gayle Gerding completed the ninth grade, the petitioners spoke to William Lucach, a guidance counselor employed at Matawan, about their daughter's mental problems regarding the death of her sister and regarding their decision to have her enroll in the performing arts (dance) program at Red Bank.

In addition, the petitioners spoke to William N. Conwell, the assistant superintendent of education for the Board, approximately at the start of the 1984-85 school year, about the possibility of financial assistance from the Board to help defray the tuition expenses at the Red Bank. At the time of the conversation, the petitioners had already arranged to send their daughter to Red Bank. Mr. Conwell indicated that he would try to arrange for a scholarship. Petitioners made no formal application to the Board to send their daughter to Red Bank. Gayle Gerding did not receive a scholarship and the petitioners paid $3,966, the full tuition for the 1984-85 school year. During that school year, the petitioners did not pursue the matter of getting financial assistance from the Board.

For the 1985-86 school year, the Board offered the petitioners a share-time program for their daughter (P-5). This program provided that she would take her academic subjects at Matawan during the morning and then she would be taken by bus to Red Bank where she would participate in the performing arts program in the afternoon. This program was developed by Mr. Lucach and a representative of Red Bank.

The petitioners rejected this offer (P-1) and again enrolled their daughter as a full-time student at Red Bank. Since the Board would not agree to pay any part of the tuition, the petitioners engaged the services of an attorney, John R. Connelly, Jr. Mr. Connelly wrote a letter to Dr. Kenneth D. Hall, superintendent of education for the Board, dated September 26, 1985, in which he stated that Red Bank is a designated area vocational technical school (AVTS), and requested the Board to pay the tuition since it was impossible for Gayle Gerding to attend Red Bank as a share-time student because of the school calendars conflict and the transportation problems (P-2). Since there was no

response to this letter, and since Red Bank did not demand any tuition payments for the 1985-86 school year, the petitioners assumed that a financial arrangement had been made by the Board. At the end of the 1985-86 school year, the petitioners were contacted by Kenneth Sommerhalter, the secretary and business administrator for Red Bank, regarding the unpaid tuition. On June 25, 1986, Mr. Connelly wrote another letter Dr. Hall regarding the matter (P-4).

After the petitioners enrolled their daughter as a full-time student at Red Bank for the 1986-87 school year (P-9), Mr. Gerding informed Dr. Hall by letter that the share-time program was not acceptable, and requested that the Board pay at least half of their daughter's tuition (P-3).

After Red Bank was informed that the Board would not pay Gayle Gerding's tuition for the 1985-86 and 1986-87 school years, the school notified the petitioners by letter dated December 11, 1986, that their daughter's attendance at Red Bank would be terminated at the end of 1986, if the tuition was not paid (P-8). In order to ensure that their daughter would be allowed to complete the program, the petitioners paid $7,932, the full tuition payments for the 1985-86 and 1986-87 school years (P-10, P-11).

According to Mr. Gerding, there was an ongoing negotiation regarding the tuition matter until he received a letter from Mr. DeMaio, dated February 2, 1987, in which Mr. DeMaio indicated that the Board would not agree to pay any portion of the tuition payments. Mrs. Gerding then wrote a letter to the Commissioner requesting his assistance regarding the matter (P-12). Dr. Saul Cooperman advised the petitioners that their dispute with the Board had to be resolved through the appeal process provided in N.J.A.C. 6:24-1.1 et seq. (P-3). The petition, which is the subject of this matter, was filed with the Commissioner on March 24, 1987.

I **FIND** that the facts stated above are not in dispute. However, there are several factual disputes.

The first factual dispute is the feasibility of the share-time program proposed by the Board. Both Mr. Conwell and Mr. Bruce M. Quinn, the Board's secretary and assistant to the superintendent for supportive services, testified that share-time programs

are not unusual and that it was the Board's policy to establish time-share programs for all of its vocational students so that these students could take their academic courses at Matawan. The Board favors time-sharing programs since they save money and since they assure the continuity of the Board's educational standards and goals as to the academic courses taken by the students. Mr. Quinn stated that the Board has about 200 students per year participating in vocational time-sharing programs. The one exception is the statutory M.A.S.T. (Marine Academy of Science and Technology) program, which is taught in a special school in Sandy Hook operated by the county, N.J.S.A. 18A:54C-1. Pursuant to this statute, the local board for the district where the student resides does not decide whether the student should be assigned to the M.A.S.T. program on a part-time or full-time basis.

Mr. Conwell stated that the petitioners did not notify the Board that there was any problem with the time-share program prepared for their daughter. Mr. Conwell was confident that any problems with the program could have been handled if the petitioners were willing to have their daughter go to Red Bank on a part-time basis.

Mr. Gerding testified that he was not sure as to when or to whom he or his wife stated their objections to the share-time program; however, Mr. Gerding stated that they rejected the program because it was unworkable. Specifically, Mr. Gerding stated that the program would be confusing since the calendars for the two schools were not identical (P-6, P-7); the schedules of classes in the two schools were not compatible; his daughter would have to spend a considerable time being bused between schools; and his daughter would not be able to fully participate in the performing arts program if she had classes at Matawan in the morning. Also, Mr. Gerding stated that the share-time program proposed by the Board required his daughter to repeat in the eleventh grade one of the dance courses that she had taken in the tenth grade.

As to this factual dispute, I **FIND** that it is evident from the testimony that the petitioners had decided that their daughter should take the performing arts program and that she should go to another school. After making this decision, the petitioners were unwilling to accept a share-time program which would place their daughter in Matawan for part of the day. Therefore, the petitioners made no effort to work with the Board to develop an acceptable share-time program.

Also, I **FIND** that since the Board had a general policy to use share-time programs for students taking vocational classes in another school, it was unwilling to pay all or part of the tuition for the petitioners' daughter.

The other factual issue is whether or not the Board was remiss in not having the petitioners' daughter evaluated as a possible special education student during the 1983-84 school year. There are certain test results regarding Gayle Gerding attached to the petition and it is not disputed that she had a difficult time adjusting to her sister's death.

Mr. Conwell testified that Gayle Gerding was a good student and that she did not have an academic or behavioral problem in the ninth grade. While in the ninth grade, she was absent seven times and was late twice, and her grades were acceptable. Mr. Conwell recognized that Gayle Gerding was upset and disturbed by her sister's death; however, he did not consider that there was any reason for an evaluation by a child study team. Also, none of her teachers or the petitioners requested such an evaluation. Helen Rappaport, the special division director who supervises the child study team for the Board, stated that referrals are made only when there is an indication of academic or emotional problems which warrants the classification of the student and the assignment of the student to a special education program. Ms. Rappaport confirmed that Gayle Gerding had never been referred to the child study team for evaluation by the petitioners or by any of her teachers.

Based on the testimony in this matter, I **FIND** that Gayle Gerding's problems were of a temporary nature and that the petitioners have not shown that the Board acted improperly by not having her evaluation by the child study team. Further, there is no indication that if she was evaluated, the child study team would have suggested that Gayle Gerding attend Red Bank on a full-time basis.

CONCLUSIONS OF LAW

Based on the facts, I **CONCLUDE** that the issue relating to reimbursement of the tuition for the 1984-85 school year is barred by the 90-day rule contained in N.J.A.C. 6:24-1.2(b), since the petitioners did not pursue the matter during the 1984-85 school year even though they knew the Board was not going to make any type of payment for that

school year. Also, I **CONCLUDE** that the issue relating to reimbursement of tuition for the 1985-86 and 1986-87 school years is not barred by the 90-day rule. As to these school years, I accept Mr. Gerding's representation that he thought initially that the Board had agreed to pay his daughter's tuition for the 1985-86 school year after his attorney wrote the September 26, 1985 letter, and that thereafter there was a continuous discussion of the tuition matter until just before the filing of the petition. Further, even if the 90-day rule were applicable, the facts in this matter warrant the relaxation of the rule, pursuant to N.J.A.C. 6:24-1.17, as to the tuition payments for the 1985-86 and 1986-87 school years.

At the hearing and in his brief, Mr. Gerding argued that the Board was responsible for the education of his daughter and that as a taxpayer and a resident of the school district, the petitioners are entitled to be reimbursed for all or at least part of the tuition paid to Red Bank. According to Mr. Gerding, this is especially true since Red Bank has been designated as the AVTS and the program taken by his daughter is a recognized vocational program. In support of his position, Mr. Gerding cited the Commissioner's decision in Pool v. Bd. of Ed. of Kingsway Regional School District, (decided on February 20, 1981).

Mr. Gerding also argued that the Board should have had his daughter evaluated during the 1983-84 school year for the purpose of designating a special education program for her.

Further, Mr. Gerding argued that the share-time program suggested by the Board was not workable, and he questioned the testimony of Mr. Conwell and Mr. Quinn that there were legitimate continuity of curriculum reasons for requiring his daughter to spend part of her school day at Matawan. Mr. Gerding argued that the only reason the Board proposed the share-time program was to save money, and that this reason improperly placed monetary considerations ahead of the welfare of his daughter. Lastly, Mr. Gerding argued that there was no reason why the vocation program taken by his daughter should be treated any differently than the M.A.S.T. program which allowed students to participate on a full-time basis.

At the hearing and in his brief, Mr. DeMaio argued that the Board was under no legal obligation to pay the tuition for the petitioners' daughter.

In support of his argument, Mr. DeMaio cited N.J.S.A. 18A:38-15, which provides:

> Any board of education not furnishing instruction in a particular high school course of study, which any pupil resident in the district and who has completed the elementary course of study provided therein may desire to pursue, may, in its discretion, pay the tuition of such pupil for instruction in such course of study in a high school of another district.

Although Mr. DeMaio argued that this statute is generally applicable in this matter, he recognized that Gayle Gerding's status was somewhat different since Red Bank has been designated as the AVTS, pursuant to N.J.A.C. 6:46-1.1 et seq. Mr. DeMaio stated that the leading cases dealing with AVTS programs are Keyport Bd. of Ed. v. Bd. of Ed. of Union Beach, et al, OAL DKT. EDU 11064-82 (Aug. 30, 1983), aff'd. by Commissioner (Oct. 17, 1983), and R.H. and E.H v. Bd. of Ed. of Freehold Regional High School District, OAL DKT. EDU 6344-84 (Jan. 18, 1985), aff'd by Commissioner (March 7, 1985), aff'd by State Board (Nov. 6, 1985), and that these decisions are instructive even though they are not directly applicable.

I agree with Mr. DeMaio's argument that these cases are not directly applicable. However, these cases recognize that students have the right to attend programs at AVTS, and that the local boards of education are not prohibited from providing access to these vocational programs on a part-time basis, except for the M.A.S.T. program which is governed by specific statutory provisions.

Since a local board of education has the dual responsibility of providing its students with a thorough and efficient education and providing the taxpayers with a financially efficient system of education, I **CONCLUDE** that the Board's policy of using vocational share-time programs is not unreasonable provided that an acceptable program can be established. In this matter, I **CONCLUDE** that the Board made a good faith effort to establish a share-time program for the petitioners' daughter, and that there was no proof that an acceptable program could not have been developed if the petitioners had worked with the Board. Further, I **CONCLUDE** that the petitioners have not shown that the Board failed to provide them with information regarding vocational education opportunities.

Although I am in total sympathy with the petitioners' decision to send Gayle Gerding to another school in view of the circumstances surrounding their other daughter's death, I **CONCLUDE** that the Board did not act unreasonably and that the petitioners are not entitled to any tuition reimbursement from the Board. Since the petitioners decided to send their daughter to Red Bank without any prior assurance of financial assistance from the Board, this matter is clearly distinguishable on the facts from the Pool case.

Therefore, I **ORDER** that the petition be **DISMISSED WITH PREJUDICE.**

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

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

November 13, 1987
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

NOV 13 1987
DATE

Receipt Acknowledged:
Seymour Ellis
DEPARTMENT OF EDUCATION

NOV 18 1987
DATE

Mailed To Parties:
Ronald L. Pauls
OFFICE OF ADMINISTRATIVE LAW

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AUGUSTUS C. AND COLETTE GERDING,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto.

Petitioners reiterate in exceptions the arguments they posed to the ALJ, and ask that the recommended decision of the ALJ dismissing the Petition of Appeal with prejudice be reversed. Petitioners' exceptions are summarized below in pertinent part.

Petitioners request that pursuant to N.J.A.C. 6:24-1.17 the Commissioner relax the 90-day rule, N.J.A.C. 6:24-1.2. The Commissioner notes that petitioners are appearing pro se in this proceeding and apparently misconstrued the conclusion of the ALJ, who in fact recommended relaxation of the 90-day rule as it pertains to the issue of tuition payment for the years 1985-86 and 1986-87, during which petitioners' daughter attended Red Bank High School. The Commissioner interprets this exception as asking that the Commissioner also relax the 90-day rule as it pertains to the 1984-85 school year, which the ALJ recommended not be relaxed.

Petitioners further aver in exceptions that "[w]e proved at trial that the Board through Mr. Conwell and Mr. Lukach (sic) never tried to work with us to establish a share time program." (Petitioners' Exceptions, at p. 2) They except to the ALJ's conclusion that the Board made a good faith effort to establish a share time schedule, and that there was no proof that an acceptable program wasn't developed. Petitioners claim that proof of these points is embodied in the answers to interrogatories and the trial transcript.

Further, petitioners except to the ALJ's statement that they argued the M.A.S.T. program allows students to attend full time and therefore that their daughter should be allowed to attend Red Bank full time. Rather petitioners contend their argument below was that M.A.S.T., before it became a statutorily governed entitlement, was a L.A.V.S. "I argued," petitioners aver in exceptions, "at the time M.A.S.T. was a L.A.V.S. students had a choice. Why shouldn't we be treated equally." (Id., at p. 4)

Petitioners claim that the situation they faced with the Board is comparable to that in Pool v. Board of Education of the Kingsway Regional School District, decided by the Commissioner February 20, 1981.

> Like Poll (sic) we received no offer of help from the Board. For anyone to expect a parent to withdraw their child from a school so they can attend as a share time student when the only schedule they ever received has that student repeating a class is not correct.
>
> FACT IS THEY NEVER PROVIDED US WITH A WORKABLE SCHEDULE. (Id., at p. 5)

Petitioners request that the Commissioner order the Matawan-Aberdeen Regional Board of Education to pay the full tuition cost for the 1984-85, 85-86 and 86-87 school years. In conclusion, petitioners aver:

> As Red Bank selects its students by audition only, I request that you set precedent and allow the talented youth of New Jersey that are accepted by audition to attend without the hardship that's been put on us. (Id., at p. 6)

The Board advises that it files no exceptions. With respect to petitioners' exceptions, the Board's position is that the ALJ made findings "which are more than amply supported by the transcript and that further she correctly applied the law applicable to the case." (Board's Reply Exceptions)

Initially, the Commissioner notes that the record before him does not include a transcript. Based on the record he has been provided, including the exhibits, both those attached to the Petition of Appeal and those admitted as exhibits by the ALJ, and the exceptions and replies thereto, the Commissioner adopts the conclusion of the Office of Administrative Law dismissing the instant Petition of Appeal, but based on the reason that follows, not for those reasons expressed in the initial decision.

For the record, the Commissioner sets forth the following chronology:

1984-85

September 1984	Petitioners approach William N. Conwell, assistant superintendent of education for respondent Board for financial assistance. No formal application to the Board to send Gayle Gerding to Red Bank. Petitioners paid full tuition.

1985-86

July 29, 1985	Petitioners write Mr. Lucach, guidance counselor at respondent high school, stating "*** we find it's unfeasible for Gayle to take her academics at Matawan H.S. while remaining a dance major in Red Bank Regional H.S.'s performing arts program." (P-1)
September 3, 1985	Board proffers share time program for Gayle Gerding. (Exhibit C - Petition of Appeal)
September 26, 1985	Petitioners' counsel, John R. Connelly, Esq. writes Board declining share time and asking Board to arrange for payment of her tuition as soon as possible. (P-2)
June 1986	Mr. Kenneth Sommerhalter, Board Secretary at Red Bank Regional H.S., contacts petitioners apprising them that Gayle Gerding's tuition had not been paid.
June 25, 1986	Petitioners' counsel writes Dr. Kenneth Hall, Superintendent of Respondent Board apprising him that the tuition had not been paid and further asking that he work out payment with Mr. Sommerhalter since it was his understanding that the Board would pay the tuition for the reasons set forth in his letter of September 25, 1986. (P-4)
August 28, 1986	Mr. Sommerhalter writes Mr. William Conwell setting forth tuition charges and payment due. (Exhibit C, Petition of Appeal)

1986-87

September 1986	Parents again enroll Gayle Gerding at Red Bank H.S.
September 4, 1986	Mr. Conwell replies to letter from Mr. Sommerhalter dated August 28, 1986, copy to petitioners, stating the Board's position that since the start of the 1985-86 school year when petitioners refused a share time, that it would not pay the tuition costs for either the 1985-86 or the 1986-87 school year. (Exhibit C, Petition of Appeal)
October 13, 1986	Parents again reject share time. In letter dated October 13, 1986 parents ask Board to consider paying if not all, at least half, of the $11,898 tuition. (P-3)

October 16, 1986	Mr. Sommerhalter forwards to petitioners tuition contracts for their daughter's attendance at Red Bank H.S. (Exhibit C, Petition of Appeal)
December 11, 1986	Dr. Donald D. Warner, Superintendent of Red Bank Regional High School District writes petitioners apprising them that if tuition due was not paid by December 17, 1986, its Board would consider resolution to terminate Gayle's attendance. (P-8)
December 17, 1986	Petitioners pay tuition in amount of $5,949. (P-10)
February 2, 1987	Counsel for respondent Board, Vincent C. DeMaio, Esq. writes petitioners' counsel apprising him that the Board's position had not changed that it would not consent to payment of tuition at Red Bank H.S. for Gayle's full-time attendance there. (Exhibit C, Petition of Appeal)
February 16, 1987	Petitioners write Commissioner of Education asking for appointment with all concerned parties to resolve the tuition matter. (P-12)
March 13, 1987	Commissioner Cooperman writes petitioners indicating that the proper procedure is to file a petition of appeal pursuant to N.J.A.C. 6:24-1.1 et seq. (P-13)
March 24, 1987	Petition of Appeal filed.
April 8, 1987	Petitioners pay tuition in amount of $1,983. (P-11)

The Petition of Appeal in the instant matter was filed on March 24, 1987. The 90-day rule requires that said Petition of Appeal shall have been filed within 90 days of the final Board determination in the matter that gives rise to the Petition of Appeal. See N.J.A.C. 6:24-1.2.

ALJ Tylutki determined in the initial decision, ante, in the section labeled Conclusions of Law, that reimbursement of tuition to petitioners for the 1984-85 school year is barred by N.J.A.C. 6:24-1.2(b), the 90-day rule, "*** since the petitioners did not pursue the matter during the 1984-85 school year even though they knew the Board was not going to make any type of payment for that school year." The Commissioner concurs in this finding. However, he does not agree with the ALJ that for the school years 1985-86 and 1986-87 the 90-day rule should be relaxed pursuant to N.J.A.C. 6:24-1.17.

As to the 1985-86 school year, the Commissioner's review of the record convinces him, contrary to the finding of the ALJ, that in that year, like the 1984-85 school year, petitioners made no formal application to the Board to send Gayle to Red Bank at Board expense. Moreover, they paid the tuition without question. Consequently, the Commissioner finds no basis for reviewing the tuition for that year and dismisses consideration of the tuition for that year as time barred under the 90-day rule.

Concerning the 1986-87 school year, as early as September 4, 1986 petitioners knew or should have known that the Board of Education of Matawan-Aberdeen had no intention of paying the tuition for Gayle's attendance at Red Bank High School. In support of this finding, the Commissioner notes that attached to the Petition of Appeal, and labeled as part of Exhibit C thereto is a letter dated September 4, 1986 addressed to Mr. Sommerhalter, Board Secretary and School Business Administrator of the Red Bank Regional High School District, from Mr. William E. Conwell, Assistant Superintendent, a copy of which was served on petitioners, which states in pertinent part:

> It was Mr. & Mrs. Gerding's choice to withdraw their daughter from our school district and enroll her on a full-time basis in Red Bank Regional High School. Therefore, it is our position that tuition for the 1985-86 and 1986-87 school years is not the responsibility of the Matawan-Aberdeen Regional School District.

Petitioners had the assistance of counsel in drafting a letter to Dr. Kenneth Hall, Superintendent of the Matawan-Aberdeen Regional School District, fully a year before the submission of the above letter. See Exhibit P-2, Letter from John R. Connelly, Jr., Esq., to Dr. Kenneth D. Hall, dated September 26, 1985. See also Exhibit P-4, Letter from John R. Connelly, Jr., Esq., to Dr. Kenneth D. Hall, dated June 25, 1986. In the Commissioner's opinion the Board's position was unambiguous and unwaivering. See Petition of Appeal, Exhibit C, Letter dated February 2, 1987 from Vincent C. DeMaio, Esq., to John R. Connelly, Jr., Esq., wherein it is stated in pertinent part:

> It appears that the parents refused the Board's proposal to acquiesce in the student's part time enrollment at Red Bank.
>
> Both Red Bank and the parents were made aware that the Matawan-Aberdeen Regional School District would not consent to payment of tuition at Red Bank for Ms. Gerding's full time attendance here.
>
> There has been no change in that position.***.

The Commissioner so finds, notwithstanding the argument of petitioners that they continued to negotiate with the Board until the date they received the above letter of February 2, 1987. The Commissioner dismisses said argument as being without merit in that the record reflects that petitioners were not involved in negotiations with the Board, but rather conducted unilateral pleas for reconsideration of the Board's clear refusal to absorb the entire cost of tuition after the parents consistently refused a share time. See P-3, a letter from Mr. Gerding to Dr. Hall dated October 13, 1986, which states in pertinent part:

> Gayle [chose] Red Bank because Matawan doesn't offer structured study in her [discipline]. The tuition ($3,966) is a hardship. I was hoping to obtain relief with the share time program. Unfortunately the schedule worked out by Matawan & Red Bank [personnel] didn't consider that Gayle had morning & afternoon classes in Performing Arts. Nor did they notice the conflict in the school holidays.
>
> I've payed $3,966 with a balance of $7,932 due. I'm asking that you treat Gayle the same as a share time student. As an Aberdeen homeowner I pay my share in taxes. Would you consider paying, if not all, at least half of the $11,898 tuition?

The Commissioner had previously held in the case entitled Marvin J. Markman and Susan M. Markman v. Board of Education of the Township of Teaneck, decided by the Commissioner August 22, 1986, that to relax the 90-day rule under circumstances where petitioners therein waited 11 months after the board's initial denial of refund and 7 months after the board's second notice of denial before filing would allow petitioners to "defeat the 90 day rule simply by writing letters requesting reconsideration***." (Slip Opinion, at p. 22) In this matter, as in Markman, the Commissioner finds no basis for extending the date for filing beyond 90 days of the Board's final determination in the matter, in this case from the date when they rejected the Board's share time option, specifically, September 1985, and certainly no later than September 4, 1986 when petitioners received a copy of Mr. Conwell's letter to Mr. Sommerhalter indicating that when petitioners refused the share time in September 1985, the Board would not pay the tuition costs for either the 1985-86 or the 1986-87 school years. Choosing the former date, petitioners' Petition of Appeal ought to have been filed by December 1, 1985; choosing the latter date, no later than December 4, 1986. In either event, petitioners were untimely in filing said petition on March 24, 1987.

As petitioners were fully apprised of the Board's final decision certainly no later than September 4, 1986, and as they did have the advice of counsel notwithstanding the fact that they appeared before the ALJ pro se, the Commissioner finds no basis for relaxing the 90-day rule pursuant to N.J.A.C. 6:24-1.17.

Accordingly, the decision of the Office of Administrative Law is adopted insofar as it dismisses the instant Petition of Appeal, but the Commissioner does so for the reasons stated herein.

Consequently, the instant Petition of Appeal is dismissed with prejudice.

In consideration of petitioners' informal request for preserving confidentiality and in light of the sensitive nature of the information contained in this matter, the Commissioner orders that the record herein be sealed.

COMMISSIONER OF EDUCATION

December 24, 1987

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3803-87
AGENCY DKT. NO. 122-5/87

PATERSON BOARD OF EDUCATION,
Petitioner,
v.
CITY COUNCIL OF THE CITY OF PATERSON,
Respondent.

Robert G. Rosenberg, Esq., and **Robert P. Swartz,** Esq., for petitioner

Jessica G. deKoninck, Assistant Corporation Counsel, for respondent
(Ralph L. DeLuccia, Jr., Corporation Counsel, City of Paterson)

Record Closed: October 28, 1987 Decided: October 29, 1987

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

The Board of Education of the City of Paterson (Board) alleges that $5,700,000 reduction of its 1987-88 current expense budget by the Council of the City of Paterson (Council) does not permit it to fulfill its responsibilities to provide a thorough and efficient education for the pupils of Paterson. The Council denied the allegation.

The matter was transmitted to the Office of Administrative Law as a contested case on June 2, 1987, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on July 10, 1987 at which the matter was set down for hearing and a discovery calendar was incorporated in the Prehearing Order entered on that date. The record for testimonial evidence closed on September 18, 1987 after six days of hearing, and the case record closed upon receipt of the Board's certified 1986-87 audit on October 28, 1987. C-7. The audit is incorporated herein by reference for the edification of the Commissioner for adjustments to this decision as deemed to be appropriate.

It is appropriate to recite the sequence of events for the edification of the Commissioner of Education because this matter was fraught with irregularities in the conduct of both parties and because of the alleged impropriety of the conduct of the County Superintendent of Schools for his intervention after the Board filed its appeal and the Commissioner transmitted it to the Office of Administrative Law as a contested case.

The Board adopted its initial current expense budget for the 1987-88 school year in the amount of $112,753,975 on February 26, 1987, and submitted same to the County Superintendent for approval the following day.

The County Superintendent disapproved and remanded the budget for further consideration.

The Board adopted a revised budget of $118,453,975 after public hearings on March 23, 1987, and submitted same to the County Superintendent. It was approved.

The public defeated the proposed budget at the general school election on April 7, 1987. The Board then transmitted its proposed budget to City Council.

City Council adopted a resolution on April 28, 1987, which reduced the amount to be raised by taxes by $5,700,000, thereby revising the Board's budget to the amount initially proposed and rejected by the County Superintendent.

The reductions and the Council's rationale incorporated in the resolution (C-1) are as follows:

	FROM	TO
Total of Instructional Salaries	$50,750,855	$46,550,855
		[-$4,200,000]

"The Council believes that the educational system has become overburdened with excess administrative and non-classroom personnel which has lessened the quality of education."

	FROM	TO
Total of All Other Expenses for Instruction	$490,609	$290,609 [-$200,000]

"The Council feels that the 300 percent increase is excessive in that over $200,000.00 has been set aside for field trips which has never been budgeted in prior years."

Total Attendance Salaries	$339,565	$239,565 [-$100,000]

"The Council cuts this item because it believes students should not have to be forced into school by school authorities; that job should be done at home."

Total Salaries for Health Services	$1,526,761	$1,326,761 [-$200,000]

"The Council feels that Health Services could be reduced by having Nurses split their time between the small schools."

Total Salaries for Operation of Plant	$3,558,084	$3,258,084 [-$300,000]

"Salaries for operation of plant is reduced because the new schools in the system require less maintenance."

Total Replacement of Equipment	$600,396	$400,396 [-$200,000]

"This item can be reduced by utilizing the present equipment for a longer period of time."

Total School District Contributions To Employee Retirement	$1,888,093	$1,788,093 [-$100,000]

"The reduction in personnel from the previous items will automatically decrease this item."

Student Body Activities - 1010 Salaries	$328,800	$228,800 [-$100,000]

"Volunteer coaches and advisors should be recruited to reduce this line item."

Special Project Salaries	$1,382,490	$1,282,490 [-$300,000]

"This item can be reduced by eliminating those project[s] that have shown the least improvement in prior years so that an incentive is established to encourage these projects to produce greater results."

TOTALS - FROM: $61,065,653 TO: $55,365,653 [-$5,700,000]

The Board adopted a resolution at its public meeting on May 4, 1987, to appeal the Council's reductions to the Commission. The Petition of Appeal was filed on May 6, 1987.

The Board also adopted a resolution (C-4) at its public meeting on May 4, 1987, to implement the Council's $5,700,000 reduction, which is reproduced as follows:

BUDGET CUTS

SPECIAL BOARD MEETING - MAY 4, 1987

LINE ITEM NO.		AMOUNT
110N		
Eliminate 1 Director Pupil Personnel Services		$ 45,000.
130S		
Eliminate 22 Law Enforcement Officers and 1 Director		496,707.
211		
Eliminate 14 Vice-Principals		560,000.
213.1		
Eliminate:	30 Reading Resource Teachers	2,105,000.
	3 Unassigned Music Teachers	
	25 Math. Resource Teachers	
	10 Manual Training Teachers	
	5 Regular Teachers	
	16 Additional Unassigned Teachers	

214B Eliminate 10 Guidance Counselors and 1 Peer Program Counselor	275,000.
215A Eliminate 6 Clerical Workers in Schools	60,690.
216 Eliminate 18 Aides	153,307.
250D Eliminate Field Trips, Etc. budget for Desegregation Plan	200,000.
310A Eliminate Attendance Officers - 10	100,000.
410A.1 Eliminate 13 School Physicians	70,200.
410A.2 Eliminate 19 School Nurses	650,000.
610A Eliminate 20 School Custodians	200,000.
730A Instructional Equipment Replacement	79,200.
730B Non-Instructional Equipment Replacement	92,822.
810A State and County Retirement Funds	100,000.
870 Decrease number of freshman for P.C.T.V.H.S. by 150	180,000.
1010 Eliminate Athletic Coaches	328,800.
1113 Special Project Salaries	300,000.
*TOTAL PROPOSED BUDGET CUTS	$5,996,726.

*Please note that there is an [approximate] difference of $296,726. from the original request of the City Council of $5,700,000. This is attributed to the sixty-day notice running into September 1987.

It is noted that the Council's resolution did not designate reductions by codified line items. It is also noted that the Board's resolution, although premature, incorporated reductions not intended by Council, such as eliminating 89 teachers from 213.1.

The County Superintendent conferred with the Board's legal representative on May 13, 1987, and transmitted a memo to Assistant Commissioner Calabrese on May 20, 1987, recommending the restoration of $3,523,593, in line item reductions adopted by the Board in the May 4, 1987 resolution. The substance of the memo (R-4) is as follows:

> After a review of the documentation presented on May 13, 1987 by Robert G. Rosenberg, Attorney for the Board, and our discussion, it is recommended that the Commissioner immediately restore a total of $3,523,593 of the amount reduced by the governing body from the 1987/88 school district budget. I believe to do less at this point would severely jeopardize the efficient operation of the instruction program for the coming school year. Additionally, the restoration would also assure the vocational school of an uninterrupted program for the coming year.
>
> Following is a listing of the items which should be reinstated immediately:

130S	22	Law Enforcement Officers	
	1	Director	496,707
213.1	30	Reading Resource Teachers	1,026,300
	25	Math Resource Teachers	806,500
	10	Manual Training Teachers	198,836
	5	Regular Teachers	96,250
	2880	Substitute Days at $50.00	
		(in lieu of 16 unassigned teachers)	144,000
214B	10	Guidance Counselors	
	1	PeerProgram Coordinator	275,000
250D		Field Trip Desegregation Plan	200,000
[810A]		State and County Retirement Fund	100,000
870		Tuition for 150 students	
		P. C. Technical/Vocational H.S.	180,000
	TOTAL		$ 3,523,593

> Relative to the remaining items, as we discussed, I will meet with school district personnel to secure additional information for the Commissioner.

At the prehearing conference the parties were referred to discovery requirements pursuant to N.J.A.C. 1:6-10.1, a calendar was established for the completion of the discovery process, and the matter was set down for hearing.

Certification requirements pursuant to N.J.A.C. 1:6-10.1 were fully discussed. Respondent was advised that its initial resolution must be translated into codified line items with greater specificity of educational rationale, and must remain consistent with its April 28, 1987 resolution.

The Board was advised that its response should relate to the Council's resolution and certification, but must exclude its own reduction implementation resolution of May 4, 1987 as it is the Council's April 28, 1987 resolution that is on appeal.

The parties were also referred to Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J.. 94 (1966) for guidance, since the regulatory scheme emanated from the opinion of the court delivered by Justice Jacobs.

Counsel for the parties put forth good faith efforts to reach an amicable resolution of the dispute, and arrived at a restoration amount of $3,500,000 to present to their respective clients for ratification. Because the discovery process could conceivably have been a deterrent to a settlement, the respondent's request for hearing adjournment and revised discovery calendar was granted and new dates for each were established. The parties did not ratify the settlement agreement, allegedly because of the intervention of the County Superintendent.

Hearings were scheduled to commence on September 11, 1987. On September 2, 1987, respondent filed a Motion for Discovery and Adjournment Pending Completion of Discovery due to the failure of the Board to fully comply with N.J.A.C. 1:6-10.1 and other discovery requests. The Motion was denied in a conference call with the parties. Counsel for the Board was ordered to expeditiously comply with discovery requirements (no motion for relief had been filed), and respondent's counsel was advised that the hearing would

proceed as scheduled since the Board had the burden of proof and would proceed first, but to respondent was reserved the right to reactivate its Motion after the Board rested in the absence of the production of required discovery by the Board. The Motion was not reactivated. The discovery documents not produced by the Board did not directly relate to line item reductions in dispute.

The Council's certification (C-2) of August 4, 1987, is reproduced in relevant part:

Instruction 200 Series

212 Salaries of Supervisors

From	To
$1,379,626	$1,139,626

Explanation: The figure specified by the Council is 10.2% above 86-87 spending. This allows for maintenance of present staff levels, particularly in light of the decision of the Board of Education to indicate 6 fewer supervisor positions in the budget for the 1987-1988 school year than in the previous year.

213.1 Salaries of Teachers

From	To
$39,940,259	$38,220,259

Explanation: The figure specified by the Council is 15% above the 1986-87 spending. In light of the increase in pay from $30 to $50 per day for substitutes and the large number of unassigned teachers (54) the additional 16 unassigned substitutes are unnecessary. The figure specified additionally reflects anticipated savings through retirements and personnel changes.

214A School Librarian

From	To
$497,175	$397,175

Explanation: The figure specified by the Council is a 26% increase over 1986/1987 spending. The Council anticipates the Board of Education will be able to hire two additional librarians.

214C Psychological Personnel

From	To
$2,084,816	$1,984,816

Explanation: The figure specified by the Council is 12% higher than 1986/1987 spending. This permits maintenance of present staff levels. The Board of Education budget does not project a personnel increase.

216 Other Salaries for Instruction

From	To
$215,840	$185,840

Explanation: The figure specified by the Council is 21% higher than 1986/1987 spending. Therefore, if the Board of Education desires, additional staff may be hired.

250 Other Expenses for Instruction

From	To
$490,609	$365,609

Explanation: The figure specified by the Council, exclusive of the additional $200,000 to implement the desegregation plan (line 250D) is nonetheless a 20% increase over 1986/1987 spending in the areas of Travel Expenses (Line 250B) and Miscellaneous Expenses (Line 250C).

310 A&B Salaries for Attendance Personnel and For Secretarial and Clerical Personnel

From	To
$339,565	$309,565

Explanation: The figure specified by the Council is 12.3% higher than the amount expended in 1986/1987 and should permit the Board to maintain, if not increase, existing staff levels.

630 Heat for Buildings

From	To
$1,329,183	$1,274,183

Explanation: A surplus existed in this line in both 1985/1986 and 1986/1987. In 1985/1986 $1,436,522 was budgeted for heat. $766,383 was spent; and $670,139 was transferred out. In 1986/1987 $1,208,348 was budgeted for heat. Pre-audited figures reflect that $1,008,348 was spent and $200,000 was transferred out. The Council believes that as much as $220,000 could be reduced from this line, but prefers to conservatively reduce only $55,000.

640 Utilities

From	To
$2,051,793	$2,001,793

Explanation: This is another line reflecting a substantial annual surplus which the Council believes could probably be cut by as much as $250,000. In 1985/1986 $1,980,989.00 was budgeted for utilities and $228,529 was transferred out. In 1986/1987 $1,938,304 was budgeted for utilities and $232,000 was transferred out.

730 (A,B&C) Replacement of Equipment

From	To
$600,396	$550,396

Explanation: The Council has appropriated approximately $7,000 more than was spent in 1986/1987 as reflected in the Board of Education's revised budget. Additional savings can be realized by utilizing the present equipment for a longer period of time.

810 School District Contributions to Employee Retirement

From	To
$1,888,093	[$1,788,093] *

Explanation: This amount represents a 7.2% increase over 1986/1987 spending. Additional savings will be realized through retirements, turnover and new hires at lower steps on the salary guide.

*Typo conceded on the record by counsel and corrected.

1010 Student Body Activities, Salaries

From	To
[$328,800] *	[$228,800] *

Explanation: The Council's figure represents an 11% increase over both 1985/86 and 1986/1987 spending. Additional hires may be possible.

820 Insurance and Judgments

From	To
$9,388,136	$6,388,136

Explanation: This is another surplus line. In 1985/1986 the Board of Education spent $6,356,428 in this line. In 1986/1987, $5,105,118 was budget for insurance. Only $3,015,866 was spent and $2,089,252 was transferred out. For 1987/1988 the Board of Education seeks a threefold increase over 1986/1987 spending. No documentation was [offered] to the Council to justify this expense. The Council believes that $6,388,136 which is double 1986/1987 spending, and more than the amount expended in 1985/1986 is a more realistic figure, and in line with actual insurance or self-insurance costs.

BUDGET TOTAL

From	To
$118,453,975	[$112,753,975] *

It is noted that the Council's Certification of August 4, 1987, deviated from its April 28, 1987 Resolution. Reference is made to a budget figure of $2,010,000 less in its Certification of Instructional Salaries; $75,000 less for Other Expenses for Instruction; $70,000 less for Attendance Salaries; $200,000 less for Salaries for Health Services; $195,000 less for Salaries for Operation of Plant; $150,000 less for Replacement of Equipment, $300,000 less for Special Project Salaries; and $3,000,000 more for Insurance and Judgments as there was no reduction for line item 820 in the Council's Resolution.

*Typos conceded on the record by counsel and corrected.

The matter of procedural or substantive arbitrariness was addressed in East Brunswick at 96, headnoted at 7 with the following:

> Commissioner of Education in resolving dispute between local board of education and township council would determine not only the strict issue of arbitrariness, but also whether the State's educational policies were being properly fulfilled, and if he found budget insufficient he could direct corrective action or fix a budget within limits originally proposed by board of education, but if he found council's budget not inadequate he must sustain it absent any independent showing of procedural or substantive arbitrariness.

It was determined by the undersigned at hearing that any appropriation reduction in the Council's Resolution which exceeded the amount in its Certification would be deemed arbitrary and therefore restored. Further, it was also determined that any appropriation reduction in the Council's Certification that had not been present in its Resolution would not be awarded credibility due to its inconsistency with law. See, East Brunswick, N.J.A.C. 6:24-7.1, and N.J.A.C. 1:6-10.1. To further the efficiency of the hearing process, the parties were advised that the Board bears the burden of proving by a preponderance of credible evidence the need of appropriations reduced by Council in its Resolution to enable it to meet the general Constitutional standard and specific legislative and administrative standards for maintenance and support of a thorough and efficient education for the pupils in the Paterson district. Reduced appropriations greater than the proven need would be sustained, while those less than the proven need would be restored.

The Board's Certification (C-3) is incorporated herein by reference.

Considerable testimony was adduced as the Board proceeded to meet its burden of proof. It was agreed that Council's legal representative would enter a stipulation of need whenever satisfied that the Board had met that burden. The reductions in accordance with the Council's Resolution and Certification when the latter was consistent will now be addressed.

TOTAL OF INSTRUCTIONAL SALARIES

Council cut $4,200,000 from the Board's proposed appropriations. It was determined that the Council provided specificity in its Certification with reference to line items 212, 213.1, 214A, 214C and 216. These references totalled $2,190,000. The remaining $2,010,000 is deemed to have been an arbitrary reduction and shall be restored. Each line item will now be separately addressed.

212: Council reduced this line item from $1,379,626 to $1,139,626. The need for $1,245,610 was stipulated on the record by counsel for both parties. I concur. $105,984 of Council's $240,000 reduction is therefore restored, while the reduction of $134,016 is sustained.

213.1: Council reduced this line item from $39,940,259 to $38,220,259. Counsel for the parties stipulated on the record that the Board's need does not exceed $38,220,259 and that the Council's reduction of $1,720,000 is uncontested. I concur. Council's reduction of $1,720,000 in this line item is therefore sustained.

214A: Council reduced this line item from $497,175 to $397,175. The appropriation is for the salaries of school librarians.

The Board's Certification indicates that the proposed appropriations reflects "actual expenditures for 1986-1987 and contracted salaries for 1987-1988 including 11 additional Librarians mandated by the State Department of Education requirements."

The Superintendent of Schools testified that the 11 additional librarians are to be assigned to the elementary schools and represent a Level II committment needed to provide "T & E" for pupils in library skills. There were four elementary librarians in 1986-87, but one has since been transferred to the secondary level. The Superintendent stated that there were appropriations in the 1986-87 budget for additional librarians, but that recruitment failed to secure additional staff.

The Superintendent referred to a July 6, 1987 Level II monitoring communication from the County Superintendent with an attached worksheet to buttress his testimony of the State's mandate for additional elementary librarians. See, P-10.

A careful and thorough review of P-10 fails to support the Superintendent's contention that the employment of 11 additional elementary librarians is mandated by the State.

Counsel for the parties stipulated on the record the need for $277,175 to meet contractual obligations for its current staff in 1987-88. Therefore, there remains in this line item $220,000, which the Board intended to utilize for the 11 additional librarians at $20,000 each.

Since Council only reduced this line item by $100,000, the remainder of $120,000 may still be utilized for six additional librarians at $20,000 each.

I **FIND** that the Board has failed to meet its burden of proof by a preponderance of credible evidence that 11 new librarians are needed to meet the State's mandate for a thorough and efficient education for its pupils. A distinction must be noted between essential and desirable. The focus of this dispute must be on essential needs in light of the public's defeat of the budget proposal.

The $100,000 reduction in this line item is **SUSTAINED**.

214C: Council reduced this line item from $2,084,816 to $1,984,816. It was stipulated by counsel for the parties that $2,006,041 is needed to meet contractual obligations for 1987-88 to maintain its staff of psychological personnel. Of the reduction of $100,000, $21,225 is therefore restored, and $78,775 is sustained.

216: Council reduced this line item from $215,840 to $185,840. Counsel for the parties stipulated a 1987-88 need of $215,840. The amount of $30,000 reduced by Council is therefore restored.

TOTAL OF ALL OTHER EXPENSES FOR INSTRUCTION

Council reduced $200,000 from the Board's proposed budget in its April 28, 1987 Resolution. However, Council only reduced $125,000 in its August 4, 1987 Certification. $75,000 of the Council's Resolution reduction is therefore deemed to be arbitrary and is therefore restored.

Counsel agreed that the only line item in dispute is 250C for Miscellaneous Expenses. The Board budgeted $54,537 in 1986-87 and proposed $204,537 for 1987-88, an increase of $150,000 or 275 percent.

The internal auditor employed by the Board testified that tuition reimbursement pursuant to Article 25:4-1 of the 1985-88 contract agreement is now charged to this line item. It was formerly charged to 213.1.

The auditor stated that $94,464 was charged to 250C in 1986-87, and that 300 teachers were reimbursed in 1986-87. He further stated that tuition costs at Paterson and Montclair are $264 per three-credit course, while Kean charges $275.

Article 25:4-1 provides for reimbursement "for tuition up to the approved State College rate for one course per contract year . . ." See, C-5.

A review of the June 30, 1987 250C Account Status and Activity Report (P-8) reveals a purchase order total amount of $94,464.27 for the 1986-87 school year. It also reveals payments to 319 individuals. There was no testimony as to what these payments represented. However, since many payments are for $264 and a spot check of names of individuals paid can also be found on the 1987-88 payroll (See. C-6), it is reasonable to believe that tuition reimbursements for 1986-87 were charged to the 250C account.

The Board's certification indicates a need for $150,000 to reimburse teachers for tuition. Giving full credence to the auditor's testimony that 300 teachers will be

reimbursed in 1987-88, and allowing liberally for the $275 per course cost at Kean College for each, only $82,500 would be needed for the Board to meet its contractual obligation.

A further review of P-8 reveals that approximately $30,000 was charged to 250C for other items.

I **FIND** that $112,500 is needed in line item 250C for the 1987-88 school year. The addition of undisputed budget appropriations results in a total need for the 250 account of $398,572.

Of the Council's reduction in its Certification, $32,963 is restored while $92,037 is sustained. Total restoration from the Council's Resolution reduction is therefore $107,963, which includes restoration of the $75,000 reduction deemed arbitrary above.

TOTAL ATTENDANCE SALARIES (310A & 310B)

Council reduced the Board's appropriations in its Resolution from $339,565 to $239,565, or by $100,000. Only $30,000 was reduced in its Certification. Counsel for the parties stipulated the need for $339,565 in line items 310A and 310B. $100,000 is therefore restored.

TOTAL SALARIES FOR HEALTH SERVICES (410A & B)

Council reduced the Board's appropriations in its Resolution from $1,526,761 to $1,326,761 or $200,000. The Council did not provide for any reduction in its Certification. This reduction is deemed to be arbitrary and shall be restored.

TOTAL SALARIES FOR OPERATION OF PLANT (600)

Council reduced the Board's appropriations in its Resolution from $3,558,084 to $3,258,084, or by $300,000. The rationale for its reduction was simply that "Salaries for operation of plant is reduced because the new schools in the system require less maintenance."

Council did not indicate any reduction in its Certification for salaries (610), however, but did indicate reductions of $55,000 for heat (630) and $50,000 for utilities (640).

Notwithstanding Council's apparent arbitrary reduction of $300,000 in its Resolution, counsel for the Board nevertheless entered a stipulation on the record to sustain the $105,000 reduction in Council's Certification. $195,000 shall therefore be restored.

TOTAL REPLACEMENT OF EQUIPMENT (730)

Council reduced the Board's appropriations in its Resolution from $600,396 to $400,396, or by $200,000. Council's Certification reduced this account to $550,396 or by $50,000.

After considerable testimony was adduced on this account, counsel for the parties stipulated that the $50,000 reduction should be sustained. $150,000 is therefore restored.

TOTAL SCHOOL DISTRICT CONTRIBUTIONS TO EMPLOYEE RETIREMENT (810)

Council reduced this account in its Resolution and Certification from $1,888,093 to $1,788,093, or by $100,000. This reduction is sustained by stipulation.

STUDENT BODY ACTIVITIES (1010)

Council reduced the Board's appropriation in both its Resolution and Certification from $328,800 to $228,800, or by $100,000.

Extensive testimony as well as evidentiary documents created more unanswered questions than enlightenment. Council's inconsistent rationale from Resolution to Certification offered no assistance.

Council rationalized the $100,000 reduction in its Resolution by stating that "Volunteer coaches and advisors should be recruited to reduce this line item." Council further stated in its Certification, that its reduced appropriation "represents an 11% increase over both 1985/86 and 1986/1987 spending. Additional hires may be possible."

The Board's proposed 1987-88 budget states that the 1010 account "provides for male and female coaches, directors and other personnel used in the High School Varsity Sports Program."

The Supervisor of Accounts for the Board testified that $213,417 was charged to this account in 1986-87 and referred to a June 19, 1987 line item report for substantiation. See, P-9. She further stated that overtime pay for teaching staff members assigned to teach Driver Education after school and on Saturdays is excluded from P-9, which she initially charges to 213.1. The auditor then transfers those charges to 1010.

The supervisor referred to P-11 for Driver Education overtime costs. When asked how much of the Board's 1987-88 appropriation of $328,800 was incorporated therein for extra curricular compensation pursuant to Schedule C-Part 2 of the negotiated agreement, she replied that she did not know. See, C-5 at 66-69.

The 1985-86 audit indicates actual expenditures charged to 1010 to be $206,812. The supervisor did not know why only $164,400 was budgeted for 1986-87.

A review of P-9 reveals that the total expenditures of $213,417.50 are categorized as overtime pay, with no charges for extra compensation. There was no explanation of what services were provided for the overtime pay.

A review of P-11 reveals a total of $28,138 charged to overtime pay at Kennedy High School ("50") and $22,172 at Eastside High School ("51"), all of which was for Driver Education. P-11 also indicates extra compensation totaling $7,000 for four staff members.

The supervisor further testified that the Driver Education program was curtailed in 1986-87 due to lack of funds, and that approximately $75,000 was needed for this program in 1987-88. Although the legitimacy of charging instructional services to 1010 rather than to 213.1 may be questioned, it shall not be addressed herein.

Unanswered questions remain for a full explanation of charges to the 1010 account as indicated on P-9 and P-11. For instance, staff member Bonadies received $4,125 in overtime pay on P-9, and $3,500 extra compenstion and $3,696 in overtime pay on P-11. Testimony revealed only the latter charge to be for Driver Education.

Notwithstanding that Schedule C-Part 2 of the negotiated agreement totals $88,770 (including all stipends and increments) for 1987-88 (excluding overtime for nurses at No. 26, estimated by the Supervisor to be $3,000), it is unknown what the Board's needs are in the absence of testimony as to how many positions exist in the district with more than one high school.

Based on the presumption that all extra compensation positions listed in Schedule C-Part 2 are filled at both Kennedy and Eastside ($88,770 doubled) and that the need for $3,000 for overtime pay to nurses and $75,000 for Driver Education is fully substantiated, the total cost would be $255,540.

Although the Board did not fully meet its burden of proof as to its need for $255,540, it is also clear from both the Council's Resolution and Certification that it had no intent to curtail any portion of the program charged to this account.

Of the Council's reduction, $27,540 is therefore restored, while the reduction of $72,460 is sustained.

SPECIAL PROJECT SALARIES (1113)

The Council reduced the Board's appropriation from $1,582,490 to $1,282,490, or by $300,000, in its Resolution.

The Council did not include this reduction in its Certification. I therefore deem the Council's $300,000 reduction in its Resolution to have been arbitrary. Therefore, the reduction of $300,000 is restored.

INSURANCE AND JUDGMENTS (820)

Council did not reduce this line item in its Resolution, but did reduce the Board's appropriation from $9,388,136 to $6,388,136, or by $3,000,000, in its Certification.

Testimony on this line item was precluded by the undersigned as the reduction was not incorporated in Council's Resolution. The Council's legal representative took issue with this preclusion, and argued that the administrative law judge (ALJ) erred as a review of the minutes of the Council-Board meeting of April 22, 1987, (R-2) indicates a reason for the Council's oversight in not reducing this line item in its Resolution.

The ALJ indicated that the Board's appropriations in this account were indicated in page 38 of its 1987-88 budget (P-4), and that it was the Council's Resolution that was on appeal before the Commissioner. It was further indicated that the process of certification of the amount to be raised by taxation after the public's rejection of the Board's proposed budget would have no meaning if Council was permitted, after the Board's appeal, to reduce, in its Certification, line item appropriations that had not been incorporated in its Resolution.

MOTION TO DISMISS

Council moved for dismissal of the Board's appeal at the conclusion of its case. It argued that public confidence in the proceedings requires a dismissal because of the improper intrusion by the County's Superintendent in this litigation after the Board filed its appeal.

The Board filed its appeal on May 6, 1987. The County Superintendent sent a communication to Assistant Commissioner Calabrese on May 20, 1987, recommending the restoration of $3,523,593 of the $5,700,000 reduction by Council, which referred to the Board's May 4, 1987 resolution implementing the $5,700,000 reduction and not the Council's resolution. See, R-4.

Council further argues that the County Superintendent improperly interfered with the litigation process on July 21, 1987, when counsel for the parties were putting forth good faith efforts to have the parties ratify a settlement agreement. The County Superintendent indicated at the Council meeting with Board representatives that he could not approve less than a $118,000,000 budget even though he had recommended only a $3.5 million restoration to Calabrese. See, R-3 at 52-54.

Council argues that the County Superintendent's communication to Calabrese may have been inadvertent, but that his interference with settlement negotiations on July 21, 1987, was unconscionable and inexcusable. Council further argued that the Commissioner cannot provide a final decision with objectivity due to the conduct of his principal representative in Passaic County.

The Board opposed the Motion in the absence of any prejudgment by the ALJ and the establishment of a fully recorded hearing on the merits of the Board's appeal.

Council's Motion was denied by the undersigned for the reasons stated below.

The Legislature has provided jurisdiction to the Commissioner to hear and determine all controversies and disputes arising under school laws. N.J.S.A. 18A:6-9. See also, East Brunswick at 103-105. The ability of the Commissioner to reach a final decision in this matter based on the record established in this dispute is unquestioned here. Even if it were, the undersigned has not been given the authority to remove jurisdiction set by the Legislature. Judicial review may be sought in courts only after the Commissioner has exhausted his jurisdictional responsibilities to decide the controversy.

Concerning the alleged impropriety of the conduct of the County Superintendent, it would be most inappropriate for an ALJ to comment. The County Superintendent is not a party in this dispute and did not appear as a witness.

Although there is no evidence that the Commissioner scheduled a conference between the parties on July 21, 1987, pursuant to N.J.A.C. 6:24-7.6, such a conference conducted by the County Superintendent may indeed be scheduled.

No judgment shall be made here on the alleged improper conduct of the County Superintendent. It is an internal matter to be determined solely by the Commissioner at his discretion.

SUMMARY OF FINDINGS AND CONCLUSIONS

	Council Reductions	Amount Restored	Amount Sustained
Instruction	$4,200,000	$2,167,209	$2,032,791
Other Instruction	200,000	107,963	92,037
Attendance	100,000	100,000	-0-
Health	200,000	200,000	-0-
Plant	300,000	195,000	105,000
Equipment	200,000	150,000	50,000
Retirement	100,000	-0-	100,000
Activities	100,000	27,540	72,460
Special Projects	300,000	300,000	-0-
Total	$5,700,000	$3,247,712	$2,452,288

I **CONCLUDE**, therefore, that the additional amount of $3,247,712 shall be certified for current expense for the 1987-88 school year to ensure a thorough and efficient program of education for pupils in the Paterson school district, and I direct the Passaic County Board of Taxation to raise that additional amount through taxation.

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

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

29 October 1987
DATE

WARD R. YOUNG, ALJ

NOV - 2 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

NOV - 4 1987
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

g

BOARD OF EDUCATION OF THE CITY OF PATERSON,

PETITIONER,

V.

CITY COUNCIL OF THE CITY OF PATERSON, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The Commissioner has reviewed the record of this matter including the initial decision filed by the Office of Administrative Law, the exceptions to the initial decision filed by Council and the Board's reply to those exceptions.

It is observed that Council by way of its exceptions to the initial decision renews those arguments it previously made before the ALJ with regard to the following:

POINT I

> The ALJ Erred in Refusing to Consider the Reductions Made by the City Council in its Resolution Dated August 4, 1987.
> (Council's Exceptions, at p. 5)

POINT II

> The ALJ Erred in Denying Council's Motion to Dismiss Based on the Improper Intrusion of the County Superintendent in the Proceedings.
> (Id., at p. 7)

The argument advanced by Council in Point I pertains to its second certifying resolution of August 4, 1987 (C-2) whereby it proceeded to set forth by current expense line item expenditures its reductions imposed upon the Board's 1987-88 school budget appropriations which it had previously eliminated in the local tax levy certification made to the Passaic County Board of Taxation on April 28, 1987 (C-1). The total amount of the reductions in both of the aforementioned certifying resolutions was $5,700,000. However, the record establishes that the reason for Council's action on August 4, 1987 was due to the fact that it had failed to comply with the provisions of East Brunswick, supra, on April 28, 1987 which require that each of the affected current expense line items reduced by Council should have been identified in writing at that time together with a statement of Council's supporting reasons for such reductions. An examination of the original certifying resolution of

April 28, 1987 (C-1) when compared with its subsequent recertification of August 4, 1987 (C-2) clearly reveals the following:

1. In the August 4, 1987 resolution Council, in determining each of the specific line item reductions, had effected changes in the amounts of the overall reductions that it had made in certain current expense line item series, together with the reasons initially set forth in its resolution of April 28, 1987.

2. Moreover, it is noted that the reasons given by Council on August 4, 1987 for its overall line item series reductions did not correspond with those reasons given in its resolution of April 28, 1987. In fact, Council had added other specific current expense line items which were not susceptible to reduction by virtue of its original action taken on April 28, 1987.

In support of its exceptions taken on Point I, Council argues in pertinent part that:

> Bd. of Ed., E. Brunswick v. Township Council, E. Brunswick, 48 N.J. 94 (1966) is the touchstone school budget decision. East Brunswick places burdens not only on the Council in reviewing a defeated school budget, but on the School Board as well. In East Brunswick the Court stated:
>
> > 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.
>
> Id. at 105. The Paterson Board of Education ignored the mandate of East Brunswick and set the Council adrift. The Board produced no background information concerning the budget and actually misstated expenses such as teachers' salaries and, possibly, insurance costs. Is it any wonder that when the Council was called upon to adopt its resolution, the first time it had done so as a Type I (sic) [II] district, the Council erred both in the preparation of the resolution and in relying on the unsubstantiated information provided by the Board of Education.
>
> (Council's Exceptions, at p. 5)

Additionally, Council also maintains that:

> The ALJ ignored the factual circumstances surrounding the adoption of the first and second Council resolutions. He erroneously viewed the Council's second resolution as a document which merely explained or reduced items in the first resolution and [as] having no independent significance. The Board did not object to the Council's second resolution. Therefore, even if the second resolution was in some way defective, that defect has now been waived.
>
> Therefore, the Council believes that the Commissioner should find that cuts to the 1987-1988 school board budget contained in the August 4, 1987 resolution were properly before the ALJ for consideration***. (Id.)

Council further relies on the minutes of its meeting of April 22, 1987 (R-2) as well as those prior rulings of the Commissioner in re: Board of Education of Monmouth Regional High School District v. Township of Shrewsbury et al., 1967 S.L.D. 155, 157 and Board of Education of the Township of Old Bridge v. Mayor and Council of the Township of Old Bridge, Middlesex County, decided by the Commissioner October 28, 1985.

The Commissioner observes that the facts with regard to Point II of Council's exceptions are undisputed and clearly delineated in the initial decision, ante, which are incorporated by reference herein.

In arguing that the ALJ committed reversible error in denying its Motion to Dismiss based on the facts set forth, ante, Council makes the following argument:

> The County Superintendent took two steps after the Board of Education filed its appeal which renders a nullity the possibility of an impartial hearing for the Council. As more fully set out in the statement of facts, supra, Superintendent Persi rendered his opinion concerning the Paterson school budget to Assistant Commissioner Calabrese while the present appeal was pending. At a July settlement conference between the parties, he indicated he would not accept less than the $118 million dollar budget originally adopted by the Board. This shattered the Council's confidence in the statutory and regulatory process. Even if his conduct ultimately has no effect on the outcome of this case, the Superintendent remains the representative of the Commissioner in the

County. In order to preserve public confidence, the case must be dismissed.

The court in the oft cited case of N.J. State Board of Optometrists v. Nimitz, 21 N.J. Super. 12 (App. Div., 1952), recognized the problems which arise when agency members intrude inappropriately in the administrative decision making process. The court ruled that opinions developed outside the hearing process could not be considered. The court stated:

> A board of experts, sitting in a quasi-judicial capacity, cannot be silent witnesses as well as judges. Their value as experts in the judging process contemplated by the statutory disciplinary proceeding consists in the application of their special knowledge to the factual controversy appearing within the record at the hearing.

Id. at 28. Just as a disciplinary hearing must be an independent process, an administrative review of a contested school budget should be no less independent. Mr. Persi's opinions are not part of the record. His attempt to insinuate them into the process constitutes reversible error. (Id., at pp. 7-8)

The Board categorically rejects each of the arguments made in Points I and II of Council's exceptions as being without merit essentially for the reasons stated by the ALJ in his initial decision as supplemented by the response made in its reply to exceptions on pages 2-5 which are incorporated by reference herein.

The Commissioner has reviewed the respective positions taken by the parties in regard to the findings and recommendations set forth in the initial decision. He has also thoroughly reviewed the transcripts of the six days of hearing conducted in this matter.

Prior to rendering his determination herein the Commissioner deems it necessary to point out several concerns that have surfaced as the result of his review of the record which must be explored, notwithstanding the fact that they have not been thoroughly addressed during the conduct of these budget proceedings.

The first of these concerns is related to the fact that it was not until one day before the record was closed before the Office of Administrative Law (October 27, 1987) that the final audit (C-7) for the 1986-87 school year was filed with the ALJ by the Board.

One of the findings of this audit (C-7) clearly impacts upon the Board's ability to provide a thorough and efficient system of education in the City of Paterson School District. It appears on page 10 of the 1986-87 audit report and has been summarized by the auditor in an attached cover letter dated October 23, 1987 to the Board Secretary which reads as follows:

> Enclosed is the annual audit of the Paterson Board of Education for the year ended June 30, 1987. You will note that the current expense fund of the Board of Education had an operating deficit of $1,904,757. The deficit was a result of several factors including unrealized state revenues, additional expenditures for tuition, insurance and cafeteria subsidy. The Board should review this financial report and its 1987-1988 budget and immediately adopt a plan to eliminate the deficit during the 1987-1988 school year.
>
> We will be pleased to review the audit findings with you and the Board of Education.
>
> (C-7 Attachment)

Secondly, the record reflects that the Board having failed school district certification during the 1986-87 school year was in a Level II monitoring process (N.J.A.C. 6:8-5.1). Subsequently, the Board was notified on or about July 6, 1987 that having failed to implement certain remedial action at Level II, it had been identified for Level III corrective action. The action to be taken with respect to a Level III designation is set forth in detail in N.J.A.C. 6:8-5.2 the purpose of which reads as follows:

> (a) A district which fails to become certified as a result of its own corrective action pursuant to N.J.A.C. 6:8-5.1 shall be examined by a review team consisting of an external committee appointed by the county superintendent of schools from among qualified staff of other districts and supplemented by the Department of Education's compliance unit.

In the Commissioner's view it is clear from a reading of the record that when the County Superintendent rejected the Board's original 1987-88 total budget proposal of $112,753,975 on February 26, 1987 and ultimately approved a revised budget proposal from the Board on March 23, 1987 which was increased by $5,700,000 to a total of $118,453,975, it was for the purpose of assisting the Board with the means to gain full State certification in order to provide its pupils with a thorough and efficient program of education.

What is not clear from a reading of the record is why the Board, after the defeat of its 1987-88 current expense proposal and being confronted with a subsequent $5,700,000 reduction in the local tax levy imposed by Council, did not seek a conference of the parties with the County Superintendent following its appeal of Council's action of April 28, 1987 (C-1) to the Commissioner on May 6, 1987.

The authority which permits the County Superintendent to become involved in formal budget proceedings after the pleadings have been filed with the Commissioner is clearly stated in N.J.A.C. 6:24-7.6 which reads as follows:

> 6:24-7.6 Conference of parties with county superintendent
>
> (a) Following receipt of the petition and answer, the Commissioner may schedule a conference to be attended by representatives of the district board of education and the governing body and to be conducted by the county superintendent of schools.
>
> (b) If the district board of education and governing body reach an agreement at the conference as to the tax levy to be certified to the county board of taxation, the district board shall submit a consent order reflecting the elements of that agreement to the commissioner not later than 10 days after the conference is concluded.
>
> (c) If the parties do not reach an agreement settling the case, any agreement reached as to stipulations of facts or narrowing of issues shall be submitted to the commissioner or the ALJ, whoever is hearing the case.

The record of this matter is barren of any evidence to the effect that such a conference was in fact held between the parties and the County Superintendent.

Given the circumstances set forth above, the Commissioner is at a loss to understand why the Board, after this matter was transmitted to the Office of Administrative Law, would have engaged in a settlement conference with Council on July 22, 1987 or be willing to stipulate at the time of the hearings that it was willing to accept a lesser amount of monies than it had originally appropriated in certain items of its current expense budget without a full hearing on the merits of the need for such funds in order to provide a thorough and efficient program of education for its pupils. Moreover, given the fact that the County Superintendent is by law responsible as the Commissioner's representative pursuant to

N.J.S.A. 18A:7A-28 to review a district budget for sufficiency as well as being intimately involved with the program monitoring and review process which currently has placed the Paterson School District in a Level III monitoring review status, it is inconceivable that the Board did not call upon the County Superintendent to testify at the hearing conducted in this matter as to why he had required a current expense budget of not less than $118,453,975.

The Commissioner observes that Council in its exceptions takes issue with the ALJ's failure to permit it to reallocate the $5.7 million in reductions in a manner consistent with its second certification of August 4, 1987 (C-2), rather than its original certification of April 28, 1987 (C-1). Council's arguments in light of this exception have been recited, ante. The Commissioner finds such arguments to be without merit essentially for the reasons set forth by the ALJ in the initial decision. Moreover, it is noted that the ALJ did not refuse to consider those specific line item reductions included in Council's second certification of August 4, 1987 (C-2) provided that they were directly related to the reasons and overall series reductions delineated by Council in its original certification of April 28, 1987. In this regard the Commissioner finds that the ALJ was not required to permit Council as much latitude as he did. Council's exception in this regard which contends that its actions are in compliance with East Brunswick is misplaced. In the Commissioner's judgment, East Brunswick required Council to set forth its reasons in writing for each of its current expense line item reductions at the time of its original certification of the local tax levy on April 28, 1987. (See August 5, 1987 Decision of the State Board in Bd. of Ed. of Township of Deptford v. Mayor and Council of Township of Deptford, Gloucester County, citing Union Township.)

In support of this determination the Commissioner relies on the precise language in East Brunswick which reads in pertinent part:

> 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. This is particularly important since, on the board of education's appeal under R.S. 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found.*** (emphasis supplied) (48 N.J., at 106)

(See also Deptford, supra.)

Consequently, the Commissioner finds and determines that the ALJ permitted more latitude than required pursuant to the East Brunswick standard when he directed Council to provide greater specification in its reductions than enunciated in its certification resolution of April 28, 1987 (C-1). However, having permitted that latitude, the ALJ properly concluded that the application of Council's certification of August 4, 1987 (C-2) only applies to these proceedings insofar as the individual current expense line item reductions and the reasons set forth therein are consistent with the intent of the total reductions and reasons appearing in Council's original certification.

The Commissioner, however, cannot accept the stipulations entered into by the parties at the urging of the ALJ with regard to any of the unrelated line items not relevant in Council's original certification.

The Commissioner also rejects any of those stipulations agreed to by the Board or ruled upon by the ALJ which permit any reductions of the related current expense line items by Council which were the subject matter of its original April 28 certification without further testimony from the responsible school official with regard to the need for such funds to provide a thorough and efficient system of education for the pupils of the City of Paterson during the 1987-88 school year. This determination is grounded upon the fact that Paterson School District is currently undergoing a Level III monitoring review after having failed to provide and implement a complete remedial corrective plan as a result of the Level II monitoring process during the 1986-87 school year.

Finally, the Commissioner has reviewed Council's exception to the initial decision objecting to the ALJ's denial of its Motion to Dismiss advanced on the grounds that the improper and unwarranted intrusion into these formal budget proceedings before the Commissioner by the Passaic County Superintendent of Schools is fatally defective. While the parties have raised some question with regard to the propriety of the timing in which the County Superintendent intervened into these proceedings, there is nothing in the record of this matter developed thus far which would lead the Commissioner to conclude that the actions of the County Superintendent prevented the parties from obtaining a fair and impartial review of this matter during the conduct of these proceedings before the Office of Administrative Law. The role and the responsibility of the County Superintendent, who acts on behalf of the Commissioner, is also spelled out in the provision of N.J.S.A. 18A:7A-28 as it relates to the reviewing of the annual budget for sufficiency.

Equally as important by virtue of the fact that it is directly affected by the budgetary approval process is the process by which the performance of each public school district is evaluated (N.J.A.C. 6:8-4.1 et seq). and the vital role delegated to the County Superintendent in assisting local school districts to achieve full certification.

The involvement of the County Superintendent in both the annual budgetary approval process and the school district evaluation and performance process places him in a position to have an intimate knowledge of both the financial and program requirements of those local school districts under his supervision in order to assist the local boards of education in meeting their constitutional mandate to provide a thorough and efficient system of education. The further circumstance in this matter of the Level III status of the Paterson School District likewise dictates a more aggressive role for the County Superintendent.

In the Commissioner's judgment the Board's failure to rely upon the Passaic County Superintendent as a witness to testify to its need for the restoration of the remaining $2,452,288 of Council's reductions recommended and sustained by the ALJ, along with its decision to accept those reductions by stipulation without additional testimony from its own responsible school officials is totally unacceptable given the special circumstances prevalent in this matter.

In the Commissioner's judgment the record developed thus far does not provide him with a sufficient factual basis upon which he can reach an informed decision with regard to the remaining $2,452,288 in current expense tax levy reductions that the ALJ recommends be sustained in the Board's 1987-88 school budget request.

In view of the above determination, the Commissioner remands this matter to the Office of Administrative Law and directs that the Board provide further testimony from the appropriate school official with respect to each of the affected line item amounts in which the total reduction of $2,452,288 has been recommended to be sustained by the ALJ.

Moreover, the Commissioner upon remand of this matter further directs that the Passaic County Superintendent of Schools be made a party to these proceedings for the purpose of obtaining any further relevant testimony with regard to the remaining tax levy reduction of $2,452,288 and for explanation as to why he originally required that the current expense budget be set at not less than $118,453,973.

In other respects the Commissioner adopts as his own those findings and conclusions of the ALJ which restore $3,247,712 in current expense tax levy appropriations to be raised for school purposes for the 1987-88 school year.

The Commissioner hereby certifies to the Passaic County Board of Taxation an additional amount of $3,247,712 in current expense appropriations to be made available to the Paterson School District for the 1987-88 school year. This amount, when added to the original current expense tax levy appropriation of $29,401,790 previously certified by the City Council of the City of Paterson on April 28, 1987, shall total $32,649,502 in current expense appropriations which is certified to be raised for school purposes

in the School District of the City of Paterson for the 1987-88 school year.

The Commissioner retains jurisdiction in this matter for the purpose of rendering a final determination of the portion of this decision which is being remanded to the Office of Administrative Law for further proceedings. Such proceedings must be scheduled on an expedited basis.

IT IS SO ORDERED this 24th day of December 1987.

COMMISSIONER OF EDUCATION

December 24, 1987

Pending State Board

THOMAS PURYEAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY AND DR. T. JOSIHA HAIG, SUPERINTENDENT OF SCHOOLS,	:	DECLARATORY JUDGMENT
RESPONDENTS.	:	
	:	

For the Petitioner, Thomas Puryear, Pro Se

For the Respondent East Orange Board, Love & Randall
(Melvin Randall, Esq., of Counsel)

For Respondent Dr. T. Josiha Haig, Jeffrey A. Bartges, Esq.

This matter was opened before the Commissioner by way of a Petition for Declaratory Judgment submitted by Thomas Puryear, a pro se petitioner. In the aforesaid petition, petitioner requests that the Commissioner construe the provisions of N.J.S.A. 18A:28-5 and 28-6 for purposes of declaring that Respondent Dr. T. Josiha Haig has not acquired tenure as Superintendent of the East Orange Public Schools inasmuch as he has not served the requisite period of time prescribed by the aforesaid statutes nor has the Board of Education acted to shorten that period of time required by statute to acquire a tenure status as superintendent.

By way of factual recitation, the following facts are undisputed:

1. Dr. Haig was appointed Deputy Superintendent in September 1983 and served in that capacity until August 2, 1985.

2. On August 2, 1985 he was appointed Acting Superintendent in which position he served until his appointment as Superintendent on March 19, 1986.

3. Dr. Haig has served continuously in the position of Superintendent to the present.

By way of support of his argument, petitioner contends that Respondent Haig has not served the requisite period of time necessary to obtain tenure as Deputy Superintendent under N.J.S.A. 18A:28-5 which provides as follows:

Tenure of teaching staff members

The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title after employment in such district or by such board for:

(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(c) the equivalent of more than three academic years within a period of any four consecutive academic years;

provided that the time in which such teaching staff member has been employed as such in the district in which he was employed at the end of the academic year immediately preceding July 1, 1962, shall be counted in determining such period or periods of employment in that district or under that board but no such teaching staff member shall obtain tenure prior to July 1, 1964 in any position in any district or under any board of education other than as a teacher, principal, assistant superintendent or superintendent, or as a school nurse, school nurse supervisor, head school nurse, chief school

nurse, school nurse coordinator, or as the holder of any position under which nursing services are performed in the public schools. (emphasis supplied)

Having failed to acquire tenure by way of three full years of service as Deputy Superintendent, petitioner contends that Respondent Haig became subject to the provisions of N.J.S.A. 18A:28-6 which provide as follows:

> Tenure upon transfer or promotion
>
> 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 his 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 members, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion. (emphasis supplied)

While petitioner does not dispute the fact that Respondent Haig has by operation of N.J.S.A. 18A:28-6 obtained tenure as Deputy Superintendent, it is his contention that respondent has not served the requisite two years in the position of Superintendent to which he was transferred. Thus, he contends that neither Haig nor the East Orange Board of Education can claim that a tenured status as superintendent exists without taking formal action under N.J.S.A. 18A:28-6 to shorten the period of time required.

By way of response to petitioner's contention, Respondent East Orange Board of Education (Board) contends that Haig as Deputy Superintendent was in a position eligible to obtain tenure at the time of his transfer or promotion to the position of Acting Superintendent, thus, upon such transfer, Haig continued to accrue tenure as Deputy Superintendent and began to accrue tenure eligibility in the new position of Superintendent of Schools, citing Euell v. Board of Education of Princeton Regional School District, 1979 S.L.D. 171 for the aforesaid proposition. The Board argues that since Haig was in a position "eligible to obtain" tenure at the time of transfer in conformity with the exact language of N.J.S.A. 18A:28-6 he was entitled to accrue tenure simultaneously in the new position of Superintendent while continuing to accrue tenure status in his previous position of Deputy Superintendent. Thomas Smith v. Board of Education of the Township of Egg Harbor, 1974 S.L.D. 430

Finally, since no question exists as to Haig's tenure as Deputy Superintendent, the Board contends that Haig's tenure status as Superintendent hinges upon whether his service as Acting Superintendent from August 2, 1985 through March 18, 1986 may be tacked on to his service as Superintendent in order to complete the two years in the new position of Superintendent required by N.J.S.A. 18A:28-6.

In the Board's view, such an outcome is dictated by such cases as Flood v. Jersey City Board of Education, decided by the Commissioner December 22, 1986; R. Thomas Jannarone, Jr. v. Board of Education of the City of Asbury Park, 1976 S.L.D. 526; and Pastore v. Jersey City Board of Education, decided June 22, 1984.

Respondent Haig's arguments largely mirror those of the Board. Contending that the segment of N.J.S.A. 18A:28-6(a) which permits persons "***under tenure or eligible to obtain tenure***" to obtain tenure after two consecutive calendar years clearly permits the conclusion that he has obtained tenure after two years of service as Superintendent. Such statutory provision, contends Respondent Haig, was designed by the Legislature to prevent abuse and the evasion of tenure acquisition. Like the Board, Haig contends that service as Acting Superintendent tacks on to service as Superintendent to provide the necessary two calendar years required to obtain tenure as Superintendent pursuant to N.J.S.A. 18A:28-6. Respondent Haig bases such contention upon the fact that his service as Acting Superintendent was not as a temporary

substitute in a position held by another but that a genuine vacancy did in fact exist. Sayreville Education Association v. Sayreville Board of Education, 192 N.J. Super. 424, 453 (App. Div. 1984) Further, Haig asserts that such determination is likewise consistent with the Commissioner's decisions which hold that it is the duties performed, not the title assigned, which determines the tenure status of an individual. Salerno et al. v. Board of Education of Newark, decided May 5, 1987 and Figurelli v. Board of Education of Jersey City, decided by the Commissioner December 11, 1986, aff'd State Board May 6, 1987

The Commissioner has carefully examined the arguments of the parties and the various cases and statutory references cited by the parties in support of their respective positions. Based upon such review, the Commissioner concludes that the determination relative to this matter rests upon conclusions to be reached on two specific issues, namely:

1. The precise meaning of N.J.S.A. 18A:28-6 relative to tenure upon transfer or promotion; and

2. The manner in which Respondent Haig's service as Acting Superintendent is to be considered for purposes of tenure acquisition.

In his review of the case law relevant to this issue, the Commissioner finds two cases most instructive in that they both involve the promotion of persons from the position of assistant superintendent to superintendent after periods of service as acting superintendent. See Jannarone, supra, and Robert F.X. Van Wagner v. Board of Education of the Borough of Roselle, 1973 S.L.D. 488.

Of the two cases cited above, the factual pattern relative to the actual service and positions held by the individuals involved, the matter of Van Wagner, supra, fits almost precisely the factual pattern of the case under consideration. Van Wagner's actual contracted services were as follows:

1. Assistant Superintendent from January 5, 1970 to June 30, 1970.

2. Acting Superintendent from July 1, 1970 to June 30, 1971.

3. Superintendent of Schools from July 1, 1971 to June 30, 1972.

4. Superintendent July 1, 1972 to June 30, 1973.

On March 13, 1973, however, the Roselle Board of Education terminated his contract as Superintendent as of May 1, 1973 thus purportedly terminating his services as superintendent prior to his

rendering a full two years of service under that title. Under those circumstances, the Roselle Board contended that Van Wagner had not acquired tenure as a superintendent because he had not met the provisions of N.J.S.A. 18A:28-5 for three calendar years of service which they contended must be met before the provisions of N.J.S.A. 18A:28-6 could become applicable. As a calendar year employee, the board contended that Van Wagner whose service began on January 5, 1970 would have had to serve until January 4, 1973 to obtain tenure as assistant superintendent and thus the two-year period required for tenure pursuant to N.J.S.A. 18A:28-6 in the position to which he was transferred (superintendent) would not begin to run until that time. The Commissioner rejected that reading of the relevant statutes as follows:

> However, the Commissioner holds to the contrary - that the time period toward tenure in a specific position to which a nontenured teaching staff member is "promoted" or "transferred" begins to toll at the time of such promotion or transfer and runs from that time forward, until such time as the staff member has fulfilled the precise requirements of N.J.S.A. 18A:28-5 for a general tenure in the school district and, at that time, or subsequently, has fulfilled one of service requirements of N.J.S.A. 18A:28-6. The Commissioner holds that a staff member has achieved a tenure status in the position to which he was promoted or transferred when he/she has acquired a tenure status first as a teaching staff member under N.J.S.A. 18A:28-5, and simultaneously under N.J.S.A. 18A:28-6. Thus, when a person at the same time - concurrently is appointed as a teaching staff member for one year, and is subsequently properly promoted to another position for two consecutive years, he would acquire a tenure status under both N.J.S.A. 18A:28-5 and 6 at the same time.
>
> The Commissioner determines that the two statutes, N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6, must be read in pari materia, and that the prescriptive mandate of the second statute is triggered at the time when the precise requirements of N.J.S.A. 18A:28-5 have been met. If, at that time, the teaching staff member has completed the service requirements of both statutes, he has achieved not only a general tenured status as a teaching staff member, but also a tenured status to his position. He has served an adequate probationary period. As the Court said in Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962):

> "***The objectives [of the tenure statutes] are to protect competent and qualified teachers in the security of their positions during good behavior, and to protect them, after they have undergone an adequate probationary period, against removal for unfounded, flimsy, or political reasons.***"
> (at p. 71)

This view is founded on a careful reading of the last paragraph of N.J.S.A. 18A:28-6 wherein it is clearly stated that the statute's provisions are applicable to nontenured teaching staff members as well as to those who have acquired a tenured status. Specifically, the Commissioner refers to that portion of the statute (N.J.S.A. 18A:28-6) which provides that, in the event employment in a "new position" is terminated:

> "*** before tenure is obtained therein, if he then has tenure in the district *** such teaching staff member shall be returned to his former position.***" (emphasis supplied.)

in the Commissioner's judgment, the "if" which the statute contains is a clear reference that the statute is applicable to nontenured as well as tenured teaching staff members who are "transferred" or "promoted" in the course of their employment. Thus, the Board's argument, ante, is, in the Commissioner's view, a specious one. (Van Wagner, supra, at 492)

Thus, applying the interpretation of the relevant statutes as set down by the Commissioner in Van Wagner, it is clear that Respondent Haig, who served consecutively as Deputy Superintendent, Acting Superintendent and Superintendent from September 1983, attained tenure as a Deputy Superintendent after three years of service pursuant to N.J.S.A. 18A:28-5(a) as of September 1986. Further applying the interpretation iterated in Van Wagner, supra, Respondent Haig was entitled to count such period of time served as superintendent simultaneously toward tenure as both Deputy Superintendent and Superintendent as provided by N.J.S.A. 18A:28-6.

The crucial question, however, as to Dr. Haig's tenure status as Superintendent is contingent upon when one commences to count the period of time served as Superintendent under the provisions of N.J.S.A. 18A:28-6. If one begins such count on March 19, 1986, when he bore the actual title, excluding the period of time served as Acting Superintendent, then Dr. Haig's acquisition of tenure as Superintendent would not occur until March 18, 1988.

In reaching a determination as to the issue of whether the period of time served by Dr. Haig as Acting Superintendent tacks on to his service under the actual title of Superintendent, both Van Wagner, supra, and Jannarone, supra, are instructive. In both of these cases, the Commissioner determined that the period of time served in the acting capacity was to be counted in determining the individuals' tenure status as superintendents, even in the face of opposition from the respective boards of education. In the one instance, that of Van Wagner, it was clear that the petitioner in that matter was filling a vacant position under title of acting superintendent and, thus, there was no technicality of another claimant to the position of superintendent. In Jannarone, supra, the Commissioner found that Jannarone was entitled to claim the period of service as acting superintendent toward tenure as superintendent even when there was no vacancy and where the superintendent was on extended leave. In doing so, the Commissioner relied upon the duties actually performed, not the title assigned, which determine the tenure status of a teaching staff member, as is contended by Respondent Haig in his brief citing Salerno, supra, and Figurelli, supra. In support of such proposition, the Commissioner adopts with approval the language of Jannarone, supra, wherein he held:

> The actual realities of the instant matter demand a similar liberal interpretation in the context of the precise conditions set forth in the statute N.J.S.A. 18A:28-6, ante, since here, as in Wall, supra, and Zielinski, supra, the Board had full knowledge of petitioner's actions in the performance of the duties of Superintendent in July 1973 and in fact ratified them by its acceptance of petitioner as "acting superintendent" at both its caucus and regular meetings. A ruling to the contrary, and an elevation of Dr. Smith's limited performance of duties during that month as that of the Superintendent would, in the judgment of the Commissioner, be a patently unfair categorization, an elevation of title over substance which cannot be sustained.
>
> (Jannarone, supra, at 542)

In the instant matter, it is abundantly clear that the East Orange Board of Education offers no challenge to the inclusion of Dr. Haig's service as Acting Superintendent in determining his tenure status as Superintendent but actually supports such inclusion. Under the circumstances, therefore, the Commissioner finds and determines that Dr. T. Josiha Haig acquired tenure as a Deputy Superintendent pursuant to the provisions of N.J.S.A. 18A:28-5 in September 1986 and subsequently acquired tenure as a Superintendent on August 1, 1987 upon the completion of two years service as Superintendent pursuant to the provisions of N.J.S.A. 18A:28-6.

COMMISSIONER OF EDUCATION

December 24, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5165-87
AGENCY DKT. NO. 203-6/87

EAST ORANGE BOARD OF EDUCATION,
Petitioner,
v.
EAST ORANGE CITY COUNCIL,
Respondent.

Melvin Randall, Esq., for petitioner (Love & Randall, attorneys)

Barbara A. Bell, Esq., for respondent

Record Closed: October 23, 1987 **Decided:** October 26, 1987

BEFORE DANIEL B. MC KEOWN, ALJ:

INTRODUCTION

The East Orange Board of Education (Board) appeals a determination of the governing body of the City of East Orange (Council or governing body) certifying to the Essex County Board of Taxation a lesser amount to be raised by local property taxes for 1987-88 current expense school purposes than the amount fixed by the Board of School Estimate. After the Commissioner of Education transferred the matter on July 28, 1987 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted September 9, 1987 during which the issues to be decided were resolved and a plenary hearing was scheduled for November 18, 1987. Thereafter, Council's motion to amend its answer by which additional issues

were raised was granted by letter ruling dated October 7, 1987. Pursuant to the amended prehearing order, the Board seeks summary decision in its favor and an Order restoring all monies to its 1987-88 current expense budget which were reduced by Council from the amount set by the Board of School Estimate. Council seeks summary decision in its favor by way of a dismissal of the Petition of Appeal for the asserted failure of the Board to strictly adhere to statutory prescription with respect to its adoption of the proposed 1987-88 current expense budget, and for the asserted failure of the Board to perfect the Petition of Appeal in the manner prescribed by law.

This initial decision concludes that the Board of Education is entitled to summary decision in its favor and an Order by which $2,800,000 is to be added to the amount already certified by Council to the Essex County Board of Taxation to be raised by local property taxes for the 1987-88 current expense costs of the East Orange school district.

PROCEDURAL BACKGROUND FACTS

The following facts, established in this record, are not in dispute between the parties. The East Orange school district is classified as a type I school district. N.J.S.A. 18A:9-1. In type I districts, members of the board are appointed by the chief executive officer of the municipality. N.J.S.A. 18A:12-7. While a board of education in a type I district prepares its annual school budget as do type II districts having an elected board, budgets prepared in type I school districts are not voted upon by the electorate; rather, they are submitted to a board of school estimate. Boards of school estimate are composed of two members of the board of education, two members of the municipal governing body, and the chief executive officer of the municipality. N.J.S.A. 18A:22-1. Boards of school estimate fix the amount of money necessary to be appropriated for the use of public schools in the district for the ensuing school year and certifies such amount to the municipal governing body and the board of education. N.J.S.A. 18A:22-14.

In this case the Board adopted a proposed annual school budget for 1987-88. On the same day it filed its proposed budget with the Board of School Estimate. This Board of School Estimate consists of the mayor of the City of East Orange who is also the president of the Board of School Estimate, the finance chairman of city council, the city council chairman, the president and the vice president of the Board of Education. The

Board of School Estimate, on the same day the Board of Education's proposed budget was filed with it, certified to the Board of Education and to the East Orange governing body an amount of money necessary to be appropriated for the use of the East Orange public schools for the 1987-88 school year, exclusive of the amount apportioned to it by the Commissioner. Three months later, the governing body adopted a resolution to certify to the Essex County Board of Taxation an amount to be raised by local taxes for 1987-88 current expense school purposes less than the amount certified to it by the Board of School Estimate.

The Board of Education filed the instant Petition of Appeal before the Commissioner of Education on June 30, 1987. The governing body filed its answer on July 24, 1987 after having been granted an extension of time within which to do so. Following the governing body's sixth separate defense set forth in its original answer, counsel for the governing body states "Annexed hereto please find Respondent's [governing body's] statement as required by N.J.A.C. 6:21-7.5." The referenced statement is a purported statement of reasons for reductions, but without specific dollar reductions, imposed by the governing body upon the amount certified to it by the Board of School Estimate.

There is no evidence to show the Board of Education notified in writing either the Board of School Estimate of its intent to appeal, N.J.S.A. 18A:22-14, or the governing body, N.J.S.A. 18A:22-17.

From the foregoing procedural background facts, the following issues have been joined by the pleadings and the amended answer.

ISSUES

The amended prehearing order sets forth the following issues of the case:

1. Whether the Board establishes by a preponderance of the credible evidence its need for any or all the $2.8 million reduction imposed by the governing body on [its] proposed 1987-88 current expense school budget.

    A. The governing body, by motion made and granted, puts into issue the amount in dispute. The Board asserts the amount in dispute is $2.8 million, while the governing body asserts the amount in dispute is $1,796,492.

2. Whether on that ultimate issue the Board is entitled to summary decision on the merits for the alleged failure of the governing body to comply with the mandate of Board of Education of East Brunswick v. Twp. Council of East Brunswick, 48 N.J. 94 (1966).

3. Whether the petition of appeal should be dismissed for the asserted failure of the Board to have served a Notice of Appeal upon the governing body.

AMOUNT IN DISPUTE

The record reveals that at a special public meeting held March 18, 1987 at 4:30 p.m., the Board adopted a proposed 1987-88 school budget after having accepted from its own finance committee a recommended reduction of $210,000. (See, Exhibit B, attached to Council's brief.) On the same day, but after the Board adopted its proposed budget, the Board of School Estimate met and adopted a resolution which provides in part as follows:

> WHEREAS, the Board of Education of East Orange in the County of Essex by resolution voted on March 18, 1987, considered the sum of $13,299,300.00 necessary to be raised by City Taxes for the operation of the public schools of the City of East Orange in the County of Essex for the school year beginning July 1, 1987 and ending June 30, 1988, exclusive of state or other revenue * * *
>
> NOW, THEREFORE BE IT RESOLVED, that the Board of School Estimate of the City of East Orange, County of Essex, State of New Jersey, does hereby fix and determine the sum of $12,296,322.00 to be necessary to be raised by City Taxes for the operation of the public schools of the City of East Orange in the County of Essex for the school year beginning July 1, 1987 and ending June 30, 1988, exclusive of state or other revenue per itemized budget summarized as follows:
>
> SUMMARY OF SCHOOL BUDGET AND DISTRICT TAXES FOR THE SCHOOL YEAR 1987-88
>
> [The Board of School Estimate's Summary of its action contained within the resolution notes that it set the Board's 1987-88 total current expense budget at $62,628,798, of which $13,299,830 is to be raised by local taxation. The Summary also notes the fact that while $13,299,830 is to be raised by local taxation for the 1987-88 school year, July 1, 1987 through June 30, 1988, the actual amount to be raised for school purposes by local taxation for the

1987 calendar year, January 1, 1987 through December 31, 1987, is $12,296,322.]

(Exhibit A, attached to Council's brief)

The Board of School Estimate duly filed its resolution, which is signed by each of the five members of the Board of School Estimate, with Council. Council, at a meeting conducted June 22, 1987, adopted a resolution which provides in part as follows:

> WHEREAS, the Board of School Estimate has filed with the City Council a Certificate of the amount of money necessary to be appropriated for the use of the public schools of the City of East Orange for the ensuing year, beginning July 1, 1987 and ending June 30, 1988, in the sum of $13,299,830, exclusive of State and other funds; and
>
> WHEREAS, R.S. 18:6-53 [now, N.J.S.A. 18A:22-17] provides that no amount in excess of one and one-half percent of the valuation of assessable rateables of any municipality as last determined by the County Board of Taxation shall be appropriated except with the concurrence and consent of the Governing Body expressed by its resolution duly passed; and
>
> WHEREAS, the valuation of the assessable rateables of the City of East Orange as last determined by the County Board of Taxation is the sum of $372,707,400.00 and one and one-half percent of such rateables is the sum of $5,590,611.00; and
>
> WHEREAS, the City Council of the City of East Orange has determined that the sum of $10,499,830.00 is the amount necessary for the use of said public schools instead of the sum of $13,299,830.00 as set forth in the Certificate heretofore filed by the Board of School Estimate; and
>
> WHEREAS, the amount to be included in the tax resolution for 1987 is $6,901,407.00 for the use of the public schools for the period from January 1, 1987 to June 30, 1987 and one-half of the appropriation for the school year beginning July 1, 1987 and ending June 30, 1988 is the sum of $5,249,915.00 * * *
>
> (Exhibit E, attached to Council's brief)

This certification resolution is similar to that adopted by the Board of School Estimate. Council acknowledges that the amount certified to it as being necessary to be raised by local taxes for school purposes for the school fiscal year July 1, 1987 through June 30, 1988 is $13,299,830, but its resolution provides for the raising of taxes on a calendar year basis, January 1, 1987 through December 31, 1987.

Council's resolution above unequivocally states that it determined the sum of $10,499,830 as the amount necessary for the use of the East Orange public schools for 1987-88 "* * * instead of the sum of $13,299,830.00 as set forth in the Certificate heretofore filed by the Board of School Estimate * * *." Council now takes the position that its sum of $10,499,830 must be compared to the amount $12,296,322 as set forth in the second paragraph of the Board of School Estimate's certification, Exhibit A above, in order to arrive at the true amount in dispute of $1,796,492. The Board of Education relies upon the affidavit filed from its secretary-business administrator who is also the secretary to the East Orange Board of School Estimate, to explain the inconsistent figures on the face of the Board of School Estimate's certification resolution.

The school board secretary, acting in his role of Board of School Estimate secretary, attests that the amount $12,296,322 is the total tax levy for the 1987 calendar year and through inadvertence or clerical error that figure was inserted in the second paragraph of the resolution of the Board of School Estimate instead of $13,299,830, the amount set for the 1987-88 school fiscal year. Council in support of its contention that the Board of School Estimate certified only $12,296,322 for the 1987-88 school year filed affidavits from the mayor and from Council's finance committee chairman, both of whom attended the Board of School Estimate meeting on March 18, 1987. Neither individual, nevertheless, attests to the resolution of the Board of School Estimate being erroneous or that it did not fix the amount $13,299,830 as the amount to be raised by local taxes for school purposes in 1987-88. Furthermore, neither affidavit attests that the figure the Board of School Estimate adopted as being necessary to be raised by local taxes for 1987-88 school purposes is $12,296,322.

Having considered the certificate of the Board of School Estimate (Exhibit A) together with the resolution adopted by Council (Exhibit E), in conjunction with the affidavit of the secretary-business administrator and secretary to the Board of School Estimate, and the affidavits filed by the mayor and the chairman of the finance committee for City Council, I **FIND** that the Board of School Estimate fixed and certified

to the Board of Education and to the governing body $13,299,830 as the amount necessary to be raised by local taxes for current expense school purposes for the 1987-88 school fiscal year, July 1, 1987 through June 30, 1988. The Board of School Estimate further fixed the amount for school purposes to be raised by local taxes for the 1987 calendar year, January 1, 1987 through December 31, 1987, as $12,296,322. I also **FIND** that the governing body understood the distinction between the two amounts referenced in the Board of School Estimate's certification for it specifically refers to the sum $13,299,830 as the amount "set forth in the Certificate heretofore filed by the Board of School Estimate * * *" (Exhibit E). I further **FIND** that the amount $12,296,322 was set forth in the Board of School Estimate's Certificate second paragraph, through inadvertence or clerical error. The intent of the Board of School Estimate and its official act and the knowledge of that intent and act by the governing body is clearly revealed in the body of the respective resolutions adopted by the Board of School Estimate and by the governing body.

Accordingly, I **FIND** and **CONCLUDE** on the evidence that the amount in dispute is $2,800,000, an amount arrived at by comparing $13,299,830 with $10,499,830, the amount determined by the City Council of the City of East Orange as being necessary for the 1987-88 school fiscal year of the East Orange public schools.

COUNCIL'S MOTION TO DISMISS

I
Asserted Board Failure to Adopt Its Budget According to Law

Council contends that N.J.S.A. 18A:22-7 imposes an obligation upon the Board to deliver a copy of its budget to each member of the Board of School Estimate which, in turn, must then fix and determine the amount of money necessary to be appropriated for school purposes the ensuing school year. This obligation, Council argues, imposes upon the Board the duty to provide information necessary for the Board of School Estimate to perform its statutory obligations. Council argues that in this instance the Board failed to provide the Board of School Estimate with a copy of its proposed budget, after the Board accepted the recommendation from its own finance committee to reduce its proposed expenditures by $210,000. Council contends that because the Board did not provide the

Board of School Estimate with either the revised budget nor an explanatory statement of the changes and revisions made following Board adoption of the recommendation to reduce its proposal by $210,000 the Board of School Estimate could not have properly fulfilled its statutory obligation. As such, Council demands that the petition of appeal be dismissed as a matter of law. Council relies upon the affidavits filed by the mayor and by the chairman of the City Council finance committee, both of whom are as noted members of the Board of School Estimate. Council also relies upon an earlier administrative decision, Bd. of Ed. of City of Orange Twp. v. Bd. of School Estimate and City Council of City of Orange Twp., OAL DKT. EDU 4324-85, aff'd Comm'r of Ed. (Mar. 31, 1986).

The Board, it is noted, did not respond to this motion to dismiss beyond its motion for summary decision in its favor.

It is necessary to consider the undisputed procedural background facts of the matter set forth above in order to dispose of this motion. The petition of appeal represents a challenge by the Board of Education to the action of the City Council of East Orange reducing the amount certified to it by the Board of School Estimate as being necessary for the operation of the East Orange public schools for the 1987-88 school fiscal year. The mayor and the chairman of the Council finance committee, in their roles as members of the Board of School Estimate, now attest that the Board of School Estimate was not provided on March 18, 1987 with any documentation of the changes occasioned by the Board accepting from its own committee a recommended reduction of $210,000. Even accepting these attestations as true, the fact remains that both the mayor and the chairman of Council's finance committee joined in the resolution adopted by the Board of School Estimate that very same day fixing the sum of $13,299,830 as being necessary for the East Orange public schools. Furthermore, there is no valid need for the Board of School Estimate to have had documentation which does not support the current expense budget proposed to it by the Board.

Council suggests that the Board of School Estimate acted in an arbitrary, capricious, unreasonable, or unlawful manner. If that is the argument to be made, it is unpersuasive in light of the undisputed facts. Recall that prior to the time the Board delivered its proposed budget to the Board of School Estimate on March 18, 1987 it had already incorporated into its proposal the $210,000 reduction recommended to it by its own finance committee. That being so, there was no need for the Board of School Estimate to have documentation with respect to how the Board reduced its proposal prior to the time the Board of School Estimate received the proposal.

Finally, this dispute, unlike Bd. of Ed. of City of Orange Twp., supra , is a dispute between the East Orange Board of Education and the East Orange governing body. The Board of School Estimate complied with its statutory mandate to fix the amount necessary for school purposes in the City of East Orange for the 1987-88 school fiscal year. It further certified such amount to the Board and to the East Orange City Council. It is Council's subsequent action in the form of certifying to the Essex County Board of Taxation a lesser amount of local taxes for school purposes than the amount the Board of School Estimate certified to it which is the focus of this dispute.

Accordingly, Council's argument that the Petition of Appeal should be dismissed as a matter of law for the asserted failure of the Board to follow a statutory prescription with respect to its adoption of a proposed 1987-88 school budget is DENIED. No showing has been made by Council on this record that either the Board or the Board of School Estimate failed to comply with its statutory obligation.

II
Asserted Failure of the Board to Perfect its Appeal

This part of Council's motion to dismiss the Petition of Appeal is bottomed upon the asserted failure of the Board to notify the Board of School Estimate and it, the governing body of the City of East Orange, of its intent to appeal. It must be noted here that at page 14 of Council's brief, Council contends that the Board failed to notify the Board of School Estimate of its intent "* * * to appeal the action of the Board of School Estimate." This Board, I FIND, is not appealing by this petition of appeal the action of the Board of School Estimate. Rather, the appeal is directly against the governing body's failure to certify to the Essex County Board of Taxation the amount fixed for school purposes to be raised by local taxes by the Board of School Estimate. A separate notice of intent to appeal is not necessary in this case to have been provided the Board of School Estimate.

N.J.S.A. 18A:22-17 provides in part as follows:

> * * * Within 20 days after the governing body of the municipality appropriates in its tax ordinance an amount for the use of the public schools of the district for the ensuing school year, the board of education shall notify the governing body if it intends to appeal to the Commissioner the amount so appropriated.

While the statute requires notification to the governing body by the Board of an intent to appeal the amount it appropriates for school purposes, the statute is silent with respect to the method of such notification. In this case, Council acted on June 22, 1987 to certify the controverted amount for school purposes to the Essex County Board of Taxation on June 22, 1987. The Board of Education filed its petition with the Commissioner on June 30, 1987 and appended to that petition proof of mailing to Council. By virtue of Council's receipt of the petition of appeal, presumably within days following June 30, 1987, notice of the appeal was provided Council. Absent specific statutory direction that the notice of intent to appeal must be separate from the actual petition of appeal, so long as the petition is filed within 20 days after the determination of the governing body, the purpose of the statute is met. The statute on its face requires a notice of intent to appeal within 20 days following the action by the governing body in order to ensure that budget disputes may be disposed of as quickly as possible.

Accordingly, the absence of a separate notice of intent to appeal to the governing body, in light of the fact the governing body received the petition of appeal filed against it within days of June 30, 1987 well within the 20 days allowed from June 22, 1987, is no basis upon which to dismiss the Petition of Appeal as a matter of law. Accordingly, the motion to dismiss is DENIED.

BOARD'S MOTION FOR SUMMARY DECISION

The Board moves for summary decision in its favor on the asserted failure of Council to provide a statement of specific line item reductions and the alleged failure of Council to provide a statement of underlying reasons for its specific reductions on June 22, 1987 when it certified to the Essex County Board of Taxation an amount lesser for school purposes than the amount certified to it by the Board of School Estimate. The Board maintains that such an asserted failure by the governing body is a fatal flaw in these proceedings and, as such, it is entitled to full restoration of the total reductions imposed upon its 1987-88 current expense budget by the East Orange governing body. In support of this argument, the Board relies upon the decision of the New Jersey Supreme Court in Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94, 105-106 (1966) and subsequent decisions of the Commissioner of Education. Thus, the Board seeks summary decision in the absence of genuine issues of material fact. The arguments of Council in support of its motion to dismiss have already been addressed.

The action taken by Council on June 22, 1987 was to acknowledge the Board of School Estimate certified to it the sum of $13,299,830 as being necessary for the use by the public schools in the City of East Orange. Council recites in its resolution, Exhibit E, that no amount in excess of one and one-half percent of the valuation of assessable rateables shall be appropriated except with its consent. Having declared that one and one-half percent of the assessable rateables in the City of East Orange is $5,590,611, it then proceeded to determine that the amount necessary for the East Orange public schools for the 1987-88 school fiscal year is $10,499,830. How Council arrived at that figure at that time is nowhere to be found in this record, nor do the affidavits filed by Council in support of its motion to dismiss shed any light whatsoever on its underlying reasons. Rather, on July 24, 1987, after the Board filed the petition of appeal against Council's action and Council was granted an extension of time within which to file its answer, the attorney for Council attached a purported statement "* * * as required by N.J.A.C. 6:21-7.5". It is believed that Council's attorney intended the citation to read N.J.A.C. 6:24-7.5 which provides in full as follows:

> (a) The governing body shall submit with its answer the following documents:
>
> 1. The amount certified for each of the major accounts;

The referenced statement attached to Council's answer is, it is initially noted, dated July 24, 1987 and is signed by Alonzo Kittrells, identified as an educational consultant for the City Council of East Orange. The purported statement of reasons is reproduced here in full:

> In accordance with Bd. of Education of East Brunswick v. Twp. Council of East Brunswick, 48 N.J. 94 (1966), respondent, City Council of the City of East Orange herein submits its statement of reasons underlying its reduction of the 1987-88 budget request by the Board of Education of the City of East Orange.
>
> 1. Anticipated surplus for 1986-87 school year.
>
> 2. Elimination of excessive administrative positions.
>
> 3. Availability of additional capital improvement funds. [Note that there is no dispute in this matter regarding capital outlay.]
>
> 4. Misstatement of financial requirement for 1986-87 school year.

5. Personnel attrition factors which have not been considered by Petitioner, Board of Education.

6. Failure to generate available revenue.

7. Failure to effectuate revenue cost-saving freeze on vacant positions.

8. Elimination of unnecessary personnel, programs, and materials reflected in the 1987-88 budget request.

9. Reduction of unnecessary monies, e.g. overtime and extra compensation.

These are the facts upon which the Board relies in its motion for summary decision in its favor.

LAW

The language of the New Jersey Supreme Court in E. Brunswick, supra, is instructive:

> 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, reasonable and with full regard for the state's educational standards and its own obligations to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the make up of the community. Where its action entails a significant aggregate reduction in the budget and the 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. 48 N.J. at 105-106.

Shortly after the E. Brunswick decision, the New Jersey Supreme Court had occasion to determine whether the Commissioner had authority with respect to type 1 school districts to direct an increase in the annual school appropriation to be raised by local taxation over the amount fixed by local officials. In Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth, 55 N.J. 501, a unanimous Court held that with respect to its earlier

ruling in E. Brunswick, "Everything there said is no less applicable to type 1 districts." at p. 505. The Court went on to hold as follows:

> The local and supervisory obligation [of the Commissioner] must apply to type 1 as well as to all other types of districts and there is utterly no legislative indication to the contrary. Otherwise there can be no assurance that the constitutional mandate will be fulfilled in type 1 districts (which are primarily city school systems). The type 1 local governing body, when it is brought into the fund raising process, must perform its function under no less a standard than applies in any other case. What was said in East Brunswick in this connection equally applies * * *.
>
> The 11/2% provision (N.J.S.A. 18A:22-17) does not evince any different intent. All that provision means that if the amount fixed by the board of school estimate is less than 1 1/2% of the assessed valuation of the municipal rateables, the governing body must accept that figure and provide for a tax levy to meet it [citation omitted]. But that if the amount fixed by the board exceeds that percentage, the governing body may reduce the amount, acting in accordance with the [E. Brunswick] standard previously mentioned, to a sum not less than the 1 1/2% figure.
>
> 55 N.J. at 505-507.

In Bd. of Ed. Tp. of Union v. Tp. Committee of the Tp. of Union, OAL DKT. EDU 2788-81 (Jun. 5, 1981), adopted Comm'r of Ed. (July 9, 1981), the Commissioner stated:

> In the opinion of the Commissioner * * * the law set forth in E. Brunswick, supra [requires] the municipal government to recommend to the board the supporting reasons for the reduction or elimination of specific line items which it believes necessary to total budgetary reduction. The Commissioner deems it proper that such decisions be made at the time of the reduction and not on a contingency basis only, if and when the budget reduction is appealed by the board to the Commissioner.

The State Board of Education in Bd. of Ed. Tp. of Deptford v. Mayor and Council, Tp. of Deptford, 1987 S.L.D. — , held as follows:

> We conclude that the language of the [E. Brunswick Court] clearly requires that a governing body provide reasons for its reductions at the time it acts pursuant to N.J.S.A. 18A:22-37. Further, we emphasize that the Commissioner has long held that the rational for the reductions must be provided at that time, e.g. Union Tp. Bd. of Ed. v. Tp. Committee, decided by the Commissioner, July 9, 1981, and we fully concur with the Commissioner that the failure of the

> governing body to know, identify and set forth the specific line items of the budget and to [enunciate] supporting reasons at the time of the reduction renders the reduction an arbitrary act. Union Twp., supra. We also agree that such arbitrariness is not negated by the subsequent submission of information or subsequent construction of a rational * * *

FINDINGS, CONCLUSIONS AND DISCUSSION

Having reviewed the foregoing cases, the law is clear that a governing body, in this case Council, must have underlying reasons to certify to the county board of taxation a lesser amount than that certified to it by the Board of School Estimate at the time it, Council, determines to certify such lesser amount. In this case, Council determined on June 22, 1987 to certify a lesser amount to the Essex County Board of Taxation than the amount certified to it by the Board of School Estimate. Council, nevertheless, had no underlying reasons, I **FIND**, at the time it determined to reduce the amount certified to it by the Board of School Estimate other than a citation to N.J.S.A. 18A:22-17. That mere citation, I **CONCLUDE**, is insufficient on its face to meet the requirement of the E. Brunswick court as understood by the Commissioner and State Board of Education, to know, identify and set forth the specific line items of the budget and to enunciate supporting reasons at the time of the reduction particularly in a situation where the reduction amounts to $2.8 million.

I **CONCLUDE** that the fact N.J.A.C. 6:24-7.5 directs a statement of reasons to be filed at the time an answer is filed in a budget dispute is of no comfort to Council. That administrative regulation merely directs that the statement of reasons be filed as part of the answer. The regulation is not authority for Council to disregard the clear requirements of E. Brunswick.

The purported statement of reasons, signed by Alonzo Kittrells, does not constitute an underlying statement of reasons by Council for its reduction. There is no evidence to show that the purported statement of reasons, dated July 24, 1987, were Council's reasons at the time it took the controverted action more than one month prior to the date of the purported statement. Moreover, the validity of the nine asserted reasons is seriously questioned when a purported reason of availability of additional capital improvement funds is listed as reason three when there is no dispute with respect to capital outlay funds. This purported statement of reasons, I **FIND**, by virtue of the date of the document, the absence of an accompanying resolution by Council to adopt

those reasons as its reasons, and the fact Alonzo Kittrells alone signed the statement, is nothing more than an effort by Council to bootstrap in this proceeding the statement of reasons prepared by Alonzo Kittrells as its reasons why it reduced the appropriation for school purposes on June 22, 1987. Under the E. Brunswick standard as viewed by the Commissioner and the State Board of Education in the cases cited above, such a bootstrap process does not cure the absence of Council from setting forth its underlying reasons with specific areas for recommended economy on June 22, 1987.

In sum, there are no genuine issues of material fact in the matter. Council took its controverted action on June 22, 1987. The action was taken by Council without benefit of underlying reasons for the action. The purported statement of reasons signed by Alonzo Kittrells does not cure the fatal defect to Council's action on June 22, 1987 by it not having an underlying statement of reasons. Accordingly, the matter is ripe for summary decision. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954).

Consequently, summary decision must be entered on behalf of the City of East Orange Board of Education. The reduction of $2,800,000 imposed by the Council of the City of East Orange upon the amount fixed by the East Orange Board of School Estimate for school purposes to be raised by local taxes for the 1987-88 school fiscal year current expense budget is hereby restored in full.

ORDER

It is, accordingly, ORDERED that the sum of $2,800,000 be and is hereby certified, in addition to the amount $10,499,830 already certified by the City Council of the City of East Orange, as the total amount necessary for current expense purposes of the City of East Orange Board of Education for the 1987-88 school fiscal year so that the total amount to be raised by tax levy for current expense purposes for the 1987-88 school fiscal year shall be $13,299,830. It is noted that the City of East Orange is on a calendar year for purposes of local taxes. Council has already certified to the Essex County Board of Taxation an amount of $12,151,322 to be raised during the 1987 calendar year. The Board of School Estimate's 1987 calendar year tax levy for school purposes stood at $12,296,322. For the 1987 calendar year, the difference is $145,000. For present

purposes, it is **ORDERED** that the sum of $145,000 be and is hereby certified to the Essex County Board of Taxation in addition to the $12,151,322 already certified by the governing body for current expense purposes of the City of East Orange Board of Education for the 1987-88 school year. It is also **ORDERED** that the total amount to be raised by tax levy for current expense purposes in the City of East Orange school district for the 1987-88 school fiscal year shall be and is $13,299,830.

The plenary hearing scheduled to commence November 18, 1987 is hereby cancelled.

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

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

October 26, 1987
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

OCT 27 1987
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:
OCT 29 1987
DATE

Ronald L. Lubetkin
OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE CITY OF EAST ORANGE,	:	
PETITIONER,	:	
V.	:	**COMMISSIONER OF EDUCATION**
CITY COUNCIL OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	**DECISION**
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Council's exceptions and the Board's reply thereto were timely filed.

Upon review of Council's exceptions it was noted that Council alleged that this matter was not appropriate for summary decision because the ALJ rendered his initial decision without affording Council an opportunity to respond to the Board's motion for summary decision in violation of the pre-hearing order. As a result, Council was granted the opportunity to file a reply brief to the Board's motion for summary decision. This has been reviewed for the purpose of rendering a determination in the matter.

As to the issue of the Board's motion for summary judgment, Council argues that genuine issues as to material fact exist which should not be disposed of in such a manner. It likewise argues that the Board has not sustained its burden to demonstrate that the instant matter is clearly devoid of any genuine factual issues to be decided by the trier of fact (Judson, supra). It contends that even a cursory review of the initial decision discloses that the ALJ found the existence of factual issues which he proceeded to dispose of in summary judgment rather than conducting a hearing.

In particular, Council maintains that a factual dispute exists over the amount by which the current expense budget was reduced by City Council action. The Board of Education alleges the amount to be $2,800,000, while Council takes the position that it is $1,796,492.

Moreover, Council avers that the ALJ

> determined the intent of two public bodies without one scintilla of evidence to support his determination. Without more, the judge simply accepted as truth the Secretary to the Board of Education and the Board of School Estimate's affidavit that clerical error was made in the Certificate. However, [he] totally ignored the

> Affidavit of Alonzo Kittrels that his examination of the sound recording of the meeting disclosed that the resolution that the Secretary is attesting to was NOT EVEN read to the Board of School Estimate.*** (emphasis in text)
> (Council's Exceptions, at p. 6)

Council also contends that the ALJ erroneously considered facts not supported by the record when he states:

> The Board of School Estimate, on the same day [March 18, 1987] the Board of Education proposed budget was filed with it, certified to the Board of Education and to the East Orange governing body an amount of money necessary...for the 1987-88 school year.
> (Exceptions, at p. 6 citing Initial Decision, ante)

As to this, Council argues that the "record is absolutely barren of any indication that the Board of Education delivered the budget to the Board of School Estimate on March 18, 1987." (Exceptions, at p. 7)

In addition to the above, Council contends that while it does not question the viability of East Brunswick, supra, as it relates to school budget appeals, it nonetheless argues that:

> ...[T]he standard enunciated in East Brunswick, as well the specific line-item requirement of N.J.A.C. 6:24-7.5, by necessity, contemplates those situation[s] wherein the imposed reductions were, in fact, taken from specific line-items in the budgetary document. Neither East Brunswick, nor N.J.A.C. 6:24-7.5 contemplates action taken by a governing body which considered the availability of funds from sources not included in the subject budget. Therefore, Petitioner's reliance upon the East Brunswick decision in support of the instant application, under the circumstances of this case is misplaced and misapplied as such is not dispositive of a reduction in a budget which was based upon funds other than those set forth in the budget. (Exceptions, at p. 2)

Further, Council avows that Branchburg Bd. of Ed. v. Branchburg, 187 N.J. Super. 540 (App. Div. 1983) has authoritatively settled in New Jersey that a municipality may consider funds available to a board of education from sources other than those included in the budget document and that a lump sum reduction is not necessarily arbitrary and capricious, such as was determined in Manville Bd. of Ed. v. Borough Council, 1967 S.L.D. 233. It also contends that its action did not entail a significant aggregate

reduction of the school budget even if, arguendo, the amount in dispute is $2,800,000 and not $1,796,492.

The Board's reply contends, inter alia, that the matter is ripe for summary decision, avowing that there is no evidence that Council can produce in defense of its inherently and fatally defective act of substantially reducing the budget without providing a detailed statement of its reduction and supporting reasons. Moreover, it argues that the ALJ clearly had the right to grant summary decision as a means for efficient disposition of a cause of action where no genuine issues of material fact exist.

As to Council's arguments that the ALJ erroneously made a factual determination as to the amount in dispute, the Board contends that such arguments "are fallacious and unsupported by the record." (Reply Exceptions, at p. 5) More specifically, it maintains that it is obvious from the March 18, 1987 Resolution of the Board of School Estimate that the sum of $12,296,322 was the amount certified to the governing body for the 1987 calendar year, not the total tax levy for the 1987-88 fiscal school year, a fact set forth in the affidavit of the Board Secretary and buttressed by the affidavit of Maureen Mitchell, Board President and member of the Board of School Estimate.

As to the issue of not providing the budget to the Board of School Estimate, the Board argues that:

> At the outset, it is submitted that the Governing Body wants to have the "best of both worlds." On the one hand, the Governing Body argues that the Board of School Estimate reduced the budget of the Board of Education by $1,003,508.00, then on the other argues that the Board of School Estimate could not properly perform its duty because of insufficient information.
>
> The fact is that on March 18, 1987, the Board of Education did reduce its original budget by [$210,000]. However, the [$210,000] is neither material not substantial in light of the overall budget of the Board of Education as it represents less than one percent of the total budget. Moreover, the fact that the Board of Education reduced its budget is irrelevant to the issue of whether the Board of School Estimate could properly discharge it[s] statutory function. However, assume for the sake of argument that the members of the Board of School Estimated (sic) did not have sufficient informa- tion regarding the Board's [$210,000] reduction in order to make an informed decision. Then, the Board of School Estimate could have; voted not to accept the budget; or not voted at all; or waited until

> sufficient information was provided, but instead, according to the arguments proffered by the Governing Body, the Board of School Estimate voted to reduce the budget of the Board of Education. It is submitted, that the arguments offered on behalf of the Governing Body are inconsistent. (Reply Exceptions, at p. 6)

In addition to the above, the Board points to Bd. of Ed. of the Borough of Lakehurst v. Borough Council, decided October 31, 1986 as standing for the proposition that a governing body may not justify its failure to comply with the mandates of East Brunswick, supra, by claiming that the board of education failed to supply it with necessary information. It also points to the recent decisions of the Commissioner and State Board in Bd. of Ed. of Deptford v. Mayor and Council of Deptford, decided April 27, 1987, aff'd State Board August 7, 1987, in particular that portion of the State Board decision which reads:

> We conclude that the language of the court clearly requires that a governing body provide reasons for its reductions at the time it acts pursuant to N.J.S.A. 18A:22-37. Further, we emphasize that the Commissioner has long held that the rationale for the reductions must be provided at that time, e.g. Union Township Bd. of Ed. v. Township Committee, decided by the Commissioner, July 9, 1981, and we fully concur with the Commissioner that the failure of the governing body to know, identify and set forth the the specific line items of the budget and to ennunciate (sic) supporting reasons at the time of the reduction renders the reduction an arbitrary act. Union Township, supra. We also agree that such arbitrariness is not negated by the subsequent submission of information or subsequent construction of a rationale. Id. We therefore affirm that the failure of the Council in this case to provide reasons for its line item reductions either at the time of its original tax levy certification or of its amended certification invalidated the reductions so as to warrant restoration of the total amounts. To hold otherwise would ignore the primary obligation of governing bodies acting pursuant to N.J.S.A. 18A:22-37 to act conscientiously at every step to effect savings that do not impair the educational process.*** (Slip Opinion, at pp. 3-4)

Upon review of the record in this matter including the exceptions, reply exceptions and Council's reply brief in opposition to the Board's motion for summary decision submitted after the issuance of the initial decision as explained above, the Commis-

sioner agrees with and adopts as his own the recommended decision of the ALJ restoring the sum of $2,800,000 to the amount of monies to be raised by local taxes for current expense purposes for the 1987-88 school year.

A thorough review of the record convinces the Commissioner that no genuine issues of material fact exist in this case, contrary to Council's arguments otherwise. It is readily apparent from the pertinent resolutions in this matter that the sum of $13,299,830 is the amount determined by the Board and the Board of School Estimates as necessary for the 1987-88 local tax levy for current expense purposes. It is likewise clear that the disputed sum of $12,296,322 represents not the school year levy but the 1987 calendar year tax levy which has absolutely no bearing on this matter. The actions under review herein relate to the amount of monies to be raised by local tax levy for the 1987-88 school year, not the calendar year. Further, it is unquestionably clear that an error occurred when the calendar year tax levy was inserted in the last full paragraph of the Board of School Estimate's resolution (Exhibit A). Any argument of Council that said Board acted to reduce the amount of tax levy for the 1987-88 school year or that a genuine issue of material fact exists over the 1987-88 school year tax levy determined by the Board of School Estimate is deemed meritless when plain reading of the totality of the resolution makes it apparent an error occurred.

Nor is the Commissioner persuaded that any other genuine issues of fact exist which preclude disposition of this matter by way of summary judgment. Moreover, the Commissioner finds none of the arguments advanced by Council as justification for its failure to comply with the mandates of East Brunswick, supra. Notwithstanding the 1967 Manville case cited by Council, subsequent case law has made it quite clear that the governing body must provide a statement of specific line item reductions and underlying reasons for its specific reductions as well conveyed by the ALJ's legal analysis in this matter.

Nor is the Commissioner persuaded that any alleged failure of the Board of Education to provide a budget to the Board of School Estimate reflecting exact revisions of $210,000 to the proposed budget in any way absolved the Council from meeting the requirements of East Brunswick, supra, or otherwise fatally flawed the budget process. Initially, it must be emphasized that Council is not in any position to complain about any alleged inadequacy of the information provided to the Board of School Estimate, particularly when Council itself did not raise the issue at the time it acted on the school budget submitted to it by the Board of School Estimate. If such a complaint were to be levied, it would appropriately have been the responsibility of the Board of School Estimate. It is clear that the Board of School Estimate however chose to vote to accept the $13,299,830 budget, neither rejecting it nor refraining from voting on it because of any inadequacy of information. Nor did it seek to obtain further information prior to its vote. As such, the Commissioner finds Council's belated complaint of no moment.

Finally, the Commissioner finds as patently absurd Council's argument that $2,800,000 does not constitute a significant aggregate reduction to the district's budget.

Accordingly, for the reasons expressed by the ALJ in his initial decision and herein, it is ordered that the Essex County Board of Taxation include the amount of $2,800,000 in the tax levy for current expense purposes for use by the East Orange School District for the 1987-88 school year. This amount of $2,800,000 when added to the $10,499,830 in current expenses previously certified in the local tax levy shall result in a total tax certification of $13,299,830 in current expenses for the 1987-88 school year.

Moreover, the Commissioner rejects the ALJ's recommended order certifying an additional $145,000 to the Essex County Board of Taxation as this figure relates to a purported 1987 calendar year tax levy which has no bearing on this matter. The instant matter falls under the Commissioner's jurisdiction insofar as the 1987-88 school year tax levy is concerned. Thus, he makes no judgment as to the accuracy or appropriateness of the calendar year figure nor does he make any order with respect to it.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 29, 1987

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3546-87
AGENCY DKT. NO. 116-4/87

BERNARD LAUFGAS,
Petitioner,
v.
BARNEGAT TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Bernard Laufgas, petitioner, pro se

Kathleen W. Hofstetter, Esq., for respondent (Gelzer, Kelaher, Shea, Novy & Carr, attorneys)

Record Closed: October 10, 1987 Decided: November 24, 1987

BEFORE DANIEL B. MC KEOWN, ALJ:

PROCEDURAL HISTORY

Bernard Laufgas (petitioner), a resident of Barnegat Township, filed before the Commissioner of Education a four count Petition of Appeal in which he alleges unnamed Board members improperly used public funds on unspecified occasions, that the Board denies unnamed pupils due process rights regarding disciplinary proceedings, and that the Board violates the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. Prior to the time the Commissioner transferred the matter on May 21, 1987 to the Office of Administrative

Law as a contested case under N.J.S.A. 52:14F-1 et seq., petitioner served 58 written interrogatories upon the Board on or about May 19, 1987. Petitioner supplemented those interrogatories with 18 additional written interrogatories served upon the Board on or about May 26, 1987. Thereafter the Board filed a notice of motion to strike interrogatories grounded upon the contention the interrogatories are an improper discovery request under N.J.A.C. 1:1-11.2(b).

On or about June 8, 1987 the Board served interrogatories upon petitioner. Petitioner filed answers to the interrogatories on or about July 6, 1987. The Board, by motion made, sought to have petitioner ordered to provide more specific answers to ten interrogatories. The Board also sought attorney fees for the motion pursuant to N.J.A.C. 1:1-10.5. Petitioner opposed both motions. Oral argument on the motions was heard and documents received from the Board July 16, 1987. A prehearing conference scheduled for the same day in this case was continued without specific date.

On August 17, 1987 this judge issued a written Order by which the Board's motion to strike interrogatories served upon it by petitioner was, in most respects, granted. Nevertheless, the Board was ordered to answer interrogatories regarding Count 3 within 20 days from August 17. Petitioner was ordered to provide the Board requested documents and more responsive answers to interrogatories within 20 days from August 17. The record shows the Board complied with the Order; petitioner did not. The Board filed on September 15, 1987 a Motion to Dismiss the petition for failure of petitioner to provide the ordered discovery. By letter dated September 30, 1987 from this judge, petitioner was advised that unless he responded to the motion by October 10, 1987 the record would close and the motion would be decided on the record developed thus far.

For the reasons which follow, the Board's motion to dismiss the Petition of Appeal for failure of petitioner to provide the requested discovery is granted.

BACKGROUND FACTS

The background facts of the matter are as set forth in the August 17 Order which is attached hereto and incorporated herein as if set forth in full. In addition, Board counsel submitted an affidavit in support of the motion to dismiss in which she attests in pertinent part as follows:

* * *

4. As of this date [September 9, 1987 the day the affidavit was executed], Petitioner has failed to comply with the terms of this Order [attached hereto] inasmuch as Answers to Interrogatories have not been received nor have documents been submitted by Petitioner.

5. Please be advised that the Respondent did provide Petitioner with the information required by this Order. A copy of the correspondence sent to the Petitioner on September 3, 1987 is attached hereto as Exhibit "B".

6. Pursuant to the authority * * * of N.J.A.C. 1:1-10.5 and N.J.A.C. 1:1-14.4 it is hereby requested that the Petition in this matter be dismissed * * *

Exhibit B referenced in Board counsel's affidavit shows that on September 3, 1987 the Board transmitted to petitioner two policy documents regarding student discipline and suspension and expulsion. The Board's submission of these documents to petitioner appears to satisfy the discovery Order entered August 17, 1987.

To this date, petitioner has failed to respond to the Board's motion to dismiss and to my letter of September 30, 1987. There is no evidence in the record before me to even remotely suggest that petitioner made any kind of good faith attempt to comply with the discovery Order entered August 17, 1987. In another case brought by petitioner against this Board on a matter unrelated here, OAL Dkt. EDU 3804-87, Agency Dkt. No. 124-5/87, and which was heard November 2, 1987, petitioner did advise this judge, though not under oath, that he had no intention of responding either to the discovery Order or to the Board's motion to dismiss. I accept that representation by petitioner.

The foregoing facts constitute the facts of the matter for purposes of the Motion to Dismiss.

DISCOVERY RULES

In this administrative forum, rules for discovery applicable to the parties in a contested case are set forth at N.J.A.C. 1:1-10.1 et seq., the Uniform Administrative Procedure Rules. N.J.A.C. 1:1-10.1(a) acknowledges that "The purpose of discovery is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood

of settlement or withdrawal * * *". The purpose of the discovery rules is to afford litigants in a contested case access to facts which tend to support or undermine their position or that of their adversary. Id. In this case, the Board is entitled to know upon which documents petitioner intends to rely upon at hearing in order to prove the truth of his allegations. Petitioner's refusal to comply with the reasonable discovery requests of the Board serves to defeat the very purpose for which the administrative discovery rules were designed. Petitioner at no time sought relief under N.J.A.C. 1:1-10.4 from discovery requests made upon him by the Board. Rather, petitioner steadfastly refuses to comply with the Board's legitimate discovery request.

N.J.A.C. 1:1-10.5 and 1:1-14.4, sanctions for failure to comply with discovery orders may include a dismissal of the Petition, the suppression of a claim, the exclusion of evidence, or other appropriate action. In this case, the Board specifically seeks dismissal of the Petition of Appeal. Nevertheless, N.J.A.C. 1:1-1.3 allows administrative law judges to relax procedural rules if a determination is made that adherence would result in unfairness or injustice.

Under Jansson v. Fairleigh Dickenson University, 198 N.J. Super. 190, 195 (App. Div. 1985), several factors were pointed out which should be considered in determining whether court rules should be relaxed. Those factors, it seems to me, are equally applicable here. The factors are: (1) the extent of the delay, (2) the underlying reason or cause, (3) the fault or blamelessness of the litigant, and (4) the prejudice that would accrue to the other party. Applying these factors to this case, petitioner has not merely caused a delay in the discovery process regarding the petition he filed against the Board, he steadfastly refuses to comply with legitimate discovery requests made of him by the Board. There is no reason offered by petitioner to show why he refuses to comply with the Board's discovery request, nor is there any statement from petitioner that for reasons beyond his control he cannot comply with the Board's legitimate discovery requests. Petitioner, by the stance he has taken, must assume the fault and blame in failing to comply with the legitimate discovery requests.

If discovery rules under the Uniform Rules of Administrative Procedure are to have any meaningful impact upon the disposition of contested cases in the Office of Administrative Law, the discovery rules must be enforced. In a manner similar to New Jersey Court Rules, administrative discovery rules further public policies of expeditious

handling of cases, avoiding stale evidence and providing uniformity, predictability and security in the conduct of litigation. See, Zaccardi v. Becker, 88 N.J. 245, 252 (1982). The time and attention of a local board of education must be directed at providing its pupils a thorough and efficient program of education, not of preparing a defense to allegations predicated upon documents petitioner refuses to identify prior to hearing.

It is recognized that while the policy of administrative discovery rules requires compliance, drastic sanctions it seems to me should be imposed only sparingly and only when no lesser sanction will suffice to erase prejudice suffered by the non-delinquent party. See, Zaccardi v. Becker, 88 N.J. 245, 253 (1982). In this case, a lesser sanction other than dismissal will not suffice to erase the prejudice which would be suffered by the Board should it be forced to proceed to a public hearing and defend itself against allegations predicated upon documents which petitioner presently refuses to identify to the Board. If petitioner's claims are suppressed as a lesser sanction, no further proceeding is necessary. If petitioner's asserted evidence in support of his petition is to be excluded from the hearing, there is no reason to have the hearing.

FINDINGS AND CONCLUSION

I FIND that petitioner has, according to this record, refused to comply with legitimate discovery requests of the Board, that there is no explanation of the underlying reason or cause for petitioner's refusal, that on this record petitioner must accept the fault or blame for his refusal, and that the Board should not be placed in a position of defending allegations based on documents petitioner refuses to identify. I CONCLUDE there is no basis upon which the discovery rules should be relaxed. I therefore CONCLUDE that in these circumstances the ultimate sanction of dismissal is warranted. Accordingly, for petitioner's steadfast refusal to comply with legitimate discovery requests made of him by the Board, the Petition of Appeal is DISMISSED.

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

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

November 24, 1987
DATE

DANIEL B. MC KEOWN, ALJ

NOV 24 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
DEC - 1 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

sc

EXHIBIT LIST

None.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER
OAL DKT. NO. EDU 3546-87
AGENCY DKT. NO. 116-4/87

BERNARD LAUFGAS,
Petitioner,
v.
BARNEGAT TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Bernard Laufgas, petitioner, pro se

Kathleen W. Hofstetter, Esq., for respondent (Gelzer, Kelaher, Shea, Novy & Carr, attorneys)

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

Bernard Laufgas (petitioner) a resident of Barnegat Township, filed before the Commissioner of Education a four count Petition of Appeal in which he alleges unnamed Board members improperly used public funds on unspecified occasions, that the Board denies unnamed pupils due process rights regarding disciplinary proceedings, and that the Board violates the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. Prior to the time the Commissioner transferred the matter on May 21, 1987 to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq., petitioner served 58 written interrogatories upon the Board on or about May 19, 1987. Petitioner supplemented those interrogatories with 18 additional written interrogatories served upon the Board on or about May 26, 1987. Thereafter the Board filed a notice of motion to strike interrogatories grounded upon the contention the interrogatories are an improper discovery request under N.J.A.C. 1:1-11.2(b).

On or about June 8, 1987 the Board served interrogatories upon petitioner. Petitioner filed answers to the interrogatories on or about July 6, 1987. The Board, by motion made, seeks to have petitioner ordered to provide more specific answers to ten interrogatories. The Board also seeks attorney fees for the motion pursuant to N.J.A.C. 1:1-10.5. Petitioner opposes both motions. Oral argument on the motions was heard and documents received from the Board July 16, 1987. A prehearing conference scheduled for the same day in this case was continued without specific date.[1]

For the reasons which follow, the Board's motion to strike interrogatories served upon it by petitioner is, in most respects, **GRANTED**. Petitioner is **ORDERED** to provide requested documents and more responsive answers to interrogatories.

BACKGROUND FACTS

Petitioner and various Board members, present and past, as well as present Board employees, and other residents of Barnegat Township, have been embroiled in a dispute for over one year. The background to the dispute is necessary in order to understand the context within which the Board filed both motions.

The record shows that on or about June 30, 1986 petitioner filed an action in lieu of prerogative writ and a verified complaint in New Jersey Superior Court, Law Division, Ocean County, naming Barnegat Township, the Barnegat Township Police Department, the Barnegat Township Planning Board, the Barnegat Township Zoning Board and the Barnegat Township Board of Education as defendants. There, petitioner alleged that the Board refused his request to examine and copy public records under its control contrary to N.J.S.A. 47:1A-1 et seq. On December 23, 1986 the Honorable Eugene D. Serpentelli, A.J.S.C., issued an Order which provides in substantial part as follows:

[1] Petitioner simultaneously filed a separate Petition of Appeal, OAL Dkt. EDU 3804-87, Agency Dkt. No. 124-5/87, against the Board in which he alleges a Board employee publicly released confidential information regarding his son. Petitioner seeks relief in this Petition in the form of an Order by which the Board would be prohibited from receiving any federal or state school aid monies and an Order to bar the employee from "employment with any educational [institution] in any district." A prehearing conference was held July 16, 1987 in this case and a prehearing order issued separately today.

1. If the plaintiff [petitioner Laufgas] desires to review any records of the Barnegat Township Board of Education * * * plaintiff shall provide ninety-six (96) hours advance notice, in writing, to the Secretary of the Board of Education, indicating therein specific records he is seeking;

2. Plaintiff shall be entitled to examine all such records on one (1) day per week, between the hours of 11:00 a.m. and 3:00 p.m.;

3. Any matters involving records relating to the discretionary aspects of the Board of Education, as contained in any Complaint, Answer or document filed in the within matter are hereby transferred to the Commissioner of Education, and the Defendant Board of Education shall make available to the Plaintiff all documents not privileged to be held by law which shall include but not be limited to student files, personnel files, evaluation files or similar files or records which, by law, boards of education are not privileged or obligated to disclose.

4. In the event, for whatever reason, Plaintiff cannot appear on the date as set forth in his prior notice, Plaintiff must make every reasonable attempt to notify the secretary of his inability to appear. The items which were then so requested shall be held for a period of one (1) week and Plaintiff shall be entitled to review these same matters one (1) week from the date and time as set forth in the prior notice.

5. If Plaintiff fails to appear on two (2) consecutive requests, the attorney for the defendant Board may submit an Order to the Court requesting that Plaintiff be barred from further inspection. This is specifically subject to Plaintiff's ability to present to the Board reasonable excuse for non-appearance.

6. If a regular pattern of failure to appear on the date set forth for review of the files occurs by Plaintiff herein, the attorney for the Board shall be permitted to bring a Motion before the Court to further restrict Plaintiff's right of inspection * * *

On or about February 6, 1987 petitioner Laufgas filed an application for an Order to Show Cause before Judge Serpentelli relating to an alleged failure of the Board to provide public documents pursuant to his Order of December 23, 1986. In support of that application petitioner filed an affidavit in which he attests that he inspected and made copies of documents on various dates during January 1987 including January 15, 22, and 29. Petitioner further attests that "Defendants [Board members] are evil people that gained power to govern the school district so they may take monies."

On the return date of the Order to Show Cause, Judge Serpentelli observed in part as follows:

> I believe that there is a misunderstanding as to the obligation of the Board under this order and the scope of its obligation with respect to the order. Mr. Laufgas has no right to ask the Board to do research for it or to interpret records of the Board, and therefore, a demand which asks for all resolutions, policies and other documents by the Board if they relate to a specific subject matter is improper. Mr. Laufgas has a right to ask for all resolutions of the Board for a given year, month or years. But its not the Board's obligation to read each and every resolution and relate which one deals with written property [?]. The Right to know law does not require the Board to do homework for the person who wants to see documents. It seems to me a major problem has developed with respect to the amount of time expended because the Board in its effort to cooperate has been exceeding cooperative and beyond the necessity to be cooperative. I'm not suggesting they shouldn't be cooperative, and if they chose to do more than they are required to do under the law, that's fine, but the order never required them to do that in the first place * * * (Transcript, February 10, 1987).

The day before the return date on the Order to Show Cause, February 9, 1987, petitioner served the Board secretary with a written demand to have available for his review on February 12, 1987 200 separate documents from the years 1979 through 1987. Thereafter, on February 17, 1987 petitioner served a written demand upon the Board secretary wherein he poses nine assertions of fact that he could not find or locate vouchers or receipts after which the demand letter directs the Board secretary to comment and to sign her name following each of the nine assertions of fact. Finally, in this letter he directs the Board secretary to "Kindly look up those receipts since I could not find the receipts and/or vouchers." and that he would present himself February 20, 1987 in her office. Petitioner next filed a letter demand dated February 27, 1987 which advises:

> I will be inspecting documents held by the Barnegat Twp. School Board 1979 through 1983, also I will need the completed list which to you for the reciepts (sic) on February 17, 1987. I will also inspect the auditors reports 1979 thru 1987 * * *

Next, petitioner sent a written demand on March 4, 1987 to the Board secretary advising her he could not find receipts for transactions occurring in 1983 and for one transaction in 1984. He concludes by advising

> Please supply me with the reciepts (sic) and copies of the checks for the same. I would also like to listen to the tapes of the last four boards (sic) meetings, only the portion that I questioned the board. I will be inspecting the documents on March 10, 1987 at 11 a.m.

Next, petitioner sent a handwritten letter demand to the Board secretary on March 4, 1987 wherein he advises he will present himself on March 19, 1987 to inspect vouchers, receipts for a 1983 state convention, 1984 and 1985 national conventions, receipts referred to in his letter demand of March 4, 1987 and a request to make a copy of the tapes of open meetings on February 9, March 2 and March 9, 1987. On March 12, 1987 petitioner submitted a written demand to the Board secretary advising he would present himself March 19 for the following purposes:

> A. I could not find the "'Penalties of Law'" that the vouchers submitted by any claimant's certification and declaration submits and signs before he/she recieves (sic) payments by the board. I could not find that statue (sic). Please advise me or show me which is that law?
>
> B. What are the policy governing smoking in the board's office.
>
> C. What is/was [Mrs. P.'s] salary (1980-1987) and what positions she did hold within the school system.

In the meantime the record in this case shows that during March and April 1987, petitioner filed in the Barnegat Township Municipal Court a total of at least 27 separate criminal charges against nine board members alleging each member committed misconduct in office or abuse of office between 1984 through 1986 contrary to N.J.S.A. 2C:30-2. He filed 12 criminal charges against the present Board secretary alleging misconduct in office, theft, fraud, falsification or tampering with records, perjury, tampering with evidence, and tampering with public records in 1985 and 1986. Petitioner filed five criminal charges against the superintendent alleging the superintendent committed misconduct in office or abuse of office in 1984 and 1985. Twenty four criminal charges were filed by petitioner against three other persons none of whom are identified as being employees of the Board or Board members. The charges according to this record have yet to be tried.

On March 19, 1987 petitioner submitted a demand to the Board secretary in which he complains he could not find vouchers, reservations, or receipts for various asserted Board expenditures in 1981, 1982, 1983, 1984. Petitioner also advised that he lost a voucher which ostensibly he had had in his possession at a prior time. This demand is prefaced with the command to the Board secretary to "Please supply me with the following documents". He stated he intended to be in her office on March 25, 1987 to inspect and collect copies of the documents. On April 1, 1987 petitioner advised the Board secretary he intended to be in her office April 6 to inspect receipts, vouchers,

checks and account receivables for attendance of various people at state conventions for 1981, 1982, 1984, 1985 and 1986. In addition, petitioner asserts five persons attended a dinner theater at a 1985 state convention and he demands their identification. In addition, petitioner stated his demand to inspect reservations, vouchers and checks for a national convention held in 1981, 1982, 1983, 1984, 1985, and 1986. Finally, petitioner demanded to review receipts and checks for various asserted expenditures made to a number of identified persons. Petitioner also repeated his demand of the Board secretary to know the statute referenced in that section of vouchers where the creditor signs "I certify under the penalties of law". On April 13, 1987 petitioner advised the Board secretary he would return April 17 to inspect all documents regarding a telephone answering machine, including the warranty, repairs necessary, cost of repairs, who determined the machine had to be repaired and dates between necessary repairs. In addition, petitioner demanded to see a daily check list of school vehicles, all defective check lists, driver bus condition reports, bus safety inspection reports, driver daily logs, vouchers for repairs by a certain garage, how much the mechanic charges per hour, all time cards for transportation employees, the names and addresses of auditors, and finally, petitioner ends with the directive to the Board secretary to "Make those documents ready for me." On April 27, 1987 petitioner advised the Board secretary that he would be in her office May 1, 1987 to inspect all policy and procedures for transportation and to inspect the entire list of all Board employees. On May 5, 1987 petitioner advised the Board secretary he would return May 11 to inspect and copy vouchers, receipts, checks, and account receivables for the 1987 national school board convention and to record the May 4, 1987 open section of the Board meeting.

Written demands by petitioner were made thereafter on May 13, 1987 to inspect all contracts between the Board and anyone or any entity; on June 3, 1987 to tape a June 1, 1987 public meeting of the Board; and, on June 15, 1987 to inspect documents on June 22, 1987 which he asserts he had not yet been allowed to inspect.

In the meantime the Board sought relief from Judge Serpentelli by way of a motion to restrain petitioner from disrupting the Board's business by his asserted unreasonable demands made upon the Board secretary since January 1987. Petitioner filed his own motion before Judge Serpentelli to seek the court's assistance to order the Board to comply with the court's earlier order. At the time of oral argument on the respective motions, the court had before it affidavits from the Board secretary and from

the superintendent as well as an affidavit from petitioner in support of the respective motions. On June 10, 1987 Judge Serpentelli issued a letter opinion which in part is repeated here:

> * * * As a threshhold matter, I repeat my finding that the Board has exceeded the requirements of law in the production of records requested by Mr. Laufgas and those responses to his questions concerning those records. The Board is under obligation to produce only those records which it is required to maintain. It is also not under an obligation to submit to interrogatories or oral depositions concerning the meaning, import or intent of the records. To the extent that it has done so, it may have exascerbated the present problem. It is my suggestion that the Board employees consult with counsel concerning the nature and extent of their obligation and disclosure of documents to Mr. Laufgas.
>
> Furthermore, it is obvious to the court that, by his conduct, Mr. Laufgas is not facilitating the cooperation of the Board employees in this process.
>
> However, at this posture I am not satisfied that Mr. Laufgas' conduct would warrant a complete termination of his right to review Board documents * * *
>
> I am, therefore, directing that disclosure continue in accordance with the terms of the Court order * * *

Board counsel responded in detail to petitioner's letter of June 15, 1987 regarding certain documents he asserts he has not been allowed to review and with specific reference to his prior demands submitted to the Board secretary.

This concludes a recitation of the background facts with respect to the Board's motion to strike the interrogatories as being an improper discovery request under N.J.A.C. 1:1-11.2(b).

INTERROGATORIES SOUGHT TO BE STRICKEN

So that the context in which the interrogatories have been served upon the Board is clear, the Petition of Appeal is reproduced here in significant part. This reproduction remains faithful to the actual Petition including typographical and grammatical errors in the original document in order not to misrepresent in any way petitioner's factual allegations upon which he seeks relief.

* * *

Petitioner filed a civil action pursuant N.J.S.A. 47:1A-1 et seq. "Right to know Law" Docket NO: L-006154-86 P.W. in the Superior Court, Ocean County, against Respondents Barnegat Township Board of Education, to inspect, copy and obtain copies of public documents in possession of respondents, namely; Vouchers, Reciepts, Checks, Policys, Regulations, and other documents held by respondents. Whereby the Honorable Eugene D. Serpentelli, A.J.S.C. ORDERED respondents to be released for inspection by petitioner.

Petitioner thru the Court order, uncovered that respondents have failed to conform to their own Policy #0402 and N.J.S.A. 18A:4-14 by not submiting reciepts for pocket expenses to state and/or national work-shops and/or conventions.

4. Pocket expenses were used for payments for spouses and/or children plane fare before respondents even left on those trips.

5. Respondents use of limousine service to the airport without repayment for such service.

6. Respondents obtained breakfast and dinner theater tickets not only for themself both for spouses and children beside pocket expenses which they failed to submit reciepts or make repayments.

7. Respondents recieved pocket expenses between $75.00 per day and up to $125.00 per day for both state and/or national conventions.

8. Respondents made reservations for four days but took six days pocket expenses.

9. Respondents stayed two nights/three days at state convention in Atlantic City, which is only 40 miles from Barnegat.

WHEREFORE Petitioner BERNARD LAUFGAS, demands judgments against Respondents BARNEGAT TOWNSHIP BOARD OF EDUCATION as follows;

A. Prohibiting Respondents pocket expenses not to exceed Twenty-five ($25.00) dollars per day to any workshop in the state and/or national convention(s).

B. Prohibit the use of any limousine service to any workshop and/or convention.

C. Prohibit the use of tax dollars by any one within the Barnegat School system for spouses and/or children plane fare, hotel room, Breakfast meal and dinner theater tickets.

D. Ordering Respondents to itimized all vouchers/invoices and attach reciepts to same before those vouchers are approved by the school board and reimmboursement are paid out.

E. Prohibit respondents to stay overnight at the state convention within 45 miles. (Atlantic City, NJ)

F. Spouses and/or children that stay over-night with respondent must pay half room fee.

G. Respondents must submit a summary of all work-shops attended even those from the state and/or national conventions.

SECOND COUNT

10. [Petitioner repeats the allegations of the first count]

11. Petitioner under the Court order obtained the right to inspect respondents Petty cash policy #614.

12. Petitioner uncovered respondents failure to comply with said policy by a number of vouchers failed to have reciepts attached to them.

13. While others have false reciepts and/or inaccurates reciepts and/or reciepts that should have not been paid by the respondents.

WHEREFORE Petitioner demands judgments against respondents Barnegat Township Board of Education as follows;

A. Ordering resondents to itimized all petty cash vouchers and attach reciepts for same.

B. Ordering all reciepts attached to vouchers to be checked that no one exceeds the amounts for meals and travel expenses (milage), as per policy #3220 and policy 0402.

C. Ordering respondents to conform with the provisions set forth in policy #614.

THIRD COUNT

14. [Petitioner repeats allegations of the first and second counts]

15. Respondents failed to show petitioner disciplinary proceedings for the students within the district.

16. A number of students inclouding that of petitioner own have been disciplined by respondents.

17. The action of respondents as to discipline of students failed to meet due procees or fairness of students and that of the tax payers.

WHEREFORE, Petitioner BERNARD LAUFGAS, demands judgments against respondents BARNEGAT TOWNSHIP BOARD OF EDUCATION as follows:

A. Ordering respondents to implement Rules and Regulations for the disciplinary of students within the district.

B. Students that are suspended must be given a hearing in form of fairness.

C. Right for parent(s)/attorney to be at hearing.

D. Right to a notice in written form.

E. Right to explaination and evidence.

F. Righ to witness/cross examination

G. Suspention affer the hearing only.

H. All punishment of suspention must be in school and attach to same a written assignment for each student.

I. All students must be advised (including) parents rights to appeal and proceedings for same inclouding that of appeal to the commissioner of education.

J. All request to respondents for appeal must be answered by them in a timely fashen.

FOURTH COUNT

18. [Petitioner repeats allegations set forth in prior counts]

19. Petitioner requested respondents pursuant the "Open Public Meeting Act" N.J.S.A. 10:1-1 et seq, as it applys to School Board to stop cartailing the open portain from the minutes of the Barnegat Township School Boards records.

20. Respondents have failed to make that portion of the Board records (public portion) parts of the official records.

21. Respondents have limited Petitioners and others of the general public to speak before the Board to Five (5) minutes.

WHEREFORE, Petitioner, BERNARD LAUFGAS, demands judgment against Respondents BARNEGAT TOWNSHIP BOARD OF EDUCATION as follows:

A. Ordering Respondents to make and keep the public portion of the Barnegat School Board meeting part of the official records of that school district.

B. Prohibit the public portion to be limited to Five minutes per person and listion to each and every member of the general public until all have they say * * *

The Board, in its answer to the Petition, denies the factual allegations set forth above and raises 14 separate defenses to the petition. These defenses include petitioner's asserted failure to state a cause of action upon which relief can be granted; the assertion that petitioner's claim is barred because of his asserted failure to comply with the provisions of N.J.A.C. 6:24-1.3(b); that the Petition is time-barred through the application of the 90 day rule at N.J.A.C. 6:24-1.2(b); that petitioner lacks standing to bring the complaints before the Commissioner; and, that petitioner's claims are barred by the application of the doctrine of laches and by estoppel.

Petitioner seeks answers to the following interrogatories which the Board seeks to strike by way of this motion:

INTERROGATORIES REGARDING COUNT 1

1 through 7

For each and every year between 1981 through 1987 the names and addresses of each and every person who served as a member of the Board; the names and addresses of each and every person who served as superintendent, school principal, school board secretary, assistant school board secretary, payroll clerk and secretary to the superintendent.

8 - 9

The identification of policies, regulations, minutes, accounts receivable (?) and state statute "or other documents" providing for the attendance of board members or staff to attend state or national conventions between 1981 through 1987 and petitioner demands copies of such documents.

10 through 17

Whether board members or "others" signed vouchers for expenses for conventions between 1981 through 1987 and, if so, petitioner demands copies of each and every voucher so signed, copies of "hotel

reservations and plane fare reservations", the identity of wives or children who attended any such convention for the years 1981 through 1987, copies of receipts for expenses received by board members or staff presumably for attendance at national conventions between 1981 through 1987, copies of all "accounts receivable" repaid to the Board "by anyone" for, ostensibly, attendance at national conventions between 1981 through 1987, whatever accounts receivable might mean to petitioner, and if the Board made reservations for wives and children of Board members or the superintendent to attend conventions between 1981 through 1987, petitioner demands the identification of "each and every one" that attended national conventions between 1981 through 1987.

18 - 19

Petitioner demands whether "respondents" used limousine service to the airport for any trip to national conventions between 1981 through 1987 and, if so, the identity of such person and when such service was used. Petitioner also demands copies of all vouchers or receipts submitted for such "limousine service".

20 through 28

This group of interrogatories has as its predicate interrogatory 20 which asks the Board, as the party respondent in this case, to "Identify each and every person (name and address) that attended the New Jersey State School Board convention between 1981 through 1987." Petitioner then demands the Board provide him copies of vouchers, receipts, hotel reservations and registration for "each and every person" who attended the New Jersey School Board convention between 1981 through 1987. Petitioner also demands the Board to "identify each and every wife, child and husband or other" who attended the New Jersey School Board conventions between 1981 through 1987, to identify anyone who received dinner theater tickets, or per diem expenses to "any state and or national convention." Finally, in this group of interrogatories petitioner demands copies of "account receivable" and "vouchers, checks, receipts, accounts receivable" for any trip that they took as it applies to any state any or national convention.

In regard to interrogatories 20 through 28, it is inconceivable that the named party respondent in this case, the Barnegat Township Board of Education, would have records to show each person who attended state school board conventions in any year. It is improper for petitioner to demand of this Board such information for state or national conventions held between 1981 through 1987. It is doubtful if state or national school board association headquarters could respond to this set of interrogatories.

29 - 30

Petitioner demands copies of any policy which specifically states that Board members must submit receipts for expenses received to workshops, state and national conventions.

31 through 33

Petitioner asks if Board members itemized expenses on vouchers and, if so, to attach vouchers and receipts for every voucher submitted ostensibly for the period 1981 through 1987. If Board members were paid expenses without any itemized voucher, petitioner demands to know the cost of each and every item for which the expenses were to have been paid.

34 through 45

These interrogatories address state and national school board conventions. Petitioner demands to know which board members between 1981 through 1987 stayed overnight in Atlantic City for the state school board convention; he demands to know each and every program individual board members attended during that same period, together with the length of time each and every program lasted.

Interrogatory 35 is clearly indecipherable and incomprehensible. It is reproduced here in full: "Attach copies of each and every NJSBA/NJASA/NJASBO, for the years 1981 thru 1987. as it applies to #34".

Petitioner demands to know the form of transportation used by individual board members between 1981 through 1987 to national conventions, demands vouchers, specific dates traveled by each and every board member between 1981 through 1987 for each convention, the dates conventions were held between 1981 through 1987, the dates each board member returned from national conventions between 1981 through 1987, the form of transportation used by individual board members between 1981 through 1987 for each return trip, that if individual board members did not return directly to Barnegat Township after each such convention petitioner demands to know where each such board member went and for how long. Petitioner demands to know whether individual board members received per diem expenses from 1981 through 1987 for days they did not return directly to Barnegat from any such convention attended. Finally, petitioner demands to know if board members between 1981 through 1987 "or others" who attended national conventions were accompanied by their spouses or children and, if so, petitioner demands copies of checks, receipts, or "accounts receivable" or any reimbursement made by such board members to the board for their spouses and children.

INTERROGATORIES REGARDING COUNT 2

46 through 53

Petitioner demands copies of policies, regulations, minutes, "or any other documents" by which the present Board or, ostensibly, prior boards of education in Barnegat are authorized to use a petty cash account; he demands to know if "respondents or others" complied with any and all such policies; he demands copies of vouchers and receipts for any vouchers submitted for petty cash between 1981 through 1987; he demands to know whether "respondents" reimbursed anyone from petty cash without receipts between 1981 through 1987; and, he demands any policy regarding expenses "for professional and others".

INTERROGATORIES REGARDING COUNT 3

Interrogatories 52 and 53 appear to relate to Count 3. So that the exact words of petitioner are preserved, and in light of the fact only two interrogatories are involved in this count, they are reproduced here in full:

52. State in detail and specific each and every policy, regulation, minutes, state statutes or other as they pretains to the disciplinary proceeding of students within the school district.

53, Attach copies for the same (#52) herewith.

INTERROGATORIES REGARDING COUNT 4

Petitioner, by way of interrogatories 54 through 58, demands to know the policy, regulation, minutes, or state statutes which allows the board to hold public meetings; he demands copies thereof; petitioner demands to know the authority by which the board "cartail" the public to speak at the meeting; he demands to know specific authority why the board, if it does not, does not record public comments verbatim in its minutes; and, he demands copies of such authority.

INTERROGATORIES REGARDING DEFENSES OF THE BOARD SET UP IN ITS ANSWER TO THE PETITION

Interrogatories 59 through 76 demand of the Board answers regarding the following matter:

59. Each and every occasion petitioner demanded of the Board the opportunity to see disciplinary records of any pupil beside his sons;

60. Each and every disciplinary record he did see and did not see and he demands copies of the documents he did not see;

61. The basis upon which the Board claims petitioner fails to state a cause of action;

62. The basis upon which the Board says the Petition is similar to the criminal charges he filed against various persons;

63. The basis upon which petitioner violated the 90 day law;

64. The basis upon which the Board says it acted in a lawful manner regarding all allegations;

65. The basis upon which petitioner is not authorized to review pupil records, and the exact time, place and date petitioner requested of the Board to see pupil records;

66. The basis upon which the Board claims it complied with all applicable statutes and regulations regarding bookkeeping and accounting, petty cash, and rules governing pupil records;

67. The basis upon which the Board claims its meetings are lawfully conducted;

68. The basis upon which the Board claims petitioner has no standing to bring the action;

69-70 The basis upon which the Board claims its conduct throughout the matter is lawful and specific citations to statutes and authorities which the Board intends to use as a defense;

71. The basis upon which the Board claims petitioner's claim is barred by any or all statutes of limitations;

72. The basis upon which the Board claims the petition is barred by laches;

73. The basis upon which the Board claims the petition is barred by estoppel;

74. The basis upon which the Board claims the petition was improperly filed;

75. The basis upon which the Board claims petitioner failed to comply with the New Jersey Tort Claims Act; and

76. Petitioner demands copies of any and all documents regarding each and every answer provided to the preceding 75 interrogatories.

With respect to the Board's motion to compel petitioner to provide more specific answers to interrogatories and to provide all documents relevant to its request to the production of documents, it is noted that the Board served 25 separate interrogatories upon petitioner on or about June 2, 1987. For the most part, each interrogatory has two or more subparts but no one of which is, by itself or in conjunction with other parts, overburdening. Except for providing his name and address and an answer to interrogatory 2(A) and 2(B), respondent's answers for all remaining interrogatories are "See 2A and 2B", with the exception of interrogatory 9 which asks the name of each and every person who participated in the preparation of answers to the interrogatories where petitioner responded "See #1". Interrogatory 2A and 2B, together with the answers provided, are as follows:

> 2(A) Identify by name, address and business title each and every person having knowledge of the facts relevant to any of the issues in this action. As to each such person so identified, set forth a complete description of their knowledge.
>
> Answer:
>
> Respondents have full knowledge to the relevant facts. When respondents will supply petitioner with his interrogatories, a more fuller respond will beforecomming.
>
> 2(B) State each person who would be called as a witness at trial. State in detail the facts upon which they will testify.
>
> Answer:
>
> Respondents have full knowledge to the facts also see # at 2A.

With respect to the Board's request for documents, 18 separate requests are made of petitioner by the Board each of which address allegations contained within the petition of appeal filed by petitioner. As an example, the first request is for "any and all documents relating in any way to the allegation in the third unnumbered paragraph of the Petition that 'petitioner, through the Court Order, uncovered that Respondent have failed to conform to their own policy #0402 and N.J.S.A. 18A:4-14, by not submitting receipts for pocket expenses to State and/or national workshops and/or conventions." Another example is request 8 which asks for "Any and all documents relating in any way to Paragraph Eleven of the Petition that 'Petitioners, under the Court Order, obtained the right to inspect Respondent's petty cash policy #614." The final example is request 13 which asks for "Any and all documents relating in any way to Paragraph Seventeen of the

Petition that 'the action of respondents as to discipline of students fail to meet due process or fairness of students and that of the tax payers.' Respondent answers the request for documents by asserting the Board has any and all documents in their possession with respect to the allegations he makes in his Petition.

This concludes a recitation of all background facts necessary for disposition of the motions under consideration here.

ARGUMENTS OF THE PARTIES

The Board generally contends that the interrogatories served upon it by petitioner seeks information and documents which are public information and public documents under the Right to Know Law, N.J.S.A. 47:1A-1 et seq. The Board claims that the record shows petitioner has had more than ample opportunity to see and secure all such requested information and documents by virtue of Judge Serpentelli's Order. The Board contends that beyond the fact petitioner already has had liberal opportunity under the court order to see and secure such information, the information he seeks by way of interrogatories served during discovery is simply not available by way of discovery under N.J.A.C. 1:1-11.2(b) which, it is noted, is now codified at N.J.A.C. 1:1-10.1(d).

Moreover, the Board contends the Petition of Appeal filed in the matter is overly broad, nonspecific, and fails to name names, dates, or places. The Board explains that in its view petitioner seeks by way of the interrogatories to compel it to provide him with documents to prove the allegations he makes against it, its present membership, its past membership, and staff members. Furthermore, the Board takes the position that in order for petitioner to have filed the Petition of Appeal in the first instance he had to have documentation in his possession or information already available to him to prove the truth of the allegations. The Board contends that petitioner's interrogatories served upon it which it presently seeks to strike, seek information which is irrelevant, oppressive and burdensome and constitute harassment inflicted upon it so as to further the fishing expedition upon which petitioner has embarked seeking to substantiate his misperception that the Board and precedessor Boards have engaged in misconduct. The Board specifically contends that interrogatories 56 through 76 seek either a legal opinion, or information already within petitioner's knowledge, or are incomprehensible.

Regarding petitioner's answers to interrogatories served upon him by the Board, the Board contends that petitioner's responses thus far have been totally and wholly unresponsive to the interrogatory posed. Finally, the Board demands the production of documents by petitioner pursuant to its request properly served upon him.

Petitioner demands full, complete, and responsive answers and documents as sought and requested by the interrogatories served upon the Board. Petitioner in large measure relies upon Irval Realty v. Bd. of Pub. Util. Commissioners, 61 N.J. 366 (1972) to enforce his asserted right to discovery and in support of his demand that the Board answer interrogatories served. Petitioner also points out that the Board's characterization that some information sought by certain interrogatories is irrelevant is not a proper objection during discovery and cites in this regard VanLangen v. Chadwick, 173 N.J Super. 517 (Law Div. 1980). In short, petitioner contends that because the interrogatories were served upon the Board during discovery following the filing of his Petition of Appeal he is entitled to responses and to the documents sought as a matter of right.

Petitioner contends with respect to the interrogatories served upon him by the Board and a demand for the production of documents that he will answer the interrogatories served upon him as soon as the Board answers interrogatories served upon it. Petitioner also asserts that all documents that the Board seeks from him it already has in its possession and that he is under no obligation to provide it with documents it already has.

DISCUSSION AND CONCLUSION

The record developed thus far in this case strongly suggests petitioner is convinced that some present and former Board members and some employees of the Barnegat Township school system, and others, are engaged in misconduct or unlawful acts related to the Barnegat Township school system. This suggestion is supported by the fact that petitioner has seen fit to file at least 27 separate criminal charges against present or past Board members, 12 criminal charges against the present board secretary, and five charges against the superintendent, together with 24 criminal charges against other persons otherwise unidentified in the record. It is presumed that some of the proofs petitioner intends to offer should the criminal charges go to trial against the named defendants shall include documents he secured from the board secretary between December 1986 through June 1987 under Judge Serpentelli's Order.

The record further discloses that at the very least petitioner reviewed documents in the board secretary's offices on at least 16 separate occasions to inspect and make copies of the documents. The record further suggests that, more likely than not, petitioner was in the Board secretary's office on more than 40 separate occasions inspecting and copying documents. These visits, by virtue of the request preceding each visit had to range from one hour to at least three hours each. Many of the visits, according to the affidavits filed by the board secretary and by the superintendent before Judge Serpentelli, suggest that the visits were accompanied by petitioner's diatribes against the board secretary, the superintendent, and various present and past Board members. Indeed, and as Judge Serpentelli observed, the record strongly suggests that the Board, and particularly the board secretary has been more than cooperative with petitioner in his review of documents under Judge Serpentelli's Order.

Nevertheless, the matter of the disputed interrogatories served by petitioner must be seen within the context of this Petition of Appeal. In addition to the arguments advanced by the Board in opposition to the interrogatories, it is noted that the named respondent in this case is the Barnegat Township Board of Education. It is further noted that following the allegations contained within Count 1, petitioner seeks an order from the Commissioner by which individual Board members would be prohibited from securing more than $25 per day expenses for state or national conventions, from using limousine service to workshops or conventions, and he seeks other prohibitions contained in his prayer for relief. Keeping in mind that boards of education are noncontinuous bodies, and each succeeding board of education may adopt its own policy to govern its own affairs by virtue of authority at N.J.S.A. 18A:11-1, this count of the petition must be seen as allegations against the present Board of Education; not against prior boards of education. The Commissioner cannot grant relief against a former board of education because a former board does not presently exist. The present Board may not be criticized nor disciplined for any omissions or commissions of lawful or unlawful conduct in which any prior board of education may have engaged.

If petitioner believes that prior Board members, individually, violated criminal statutes he has avenues of redress available to him one of which he has already exercised in the filing of criminal complaints. The Commissioner has authority only to direct the official conduct of sitting board members or to issue regulations regarding the official conduct of future board members. It would be a useless exercise in the administrative arena to hear allegations of wrongdoing against former boards of education in the absence

of authority for the Commissioner to take corrective action against a nonexisting entity under his authority at N.J.S.A. 18A:6-9. Consequently, all interrogatories by which petitioner seeks information and/or documents for years prior to 1987 in support of his Count 1 allegations are clearly irrelevant and immaterial in this administrative proceeding.

While in civil actions discovery is generally available to litigants of any matter relevant to the subject matter involved in the pending suit, R. 4:10-2(a); Irval Realty, supra, the opponent of a discovery request may secure a court order to protect against annoyance, embarrassment, oppression, or undue burden or expense.

In similar fashion, discovery is generally available to litigants in this administrative forum in order to facilitate the disposition of cases by streamlining the hearing. Litigants generally should have access to facts which tend to support or undermine their position or that of their adversary. Requested discovery must appear to be reasonably calculated to lead to the discovery of admissible evidence at the time of hearing. N.J.A.C. 1:1-10.1. The Uniform Rules of Administrative Procedure at N.J.A.C. 1:1-10.1(d), provides "Public documents accessible under legislative authorization shall not be discoverable under this subchapter, except for good cause shown * * *."

As noted above, petitioner has already taken great advantage of his rights under the Right to Know Law and has spent many hours at the Board secretary's office reviewing and securing copies of Board documents. The information he seeks by way of interrogatories served in this administrative arena is available and has been made available to him under the Right to Know Law pursuant to Judge Serpentelli's Order and, consequently, constitutes an improper discovery request here. Petitioner has not shown good cause for the Board to be Ordered to answer Count 1 interrogatories in light of the issue presented in Count 1 of the petition. Petitioner has had ample opportunity between December 1986 through June 1987 to review and copy documents of the Board as is his right under the Right to Know Law. Furthermore, the vast majority of information sought by way of the interrogatories served reflect petitioner's desire to secure duplicate information he has already reviewed or has clearly had the opportunity to review. The controverted interrogatories here are, in my view, excessive and are of a drag-net nature. The interrogatories are unduly burdensome and oppressive. Many are incomprehensible, while others simply meander. Most, if not all, interrogatories seek information irrelevant to the subject matter of Count 1 of the Petition of Appeal and they seek information not

calculated to lead to admissible evidence at the time of hearing in this case. The interrogatories served by petitioner upon the Board are, I FIND and CONCLUDE, inconsistent with the spirit and purpose of the Uniform Rules of Administrative Practice, N.J.A.C. 1:1-1 et seq. If petitioner's Count 1 allegations against the present Board have any merit at all, and on the assumption the allegations if proven true by petitioner would warrant relief, petitioner should not need answers to these interrogatories to be successful in establishing the truth of the allegations. Petitioner by his own words asserts in Count 1 of the petition that he "* * * thru the Court order, uncovered that respondents have failed to conform to their own Policy #0402 and N.J.S.A. 18A:4-14 by not submiting reciepts for pocket expenses to state and/or national work-shops and/or conventions * * * *". Petitioner verified that "the facts contained [within the petition] are true to the best of my knowledge and belief." If petitioner uncovered the documents which prove the truth of the allegations which follow, he should be prepared to come forward and expose the documents to the light of day.

Accordingly, the Board's motion to strike petitioner's interrogatories regarding Count 1 is GRANTED for any and all the following reasons:

1. The interrogatories seek information which is irrelevant and immaterial to the subject matter of Count 1; and/or

2. The interrogatories are an improper discovery request under N.J.A.C. 1:1-10.1(d) because most, if not all, seek information which is public information; and/or

3. The interrogatories seek information or documents already in the possession or which should have been in the possession of petitioner by virtue of his numerous demands made upon the Board secretary together with the numerous opportunities granted him to inspect records of the Board pursuant to his right under the Right to Know Law; and/or

4. The interrogatories seek information or documents which petitioner verifies in his Petition of Appeal he already possesses; and/or

5. The interrogatories are unduly burdensome and oppressive upon the Board in light of his many opportunities to inspect the same documents under Judge Serpentelli's Order; and/or

6. The interrogatories are incomprehensible or of such a univeral nature, as an example Interrogatories 20-28, that the Board simply cannot provide an answer in any intelligible way; and/or

7. The interrogatories, taken as a whole, are of such a drag-net nature that they are inconsistent with the spirit and purpose of discovery in this administrative forum, under the Uniform Rules of Administrative Practice.

Petitioner's interrogatories regarding Count 2 seek information and documents which, if answered, would constitute a legal opinion, or the interrogatories are irrelevant and immaterial to the subject matter in issue, or they seek information and documents which are already in the possession of or should be in the possession of petitioner. Furthermore, these interrogatories are vague, universal in nature, burdensome and oppressive.

For these reasons, petitioner's interrogatories regarding Count 2 are stricken.

Petitioner's interrogatories regarding Count 3 shall be answered by the Board only to the extent of providing petitioner with copies of its formally adopted written policies, if any, regarding pupil discipline and procedures. If interrogatory 52 or 53 is intended by petitioner to seek information or documents other than formally adopted written policies and procedures regarding pupil discipline, then in that event interrogatory 52 and 53 shall be stricken for vagueness.

Petitioner's interrogatories regarding Count 4 are stricken on any one or all the following grounds:

1. The interrogatories seek a legal opinion; and/or

2. The interrogatories seek information or documents already in or which should already be in petitioner's possession; and/or

3. The interrogatories are vague, confusing, and internally inconsistent.

In sum, the Board's motion to strike interrogatories regarding Count 1 and Count 2 is **GRANTED**; the motion is partially **GRANTED** and partially **DENIED** regarding Count 3; and the Board's motion to strike interrogatories regarding Count 4 is **GRANTED** in full.

Finally, the Board's motion to strike interrogatories 59 through 76 is **GRANTED** in full. These interrogatories seek information and documents which constitute legal opinions; the interrogatories are vague and incomprehensible; and, several interrogatories border on being innane in that petitioner seeks information from the Board which is uniquely in the possession of petitioner himself.

BOARD'S MOTION TO COMPEL MORE SPECIFIC ANSWERS TO INTERROGATORIES AND FOR PETITIONER TO PROVIDE DOCUMENTS

Initially, it is noted that petitioner merely provided his name and address as the sole answers to the Board's interrogatories. The remainder of responses provided referenced interrogatories 2A and 2B. These responses do not constitute answers to properly phrased and served interrogatories. Consequently, this motion is perhaps mislabled when it called for more responsive answers to interrogatories instead of calling for answers to interrogatories served. In either case, petitioner is **ORDERED** to fully answer each and every interrogatory served upon him by the Board.

In similar fashion petitioner is **ORDERED** to respond to the Board's Request for the Production of Documents. If petitioner does not have possession of requested documents and cannot acquire possession of the requested documents, and, therefore, does not intend to rely upon the documents at the time of hearing, a written response in that regard shall be served by petitioner upon the Board in lieu of the documents requested. Alternatively, petitioner may in lieu of supplying documents in his possession but already in the Board's possession, identify with specificity the documents at issue for that specific demand.

In conclusion, petitioner's interrogatories regarding Counts 1, 2 and 4 are stricken. Count 3 interrogatories shall be answered by the Board in a manner consistent with this ruling within 20 days from today's date. Petitioner is **ORDERED** to fully answer interrogatores served upon him by the Board and he shall supply the Board copies of requested documents or identify with specificity the documents at issue within 20 days from today's date. The Commissioner is of the view he has no authority to award attorneys' fees. Accordingly, the Board's request for attorneys' fees must be **DENIED**.

Hearing dates shall not yet be set. Once discovery is completed — which shall be 20 days from today's date — appropriate motions shall be entertained from the parties for 30 days following. Subsequent to disposition of motions filed, the issues if any which remain shall be refined and a hearing date then shall be set.

This order may be reviewed by the Commissioner of Education either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case pursuant to N.J.A.C. 1:1-18.6.

August 17, 1987 — DATE

Daniel B. McKeown — DANIEL B. MC KEOWN, ALJ

sc

BERNARD LAUFGAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review of the record in this matter, the Commissioner is in full agreement with the Administrative Law Judge's findings and conclusions which are based upon a well-reasoned analysis of the issue. The recommended initial decision dismissing the Petition of Appeal with prejudice is adopted, therefore, as the final decision in this matter for the reasons expressed therein.

COMMISSIONER OF EDUCATION

December 30, 1987

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3806-87
AGENCY DKT. NO. 129-5/87

BOARD OF EDUCATION OF THE
BOROUGH OF POINT PLEASANT,
Petitioner,
v.
MAYOR AND COUNCIL OF THE
BOROUGH OF POINT PLEASANT,
OCEAN COUNTY,
Respondent.

James P. Brady, Esq., for petitioner (Novins, Farley, York, Devincens and Pentony, attorneys)

James N. Citta, Esq., Ann M. Dougherty, Esq., co-counsel for respondent (Citta, Citta and Millard, attorneys)

Record Closed: September 23, 1987 Decided: November 20, 1987

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

Petitioner, the Board of Education of the Borough of Point Pleasant (Board), appeals from an action taken by the Mayor and Council of the Borough of Point Pleasant (Council) pursuant to N.J.S.A. 18A:22-37 certifying to the Ocean County Board of Taxation a lesser amount of appropriations for school purposes for the 1987-88 school year than the amount proposed by the Board in its budget which was rejected by the voters.

PROCEDURAL ASPECTS

At the annual school election held on April 7, 1987, the Board submitted to the electorate a proposal to raise by local taxation the amounts of $10,016,284 for current expense and $98,645 in capital outlay for the 1987-88 school year. Both items were 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 Point Pleasant for the 1987-88 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 Ocean County Board of Taxation the amounts of $9,515,766 for current expenses and zero dollars for capital outlay. The Board, thereafter on May 12, 1987, submitted its Petition of Appeal to the Commissioner of Education seeking the restoration of its reduced funds. Council filed its Answer with the Commissioner on June 1, 1987. Subsequently, on June 2, 1987, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on July 1, 1987 at which the issues to be determined were set forth and scheduled hearings were established. Hearings were conducted on August 26, 27 and 28, 1987 at the Ocean County Administrative Building, Toms River; September 3 and 4 at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City; and September 16 and 17, 1987 at the Ocean County Administration Building, Toms River, New Jersey. The record was considered closed upon the receipt of petitioner's last proferred document on September 23, 1987. Extensions were requested and granted for the undersigned to execute this initial decision.

ISSUES TO BE DETERMINED AND AMOUNTS IN DISPUTE

Pursuant to N.J.A.C. 6:24-7.3(c) the Board supplied the following information which forms a basis of it appeal:

PROPOSED TAX LEVY ADOPTED BY THE BOARD OF EDUCATION		AMOUNT OF TAX LEVY CERTIFIED BY GOVERNING BODY	
Current Expense	$10,016.284	Current Expense	$9,515,766
Capital Outlay	98,645	Capital Outlay	00

PROPOSED TAX LEVY ADOPTED BY THE BOARD OF EDUCATION	AMOUNT OF TAX LEVY CERTIFIED BY GOVERNING BODY

Amount of reduction in the budget by governing body:

Current Expense	$ 500,518
Capital Outlay	98,645
	$ 599,163

Amount of reduction in dispute before the Commissioner:

Current Expense	$ 500,518
Capital Outlay	98,645
	$ 599,163

The issues to be resolved by this tribunal, as agreed to by the parties, are as follows:

A. Whether Council's action to reduce the Board's proposed tax levy and budget was arbitrary and capricious?

B. Whether Council's actions deny a thorough and efficient education to the pupils under the Board's direction and control?

C. Whether Council's determination to reduce the Board's budget appropriations were based upon erroneous findings of fact?

D. Whether Council's determination are without any basis in fact?

E. Whether Council's action constitute an attempted usurpation of managerial functions and prerogatives of the Board?

UNCONTESTED FACTS

The following evidence is neither disputed nor contested and is therefore **ADOPTED AS FACT:**

Subsequent to the defeat of the Board's proposed budget at the polls, the Board submitted its budget to the Mayor and Council on April 8, 1987, pursuant to N.J.S.A. 18A:22-37. By way of letter dated April 10, 1987, respondent advised the Board that the

Mayor had appointed a "Committee of interested residents to advise the Governing Body on the Board's Budget," and requested certain information from the Board by April 13, 1987, to "assist in the Committee's first meeting." (Exhibit B, Board's Brief in Support of Motion for Summary Decision.) The Board, by letter dated April 10, 1987, indicated the difficulty of providing all of the requested documentation within the time constraints. In the alternative, the Board invited Council and its representatives to review the Board's records in the Board's offices. On April 14, 1987, subsequent to the Mayor's appointment of the citizen's ad hoc committee to review the Board's budget, the Borough Council ratified the Mayor's action (Exhibit C).

On April 15, 1987, Council invited the Board to a joint meeting scheduled for April 23, 1987 (Exhibit D). By letter dated April 16, 1987, the Board confirmed that the information and data requested by Council in its letter of April 10, 1987, had been provided to Council's representative except personnel information considered confidential by the Board's legal counsel. Mr. Paul Laracy, Municipal Administrator of the Borough of Point Pleasant, worked in conjunction with Council's ad hoc committee in reviewing the Board's budget proposal from April 9 through April 27, 1987 (Laracy Affidavit, August 27, 1987 para. 6). Mr. Laracy and the citizen ad hoc committee made specific recommendations to the Council with respect to reductions in the Board's line item accounts and its capital outlay budget proposals.

Subsequently, on April 23, 1987, a joint open public meeting was held by Council and the Board, with the Board represented by its Superintendent of Schools and two Board members. (See: Exhibit B, Transcription of Meeting of Mayor and Council and Board of Education re: Budget - April 23, 1987.) The governing body presented the Board with the following recommended reductions to its 1987-88 current expense and capital outlay budgets:

LISTING POSSIBLE BOARD OF EDUCATION BUDGET CUTS

Item No.	Item Descriptions	Budget 87/88	Savings	Justifications
J 110 b	Bd. of Secret. Salary	$ 157,500	$ 4,771	1986/87 Projected Spending +10%
J 211	Sal. of Princ. Superv., etc.	780,000	74,000	See attachment 2

Item No.	Item Descriptions	Budget 87/88	Savings	Justifications
J 212	Dept. Head Salary	$ 70,000	$ 9,200	1986/87 Projected Spending +10%, + extra week of work in summer
J 213	Teachers Salaries	5,116,000	55,500	See attachment 3
J 214	Counselors Salaries	221,600	6,000	1986/87 Projected Spending +10%, + new alcohol counselor, + $5,500 for summer counselling sessions if needed
J 214 c	Psychologists Sal.	150,000	15,542	1986/87 Projected Spending +10%
J 215 a	Salaries for Clerical Asst.'s to Princ., Super., etc.	225,000	20,000	See attachment 2
J 240	Teaching Supplies	275,000	31,625	1986/87 Projected Spending +10%
J 550 a	Gas for Transport.	35,000	14,422	1986/87 Projected Spending +10%
J 550 b	Lubricants	3,500	2,036	1986/87 Projected Spending +10%
J 610 a	Custodian Salaries	385,000	10,000	New position proposed by Board not recommended
J 630	Heat	150,000	48,672	1986/87 Projected Spending +20%
J 650 c	Supplies for grounds	13,850	7,987	1986/87 Projected Spending +10%
J 810 a	Employee Retirement	138,000	10,501	1986/87 Projected Spending +10%
J 810	Social Security	161,000	6,669	1986/87 Projected Spending +20%
J 820 a	Property Insurance	68,000	5,454	1986/87 Projected Spending +10%

Item No.	Item Descriptions	Budget 87/88	Savings	Justifications
J 820 b	Employee Insurance	$1,175,000	$ 79,050	1986/87 Projected Spending +20% Excludes approp. for unemploy.
J 820 c	Liability Insurance	173,000	11,109	1986/87 Projected Spending +10%
	Capital Outlay	98,645	98,645	Use part of $348,986 Surplus
	Revenues:			1986/87 Projected
	Misc. Revenue	80,000	34,000	Revenues = $115,000
	Unemployment Ins. Fund	0	54,000	Withdraw Board contributions from last 3 years Fund balance in SUI account excessive
	TOTAL		$599,163	

Subsequently, on April 24, 1987, Mayor and certain members of Council met with the three members of the citizens ad hoc committee. (See: Transcript of Record Proceedings, Council Meeting of the Mayor and Council of the Borough of Point Pleasant and the Ad Hoc Committee Re: Board of Education Budget.) Thereafter, on April 27, 1987, Council adopted a resolution setting the amounts to be raised by local taxes as follows:

Current Expenses	$9,515,766	
Capital Outlay	0	
Total	$9,515,766	(Exhibit G)

Council, in effect, reduced the Board's budget by the amount of $599,163; the amount of reduction Council presented to the Board at its joint meeting held on April 23, 1987.

THE BOARD'S MOTIONS FOR SUMMARY DECISION

Prior to opening the herein record, the Board propounded motions (1) for Partial Summary Decision and (2) for Summary Decision. The Board's motions were accompanied by briefs of law, affidavits and exhibits in support of its positions. Council opposed both applications with the submittion of affidavits and a brief contending, among other things, that genuine issues of material fact existed, therefore, the Board's motions

did not meet the standards for summary decision as set forth in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954). Oral argument on the motions was held on August 28, 1987, at the conclusion of which, this tribunal reserved decision pending the presentation of all the facts with regards to all issues in controversy.

In its brief and legal arguments for summary decision, the Board contends, among other things, that the governing body failed to independently reach its determinations to reduce the Boards budget by virtue of the Mayor's appointment of a citizen ad hoc committee to review the budget proposal and make recommendations to Mayor and Council for specific budget reductions. The board asserts that Council's reliance upon the recommendation of the citizen ad hoc committee flies in the face of our Supreme Court's admonition in Board of Education of the Township of East Brunswick v. Township Council of East Brunswick, 48 N.J. 94, 106-106 (1986), where it said, in pertinent part, that:

> * * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determination 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 view of the make-up 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 for the governing body's underlying determinations and supporting reasons. * * * (Emphasis supplied.)

The Board argues that the determinations, which resulted in the Resolution of April 28, 1987, reducing the current expense budget and capital outlay budget proposed by petitioner were not "independent determinations" of the respondent governing body. Instead, the determinations in question were those of the ad hoc committee appointed by the Mayor, which appointments were later confirmed by the Council after the ad hoc committee already had undertaken the task of reviewing the budget.

The Board contends that the statutory duty imposed upon a governing body by N.J.S.A. 18A:22-37, is neither satisfied nor, are the purposes of the statute served by the governing body abdicating its responsibility to a group of three unelected people and, then, acting as a rubber stamp or not, the participation of the ad hoc committee in the budget review and determination process results in the lack of an 'independent determina-

tion' on the part of the governing body, rendering the reductions effected by its Resolution of April 28, 1987 arbitrary, capricious and/or unreasonable per se.

The Board argues that given the foregoing, it is submitted that respondent Mayor and Council did not fulfill its statutory responsibilities with respect to review of petitioner's budget and certification of amounts so as to allow a thorough and efficient education. The failure of respondent to execute the responsibility imposed upon it by statute renders its action arbitrary, capricious and/or unreasonable per se and, therefore, mandates the full restoration of petitioner's budget (citations omitted).

This tribunal will not consider the Board's arguments at Point II of its brief with regards to the form of government under Title 40 of the New Jersey Statutes Annodated, and/or whether the Mayor's appointment of the ad hoc committee, later ratified by Council, was an exertion of ultra vires powers as alleged. This is an argument not within the jurisdiction or competency of the Commissioner of Education and, therefore, will not be entertained here.

In its opposition to the Board's motion for summary decision, Council submits affidavits of Mayor Leonard Arms, four Councilmen and Borough Administrator Paul Laracy, together with a brief of law and attached exhibits. In its Statement of Facts, it contends that the Board's facts are fatally flawed and that Mayor and Council reviewed the Board's budget independently of any report or advise from the ad hoc committee. It asserts, among other things, that: First, each member of the Mayor and Council reviewed the budget on his own. Second, each member reviewed the information gathered, at respondent's request, by Municipal Administrator, Paul Laracy. Third, each member reviewed the recommendations of the ad hoc committee members, each of whom filed separate, and sometimes conflicting reports. Fourth, respondent consulted with Board members and School Superintendent, Dr. Lawrence DeBellis during the joint meeting of April 23, 1987. Finally, the respondent met again on April 24, 1987, at which time the proposed budget cuts were discussed at great length.

Council argues that summary decision should not be granted to the Board because Council fulfilled its statutory duties under N.J.S.A. 18A:22-37 and denies that its actions were either arbitrary, capricious and/or unreasonable per se, making the instant matter subject to summary decision. Council asserts that in addition to raising issues of material fact with regard to the Board's conclusion that there was no "independent

determination" of the Board's budget by the governing body, it argues that there is absolutely no case law or school law decision cited which supports the Board's contention that the mere participation of the ad hoc committee results in a lack of "independent determination." Council contends that the decision in Bd. of Ed. of Jackson Twp. v. Twp. Comm. of Jackson (OAL EDU 5573-82), cited by the Board was not rendered on a motion for summary judgment but, rather, that it was rendered after a hearing on the issues. Council asserts further, that the Jackson case did not hold the proposition that the existence of an ad hoc committee was arbitrary, capricious and/or unreasonable but, rather, that the ALJ concluded that the governing body failed to make its determination independently to reduce the Jackson Board's budget and, instead, considered voter reaction when it relied upon its ad hoc citizens' committee to arrive at its determination.

At Point III of its brief, Council contends that the Board has failed to meet its burden for summary decision as enunciated in Judson and, therefore, its request and application should be denied.

THE BOARD'S MOTION FOR PARTIAL SUMMARY DECISION

The Board observes the statute which grounds the municipal governing body's right and authority to review and determine the Board's budget subsequent to its defeat at the polls by the electorate. The Board also observes the interpretation of N.J.S.A. 18A:22-37 by the Supreme Court of New Jersey in East Brunswick where it said, in part, that:

> * * * 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 view of the make-up 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).

In its statement of facts in support of its motion for partial summary decision, the Board sets forth line item reductions which total $153,018 in the aggregate as follows:

Item No.	Item Descriptions	Budget 87/88	Savings	Justifications
J 110 b	Bd. Secret. Salary	$ 157,500	$ 4,771	1986/87 Projected Spending
J 212	Dept. Head Salary	70,000	9,200	Spending +10%, + extra week of work in summer
J 214	Counselors Salaries	221,600	6,000	1986/87 Projected Spending +10%, + New alcohol counselor, +5,500/for summer counselling sessions if needed
J 214 c	Psycholog.	150,00	15,542	1986/87 Proj. Spending +10%
J 240	Teaching Supplies	275,000	31,625	1986/87 Proj. Spending +10%
J 550 a	Gas for Transport	35,000	14,422	1986/87 Proj. Spending +10%
J 550 b	Lubricants	3,500	2,036	1986/87 Proj. Spending +10%
J 630	Heat	150,000	48,672	1986/87 Proj. Spending +20%
J 650 c	Supplies for grounds	13,850	7,967	1986/87 Proj. Spending +10%
J 810 a	Employee Retirement	138,000	10,501	1986/87 Proj. Spending +10%
J 810	Social	161,000	6,669	1986/87 Proj. Spending +20%
J 820 a	Property Insurance	68,000	5,454	1986/87 Proj. Spending +10%
J 820 b	Employee Insurance	1,175,000	79,050	1986/87 Proj. Spending +20% Excludes approp. for unemploy.
J 820 c	Liability Insurance	173,000	11,109	1986/87 Proj. Spending +10%
	TOTAL		$153,018	

The Board contends that Council's "justifications" or "reasons" for its reduction to the above budget line item appropriations does not comport with the East Brunswick Court's admonition that the governing body is required to supply a "detailed statement setting forth its underlying determinations and supporting reasons." Id. at 106. In addition, the Board asserts that Council's description of its "general approach" taken with respect to the line item reductions does not represent "reasons" as defined by the Court in East Brunswick but, rather, amounts to conclusory statements offered by the governing body. The Council's statement in part, is as follows:

> . . . the primary approach was to review 1986-87 spending levels through March 31st to project spending through June 30th, and to allow for a moderate increase in spending for the 1986/87 school year. For salary accounts, current yearly salaries as provided by the Board were totaled. In most cases, a 10 percent increase over projected spending has been allowed. For line items which are subject to more volatility (e.g., hearing and hospitalization), a larger cushion has been provided. (Attachment 1 to governing body's Resolution adopted April 27, 1987.)

The Board observes that the Commissioner has held that conclusions and opinions masquerading as a detailed statement setting forth the governing body's underlying determinations and supporting reasons will not be tolerated. Board of Education of the Borough of South River v. Mayor and Council of the Borough of South River, Middlesex County, 1986 S.L.D. ____ (OAL DKT. No. EDU 4546-86; Agency Dkt. No. 195-6/86); Board of Education of the Borough of Union Beach v. Mayor and Council of the Borough of Union Beach, 1973 S.L.D. 231; Board of Education of the Borough of Holedon, 1970 S.L.D. 70. The Board contends that Council supplied no reasons for its reductions of the items which total $153,018. The governing body simply provided a 10 or 20 percent increase over the projected expenditure for 1986-87. The Council's "justifications" are conclusions without the detailed statement of underlying determinations and supporting reasons. The Board contends that absolutely nothing is set forth in the governing body's so-called reasons indicating any investigation or concern about the actual amounts anticipated to be needed for the funding of these accounts in order to meet required expenditures for the 1987-88 budget year. In effect, Council arbitrarily selected the figure of 10 percent or 20 percent above projected spending for 1986-87 without any indication of a reason why that particular figure was selected as opposed to any other percentage figure. No relationship whatsoever is established between the reductions indicated by Council and the requirements for those accounts in fiscal year 1987-88. The governing body's "reasons" or as it refers to its "justifications" are totally devoid of any

rationale indicating any examination and assessment of the school district's needs for the items which total the $155,018 reductions. The action by Mayor and Council with respect to these line items are per se arbitrary, capricious and unreasonable (citations omitted).

The Board argues that under such circumstances, the presumptive correctness of the determinations of the local board of education must prevail. Boult and Harris v. Bd. of Ed. of Passaic, 1939-40 S.L.D. 7, at 13, aff'd. State Bd. of Ed. 15, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948).

The Board, at Point II of its brief, contends that it is entitled to summary decision granting restoration of the entire capital outlay budget which was totally eliminated by Mayor and Council. The Board asserts that although the governing body did not provide a detailed statement of supporting reasons for this reduction in accordance with East Brunswick, Mayor and Council did advance its opinion that the capital outlay budget should be funded through the use of a projected surplus in the account in an amount of $348,986. It argues that while the lack of a detailed statement of supporting reasons is fatal to the Mayor and Council's reduction as arbitrary, capricious and unreasonable per se, the reduction cannot be sustained on yet another ground; i.e., the Board's entitlement to maintain a reasonable surplus of funds to meet unforeseen contingencies during the ensuing fiscal year. Bd. of Ed. Fair Lawn v. Mayor, Council Fair Lawn, 143 N.J. Super. 259, 273 (Law Div. 1976).

The Board contends that its capital outlay budget of $98,645 should be restored and funded in full for the 1987-88 fiscal year. It asserts that of the $348,000 the governing body projected as surplus funds, the sum of $230,000 is strictly dedicated to the funding of the construction of a proposed field house pursuant to a referendum approved by the voters in 1985. As a consequence of this specific dedication of $230,000, the projected capital outlay surplus is therefore reduced to the amount of $118,000, of which $100,000 was appropriated by the Board with the awarding of contracts on May 14, 1987, for the supply and installation of air exchanges in ten substandard classrooms as demanded by the school district's 1986 T & E Monitoring Report (Exhibit P-2). Thus, the anticipated capital outlay surplus is reduced to $18,986.20, which is the actual unappropriated capital outlay free balance as of June 30, 1987 (See: Affidavit of Lawrence Mack, Board Secretary).

The Board observes that while the Commissioner of Education and the Courts have allowed and permitted local boards of education to maintain reasonable surplus funds, no bright line test, in terms of the ratio between unappropriated free balance and the total budget, has ever been adopted by the Commissioner. In the instant matter, the unappropriated capital outlay free balance is only $18,986.20, which is very modest in terms of the total potential cost of unexpected capital outlay expenditures. This is particularly in light of the T & E Monitoring Report (Exhibit P-2) and the Robbins Report (Exhibit P-5) which forecast continuing expenditure of funds from the capital outlay account in order to properly service the needs of the district's physical facilities.

The Board argues, among other things, that the governing body's clear mistake of fact, in its elimination of the entire capital outlay budget, would cause a virtual elimination of the unappropriated capital outlay free balance and bring to a standstill all capital projects previously undertaken by the Board. Therefore, it argues that it is entitled to summary decision in its favor to fully restore its proposed capital outlay budget in the amount of $98,645 for fiscal year 1987-88.

At Point III in its brief and on its argument, the Board contends that the governing body's "justifications" for its reduction of the Current Expense budget on account of Council's anticipation that revenues would be greater than those anticipated by the Board are not supported by detailed reasons as required by East Brunswick but, rather, are Council's conclusions which, therefore, mandate the restoration at $34,000. The Board argues further that Council's anticipation of increased revenues in the amount of $54,000 on account of withdrawals from the State Unemployment Insurance Fund (S.U.I.) is erroneous as a matter of law.

The governing body responds to the Board's assertions and arguments by way of affidavits executed by its Mayor and Borough Administrator.

In summary, the Board contends that it anticipated $80,000 in miscellaneous revenues (interest payments on deposits) in its proposed 1987-88 current expense budget. Council, on the other hand, opined that the Board would or could experience a savings of $34,000 in its current expense budget through the generation of $114,000 in miscellaneous revenues. While Council indicated that the projected miscellaneous revenues for 1986-87 was in an amount of $115,000 and, in part, its "justification" in support its $34,000 anticipated savings, the Board argues that this "historical fact," although interesting, does

not constitute a detailed reason for Council's assertion that a $34,000 savings would occur. The Board argues that the governing body provided no analysis nor review of past, current and anticipated interest rates with respect to funds on deposit by the Board which would from the basis for the revenues to be generated. The Board contends that there is absolutely no correlation between the amount of 1986-87 projected revenues and those to be anticipated in fiscal year 1987-88. The Board contends that in addition to the Council's failure to set forth its "detailed supporting reasons," the governing body's projection of miscellaneous revenue (interest payments on deposits) was incorrect for 1986-87. The amount of total revenue on account of interest or deposits during the 1986-87 fiscal year was $100,000, which was down from the actual amount of $115,000 for fiscal 1985-86 formed the basis of Council's projection. The Board argues, among other things, that Council's erroneous projection computation coupled with its lack of any detailed statement of reasons as required by East Brunswick dictates that the $34,000 reduction must be restored to its 1987-88 current expense budget.

As a consequence of Council's stipulation there was no basis in law for its reduction of $54,000 in the Board's SUI account. The Board's arguments are not included nor considered here.

Council, through Mayor Arms and Municipal Administrator Laracy, contends that its line item reductions of $153,018 were made on the basis of information gathered by its ad hoc committee together with meetings held with Laracy and the Board Secretary, Superintendent of Schools, Board members and the Ocean County Superintendent of Schools. It asserts that the 10 percent and 20 percent reductions were not arbitrary but, rather, were as a consequence of the Board having built surpluses into many of its budget items which, Mayor Arms contends, was arbitrary. The Mayor further asserts that the Board may disagree with Council's reasons, however, there can be no serious argument that Council failed to state any reason for its reductions. The Mayor relies upon its Attachment I to Council's Resolution of April 28, 1987, which is captioned "Description of General Approach Taken For Line Item Reductions" and states that:

> The Governing Body and its advisors approached the school board budget with the concept of reducing expenditures only in areas which would not effect educational services received by the community's students. For "other expense" accounts, the primary approach was to review 1986-87 spending levels through March 31st, to project spending through June 30th, and to allow for a moderate increase in spending for the 1987-88 school year. For

> salary accounts, current yearly salaries as provided by the Board were totalled. In most cases, a 10% increase over projected spending has been allowed. For line items which are subject to more volitility (e.g., heating and hospitalization), a larger cushion has been provided.
>
> This very conservative approach has been taken in order to preserve the Board's financial flexibility and to assure that the reductions remain defensible when considered either individually and as a whole. (Mayor Arms Affidavit, Exhibit C)

Mr. Laracy contends that the 10 percent increase as to line items J110b, J212, J214 and J214c was not arbitrary but, rather, reasonable. Moreover, as to line items J212-J214c, Department Head salaries, the appropriation valued by the Mayor and Council included monies for an additional week of work in the summer months to prepare for the subsequent school year; information conveyed to the ad hoc committee by the Board and Superintendent which was passed on to Mayor and Council for its determination. Further, in communications with the Board, Laracy and the ad hoc committee learned that the Board planned to employ an additional alcohol counselor who would be employed during the summer session. Mayor and Council felt that such additional expenditure were necessary for a thorough and efficient education and therefore adjusted the appropriation accordingly.

The Borough Administrator asserts that he and the ad hoc committee gathered information with respect to line item J240, Teaching Supplies actual costs and expenditures as well as surpluses and transfers of funds from the account in past years. The Board's audit report for 1985-86 showed that $221,250 had been budgeted and that $180,317.20 had been expended which resulted in $40,932.80 having been transferred from the J240 account to other accounts. Therefore, Council reasoned, it was clear that the Board's proposed 1987-88 budget for teaching supplies was inflated. Consequently, Mayor and Council voted to appropriate 10 percent one fiscal year 1986-87 expenditures to correct for inflation and permit small growth.

As to line items J550a - Gas for Transport and J550b - Lubricants, Laracy and the ad hoc committee found that these items had been over budgeted in 1985-86, resulting in a transfer out to other accounts, yet the Board was seeking an increase over the prior years budgeted amount.

The ad hoc committee presented Mayor and Council with information regarding the Board's property insurance and liability insurance and the relative stable nature of property insurance and the lessening rate of increase in liability insurance. The ad hoc committee also presented the governing body with information regarding savings the Board could experience in its liability insurance costs by joining the insurance pool through the New Jersey School Board's Association.

With regards to line items J650c - Supplies and J810a - Employees Retirement, Council applied the 10 percent over current spending. As to line items J630 - Heat, J810 - Social Security and J820b - Employees Insurances, Mayor and Council realized that these areas are of greater volatility and, therefore, applied a 20 percent factor for the 1987-88 budget.

With regard to the Council's imposed capital outlay reductions, Mr. Laracy was aware that $230,000 of the Board's $348,986 capital surplus was dedicated and allocated by the constituent voters to build a fieldhouse and, therefore, was not available for any other use by the Board. However, the sum of $118,986 in capital surplus was available to fund proposed capital outlay projects without the $98,645 budgeted by the Board. He and the Mayor contend that the issue of air exchanger appropriations of approximately $100,000 was made after Council took its action to reduce this budget item and that there was no prior discussion of the need for such an expenditure prior to Council's action to so reduce. The appropriation for the expenditure for air exchangers did not appear in the Board's 1987-88 capital outlay budget nor was there an explicit mandate from the County Superintendent to so install the equipment as the result of the Board's T & E monitoring.

The ad hoc committee and Mr. Laracy viewed the Board's miscellaneous revenues and noted that it anticipated $80,000 for fiscal year 1987-88. However, an examination of the Board's audit report revealed an amount of $178,215.98 in miscellaneous revenue for 1985-86. Mr. Laracy therefore used the year to date figures for fiscal year 1986-87 and projected it through the end of the fiscal year to arrive at its projected total of $115,000 for 1986-87. Mr. Laracy contends that the projected revenue for 1987-88 would at least equal that of 1986-87 based upon several factors: i.e.; (1) Interest rates had bottomed out and appeared to be on the increase; (2) Even with the reductions in appropriations imposed by Mayor and Council, the total budget for fiscal year 1987-88 is 8 percent higher than the previous year, therefore, the Board has more money to invest and more money upon which interest may be earned; (3) the interest

income is but one element of miscellaneous revenues. Mr. Laracy asserts that the auditor's report for fiscal year 1985-86 included a variety of items other than interest income which totalled $49,029.00 in miscellaneous revenues.

Borough Administrator Laracy concluded his affidavit by stating:

> The ad hoc committee John McGeehan, Robert Kling and Robert Urban, all of whom have experience in the educational field, met with the Mayor and Council to present their findings. I also attended this meeting and participated in the discussion, but it was the Mayor and Council which decided to reduce appropriations in certain areas based upon the facts before them. This was not an across-the-board cut made in frustration from lack of information. Rather, as described above, the ad hoc committee and I participated in an extensive information-gathering process which resulted in substantial information which we presented to the Mayor and Council (Laracy Affidavit, August 4, 1987).

DISCUSSION RE: AD HOC COMMITTEE

The herein record demonstrates that Mayor and Council conducted three meetings between April 23 and April 27, 1987, concerning the Board's proposed current expense and capital outlay budget for 1987-88. On April 23, 1987, a joint meeting of Mayor and Council with representatives of the Board were present to discuss the Board's budget at an open public meeting. On April 24, 1987, Mayor and Council met with its ad hoc committee which presented a list of possible budgeting reductions to the Board's proposed 1987-88 current expense and capital outlay budgets in open public meeting. On April 27, 1987, Mayor and Council adopted its resolution to certify to the Ocean County Board of Taxation the amount of $9,515,766 for current expenses in taxes to be assessed, levied and collected for school purposes for the 1987-88. Mayor and Council resolved that no amount of taxation should be raised for capital outlay.

Mayor Arms and Borough Administrator Laracy contend that the ad hoc committee merely supplied information to Council for Council's ultimate determination to reduce the Board's 1987-88 school budget. A review of the total record, including the transcript of the open public meeting held on April 24, 1987, reveals the following:

Mayor Arms acknowledged his appointment of the ad hoc committee (p. 4) and expressed his opinion that it had more expertise in school budgets than Council (p. 5). The Mayor then turned the open public meeting over to ad hoc committee member John McGeehan who expressed his opinion as follows:

> In my opinion, as a current principal and also as of September, I will have three children in the district, I have a dual concern, actually three concerns, and as a professional concern, but also as a parent as well as a taxpayer. (Transcript of Recorded Proceedings Exhibit "C", p. 7, lines 14 through 18)

Ad hoc committee member McGeehan proceeded to present projected savings line-item by line-item to Mayor and Council. Mr. McGeehan asserted, among other things, that the first item for consideration was line item 110b, Board Secretary Salaries where a savings of $4,771 could be realized (p. 9). A discussion by the Mayor and Councilman Smith followed:

> MAYOR ARMS: Okay. So, the consensus of the entire ad hoc committee is that the reductions on J110b by $4,771 is a viable reduction.
>
> MR. SMITH: Let's develop a concept that says we're going to go to the State and say that we're going to revise the budget, I don't think $4,771 is the number to utilize. I think we should give them our projections and suggest that a cut of $4,000 is an appropriate amount, not to get into the $771. . . . (p. 10).

The Mayor continued with the discussion and asserted:

> . . . So, whatever figures you fellows (ad hoc committee) came up with, if you feel strong about it, which I know you researched it, I'm for going with your figures (p. 11).

Councilman Fream stated: "I agree one hundred percent." (p. 11)

With regard to the ad hoc committee recommendation to reduce the Board's J211 account, Councilman Smith stated:

> MR. SMITH: I guess the name of the game is to go for the $92,500. It will be challenged I'm sure. It will probably be defensible by the Board and Dr. DeBellis to a certain extent. But I think there's a reduction there. I don't think we'll get the full $92,500 but I think

> if it is challenged and reviewed on a State level, I think it will be looked at and a reduction would be in order (p. 13).

It is apparent from the transcript that ad hoc committee member McGeehan lead the discussion and presented conclusions to Mayor and Council with respect to specific line item reductions and the Board's budget (pp. 17, 18 and 19) with the approval of the Mayor and Council members present and participating (pp. 26 and 27). Mr. McGeehan made more than recommendations to the Mayor and Council. He expressed firm opinions and stated conclusions which were accepted unchallenged by the Mayor and Council. For example at page 28, MR. SMITH: "No problem." MAYOR ARMS: "Everybody happy with that?" At page 29, MAYOR ARMS: "I have no problem with that one. Everybody agree? Okay."

Where the discussion centered on the Teaching Supplies account (J240), Mr. McGeehan supported the proposed reduction by personalizing his experience as a teaching staff member in another school district:

> MR. MCGEEHAN: Okay. So, as of now, as of March, the $195,000 in a $221,000 budget and again, what tends to happen towards the end of the school year, I know I do it, if you have a balance in a certain account, you run out and you spend that. . . . (pp. 35 and 36).

There is also the instance where Mayor Arms overrules a recommendation of a Council member and supports the recommendation of the ad hoc committee. Mayor Arms said, in part, "I'd like to go with their (ad hoc committee) recommendations although my gut feeling is I think you're right, Charlie (Councilman Charles Willis) (p. 49).

There is little doubt that Mayor and Council met the precise conditions as set down in N.J.S.A. 18A:22-37, which provides as follows:

> If the voters reject any of the items submitted at the annual school election, the board of education shall deliver the proposed school budget to the governing body of the municipality, or of each of the municipalities included in the district within 2 days thereafter. The governing body of the municipality, or of each of the municipalities, included in the district shall, after consultation with the board, and by April 28, determine the amount which, in the judgment of said body or bodies, is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district, and certify

to the county board of taxation the totals of the amount so determined to be necessary for each of the following:

a. Current expenses of schools;

b. Vocational evening schools or classes;

c. Evening schools or classes for foreign born residents;

d. Appropriations to capital reserve fund; or

e. Any capital project, the cost whereof is to be paid directly from taxes, which amounts shall be included in the taxes to be assessed, levied and collected in such municipality or municipalities for such purposes.

Within 15 days after the governing body of the municipality or of each of the municipalities included in the district shall make such certification to the county board of taxation, the board of education shall notify such governing body or bodies if it intends to appeal to the commissioner the amounts which said body or bodies determined to be necessary to be appropriated for each item appearing in the proposed school budget.

The issue here, however, is whether the Mayor and Council met the criteria laid down in East Brunswick?

There is noting in the statute, N.J.S.A. 18A:22-47, nor in the East Brunswick Court's admonitions which provide or preclude a governing body the use of a citizen's ad hoc committee to collect data and information concerning a budget which was rejected by the voters. It is the extent beyond which mere data and information collection by such an ad hoc committee is at issue here.

The East Brunswick Court admonished local governing body's that in the cause of seeking to effect savings which will not impair the educational process, the governing body's ". . . determinations must be independent ones properly related to educational considerations rather than voter reactions." (48 N.J. 105) (Emphasis supplied)

Mayor and Council together with its Borough Administrator would have this tribunal believe that its ad hoc committee was merely an information and data collector. The transcript of the proceedings held on Friday, April 24, 1987, suggests otherwise. Here, not only did Mayor and Council effectively turn the open public meeting over to ad hoc committee member, Mr. McGeehan; a citizen taxpayer who made specific

recommendations for reductions to the Board's 1987-88 budget. In fact, Mr. McGeehan stated on the record of the proceedings that his concerns (recommendations) were made to Mayor and Council in part because he is "a parent as well as a taxpayer" (p. 7). Moreover, the record shows, among other things, that there was no discussion by Mayor and Council subsequent to one of Mr. McGeehan's specific recommendation (p. 42); that Mayor Arms asked the ad hoc committee for its specific recommendation with regards to a line item reduction (p. 48); that Mayor Arms asked the ad hoc committee whether it was "comfortable" with a reduction recommended by Mr. Laracy (p. 54 and 55); and, among others, where Mayor Arms asked the ad hoc committee's reasoning for a specific reduction.

This use of an ad hoc committee goes well beyond the bounds of mere data and information collection. Here, Mayor and Council's determinations were neither independent nor without consideration of voter reactions. Rather, the governing body relied in whole or in significant part upon opinions and conclusions set forth by citizen taxpayer to effectuate reductions in the Board's annual budget. This citizen ad hoc committee is neither statutorily nor constitutionally bound to perform any governmental function. Its members submit to no oath of office to uphold this State's statutes and constitution. Nor is it a dispassionate entity, free of bias or prejudice. Thus, despite the governing body's protestations to the contrary, its the use of the ad hoc committee is clearly contra to and in conflict with the specific directions given to it by the East Brunswick Court (Id. 105-106).

I **FIND** and **CONCLUDE**, therefore, that the Mayor and Council's adoption of its citizen's ad hoc committee recommended reductions to the Board's 1987-88 budget constitutes procedural and substantive arbitrariness. 48 N.J. 107; Board of Education of the Township of Jackson v. Township Committee of the Township of Jackson, Ocean County, 1983 S.L.D. ___ (OAL DKT. No. EDU 5573-82, Commissioner Decision January 13, 1983).

DISCUSSION RE: DETAILED STATEMENT UNDERLYING GOVERNING BODY'S DETERMINATIONS AND SUPPORTING REASONS

Resort is again taken to East Brunswick where the Court said, at 106 that:

> Where the governing body's action entails a significant aggregate reduction in the budget . . . it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.

The Commissioner has consistently required strict adherence to the governing body's obligation to provide specific determinations and supporting reasons for its reductions in each particular line item. Where, as here, there are "significant aggregate reductions," the governing body's obligation to set forth the basis for its determinations is fundamental to assess the appropriateness and its actions and to weigh whether the constitutional and legislative mandate for a thorough and efficient system of free public schools is being carried out.

With regard to the 14 line items identified by the Board and set forth hereinbefore as representing a total reduction of $153,018 by Mayor and Council, the governing body applied, in most instances, a two pronged method for its justification for the reduction of the individual line item account; i.e., the Board's 1986-87 projected spending plus a 10 percent or 20 percent increase depending upon the "volitility" of the account. (See: Exhibit C, Affidavit of Mayor Arms, August 4, 1987.) Those items deemed to be subject to more volitility appear to be Heat - J630, Social Security - J810 and Employee Insurance - J820b. What is meant by "volitility" is neither explained nor described by Mayor and Council.

Except for line items J212 - Department Head Salary and J214 - Counselors Salaries, there is no analysis of the Board's needs for the 1987-88 budget year to support the governing body's "justification" for its reductions. Even with regards to those two line items (J212, J214), Mayor and Council applied the two pronged method (1986-87 projected spending plus 10%) with an additional stipend for extra work during the summer months. There is no analysis as to why a 10 percent increase over the 1986-87 projected spending is adequate, necessary or, even appropriate for these two line items or those others where the same standard was applied. Attachment I, "Description of General Approach Taken for Line Item Reductions" is of no consequence for meeting the governing body's

obligation to set forth its detailed statement underlying its determinations and supporting reasons East Brunswick (See: Exhibit C - Affidavit of Mayor Leonard Arms, August 4, 1987). That document merely describes the method as to how the reductions were made. There is no clarity as to why the Mayor and Council made its determinations, nor does the document set forth the underlying reasons in support of the reductions.

The Commissioner has held that the "underlying" determinations and supporting reasons" required by East Brunswick must indicate for each line item reduced, precisely how and why the governing body determined that the reduction was warranted. Bd. of Ed. of Boro. of Union Beach v. Mayor and Council of Boro. of Union Beach, 1973 S.L.D. 231; Bd. of Ed. Boro. South River v. Mayor and Council Boro. South River, 1986 S.L.D. ____ (OAL DKT. No. EDU 4546-86). The Commissioner has held that mere conclusions and judgments made by the governing body are not adequate reasons, nor do they meet the Courts guidelines in East Brunswick; consequently, they cannot be considered. Union Beach, 1973 S.L.D. 231, 234. In Bd. of Ed. of Twp. of Old Bridge v. Mayor and Council of Twp. of Old Bridge, 1985 S.L.D. ____ (OAL DKT. No. 4025-85, September 9, 1985) the Commissioner adopted, among other things, the following language:

> The case law . . . admits no question that the failure of a governing body to specify each line item to be reduced or eliminated and the particular reasons therefore, at the time of its action, is a defect fatal to the reduction.

After a complete review of the herein record and in consideration of the unambiguous guidance in statute and case law, I **CONCLUDE** that the failure of the Mayor and Council to submit its supporting reasons for certain line item reductions to the Board's budget fails to comport with the East Brunswick guidelines.

CONCLUSIONS

Although this tribunal finds and concludes that Mayor and Council's adoption of its citizen ad hoc committee recommendations with regards to line item reductions to the Board's current expense and capital outlay budget constitutes arbitrary conduct, summary decision is **DENIED** to petitioner Board due to certain facts in dispute. Judson, 17 N.J. 67 (1954). Similarly, the Board's motion for partial summary decision is **DENIED** notwithstanding that this tribunal finds and concludes that Mayor and Council's

determinations to reduce certain budget line items in an amount of $153,018 were not supported by detailed statements of reasons for the reductions. East Brunswick; Judson.

It is well established that the burden of proof in a budget appeal lies with the board of education by a preponderance of the credible evidence that the restoration of budget funds reduced by the governing body are necessary rather than desirable, Bd. of Ed. Boro. of Manville v. Mayor and Council of Boro. of Manville, 1970 S.L.D. 285, 288. In the instant matter, the Board has stipulated that two items reduced by Council are not contested and, therefore, are no longer in dispute: i.e. J820b - Employee Insurance in the amount of $79,050 in reduction; and, J110b - Board Secretary Salary in an amount of $4,771 reduction. Accordingly, the amount of the combined total of the two accounts of $83,821 is no longer in dispute and, therefore, Council's action is **SUSTAINED** with respect thereto.

Further, the Board, through its Board Secretary Mr. Lawrence Mack, concedes Council's reductions in the following line items:

J550 b	Lubricants	$ 2,036
J650 c	Supplies for Grounds	7,967
J820 a	Property Insurance	5,454
J820 c	Liability Insurance	11,109
	TOTAL	$26,566

Respondent Mayor and Council concede that its reduction of $54,000 in the Board's State Unemployment Insurance (SUI) Fund has no legal basis and, therefore, must be restored to the Board. Accordingly, the amount of $54,000 is restored to the Board's SUI account and is not to be considered as a revenue to the Board.

The Board has failed to demonstrate its need for the restoration of all the funds to its J211 account. The record shows that the Board's creation of a new position of Supervisor of Facilities and Special Program is desirable rather than necessary. Whether Council's recommendations as to the distribution of the duties for the proposed position is followed by the Board is of no consequence here (See; Attachment 2, Exhibit F - Board's Brief in support of Motion for Summary Decision). Rather, the need for the position, in view of this budget dispute, has not been affirmatively established by the Board.

Further, the Board admits that its high school functioned with only one vice principal during the 1986-87 school year while one of its two vice principals was on an approved leave of absence. Accordingly, the Board has failed to establish its need for the recommended reduction of one vice principal.

The record does show, however, that the Board's high school is due to undergo its ten-year evaluation by the Middle States Association of Secondary Schools and Colleges. Further, the Board is at Level II of the T & E monitoring system where the need for improvement has been identified as in its physical plant and facilities and curriculum planning and development. Two of the four positions eliminated by Council's budget reductions in account J211, are in the area of curriculum. Where, as here, curriculum coordinator positions are necessary to meet the Board's needs in development and articulation in order to meet and satisfy the State's T & E mandate; the positions must be restored. Therefore, the two curriculum coordinator positions eliminated by Council at the projected cost of $18,500 each is hereby restored to the Board's 1987-88 current expense budget.

In connection with the restoration of $37,000 to the Board's J211 account, Mayor and Council imposed a $20,000 reduction to the Board's J215 a line item account - Salaries for Clerical Assistants. The governing body reasoned that a reduction in four supervisory positions would eliminate the need for two secretarial-clerical staff members in an amount of $20,000. Now that this tribunal has restored two of the four reduced supervisory staff positions under line item J211, it follows that one clerical position be restored. Therefore, the amount of $10,000 is restored to the Board's J215 a account.

The Board has failed to successfully establish its need for the three teaching staff members eliminated by Mayor and Council. The testimony demonstrates that the middle school principal was able to adjust the schools classes in art, music, computer science and its program for the academically advanced pupils with the reduction of three teaching staff members by attrition. Although the music, art and computer program moved from compulsory to elective, there is nothing in this record to show that any pupil was denied access to any of the courses of study. The record does demonstrate that all of the academically advanced pupils were accomodated in the schools program. Accordingly, the amount of $55,500 reduced from the Board's J213 account is hereby **SUSTAINED.**

A major point of contention between the parties, among others, is the Board's capital outlay budget and surplus, or unexpended balance, accrued therein. The Board does not dispute it had accumulated $348,986.20 in its capital outlay at the close of its 1985-86 fiscal year. Nor does the Mayor and Council dispute that $230,000 of the above amount is dedicated, by the voters, for the construction of an athletic field house and, therefore, is unavailable for any other capital expenditures. The dispute, therefore, centers upon; (1) the Board's use of the approximately $119,000 unexpended balance in its capital outlay budget; and, (2) Mayor and Council's reduction and elimination of $98,645 from the Board's 1987-88 budget.

The Board contends that it has already spent $100,000 of the approximately $119,000 in capital surplus for the installation of air exchangers to its school buildings in order to comply with its T & E Monitoring Report and the directions from the Ocean County Superintendent of Schools. It argues that it is in need of the budgeted $98,645 to commence repairs to its physical plant which is estimated to cost approximately $420,00 (Exhibit P-16, P-18). The board argues that the remaining $19,000 in its capital outlay account is insufficient to carry out any one repair project and is totally inadequate in the event an emergency arises during the 1987-88 year. The Board argues further that it should not be penalized by Council for carrying a surplus in this account which, it notes, is permissable under State Board of Education rules and the Commissioner's decisions (N.J.A.C. 6:20-2.14, Bd. of Ed. of Penns Grove-Upper Penns Neck Reg. S.D. v. Mayor and Council Boro. of Penns Grove and Twp. Comm. of Twp. of Upper Penns Neck, 1971 S.L.D. 372).

Mayor and Council contend, among other things, that the Board has carried an extraordinary amount of surplus in its capital account and that it was not until the governing body determined to elimintate the entire amount of $98,645 that the Board decided to spend $100,000 of its surplus in the account. Council argues, among other things, that the Board did not project any expenditure for air exchangers in its 1986-87 budget or in its 1987-88 budget, therefore, it should not be allowed to add to its capital surplus through the restoration of the $98,645 reduced by the governing body.

The Board advances a sound and persuasive argument for the restoration of its capital outlay funds. In veiw of the fact that the Board is faced with capital projects of considerable magnitude and expense, it has established its needs for the funds. Its approximately $19,000 in unexpended free balance in this account is not adequate to

perform any of those projects outlined in its two studies (i.e., Robbins Report; Facilities Study E.I. Associates). Nor is the $19,000 excessive in light of Commissioner's decision and State Board of Education rules.

I CONCLUDE, therefore, the Board has demonstrated its need for the restoration of the $98,645 reduced by Mayor and Council.

Having previously concluded that the governing body's adoption of its ad hoc committee recommendations as arbitrary and, having also concluded that those line item reductions (not conceded by the Board) which lacked Council's underlying supporting reasons for its determinations violated the standards set forth in East Brunswick; I now CONCLUDE that all of the remaining reductions to the Board's 1987-88 school budget are hereby restored.

A summary of the reductions and restorations are set forth hereinbelow as follows:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110 b	Bd. Sec. Sal.	$ 4,771	$ -0-	$ 4,771
J211	Sal. Princ. Supervisor, etc.	74,000	37,000	37,000
J212	Dept. Head Sal.	9,200	9,200	-0-
J213	Teacher Sal.	55,500	-0-	55,500
J214	Couns. Sal.	6,000	6,000	-0-
J214 c	Psy. Sal.	15,542	15,542	-0-
J215 c	Sal. Clerical	20,000	10,000	10,000
J240	Teacher Supplies	31,625	31,625	-0-
J550 a	Bus Transp.	14,422	14,422	-0-
J550 b	Lubricants	2,036	-0-	2,036
J610 a	Cust. Sal.	10,000	10,000	-0-
J630	Heat	48,672	48,672	-0-
J650 c	Supp. Grounds	7,967	-0-	7,967
J810 a	Emp. Retirement	10,501	10,501	-0-

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
J810	Soc. Security	$ 6,669	$ 6,669	-0-
J820 a	Prop. Ins.	5,454	-0-	5,454
J820 b	Emp. Ins.	79,050	-0-	79,050
J820 c	Liab. Ins.	11,109	-0-	11,109
CAPITAL OUTLAY:		$ 98,645	$ 98,645	$ -0-
REVENUES:				
	Misc. Revenue	34,000	34,000	-0-
	SUI	54,000	54,000	-0-
	TOTALS	$599,163	$386,276	$212,887

ORDER

Accordingly, I **FIND** and **DETERMINE** that the certification of the appropriations necessary for school purposes for 1987-88 made by Mayor and Council is insufficient by an amount of $287,631 in current expenses and $98,645 in capital outlay for the maintenance of a thorough and efficient system of public schools in the district. It is therefore **ORDERED** that the certification to the Ocean County Board of Taxation be increased by the sum of $287,631 in current expenses and $98,645 in capital outlay of appropriations for school purposes for 1987-88 to the previous adopted certification so that the total amount of the local tax levy for current expenses of the school district shall be $9,803,397 and the total amount of the local tax levy for capital outlay shall be $98,645.

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

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

20 November 1987
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

11-20-87
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 24 1987
DATE

Ronald L. Parks/KS
OFFICE OF ADMINISTRATIVE LAW

ml

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MAYOR AND COUNCIL OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY, RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by the parties pursuant to N.J.A.C. 1:1-18.4 as were the parties' reply exceptions.

Petitioner Board of Education of the Borough of Point Pleasant (Board) focused its exceptions to the initial decision on the ALJ's disposition of the Board's Motions for Partial Summary Decision and for Summary Decision, both of which the ALJ denied on the basis that certain factual issues were extant, citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67 (1954). The Board submits that the ALJ erred in making such a conclusion because there were no factual issues concerning the prayer for relief respecting each motion.

> ***Were it otherwise, Judge Law would not have been able to reach his conclusions that the respondent did not comply with the requirement that it provide a detailed statement of underlying determinations and supporting reasons nor could he have reached the conclusion that the use of the ad hoc citizens committee constituted both procedural and substantive arbitrariness rendering the reductions effected by the respondent invalid. (Board's Exceptions, at p. 3)

Rather, the Board contends, concerning the Motion for Partial Summary Judgment relative to the line item reductions, the facts in contest pertain to the merits of demonstrating that the reduction made by Respondent Mayor and Council (Council), "would have the effect of denying a thorough and efficient education to the pupils under the control and direction of petitioner. See Judge Law's citation of Bd. of Ed. Boro. of Manville vs. Mayor and Council of Boro. of Manville, 1970 S.L.D. 285, 288.***" (Board's Exceptions, at p. 4) This was an issue that need never have been reached had the ALJ not reserved decision on the Motion for Partial Summary Decision and the Motion for Summary Decision prior to the commencement of the hearings in connection with the budget, argues the Board.

Citing Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94, 105-106 (1966) among other cases, the Board contends that failure of a governing body to comply with the dictates of East Brunswick through a lack of detailed statements setting forth the underlying determinations and supporting reasons for line item reductions of the governing body will result in the full restoration of the line item reductions for which no such reasons were provided. "Such lack of reasons is fatal and results in the line item reductions being void ab initio," claims the Board. (Board's Exceptions, at p. 4) Moreover, the Board avers that Council "sought to 'bootstrap' its way into a factual dispute by fashioning and providing reasons for its reductions after it had acted." (Id., at pp. 4-5) Citing Board of Education of the Township of Union v. Township Committee of the Township of Union, decided by the Commissioner July 9, 1981, the Board submits that "the governing body must have the rationale *** at the time it acts and shall not be permitted to subsequently construct one in a 'bootstrap' manner." (emphasis in text) (Board's Exceptions, at p. 5, citing Slip Opinion, at p. 5)

The Board claims that the ALJ, after making a finding that there is a lack of a detailed statement of underlying determinations and supporting reasons, decided the reductions made by Council were arbitrary per se, but then, instead of granting the partial summary decision in favor of the Board

> required petitioner to go forward with each of the line item reductions which were the subject of the motion for partial summary decision and bear the burden of proof in demonstrating that those same reductions were arbitrary on the basis that the reductions would inhibit the ability of petitioner to provide the constitutionally mandated thorough and efficient education. (Initial Decision, at 24).
>
> (Board's Exceptions, at p. 6)

Thus, contends the Board, the ALJ made it prove arbitrariness twice:

> Once Judge Law made the determination that respondent had not supplied a detailed statement of underlying determinations and supporting reasons for its reductions which were the subject of the motion for partial summary decision, the inquiry should have ended there. (Id.)

The Board submits the same objection with respect to the ALJ's ruling on the summary decision motion. "Although Judge Law decided that the utilization of the ad hoc citizens committee had so tainted respondent's budgetary review proceedings and its resolution of reductions so as to render the reductions procedurally and substantively arbitrary per se, Judge Law refused to restore the

full amount of petitioner's proposed budget.***" (Id.) Instead, avers the Board, the ALJ reserved decision on the Motion for Summary Decision and required the Board to go forward and attempt to meet the burden of proof regarding arbitrariness as defined in Manville, supra. The Board contends that once there was a determination that the use of the citizens ad hoc committee rendered the reductions of Council arbitrary per se, the inquiry should have ended there. The Board further argues that it is not required to prove the need for the funds eliminated from the budget because the reductions themselves are invalid from the beginning. The Board cites Board of Education of the Borough of Point Pleasant v. Borough Council of the Borough of Point Pleasant, 1975 S.L.D. 1039 for the proposition that such reductions arbitrarily enacted, legally do not exist.

The Board submits that the initial decision should be modified to the effect that each line item which was the subject of the Board's Motion for Partial Summary Decision and the entire amount of the reductions effected by Council in the amount of $599,163 be void ab initio in accordance with the ALJ's finding of procedural and substantive arbitrariness in connection with the Board's Motion for Summary Decision.

Council filed the following timely cross-exceptions, a reply to the exceptions to the initial decision filed by the Board. These cross-exceptions are summarized below in pertinent part:

1. Council takes exception to the ALJ's finding that the involvement of the ad hoc committee constituted procedural and substantive arbitrariness. Council argues that nothing in statute or case law precludes the governing body of a municipality from obtaining assistance n performing its function under N.J.S.A. 18A:22-37. Further, Council suggests that the ALJ's decision "twists the language of East Brunswick, Supra, to support a finding of arbitrariness. *** By taking the word 'independent' out of this context, Judge Law requires an unreasonably abstract decision-making." (Council's Exceptions, at p. 6) Council avers that the ALJ has equated participation by an ad hoc citizens committee with the impermissible "consideration of voter reaction" language mentioned in East Brunswick, supra. Council claims, "The ad hoc committee was not appointed to relay taxpayer sentiment, but rather to assist the governing body in information gathering." (Id.) It cites Board of Education of Monmouth Regional High School v. District Township Committee of Shrewsbury, but omits the citation for this case.

2. Council takes exception to the ALJ's finding that it failed to supply sufficient reasons as to contain reductions. In this regard Council avers the ALJ imposed a standard for explaining reasons supporting the reductions which is unwarranted under previous decisions. "In those cases where the 1986-87 spending levels plus ten percent was used as the basis for reduction, the Board did not meet its burden of proving that more than those sums were needed." (Council's Exceptions, at p. 7) It claims the ALJ

took an inconsistent approach, substituting his judgment for Council's in those areas where a more detailed explanation was provided but, without authority, removed from the Board its burden of proving that the funds sought for said line items were needed.

3. Council takes exception to the ALJ's finding that the entire capital outlay budget shall be restored.

4. Council takes exception to the ALJ's finding that the entirety of Item J630 - Heat shall be restored.

As to the third and fourth issues of exceptions, Council claims the ALJ lacked a factual basis for his restoration of the funds as follows:

> As to the third and fourth issues of exception, the ALJ lacked a factual basis for his restoration of the funds. The record shows that the Petitioner spent less than $3,000.00 from its capital surplus in the preceding year and had not planned to spend the money for the air exchangers until the budget defeat. This type of bald manipulation of budgets cannot and should not be countenanced by the Commissioner. As to the full restoration of the J630 - Heat budget, Judge Law erred in that the only testimony supporting such an expenditure came from Board Secretary Mack who testified to a sort of 3-year cyclical theory which was his personal construction, unsupported by scientific theory.
>
> (Council's Exceptions, at p. 7)

By way of reply exceptions, Council avers, "The argument adduced by the Petitioner in support of its exceptions suffers from both factual inaccuracy and a fundamental misunderstanding of the nature of summary decision." (Council's Reply Exceptions, at p. 1)

As to the ad hoc committee, Council avers the ALJ's findings in the discussion section of his initial decision are mere dicta, not the holding of the decision. Moreover, Council claims, nowhere in the initial decision does the ALJ find the reductions procedurally and substantively arbitrary per se as argued at page 6 of the Board's exceptions. "Rather, Judge Law, after reviewing all the evidence and testimony in the case made specific findings and conclusions restoring $386,276. of the $599,163. reductions to the budget, after finding that the involvement of the ad hoc committee constituted arbitrariness in this case." (emphasis in text) (Council's Reply Exceptions, at pp. 1-2)

Secondly, Council contends that summary decision and partial summary decision in the instant matter were inappropriate because factual disputes exist concerning the role played by the ad hoc committee and whether the governing body gave adequate reasons

for its reductions. Council cites Judson v. Peoples Bank and Trust Company, supra, for the fact that summary decision is to be granted only where no material facts are in dispute. Further, Council suggests that the burden of proof lies with the Board to prove by a preponderance of credible evidence that restoration of funds is necessary, not merely desirable, citing Board of Education of the Borough of Manville v. Mayor and Council of the Borough of Manville, 1970 S.L.D. 285, 288. Council claims that the Board's exceptions ignore "the fact that it bore the burden of proof and that in considering the motions, Judge Law was bound to view the facts in the light most favorable to the respondent." (Council's Reply Exceptions, at p. 2)

Council urges that nothing in case law precludes the use of a citizen's ad hoc committee for purposes of collecting data and information concerning a budget which had been rejected by the voters and it cites the initial decision, ante, as being in support of this proposition. Moreover, Council says there are no decisions which hold that the involvement of an ad hoc committee is arbitrary per se, the only other reported decision addressing ad hoc committee involvement, that of Board of Education of the Township of Jackson v. Township Committee of Township of Jackson, decided by the Commissioner January 13, 1983 also involved a finding of arbitrariness after hearing.

As to the Board's exception concerning the denial of the Motion for Partial Summary Decision, Council avers "***Petitioner is really asking the Commissioner to restore to its budget money which it has already admitted that it doesn't need." Council cites the initial decision, ante, averring that the Board "stipulated that the two items J820b - Employee Insurance with a $79,050. reduction and J110b-Board Secretary salary with a $4,771. reduction are not contested, and, therefore, are no longer in dispute." (Council's Reply Exceptions, at p. 3)

Further, Council states that Board Secretary Mack conceded the Council's reductions in J550 - Lubricants ($2,036), J650c - Supplies for Grounds ($7,967), J820a - Property Insurance ($5,454), and J820c - Liability Insurance ($11,109). Council challenges the Board's statement that these stipulations and concessions would not have been made had the Motion for Partial Summary Judgment been granted prior to hearing and, thus, these items should be restored to its budget by the Commissioner. Council suggests that the Board's allegation that it has had to bear a double burden of proof is incorrect. Council claims, "The issue of any arbitrariness in the governing body's actions goes only to the scope of the Commissioner's review of the budget reductions, and does not serve to diminish the petitioner's burden of proof." (Id.) It cites Board of Education of East Brunswick Township v. Township Council, East Brunswick, 48 N.J. 94, 106-107 (1966) for this proposition.

It is Council's position that the ALJ expanded his own power to review the budget by finding procedural and substantive

arbitrariness in the involvement of the ad hoc committee. However, once the ALJ did so, it remained the Board's burden to show the restoration of funds was necessary.

> As to certain items, the Petitioner stipulated and conceded its inability to meet that burden. ***Restoring those funds would make a mockery of the entire process of budget review.
>
> As to other line items where he made less than full restoration, Judge Law made a specific finding of fact, based upon all evidence before him, that such restoration was not needed. To ignore these specific findings by an ALJ fully apprised to all relevant facts after seven days of hearing encompassing eight witnesses and 65 exhibits would denigrate the hearing process and exceed the proper scope of the Commissioner's review of the Initial Decision. (Id., at p. 5)

The Board's reply exceptions contend that, contrary to the claim of Council, the ALJ's findings of arbitrariness with regard to both the use of the ad hoc committee as well as the failure of the governing body to provide a detailed statement of the underlying determination supporting reasons accompanying its resolution of budgetary reductions were certainly not dicta. The Board claims that "the [Council's] 'justifications', which ostensibly represent the 'underlying determinations and supporting reasons' of respondent, are not reasons at all but, rather, are factually unsupported conclusions.***" (Board's Reply Exceptions, at p. 2) The Board avers that percentage reductions do not comport with the mandate of East Brunswick, supra.

As to Council's allegation that the Board's exceptions as to the denial of the Motion for Partial Summary Decision demonstrate that "'the petitioner is really asking the Commissioner to restore to its budget, money which it had already admitted that it doesn't need.'" (Board's Reply Exceptions, at p. 3 quoting Council's Reply Exceptions, at p. 3) Such a concession was never made. Instead, the Board states that after the ALJ reserved decision on the motions

> [P]etitioner conceded that it could not prove the need for the restoration of funds with respect to certain line items as measured against the burden of proof indicated in [Manville, supra]. In each case, that such a concession was made, petitioner stated that it was not conceding its entitlement to the restoration of those same funds if it prevailed on the motions for partial summary decision and summary decision. (emphasis in text)
> (Board's Reply Exceptions, at p. 3)

As to the ad hoc committee and Council's allegation that summary decision was inappropriate in regard to whether the committee extended beyond mere fact-finding, the Board states that it is clear from the transcripts of the meeting held by Council, as well as from the hearing below, "The ad hoc committee made specific determinations and recommendations to respondent as to which areas of the budget to cut and as to how much of specific line items should be cut." (Board's Reply Exceptions, at p. 4)

The Board contends, "This is not mere information gathering but, represents the intrusion of value judgments of the members of the ad hoc committee upon the deliberative process of respondent, which is required by statute and case law to make independent determinations without regard to voter reaction.***" (Id.)

With regard to cross-exception No. 3, the Board submits that the initial decision and the testimony and exhibits more than amply demonstrate the Board's need for the funds in question. As to the finding of the ALJ returning line item J630-Heat in its entirety, the Board rebuts Council's contention that there was no factual basis to restore these funds. The Board states again that it demonstrated at hearing that the funds were needed on the basis of percentage increases from prior years. Moreover, the Board contends that Council had no factual basis supporting this reduction.

For the reasons set forth in the Motions for Partial Summary Decision as well as Summary Decision, the Board asks the Commissioner to review the brief and submission of the Board and Council in connection with its exceptions and replies. Said documents are incorporated herein by reference.

Finally, the Board affixes to its reply exceptions a Certification signed by Board counsel concerning the manner and nature of the concession of certain line items made during the hearing. Said submission is made in lieu of transcripts. The Commissioner will not consider such a document as a part of the record before him in that the regulations do not provide for said submissions nor for provision of an opportunity for Council to rebut any statements made in said Certification.

Upon his careful review of the record before him, which it is noted includes the transcripts of Meeting of Mayor and Council and Board of Education Re: Budget, dated April 23, 1987 (Exhibit B); Council Meeting of the Mayor and Council of the Borough of Point Pleasant and the Ad Hoc Committee Re: Board of Education Budget, dated April 24, 1987 (Exhibit C); as well as transcripts of the hearing conducted before Lillard E. Law, ALJ dated September 3 and September 4, 1987, the fourth and fifth days of hearing in the instant matter, the Commissioner grants summary decision in the instant matter, restoring all amounts in contest between the parties for the reasons that follow.

Initially, the Commissioner notes at the outset of the meeting of April 24, 1987, Mayor Arms read into the record a letter from the Borough attorney elucidating the purpose of the governing body's review process in a budget appeal rejected by the voters, including the standard set forth in Board of Education of East Brunswick Township, supra. Therein Mayor Arms stated:

> The governing body's review process is limited to affecting savings which shall not impair the educational process. This determination must be independent or properly related to the educational considerations rather than border (sic) [voter] reaction. ***Where its actions result in a significant aggregate deduction in the budget. (sic) It (sic) should be accompanied by a detailed statement setting forth the governing body (sic) underlined (sic) determinations and supporting reasons.***
> (Exhibit B, at p. 2 quoting East Brunswick, supra)

Despite what appears from the record to be a good faith effort at achieving the above directive, the Commissioner is in accord with the ALJ below in his findings in the initial decision, ante, "that the failure of the Mayor and Council to submit its supporting reasons for certain line item reductions to the Board's budget fails to comport with the East Brunswick guidelines."

The Commissioner adopts as his own the reasons set forth in the initial decision, ante, in support of this conclusion. (See also - Exhibit B, at p. 5.)

Having determined that the line item reductions made by the Council fail to meet the East Brunswick standard and based on the record as contained in the papers submitted by the parties in the Board's Motion for Partial Summary decision, the Commissioner is required to direct the remedy set forth in law when such justifications are deficient -- restoration of all line item amounts affected by any reductions made without appropriate supporting reasons. See Bd. of Ed. of Boro. of Union Beach v. Mayor and Council of Boro., South River, 1973 S.L.D 231. See also Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, Gloucester County, decided by the Commissioner April 27, 1987, aff'd St. Bd. August 7, 1987.

In this regard, the Commissioner rejects the conclusion of the ALJ and Council that partial summary decision must be denied in the instant matter because, allegedly, there remain facts in contest which preclude summary decision. The facts alleged to be in dispute pertain to the merits of the line item reductions made by Council. Such matters need not be reached herein because there can be no question that "the failure of a governing body to specify each line item to be reduced or eliminated and the particular reasons

therefore, at the time of its action, is a defect fatal to the reduction." (emphasis supplied) Bd. of Ed. of Twp. of Old Bridge v. Mayor and Council of Twp. of Old Bridge, decided by the Commissioner September 9, 1985 (Slip Opinion, at p. 9) See also, Board of Education of the Township of Deptford, supra.

Moreover, pertaining to the Motion for Summary Decision concerning the ad hoc committee herein, the Commissioner agrees with the ALJ in the initial decision, ante, that "[t]his use of an ad hoc committee goes well beyond the bounds of mere data and information collection." In the Commissioner's opinion any such committee represents an abdication of the legislatively mandated responsibility of the Mayor and Council as delineated in N.J.S.A. 18A:22-47 and East Brunswick, supra, because they are not the elected officials. It is clear from the transcript of the meeting conducted on April 23, 1987 that Council did not participate to the extent mandated by law, but merely conceded to the recommendations of its committee members. The Commissioner decries use of such lay participants in the process established by law and specifically requiring action and interaction between the Mayor and Council and the Board and for no participation by any other group, since voter participation and lay participation have already been met by the budget election process. The Commissioner so finds notwithstanding any language to the contrary in his earlier decision in Board of Education of the Township of Jackson, supra.

Although inconsequential to the Commissioner's determination herein, it is noted for the record as follows:

1. The charts on pages five, ten, and twenty-eight should indicate line item J810b - Social Security;

2. The last paragraph on page nine and the total on page ten indicate line item reductions of $153,018, however, the amount of the savings listed on page ten adds up to $253,018. The top of page twelve indicates reductions totaling $155,018; again, the savings listed on page 10 add up to $253,018;

3. The last paragraph on page sixteen indicates an amount of $178,215.98 in miscellaneous revenue as per the 1985-86 audit report. It should be noted that the $178,215.98 was miscellaneous revenue in the general fund. There was an additional $90,266.80 miscellaneous revenue in the special revenue fund due to registration fees for a total of $268,482.78.

Accordingly, the Commissioner orders that the local tax levy for 1987-88 school budget in Point Pleasant as follows:

	AMOUNT CERTIFIED	AMOUNT RESTORED	TOTAL
CURRENT EXPENSE	$9,515,766	$500,518	$10,016,284
CAPITAL OUTLAY	-0-	$ 98,645	$ 98,645

The Ocean County Board of Taxation is hereby directed to make the necessary adjustment set forth above to reflect a total amount of $10,016,284 to be raised in the 1987-88 local tax levy for current expense purposes and $98,645 in capital outlay for school year 1987-88.

Accordingly, summary decision is granted in favor of the Board. The Commissioner hereby orders the entire amount reduced by the Mayor and Council in its resolution of April 27, 1987 be restored to the school budget of Point Pleasant Borough for the 1987-88 school year.

COMMISSIONER OF EDUCATION

December 31, 1987

IN THE MATTER OF THE TEACHING :
CERTIFICATE OF PATRICIA ACKEN, :
SCHOOL DISTRICT OF THE TOWNSHIP : STATE BOARD OF EDUCATION
OF EAST AMWELL, HUNTERDON COUNTY. : DECISION
:

Decided by the Commissioner of Education, December 22, 1986

For the Petitioner-Respondent, Fogarty and Hara
(Stephen R. Fogarty, Esq., of Counsel)

For the Respondent-Appellant, Klausner, Hunter and Oxfeld
(Stephen E. Klausner, Esq., of Counsel)

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

May 6, 1987

EVELYN BALL ET AL.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, August 31, 1984

For the Petitioners-Respondents, Bucceri and Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Appellant, Greenwood and Sayovitz
(Sidney A. Sayovitz, Esq., of Counsel)

The parties in this case are the same parties as those in Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A-2508-84T7 (App. Div. February 26, 1986), certif. denied, Docket #25,352 (June 30, 1986). Each of the Petitioners-Respondents (hereinafter "Petitioners") were originally auxiliary teachers employed by the Respondent-Appellant, Board of Education of the Township of Teaneck (hereinafter the "Board"). All are tenured. Some of the Petitioners continue to serve as auxiliary teachers, while others accepted assignments as classroom teachers in 1983 and 1984. Those who accepted assignments as classroom teachers assert that, upon their placement on the negotiated salary guide applicable to classroom teachers, the Board was required by the education laws to credit them with one step on the negotiated salary schedule applicable to classroom teachers for each year of service as auxiliary teachers. Those who continue to serve as auxiliary teachers assert that they are entitled to be placed on the negotiated salary guide applicable to classroom teachers, with credit of one step for each year of service as auxiliaries.

In an Initial Decision issued prior to our decision in Hyman, supra, the Administrative Law Judge (ALJ), finding that auxiliary service was less than full-time, and that Irene Skulnik's claim to credit upon her initial employment as a classroom teacher was barred by laches, determined that the salaries of auxiliaries who became classroom teachers were controlled by the provisions of the collective negotiations agreement applicable to classroom teachers and that there was no requirement that prior auxiliary experience be credited for salary purposes. She further found that auxiliaries who continued to serve in that capacity were to be given salary credit for their service in determining placement on the

regular classroom teacher guide, as was directed by the Commissioner's decision in Hyman. She concluded, however, that entitlement to salaries of auxiliaries would be controlled by the ultimate determination in Hyman, which was then on appeal to the State Board.

The Commissioner adopted the ALJ's determination that the placement of auxiliaries in the salary guide applicable to classroom teachers, as directed by the Commissioner's decision in Hyman, included credit for their prior years of service. He, however, rejected the ALJ's determination concerning credit for prior auxiliary service upon employment as a classroom teacher, finding instead that experience as a supplemental or auxiliary teacher is to be included in determining proper placement on the salary guide. Finally, he found that Petitioner Skulnik was entitled to prospective relief from 1982 to 1983 and that time spent in home instruction was not creditable for placement on the salary guide. The Board was directed to promptly make proper renumeration to the Petitioners. The State Board granted the Board's motion for a stay of the Commissioner's decision on March 6, 1985.

Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A-2508-84T7 (App. Div. February 26, 1986), certif. denied, Docket #25,352 (June 30, 1986), has settled that auxiliaries, whether full or part-time, have no entitlement under the education laws to placement on any particular salary guide, including the negotiated guide applicable to classroom teachers. Hence, the Petitioners who continued to serve as auxiliaries have no claim to compensation beyond that conferred by the negotiated salary guide applicable to them during the years relevant to this litigation. Therefore, their dependent claim that they are entitled to credit on the guide applicable to classroom teachers for prior years of auxiliary service must fail.

The remaining question is whether the former auxiliary teachers involved in the litigation were entitled under the education laws to the credit they seek for auxiliary service when they were subsequently employed as classroom teachers and placed upon the negotiated guide applicable to classroom teachers, and that therefore, they are entitled to salary adjustments. The starting point for resolving the question of whether the placements of Petitioners on the negotiated schedule applicable to classroom teachers contravened the education laws is N.J.S.A. 18A:29-9, which provides that:

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

Id.

Thus, when initial placement occurs, the member's place on the schedule is determined by agreement between the member and the board unless it is superseded by a collective negotiations agreement.

2

Belleville Education Association v. Belleville Board of Education, 209 N.J. Super. 93 (App. Div. 1986). We emphasize that, whether by individual or collective agreement, agreement between the parties concerning initial placement may be set aside in this forum only if placement on the salary schedule contravenes the specific requirements of the education laws. e.g., Larson v. Board of Education of Piscataway, decided by the State Board, October 6, 1982.

"Member" is defined by N.J.S.A. 18A:29-6 for purposes of determining when an initial placement has occurred under N.J.S.A. 18A:29-9. That provision defines "member" as a "full-time teaching staff member," and, based on the statutory language, we conclude that an initial placement occurred when the Petitioners in this case who were formerly part-time auxiliary teachers accepted full-time employment for the first time, either as full-time auxiliary teachers or as full-time classroom teachers. In so concluding we emphasize that, as we found in Hyman, supra, auxiliary teachers in this District who were employed for six hours a day were full-time teaching staff members during the years relevant to this litigation.[1]

The education laws, however, include no requirement that prior in-district experience be credited upon initial placement by correlating each year of part-time experience with the steps contained in the applicable salary schedule and placing the member accordingly. Rather, to the extent that prior in-district experience must be recognized, such requirements are set forth in N.J.S.A. 18A:29-7 (repealed 1985), which mandated for the years relevant to this litigation that compensation conform to minimum statutory amounts that incorporated prior experience,[2] and

---

1 As set forth in Hyman, the State Board is authorized to prescribe the requirements of "full-time" under N.J.S.A. 18A:29-6 (repealed 1985) (provision now codified at N.J.S.A. 18A:29-5). The authority to define "full-time" has been delegated by the State Board to the district boards, as long as the number of hours required each day is more than four hours. N.J.A.C. 6:13-1.13 The Teaneck Board of Education has utilized this authority by stating "Auxiliary instructor personnel who are employed on a full-time basis shall have a work day of six (6) hours exclusive of lunch." Stipulation of Facts, Exhibit J-1; Agreements between the Teaneck Board of Education and the Teaneck Teachers' Association, 1982-1985, Art. XVII(B).

2 We note that, effective September 9, 1985, the compensation statutes were substantially altered. N.J.S.A. 18A:29-6, N.J.S.A. 18A:29-7, N.J.S.A. 18A:29-8, N.J.S.A. 18A:29-10 and N.J.S.A. 18A:29-12 were repealed. Teacher Quality Employment Act, N.J.S.A. 18A:29-5, L. 1985, c. 321 sec. 16 (1985). In addition to repealing those statutory provisions, the Teacher Quality Employment Act raised the minimum salary for full-time teaching staff members to $18,500. N.J.S.A. 18A:29-5. Although the entitlement to compensation benefits in this case is to be determined under the statutes in effect prior to September 9, 1985, we emphasize that the new statutory minimum, like the predecessor statutes, is applicable only to full-time teaching staff members.

N.J.S.A. 18A:28-5, which prohibits reduction in the compensation of tenured teachers. See Hamilton Township Supplemental Teacher's Association v. Hamilton Township Board of Education, decided by the State Board, September 3, 1986. Although the applicable statutory requirements do not mandate that prior experience be credited in correlation with the compensation levels that would have been applicable had such prior experience been compensated at the rate set forth in the salary schedule applicable upon initial placement, we emphasize that the statutory scheme does incorporate recognition of prior experience.

In this case, the compensation of the Petitioners, whether they were compensated pursuant to the schedule applicable to auxiliary teachers or that applicable to classroom teachers, was well above the amounts required by N.J.S.A. 18A:29-7 (repealed 1985), and there is no indication that any reduction in the compensation of any tenured teacher resulted from initial placement on the applicable schedules. We, therefore, conclude that neither the individual Petitioners in this case who were previously employed less than six hours a day and were placed on the salary schedule applicable to classroom teachers upon their acceptance of full-time employment as classroom teachers, nor those who served as full-time auxiliary teachers during 1983-84 have any claim under the education laws to salary adjustments based upon their previous experience as part-time auxiliary teachers.[3]

Initial placement, however, did not occur when placement on the salary schedule applicable to classroom teachers occurred following reassignment from service as a full-time auxiliary teacher to service as a full-time classroom teacher. Again, N.J.S.A. 18A:29-9 specifies that initial placement occurs when a "person shall hereafter accept office, position or employment as a member in any school district of this state...." We recognize that, in addition to cases where an individual accepts employment as a full-time member for the first time, the statute encompasses cases where a teaching staff member accepts a "position." However, Petitioners in this case, whether full or part-time during the years relevant to this litigation, were all employed under instructional certificates and achieved tenure in the position of teacher. See Lichtman v. Ridgewood Board of Education, 93 N.J. 362 (1983); Childs v. Union Township Board of Education, 1982 S.L.D. 1456. Therefore, reassignment from full-time auxiliary teacher to full-time classroom teacher did not constitute acceptance of a "position," and N.J.S.A. 18A:29-9 is not applicable in judging the validity of placements on the applicable schedule following such reassignment.

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[3] Although the issue is not presented in this appeal, we note that any challenge to compensation levels based on the propriety of initial placement occurring in the past would be subject to N.J.A.C. 6:24-1.2. See Bertisch v. Board of Education of the Borough of Bergenfield, decided by the Commissioner, April 10, 1986, aff'd by the State Board, September 3, 1986.

However, there is nothing in the education laws that mandates that upon reassignment from service compensated pursuant to one salary schedule, a full-time teaching staff member is entitled to credit on the schedule applicable to her new assignment in direct correlation with the compensation levels specified in that schedule. Again, recognition of prior experience is mandated only to the extent that it is incorporated in the applicable statutory minimums and in the requirement that placement on the applicable guide upon reassignment may not result in a reduction in compensation of a tenured teacher. As stated, Petitioners were compensated well above the statutory minimums and there is no indication that any reduction in compensation occurred in the case of any of the individual Petitioners who had previously served as full-time auxiliary teachers. We therefore conclude that Petitioners who had previously been assigned as full-time auxiliary teachers have no entitlement under the education laws to salary adjustment as a result of placement on the applicable salary schedule upon their reassignment as full-time classroom teachers. In so concluding, we reiterate that, as set forth in Hyman, supra, the education laws permit a district board to adopt different salary schedules for different categories[4] of teachers, and wages are a matter of negotiation within statutory limits. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978); Bd of Education of Englewood v. Englewood Teachers, 64 N.J. (1973).

In sum, we conclude that, because those Petitioners who continued to serve as auxiliary teachers have no entitlement to be compensated based on the salary schedule applicable to classroom teachers, they have no claim to credit on that schedule for their prior experience. We further conclude that, insofar as the education laws mandate credit for prior in-district experience, whether placement on a salary schedule is an initial placement pursuant to N.J.S.A. 18A:29-9 or is the result of reassignment within the district, those requirements are set forth in N.J.S.A. 18A:29-7 (repealed 1985),[5] and in N.J.S.A. 18A:28-5, which prohibits reduction in the compensation of a tenured teaching staff member. Because there is no indication that any individual Petitioner in this case was compensated for her service at less than the amounts set forth in N.J.S.A. 18A:29-7 (repealed 1985) or that any reduction in the compensation of any tenured teaching staff member occurred as the result of any of the placements challenged here, we concluded that the Petitioners in this case have no entitlement under the education laws to retroactive salary adjustments based upon their previous experience as auxiliary teachers. In light of our conclusion that Petitioners involved in this litigation have no entitlement under the education laws to additional credit for their experience as auxiliary teachers upon placement on the negotiated salary guide applicable to classroom

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[4] As in Hyman, "category" in this context refers to classification of various kinds of teachers by subject matter taught or type of instructional service rendered, and not to seniority categories.

[5] See supra note 2.

teachers, we need not address the question of whether Petitioner Skulnik's claim to such credit is barred by laches. Finally, by our decision, we dispose the remand that was directed by Appellate Division in Hyman v. Board of Education of the Township of Teaneck, Docket #A-2508-84T7 (App. Div. Feb. 26, 1986), certif. denied, Docket #25,352 (June 30, 1986), for the purpose of determining whether three of the Petitioners were entitled to use their years of service as auxiliary instructors for current placement on the classroom teacher salary guide.

James Jones abstained.
Attorney exceptions are noted.
January 7, 1987

IRENE BARTZ,	:	
PETITIONER-RESPONDENT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,	:	
RESPONDENT-RESPONDENT,	:	
AND	:	STATE BOARD OF EDUCATION
MARILYN BURKE,	:	DECISION
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,	:	
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, June 11, 1986

For the Petitioner-Respondent Irene Bartz, Ruhlman, Butrym and Friedman (Richard A. Friedman, Esq., of Counsel)

For Petitioner-Appellant Marilyn Burke, Sterns, Herbert and Weinroth (Linda N. Stern, Esq., of Counsel)

For the Respondent-Respondent, Nichols, Thompson, Peek and Meyers (Kenneth S. Meyers, Esq., of Counsel)

For the Intervenor Brian Reardan, Katzenbach, Gildea and Rudner (Ezra D. Rosenberg, Esq., of Counsel)

In this case, Petitioner Irene Bartz and Petitioner Marilyn Burke, both tenured teachers with seniority in the category applicable to home economics, challenged the Board's actions that restructured its home economics program so as to reduce an existing full-time position to which both teachers claimed entitlement by virtue of seniority.

The record shows that for the 1984-85 school year, Petitioner Bartz was employed by the Board to teach three home economics classes. Stipulation of Facts, #1. For that year, Petitioner Burke was employed on a full-time basis, and assigned five home economics classes. Id.; Deposition of Joseph Pililli, December 18, 1985, at 6-7. By letter dated April 23, 1985, Petitioner Bartz was advised that the Board would offer her a part-time home economics position for 1985-86. Bartz, Petition, Count 1. By action of the Board on May 13, 1985, the full-time home economics position, in which Petitioner Burke was serving, was reduced to a part-time position for 1985-86. Burke, Petition, Count 1. As a consequence of the Board's actions, both Petitioner Bartz and Petitioner Burke were employed in 4/7 positions, representing four home economics classes each, for the 1985-86 school year.

By petition filed with the Commissioner on May 20, 1985, Petitioner Bartz challenged her appointment to a part-time position for 1985-86, asserting that pursuant to the Administrative Law Judge's determination in Bartz v. Board of Education of the Township of Green Brook, (Bartz I),[1] in which the Initial Decision had been rendered on April 8, 1985, and which was then pending before the Commissioner, she was entitled to a full-time home economics position. Petition, Count 1. She alleged that under the circumstances, the Board's action to assign a teacher with less seniority to the same number or more home economics classes would violate her tenure and seniority rights where her assignment on a full-time basis would not substantially interfere with the Board's home economics department. Id.

On August 12, 1985, Petitioner Burke filed a petition with the Commissioner challenging the Board's action in reducing her position. She alleged that her tenure and seniority rights were violated by the Board's retention of a less senior teacher, i.e., Petitioner Bartz, assigned to a part-time schedule of home economics classes. Petition, Count 1.[2]

The matters were transmitted to the Office of Administrative Law on July 10 and August 29, 1985, respectively. On August 16, prehearing conference established that the issue in the matter initiated by Petitioner Bartz was whether the Board had

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1 Bartz v. Board of Education of the Township of Green Brook, decided by the Commissioner May 24, 1985, aff'd by the State Board, Nov. 11, 1985, aff'd Docket #A-1800-85T1 and Docket #A-1934-85T1 (App. Div. Jan. 28, 1987).

2 Ms. Burke also claimed that she was entitled by virtue of her seniority to assignment to teach family living. However, she specifically abandoned that claim in this appeal. Brief on behalf of Petitioner-Appellant Marilyn Burke, at. 1.

violated Petitioner Bartz's seniority rights and/or acted in bad faith by its failure to assign her to a full-time home economics position while maintaining two part-time positions or changing the structure of its program. Prehearing Order, August 16, 1985. On September 11, the Administrative Law Judge (ALJ) consolidated the matter initiated by Petitioner Bartz with that initiated by Petitioner Burke.

The matter was further complicated when, effective October 31, Petitioner Bartz resigned from her employment with the District. On November 27, Petitioner Burke filed an amended petition, alleging that on October 22, the Board had posted the position that Petitioner Bartz had held, that Petitioner Burke had applied for the position, but was advised on October 30 that it was filled. Petitioner Burke further asserted that on November 11, the Board determined to retain the two part-time positions, and that it had hired a non-tenured teacher to fill the position in violation of her tenure and seniority rights. Amended Petition, Count 5.

Based on the stipulation of facts, the ALJ in his Initial Decision concluded that as of November 1, Petitioner Burke was entitled to a full-time position if Petitioner Bartz chose to work outside the District. In reaching this conclusion, he relied on the ALJ's determination and the Commissioner's decision in Bartz I, which held that Petitioner Bartz was entitled to a full-time home economics position when her cooperative education position was abolished, and found that as of June 1985, Petitioner Bartz had eight years' seniority in home economics as compared to Petitioner Burke's seven years. He further found that the Principal's testimony showed that there would be no difficulty in assigning Petitioner Bartz to a full-time home economics teaching load and there was no educational basis such as was present in Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1982), underlying the Board's decision to abolish full-time home economics teaching positions.

Relying on Mishkin v. Mountainside Bd. of Ed., Docket #A-803-83T2 (App. Div. November 2, 1984), the ALJ however concluded that Petitioner Bartz's resignation had not terminated her rights, and found that the Board was required to pay Petitioner Bartz the salary she would have earned had she been employed on a full-time basis minus mitigation from November 1, 1985, to the date of the final decision in the matter or the end of the school year, which ever came first, and to offer Petitioner Bartz a full-time position. If Petitioner Bartz accepted, the non-tenured teacher would have to be "riffed" and Petitioner Burke offered the remaining part-time position.

The Commissioner adopted the ALJ's decision with minor modification. In adopting the ALJ's determination in the matter, the Commissioner rejected the Board's and Petitioner Burke's exception that Petitioner Bartz did not have eight years home economics seniority, relying on Bartz I, which held that Petitioner

Bartz was to be credited for one full year for each year she was assigned to teach home economics as part of her full-time employment, although her position included assignment to only one home economics course.

The Commissioner further rejected the Board's arguments that its creation of two part-time positions was properly based on sound educational policy. The Commissioner found that under Valinski v. Board of Education of the Borough of Garwood, decided by the State Board, Nov. 18, 1985, appeal dismissed, Docket A-0738-85T1 (App. Div. March 6, 1985), the Board had the burden to establish the existence of sound reasons to create two part-time positions and thus reduce the employment of a tenured teacher, and that the ALJ's assessment of the reasons for the Board's actions proffered by the Principal was proper. The Commissioner concluded that the Board had not established the existence of an educational reason precluding Petitioner Bartz's retention on a full-time basis, and therefore it had failed to fulfill its obligation to attempt to acknowledge her tenure rights that were clearly established in Bartz I.

The Commissioner found that Petitioner Bartz was entitled to a full-time position, and that "absent documentation to the record that Bartz's resignation was for anything but her then held part-time position," the Appellate Division's unreported decision in Mishkin, supra, was controlling. Accordingly, he found that Petitioner Burke was not entitled to relief. However, the Commissioner held that if Petitioner Bartz refused the full-time position, Petitioner Burke would be entitled to it. Finally, the Commissioner corrected the ALJ's award of back pay to direct such relief from September 1, 1985.

Petitioner Burke appealed the Commissioner's decision, arguing that Petitioner Bartz's resignation from her employment had terminated her tenure rights, and that, regardless, Petitioner Burke was entitled to relief on the basis of the impact on her of the Board's retention following Petitioner Bartz's resignation of a non-tenured teacher during 1985-86. Petitioner Bartz filed a responsive brief, but the Board neither appealed nor responded to Petitioner Burke's appeal.

The underlying premise of Petitioner Burke's claim that she is entitled to a full-time position by virtue of Petitioner Bartz's resignation is that the Board's action in establishing and maintaining two part-time home economics positions was improper. Thus, although the Board did not appeal the Commissioner's determination of this issue, we are required to assess the validity of the Board's action in order to resolve this appeal. After careful examination of the circumstances, we conclude that the Board's action in eliminating one full-time home economics position, to which the most senior tenured teacher was entitled, and allocating its home economic courses between two part-time positions was in violation of the tenure rights of the senior teacher entitled to the full-time position.

Initially, we emphasize that the question of which of the two Petitioners involved here was most senior at the time the controversy now before us arose is no longer at issue. The Commissioner's decision in Bartz I, which both the State Board and the Appellate Division affirmed on appeal, established that as of the end of the 1983-84 school year, Petitioner Bartz had seven years' seniority in the category of home economics at the secondary level in comparison to Petitioner Burke's six years seniority. As the ALJ found in considering the case now before us, pursuant to the Commissioner's directive in Bartz I, at the end of the 1984-85 school year, Petitioner Bartz was entitled to be credited with eight years' seniority in that category in contrast to Petitioner Burke's seven years of seniority. Consequently, it is settled that it was Petitioner Bartz who was entitled to the full-time position that was reduced by the Board's action in this case.

The reduction of a full-time position to part-time resulting in reduction of the employment of a tenured teacher from full-time constitutes a reduction in staff. Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1982). Accordingly, the threshold question in resolving this appeal is whether the Board's action in reducing the full-time position to which Petitioner Bartz was entitled was a proper exercise of the authority granted the district Board by N.J.S.A. 18A:28-9.

N.J.S.A. 18A:28-9 authorizes a district board to reduce the number of the staff members it employs if it determines that such action is advisable for reasons either of 1) economy, 2) reduction in the number of students, 3) a change in the administrative or supervisory organization of the district, or 4) other good cause. Although a board may properly reduce its staff for any one of the permissable reasons, we emphasize that its action must be taken on the basis of at least one of the reasons set forth in the statute. Sampietro v. Board of Education of the Township of Ridgefield Park, decided by the State Board, Nov. 5, 1986.

It was not contended in these proceedings that the Board's action was taken for reasons of economy or because of a decline in the number of students. In fact, the Board offered exactly the same number of home economics courses in 1985-86 as it had in 1984-85. Deposition of Joseph Pililli, 12/18/85, at 10. Nor was the Board's alteration of its home economics program pursuant to a change in the administrative or supervisory organization of the District. Rather, as established by the Principal's deposition, upon whose recommendation the Board relied, the program was restructured so as to "better meet the needs of the students." Deposition of Joseph Pililli, 12/18/85, at 15.

Specifically, the change in format was intended to utilize the talent of the teachers so as to best fit the needs of the students and offer them "the best possible teacher for their services." Id. at 21. The record shows that the program as structured in 1984-85 could have been maintained without scheduling difficulties, clean up problems or the necessity of scheduling

either home economics teacher to teach three classes in a row, id. at 23-24; 27, and the Principal considered both Petitioners to be competent teachers. Id. at 29. The Principal, however, judged that Petitioner Burke could relate better than Petitioner Bartz to seventh and eighth grade students, id. at 29, and he preferred that Petitioner Bartz teach sewing while Petitioner Burke teach cooking. Id. at 26. Thus, the reduction of the full-time position and establishment of two equal part-time positions was taken by the Board in order to facilitate assignment of the Petitioners according to the relative strengths of each as perceived by the Principal.

Although N.J.S.A. 18A:28-9 grants district boards broad discretion to reduce the number of staff members it employs, we emphasize that such action may not impermissibly abridge the tenure rights afforded by N.J.S.A. 18A:28-5. e.g., Lingelbach v. Board of Education of the Borough of Hopatcong, Docket #A-4783-83T7 (App. Div. May 17, 1985), certif. denied, 101 N.J. 333 (1986). Because of the measure of security conferred by the tenure statute, we have held that even in cases where a reduction in staff is legitimately necessitated by declining student enrollment or budgetary constraints, a district board must establish educationally based reasons for reducing the full-time employment of a tenured teacher while retaining a non-tenured teacher on a part-time basis in the educational program affected by the reduction. Valinski, supra.; Miles v. Board of Education of the Borough of Watchung, decided by the Commissioner, June 14, 1984, aff'd by the State Board, Dec. 5, 1984, aff'd, Docket #A-1903-84T7 (App. Div. Dec. 5, 1985). Although both teachers in this case are tenured, we conclude that no lesser standard applies in determining whether the Board had "good cause" in this case to reduce the employment of Petitioner Bartz, who was entitled to the existing full-time position by virtue of her seniority.

As set forth above, no reduction in the Board's home economics program was anticipated, nor was any reduction in the number of courses effectuated as a result of the Board's action. Rather, as intended, the program was maintained at exactly the same level following the Board's action, and the most senior tenured teacher deprived of full-time employment because the Board sought to utilize what the Principal perceived as the relative talents of two tenured teachers in a specific manner. Although assignment of classes within full-time tenurable positions based on such judgments is within a Board's discretion, Capodilupo v. Board of Education of the Town of West Orange, decided by the State Board, Sept. 3, 1986, slip. op. at 9-10, aff'd, Docket #A-943-86T7, (App. Div. July 2, 1987), we find that N.J.S.A. 18A:28-9 does not authorize reduction in the employment of a tenured teacher on this basis. Rather, because qualification to fill teaching assignments within the public school system is controlled by statute and regulation, see N.J.S.A. 18A:1-1; N.J.S.A. 18A:6-38; N.J.A.C. 6:11-1 et seq., we find that the rights conferred by N.J.S.A. 18A:28-5 preclude reduction in the employment of a tenured teacher based on administrative judgments concerning relative ability or talent. We therefore conclude that the Board's action in this case to restructure its home economics

program so as to reduce an existing full-time position to which a tenured teacher was entitled was improper.

As set forth above, it is settled that Petitioner Bartz was the tenured teacher entitled to the full-time position. However, for the reasons that follow we conclude that by virtue of her resignation, Petitioner Bartz relinquished her rights to the position as of October 31, 1985, the effective date of her resignation.

Again, it is stipulated that Petitioner Bartz resigned from the Green Brook School District effective October 31, 1985, to accept a full-time position in Pennsylvania. Stipulation of facts, at 2. In accepting her resignation, the Board waived the sixty day notice requirement. Id.

It is settled that a voluntary resignation of a tenured teacher terminates all previously acquired tenure rights, and no part of a teacher's service prior to the date of such resignation may be counted in calculating the time necessary to attain new tenure status. e.g., Misek v. Board of Education of the Township of Willingboro, Docket #A-4913-79 (App. Div. May 7, 1981). Further, tenure status is achieved in a position regardless of whether service in the position is on a full-time or part-time basis. Lichtman v. Ridgewood Board of Education, 93 N.J. 362 (1983). Thus, there is no basis for distinguishing the effect of a voluntary resignation from employment in a district on the grounds that a member's service was on a part-time basis at the time of her resignation. In this case, there is no indication in the record that Petitioner Bartz cast ambiguity on her resignation by specifically affirming in her resignation that she would be prepared to work for the Green Brook Board on a full-time basis after she resigned her employment to accept full-time employment in Pennsylvania. See Mishkin v. Board of Education of the Borough of Mountainside, Docket #A-803-8312 (App. Div. Nov. 2, 1984).

Under the circumstances with which we are presented, we conclude that Petitioner Bartz's resignation from her employment terminated her tenure rights. Accordingly, we find that she is entitled to relief only until the effective date of her resignation, but direct payment of the difference between what she would have earned in the full-time position and the amount she was compensated for her part-time service from the commencement of the 1985-86 school year through October 31, 1985.[3]

We emphasize that although Petitioner Bartz was entitled to the protection afforded her by her tenure status while employed by the Board, such protection could not survive a voluntary resignation

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[3]We note that in her exceptions to our Legal Committee's report, Ms. Bartz concedes that the Board's obligation to her is in any event limited to 1985-86 since she declined its offer of employment for 1986-87.

from her employment tendered in order to accept full-time employment elsewhere. To hold otherwise would allow a teaching staff member to forever opt between his alleged tenure entitlement and a more lucrative position. See Boguszewski v. Board of Education of Demarest, 1979 S.L.D. 232. Nor can we ignore the uncertainty in the administration of the seniority system that would result if district boards were required to effectuate seniority rights in circumstances where a tenured teacher has resigned her employment.

We further find that although Petitioner Bartz's resignation terminated her rights to the full-time home economics position, her resignation did not validate the Board's actions in reducing the position. Nor did it entitle the Board to maintain the position on a 4/7 th basis. Rather, upon Petitioner Bartz's resignation, the Board could not continue to employ Petitioner Burke on a part-time basis while also assigning a non-tenured teacher to teach its home economics course on a part-time basis without establishing a sound educational reason for doing so. Valinski, supra. As set forth above, no such reason was established in this case for the Board's original action in reducing the position and the record reveals no independent rationale for maintaining the position on a part-time basis following Petitioner Bartz's resignation. Accordingly, we direct that Petitioner Burke be reinstated to the full-time home economics position at issue with back pay minus mitigation from the effective date of Petitioner Bartz's resignation.

Attorney exceptions are noted.

August 5, 1987

LINDA BASSETT,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,	:	DECISION
RESPONDENT/CROSS-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, March 19, 1984

Decision on Motion by the State Board of Education, July 11, 1984

For the Petition-Appellant, Bucceri and Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent/Cross-Appellant, Parisi, Evers and Greenfield (Irving E. Evers, Esq., of Counsel)

Linda Bassett (hereinafter "Petitioner") was initially employed by Board of Education of the Borough of Oakland (hereinafter "the Board") in 1974-75 as a full-time reading teacher and served continuously in that capacity until March 1980, when she took an approved leave of absence. Upon her return to active employment on September 6, 1983, as a result of a reduction in force that occurred at some point while she was on leave, she was assigned to teach two periods a day as a supplemental and compensatory education teacher. One week after that assignment was made, however, she was assigned one additional period per day. On February 10, 1984, her assignment was reduced to two periods per day, but on February 17, 1984, she was assigned two additional periods, and from that date taught four periods per day. Certification of Linda Bassett, May 8, 1984. It is undisputed that Petitioner achieved tenure pursuant to N.J.S.A. 18A:28-5 prior to commencing her leave of absence in 1980.

Prior to commencing her leave, pursuant to the applicable collective negotiations agreement, Petitioner was compensated $19,833 annually, which represented payment at step 8¾ of the negotiated schedule applicable to all full-time teachers. Upon her return and reassignment, she was compensated at the rate of $10.80 per hour, which was the compensation rate set forth in the collective agreement for 1983-84 for hourly rate teachers with four years of experience and which was the compensation applicable to Petitioner's assignment. Petitioner challenged the propriety of her salary rate and benefits for 1983-84, asserting that her

compensation and benefits for that year were in violation of N.J.S.A. 18A:28-5.

The Administrative Law Judge (ALJ) found that although the Oakland Teachers Association and the Board had the statutory right and obligation to negotiate an agreement concerning terms and conditions of employment, "[t]he implementation of any such terms [of such agreement]... may not contravene N.J.S.A. 18A:28-5 by reducing Petitioner's salary." Initial Decision, at 7. He found that Petitioner's compensation for 1983-84 was below the amount that her salary would have been on a pro-rated basis under the Board's formula for calculating the salaries of part-time teachers who were compensated based upon the negotiated salary schedule that had applied to Petitioner prior to her leave. He therefore concluded that since compensation below the amount established by that formula would be in violation of N.J.S.A. 18A:28-5, which prohibits reduction in the compensation of any teaching staff member except as provided by N.J.S.A. 18A:6-10, Petitioner was entitled to salary adjustment. Finally, he found that under the terms of the negotiated agreement, Petitioner was not entitled to Health Care and Dental Services, but was entitled to the same sick days as all teachers.

The Commissioner found that although the parties were free to negotiate separate salary schedules for supplemental teachers, the salary agreement involved in this case failed to accord remedial teachers full rights and recognition of teaching staff members as required by Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), and Rutherford Education Association et al. v. Board of Education of the Borough of Rutherford, Docket # A-2014-82T3, #A-2016-82T3, #A-2018-82T3, #A-2021-82T3 and #A-2023-82T3 (consolidated) (App. Div. Jan. 11, 1984).[1] After reviewing the language of the relevant provisions of the agreement, the Commissioner also found that the establishment of the category of "hourly rate teachers" within the agreement violated that agreement because there was no provision for the recognition of hourly rate teachers. He further found that because the agreement specified that the salary schedules of all teachers covered by the agreement were set forth in the salary schedules incorporated in the agreement, the Board had attempted to artifically split and sever Petitioner's salary entitlement from other part-time teachers "...who are apparently accorded the same salary on a pro-rata basis on the regular teachers' salary guide." Commissioner's decision, at 21. The Commissioner therefore concluded that the applicable provisions of the collective agreement were ultra vires and that Petitioner was in fact a "regular" part-time teacher in the Board's employ. He further determined that relief afforded to Petitioner

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[1] We note that subsequent to the Commissioner's decision in the instant case, the New Jersey Supreme Court rendered its decision in Rutherford, holding that the Petitioners in that case were entitled to retroactive relief under Spiewak and specifying that Spiewak had not addressed the question of what constituted the emoluments of tenure. Rutherford Educ. Ass'n v. Bd. of Educ., 99 N.J. 8 (1985).

must conform to the directives of Spiewak and Rutherford, and directed the Board to establish Petitioner's salary and benefits at the same rate as other part-time teachers with similar qualifications and experience in accordance with the collective agreement.

Petitioner appealed the Commissioner's decision, asserting that the ALJ's calculations concerning her compensation, which were impliedly adopted by the Commissioner, were in error. The Board cross-appealed, claiming that the establishment of the category of "hourly rate teacher" was by agreement of the parties and did not violate either that agreement or the education laws. After careful review of the record and the relevant law, we conclude that although the collective negotiations agreement at issue here does not contravene the requirements of the education laws, the rate at which Petitioner was compensated during the 1983-84 school year constituted a reduction in salary in violation of N.J.S.A. 18A:28-5.

Initially, we reiterate that compensation is a mandatory subject of collective negotiations and that the adoption by a Board of a salary policy that includes more than one salary schedule is permissible so long as those schedules conform to the requirements established by the education laws. Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A2508-84T7 (App. Div. February 26, 1986), certif. denied, Docket #25,352 (June 30, 1986). Moreover, the applicable standards, which are set forth in N.J.S.A. 18A:29-1 et seq., are applicable only to full-time teaching staff members. See, e.g., id.[2]. Thus, the education laws do not specify any standards governing the compensation of members who are not full-time, aside from the requirement that the compensation of a tenured teacher may not be reduced, N.J.S.A. 18A:28-5, except as provided by N.J.S.A. 18A:6-10, Bergenfield Education Association v. Board of Education of Bergenfield, decided by the State Board, September 3, 1986, and, accordingly, do not mandate that all categories of part-time teachers be compensated in the same manner or at the same rate. We therefore conclude that the collective agreement adopted by the Board for 1983-84 did not contravene the requirements of the

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[2] We note that, effective September 9, 1985, the compensation statutes were substantially altered. N.J.S.A. 18A:29-6, N.J.S.A. 18A:29-7, N.J.S.A. 18A:29-8, N.J.S.A. 18A:29-10 and N.J.S.A. 18A:29-12 were repealed. Teacher Quality Employment Act, N.J.S.A. 18A:29-5, L 1985, c. 321 sec. 16 (1985). In addition to repealing those statutory provisions, the Teacher Quality Employment Act raised the minimum salary for full-time teaching staff members to $18,500. N.J.S.A. 18A:29-5. Although the entitlement to compensation benefits in this case is to be determined under the statutes in effect prior to September 9, 1985, we emphsize that the new statutory minimum, like the predecessor statutes, is applicable only to full-time teaching staff members.

education laws by its provision for a category designated as "hourly rate teachers" so long as, if applied to full-time members, the applicable statutory minimums were met. In so concluding, we note that there is no claim that the statutory minimums were not met in the case of any full-time member.

As we have previously stated, we will not set aside the provisions of a collective negotiations agreement where the agreement does not contravene the specific requirements of the education laws, see e.g., Bergenfield, supra, and we would decline to do so in this case. Because we find that the relevant provision does not on its face contravene the education laws, we would reverse the Commissioner's determination that agreement as to the category of "hourly rate teachers" was ultra vires. We further conclude that this is not the proper forum for determining the validity of the provision based solely upon the contract language and would set aside the Commissioner's finding that the provision was invalid because it was not consistent with the recognition clause and other provisions of the agreement.

However, although we conclude that hourly compensation such as provided by the agreement does not on its face contravene the requirements of the education laws, we find that the compensation afforded to Petitioner at the hourly rate of $10.80 for the 1983-84 school year resulted in an improper reduction in the compensation of a tenured teaching staff member in violation of N.J.S.A. 18A:28-5. It is not disputed that Petitioner achieved tenure prior to commencing her leave of absence in 1980. We emphasize that upon her return to active employment, she was not "transferred" within the meaning of N.J.S.A. 18A:28-6 from one tenurable position to another. Rather, she was reassigned within the same tenurable position. Prior to commencing her leave, she was employed under her instructional certificate, achieved tenure as a teacher and, upon her return, was reassigned within the same position. Therefore, by virtue of her status as a tenured teaching staff member, she had statutory protection against reduction in her compensation. Since N.J.S.A. 18A:28-5 specifically mandates that the Petitioner's salary level be maintained, the Board was required to conform to the statutory requirement even if it was contractually bound by the provision in the collective negotiations agreement establishing a lesser rate of compensation for "hourly rate" teachers which was applicable to Petitioner's assignment for that year.

As found by the ALJ, if Petitioner had been employed full-time during 1983-84, her salary would have been $24,699. The Findings of Facts indicate that a full-time teacher works from 8:30 a.m. until 3:15 p.m., or 6.75 hours per day. The negotiated agreement states that there are 185 teacher days per year, four of which may be used as snow days. Therefore, had Petitioner been employed as a full-time teacher during the 1984-85 school year, she would have been scheduled to work a minimum of 181 days. By multiplying the number of hours worked per day by the number of days we arrive at a figure representing hours worked per year (1,221.75). By dividing the amount that Petitioner's full-time

salary would have been by this number of hours, we reach an hourly rate of $20.22, which represents the minimum hourly rate at which Petitioner could have been compensated without reducing her rate of compensation. The rate at which she was compensated, $10.80 per hour, falls far short of that minimum rate, and we therefore conclude that by compensating her at $10.80 per hour, the Board improperly reduced her compensation.

We further conclude that the proper remedy for the Board's violation of N.J.S.A. 18A:28-5 is to award Petitioner the difference between the amount that she received at the rate of $10.80 and $20.22, which represents the proper rate of compensation in her case, for all hours for which she was compensated in 1983-84. Such hours, as indicated by the supplementation of the record in this case, includes two periods of 50 minutes each per day from September 6, 1983, through September 13, three periods from September 14, 1983 through February 9, 1984, two periods from February 10 through February 16 and four periods per day from February 17 through the end of the school year. Certification of Linda Bassett, May 8, 1984. If Petitioner had been compensated at the rate of $20.22 per hour during that period, she would have received compensation on an hourly basis at a rate that maintained her level of compensation as required by N.J.S.A. 18A:28-5. By awarding her the difference between the amount she received and that which she would have received on an hourly basis absent reduction in her rate of compensation, we would cure the statutory violation. We find that because, as set forth above, the education laws do not specify any standards governing the rate or manner of compensation of teaching staff members who are not full-time and, therefore, do not prohibit a Board from estabishing or agreeing to different manners or rates of compensation for different categories of part-time teachers, the remedy that we would provide represents the full extent of Petitioner's entitlement under the education laws. We therefore decline to apply to Petitioner the contractual provision applicable to part-time teachers who, as set forth in the collective negotiations agreement, are within the category of teachers compensated pursuant to the schedules applicable to full-time members.

Finally, because there is no indication that the Board has acted in bad faith or has willfully violated the statute, we decline to grant Petitioner's request for interest for the period prior to our decision in this matter, which was included in her exceptions to our Legal Committee's Report.

Attorney exceptions are noted.
February 4, 1987

LINDA BASSETT,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT/CROSS-APPELLANT.	:	

Decided by the Commissioner of Education, March 19, 1984

Decision on Motion by the State Board of Education, July 11, 1984

Decided by the State Board of Education, February 4, 1987

For the Petitioner-Appellant, Bucceri and Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent/Cross-Appellant, Parisi, Evers and Greenfield (Irving E. Evers, Esq., of Counsel)

On February 4, 1987, we rendered our decision in this case, concluding that the district Board had violated Appellant's tenure rights by compensating her at a lower rate when she returned from maternity leave and was reassigned from service as a classroom teacher to service as a supplemental and compensatory education teacher. In our decision, we denied Appellant's request for interest, which was submitted in her exceptions to our Legal Committee's Report in the matter, concluding that

> ...because there is no indication that the Board has acted in bad faith or has wilfully violated the statute, we decline to grant Petitioner's request for interest for the period prior to our decision in this matter....

Bassett v. Board of Education of the Borough of Oakland, slip. op. at 9.

Appellant now has moved pursuant to N.J.A.C. 6:2-1.17 for clarification of our decision on the issue of interest. In support of her motion, Appellant's attorney states that

> [by] denying only interest prior to the decision, the State Board implies that post-decision interest is available. However, no real opinion

is expressed on the subject and the terms of the interest, if granted, are not specified.

> Our denial of interest was based upon Appellant's request ...that interest should be awarded, based upon the sum of back pay wrongfully denied to her since the 1983-84 school year. Several years have passed and Bassett has been denied the use of funds that should have been paid to her. This deprivation was further increased by the extraordinary delays in the State Board's handling of the appeal. The only appropriate remedy for this deprivation is an award of interest.

Thus, Appellant did not request post-judgment interest. We therefore did not award such interest when we rendered our decision in this matter, and did not imply by our our denial of pre-judgment interest that post-judgment interest now is available to Appellant in this forum.

April 1, 1987

RICHARD FRANCIS BICKINGS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL-TECHNICAL SCHOOLS, CAMDEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 23, 1985

For the Petitioner-Respondent, Reuss, Cavagnaro and Kaspar (Carl W. Cavagnaro, Esq., of Counsel)

For the Respondent-Appellant, Davis, Reberkenny, and Abramowitz (Robert F. Blomquist, Esq., of Counsel)

This appeal involves the extent of relief to which Petitioner Richard Bickings (hereinafter Petitioner) is entitled under N.J.S.A. 18A:29-11 based on his claim under the statute to salary credit for three years' service with the United States Marine Corps. In his Initial Decision, the Administrative Law Judge (ALJ) found that although Petitioner was entitled to military service credit under the statute, his entitlement to relief was limited by Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982), to prospective relief from the date on which he filed his Petition of Appeal with the Commissioner. The Commissioner modified the Initial Decision, and held that Mr. Bickings' individual claim should be given retroactive remedial effect consonant with an earlier administrative determination affecting 59 teachers whose claims for military service credit were filed on their behalf by their collective negotiations representative. Camden County Voc.-Tech. Ed. Ass'n, et al. v. Bd. of Educ. of the Camden Cty. Voc-Tech. Schools, Camden Cty., decided by the Commissioner, September 30, 1983, aff'd by the State Board, November 7, 1984, aff'd, 207 N.J. Super. 23 (App. Div. 1986). The Commissioner reasoned that the provisions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically N.J.S.A. 34:13A-5.3, required that the Association include Mr. Bickings within its action, and concluded that, therefore, Petitioner Bickings was entitled to relief from the date on which the Association's petition was filed.

The material facts are as follows: Petitioner, who was not an Association member, commenced employment with the Board in September 1975. During the 1980-81 school year, he became aware of the possibility that he was eligible for military service credit,

and he submitted the appropriate form (DD-214) to the Superintendent. The Camden County Vocational-Technical Education Association thereafter filed a Petition of Appeal with the Commissioner on behalf of 59 individually named members, seeking military service credit. The Association was and is the majority representative of the Board's teachers under N.J.S.A. 34:13A-5.3. Mr. Bickings was not made a party to the Association action. He, however, believed its disposition would control his entitlement.

Mr. Bickings did not know that he had not been included in the Association's action until Spring 1984, when a list of the members who were represented in that litigation was posted. Although the Superintendent assured Mr. Bickings that he would receive benefits in the same manner as the teachers involved in that litigation, in July 1984, the Board advised him that it would not approve his request for retroactive credit. At its August 15, 1984, meeting, the Board offered to prospectively grant Mr. Bickings military service credit effective September 1, 1984, if he waived any claim to retroactive relief. Mr. Bickings declined this offer, and filed a Petition of Appeal to the Commissioner on November 15, 1984.

While the matter initiated by the Association was pending, the New Jersey Supreme Court decided Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982). In Lavin, the Court held that the six year statute of limitations applicable to contract claims did not apply to claims for salary credit for military service pursuant to N.J.S.A. 18A:29-11. However, based upon its conclusion that bright line treatment of all claims of this nature was warranted, the court further held that enforcement of claims under the statute was limited to the period subsequent to the date on which a Petition of Appeal was filed with the Commissioner. Accordingly, the Administrative Law Judge (ALJ) in the instant matter found that Mr. Bickings was legally entitled to relief from November 15, 1984, the date on which he filed his petition. The ALJ, however, awarded relief in this case from September 1, 1984, because the Board had offered Mr. Bickings prospective salary adjustment as of that date. The ALJ rejected Mr. Bickings claim that the date from which he was entitled to relief was June 24, 1980, the date on which the petition was filed in the Association's action because: (1) the Board could not be held to the Superintendent's promise of similar treatment and (2) Mr. Bickings had rested on his rights for four years without filing an individual claim and without ascertaining if he was a part of the Association action.

The Commissioner rejected the ALJ's determination that Mr. Bickings was entitled to relief only from September 1, 1984, holding that he was entitled to relief from the date on which the Association filed its petition. The Commissioner concluded that Mr. Bickings should have been among those represented by the Association in its action against the Board because, as set forth in N.J.S.A. 34:13A-5.3, a majority representative has a responsibility "...for representing the interests of all [negotiations unit] employees without discrimination and without regard to employee

organization membership...." Commissioner's decision, at 14. The Commissioner observed that Mr. Bickings "may have been lulled into believing that he was included among the others", and he reasoned that "petitioner had every right to expect that the Association would rigorously represent his rights as well as those of its members and to inform him of his status regarding the grievance." Commissioner's decision, at 15.

The Commissioner further found that Mr. Bickings' petition was filed within 90 days of when the Board tendered a final settlement offer to him and was therefore timely filed pursuant to N.J.A.C. 6:24-1.2. He concluded however that, even if the petition was not filed in compliance with N.J.A.C. 6:24-1.2, the circumstances would warrant relaxation because Mr. Bickings would have been included in the Association's action had he been a member. Concluding that Mr. Bickings should have been represented in the Association's action and finding that he had filed his petition in a timely manner after learning that he was not one of the individually named petitioners in that case, the Commissioner found that Mr. Bickings was entitled to the same benefits as those petitioners from the date that the petition in that matter was filed.

We first emphasize that Mr. Bicking's entitlement to substantive relief pursuant to N.J.S.A. 18A:29-11 is not challenged in this appeal, and that, as found by the ALJ, Petitioner is entitled to salary credit for his military service. Thus, the issue in this case is not Mr. Bicking's substantive entitlement to relief. Rather, it is the question of whether Lavin's limitation on retroactive relief controls the date from which enforcement of his claim is to be afforded, or whether, as the Commissioner found, the failure of the Association to include him in its action extends his entitlement to include the period from the date on which the Association filed its petition on behalf of 59 individually named teachers. In resolving this issue, we find that the Commissioner's authority to relax the rules governing the administrative process under which controversies arising under the school laws are resolved does not control Petitioner's legal entitlement to retroactive relief. Rather, that issue must be resolved under the applicable legal standards enunciated by the courts.

In Lavin, supra, the New Jersey Supreme Court held that because the benefit conferred by N.J.S.A. 18A:29-11 is a statutory benefit unrelated to service as a teacher, the statute of limitations applicable to contractual claims does not apply. Thus, although we would agree with the Commissioner that Petitioner's claim in this case was timely filed, Mr. Bicking's claim to substantive relief in any event would not be time barred by application of the 90 day rule.

However, as set forth above, the court in Lavin established a bright line rule which governs the date from which retroactive relief is to be afforded where substantive relief is claimed under N.J.S.A. 18A:29-11. Specifically, the court held that in such cases, relief is limited to the period subsequent to the date on

which the Petition of Appeal to the Commissioner was filed. In finding that such bright line treatment was warranted, the court emphasized the large number of claims of this nature throughout the state and the financial impact that affording retroactive enforcement would have on district boards. It found that it was fair and equitable to treat all claims of this nature in a like manner, and further found that bright line treatment had the added advantage of administrative ease.

The question now before us is whether the fact that Petitioner, who although not an Association member was a member of the collective negotiations unit represented by the Association, was not included in the earlier action filed by the Association on behalf of 59 individually named teachers alters the application of Lavin in this case. After careful consideration, we conclude that the failure of the Association to include Petitioner in its action does not alter the application of Lavin in this case so as to confer on Petitioner an entitlement under the education laws to retroactive enforcement of his claim as of the date on which the Association claim was filed, and thereby impose solely on the Board financial liability resulting from the Association's failure to include him in its action.

We emphasize that any expectation that Petitioner could rightfully hold that the Association would "rigorously represent his rights as well as those of its members and inform him of his status regarding his grievance," Commissioner's decision, at 15, emanates, not from the education laws, but, as the Commissioner indicated in his decision, from N.J.S.A. 34:13A-5.3. We further emphasize that a violation of N.J.S.A. 34:13A-5.3 was not established below, and that neither the facts nor the legal issues relevant to an unfair practice/unfair representation claim were before the ALJ or the Commissioner. Furthermore, N.J.S.A. 34:13A-5.4 vests the Public Employment Relations (PERC) with "exclusive jurisdiction" under the New Jersey Employer-Employee Relations Act with respect to unfair practices such as those involved in the claim that the Association had breached its duty to Petitioner in this context. We have serious reservations about extending our jurisdiction beyond school law matters into the realm of issues that, even if not exclusively reserved to PERC, are primarily within its expertise, and we emphasize that such expertise uniquely equips that agency to construe the scope of the duty of fair representation under the New Jersey Employer-Employee Relations Act.

We further emphasize that although the Commissioner characterized Mr. Bickings' claim as a "grievance" in concluding that he had a right to rigorous representation, the matter does not involve the Association's failure to provide him with proper representation in persuing a contractual grievance. Rather, by his decision, the Commissioner would impose on employee associations which represent teachers a duty of fair representation in the litigation context. To our knowledge, PERC has not imposed on public sector employee associations a responsibility to represent non-members in litigation of non-contractual claims arising under

statutes or administrative regulations, and our review of judicial decisions related to this question fails to reveal any judicially imposed duty in this context. Although the United States Supreme Court recently held that a private sector union has standing to represent its members in claims arising under federal statute, the court did not impose any obligation on such employee organizations to represent all members of a bargaining unit equally in a litigation context, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, 91 L.Ed. 2d 228 (1986), and the District of Columbia Circuit of the United Stated Court of Appeals resolved in the negative the question of whether an employee organization representing employees of the federal government had a duty to provide attorneys to non-members on the same basis as to members. National Treasury Employees Union v. Federal Labor Relations Authority, 123 LRRM 2129 (D.C. Cir. 1986). Thus, no duty of fair representation has been imposed on employee associations in the litigation context in either the public or private sector, and we decline to impose such duty under the education laws.

If an exception to Lavin is to be made in this case, the determination to do so must rest on the Board's conduct with regard to Petitioner. Although we find that assurances such as those made by the Superintendent to Petitioner might warrant relaxation of the 90 day filing requirement even in the absence of Lavin's holding that the statute of limitations is not applicable, we find that assurances made four years after the Association's petition was filed do not provide a basis for extending Petitioner's entitlement to retroactive relief to the date on which the Association filed that petition. Further, it was the Association and not the Board that petitioned the Commissioner in the action on behalf of its members, the Board had no authority to include Mr. Bickings in the action, it had no obligation to represent him in his statutory claim against it, and we find that there is no indication in the record that the Board failed to process the required form submitted by Mr. Bickings or was in any way responsible for his failure to be included in the Association's action. We conclude that under these circumstances, there is no basis for extension of retroactive relief beyond the period authorized by Lavin to an individual who was not a party to another action so as to enforce his claim as of the date that action was commenced, and that to do so would impose an unwarranted financial burden on the district. Our concern in imposing financial liability on the Board in this case is highlighted by the fact that any responsibility to include Petitioner in the Association's action would lie not with the Board, but with the Association.

Finally, we reiterate that by our decision Petitioner would not be denied retroactive credit for his military service. Rather, we conclude that, as provided by Lavin, Petitioner is entitled to military service credit as required by N.J.S.A. 18A:29-11 from November 15, 1984. In so concluding, we find that, although the Board offered to implement Bickings' military service credit as of September 1, 1984, it was not bound by that offer. The offer was

clearly extended as an offer of settlement in order to avoid litigating Mr. Bickings' claim. Mr. Bickings did not accept.

For the reasons set forth above, we direct that the Board implement Petitioner's entitlement to military service credit under N.J.S.A. 18A:29-11 as of November 15 ,1984.

Attorney exceptions are noted.
February 4, 1987

IN THE MATTER OF THE TENURE :
HEARING OF EDNA BOOTH, SCHOOL : STATE BOARD OF EDUCATION
DISTRICT OF THE TOWNSHIP OF WEST : DECISION
ORANGE, ESSEX COUNTY. :

Decided by the Commissioner of Education, May 31, 1985

For the Petitioner-Respondent, Samuel A. Christiano, Esq.

For the Respondent-Appellant, Zazzali, Zazzali & Kroll
(Kenneth I. Nowak, Esq., of Counsel)

On September 26, 1984, the Board of Education of the Township of West Orange (hereinafter "Board") certified tenure charges pursuant to N.J.S.A. 18A:6-10 et seq. with the Commissioner of Education against Edna Booth, a tenured teacher in the District. The Board's statement of charges alleged incompetency.

Earlier, in August 1984, prior to certifying the charges, the Board had served the same charges upon Mrs. Booth and scheduled a hearing on those charges for its September 17 meeting. On September 13, Mrs. Booth petitioned the Commissioner to enjoin the Board's consideration of the tenure charges, asserting that the charges of incompetency were actually charges of inefficiency under N.J.S.A. 18A:6-11, which would require a 90-day corrective period before formal certification of tenure charges. On September 14, 1984, the Administrative Law Judge (ALJ) denied such relief, but directed that the Board reassign Mrs. Booth to a teaching position by September 17. The Board thereafter suspended Respondent from her position, effective September 19, 1984.

The two matters were consolidated and hearings were conducted before an Administrative Law Judge (ALJ). The ALJ found that the tenure charges included nine allegations of incompetency, eight relating to Respondent's performance as a teacher and the ninth relating to excessive absenteeism. As to the eight charges concerning to Respondent's performance, the ALJ concluded the facts showed that: 1) Respondent had failed to adequately implement the daily lesson plans that she is assigned to teach, 2) Respondent had failed to create and maintain an appropriate emotional learning climate in her classroom, 3) Respondent had failed to apply sound principles of pupil growth and development, 4) Respondent had failed to be reasonable and impartial with her students, 5) Respondent had failed to build and maintain an atmosphere of mutual respect with her pupils, 6) Respondent had failed to consistently assign appropriate homework, 7) Respondent had failed

to be open and receptive to criticism and that she had demonstrated a distinct unwillingness, over a period of three years, to listen to suggestions for improvement and change, and, finally, that 8) Respondent had failed to develop and maintain good relationships with parents of her pupils and with the community.

The ALJ found that under the facts and circumstances involved in this case, the Board's choice in characterizing the charges as incompetency rather than inefficiency was correct and reasonable. The ALJ recognized that N.J.S.A. 18A:6-11 provides that:

> ....if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency.

The ALJ emphasized that the intent of the statute as it relates to charges of inefficiency is to give a teacher who has rendered satisfactory service the opportunity to demonstrate that she can still be an effective teacher, but that a Board, however, is under no obligation to file charges of inefficiency. Initial Decision, at 21. Rather, the ALJ found that if a board concludes that a teacher lacks the capacity to perform properly, it may, as in the case before him, choose to file charges on that basis. Id. Nonetheless, the ALJ found that the record was replete with voluminous evidence showing long-term constant efforts to assist Respondent over a period of three years and that such efforts extended over a much longer period than the 90 days contemplated by N.J.S.A. 18A:6-11.

The ALJ further concluded that the Board had proven its charge of excessive absenteeism. He determined that Respondent's consistent pattern over many years demonstrated that neither the Board nor the students had obtained the full benefit of the services to which they were entitled, and that Respondent's acknowledged record of absenteeism was unacceptable and excessive. Id. at 23. He further found that Respondent had failed to adequately explain much of her absenteeism, and that she had not heeded stern and clear warnings concerning her absenteeism and the adverse effect her absenteeism was having on the educational process.

Based on all of the charges, the ALJ determined that dismissal was the appropriate penalty. In so concluding, he emphasized that Respondent's attitude was mainly defiant and defensive, and that her performance never rose to the level of reasonable acceptability despite consistent efforts by the administrative staff over a period of three years.

After thoroughly examining the entire record, the Commissioner concluded that the Board had failed to meet its burden of proof that Respondent was incompetent, and he rejected the ALJ's conclusion that the Board's choice of charging incompetence was

reasonable based on its efforts at correction. Based on his review of the record, the Commissioner found that any deficiencies relating to the charges of incompetency in Respondent's job performance were restricted to the 1982-83 and 1983-84 school years. He observed that Respondent's annual performance report for 1982-83 rated her satisfactory in the area of creating an atmosphere of mutual respect, which had been designated as needing improvement, and that her observation/evaluation report developed by the principal of the high school to which she was transferred that year was extremely favorable. Commissioner's decision, at 39. He further noted that although Respondent's final evaluation for that year was not finalized until October 3, 1983, there was no indication in the record whether the high school principal's favorable view was considered in the final report.

After review of the testimony and the evaluation reports for 1982-83, the Commissioner found that there were three areas which were identified as needing improvement as indicated by the weaknesses noted by the junior high principal. He however found that the evaluations did not in themselves support a charge of incompetency, but required review in the context of the 1983-84 school year.

The Commissioner found that the observation report of October 3, 1983, was unquestionably favorable, with the exception of two relatively minor points that became a source of conflict, in part because of Respondent's defensiveness and lack of receptivity to constructive criticism. The other formal observations of Respondent during the 1983-84 school year identified problems in student preparation and lesson structure and recommended corrective actions.

The Commissioner found that Respondent's 1983-84 annual evaluation report was the most highly negative one Respondent had received during her teaching service. In that report, of the three areas previously noted for improvement, two were rated satisfactory in the 1983-84 report. However, seven new areas were identified as needing improvement. The Commissioner determined that, even assuming all the criticisms in the report were valid, at best they provided a basis for a conclusion of inefficiency, and did not support a finding of incompetency.

In reaching this conclusion, the Commissioner emphasized the distinction between a charge of inefficiency and that of incompetency, stating that

> ...[t]he charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a

> useless exercise. Incompetence requires proof that the affected person, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher.

Commissioner's decision, at 45, quoting In the Matter of the Tenure Hearing of Patricia Nafash, decided by the Commissioner, March 13, 1984, at 37. (citations omitted).

The Commissioner found that the only long term recurring problem established by the record was that of Respondent's poor attendance, and emphasized that prior to 1982-83 she had received extremely favorable evaluations. Although he concluded that a prior history of good evaluations does not in itself preclude a charge of incompetency, he found that in this case, such history demonstrated the ability to perform satisfactorily in at least eight of the areas specified in the charges.

The Commissioner therefore concluded that the record did not demonstrate that Respondent was so lacking in competency that the 90 day improvement period would be a useless exercise. Id. at 46. He again emphasized that the Board had charged her with incompetency rather than inefficiency, and determined that it had failed to meet its burden of proof as to a charge of incompetency. He rejected the ALJ's conclusion that the Board's choice of incompetency was reasonable in light of its attempts at correction, finding that 1983-84 was the only year in which a concerted effort was made to help Respondent improve on perceived weaknesses. Id. at 47. Although the Commissioner found that inefficiency might be documented based on the record in the case, he again emphasized that N.J.S.A. 18A:6-11 mandates that if the charge is inefficiency, the employee must be provided with written notice of the alleged deficiency and at least 90 days to correct it prior to the certification of charges.

The Commissioner however adopted the ALJ's determination that Respondent's long-term record of absenteeism was excessive, and that despite two increment withholdings based upon her absenteeism and further warnings, Respondent's absenteeism had not improved and was not likely to do so. Therefore, although he rejected the ALJ's determination concerning the charges of incompetency based on job performance, the Commissioner concluded that Respondent's absenteeism constituted just cause for dismissal from her tenured position.

Like the Commissioner, we have carefully reviewed the record in this case, and we agree with him that it does not support a conclusion of incompetency. For the reasons set forth in his decision, we further concur with the Commissioner that while the record may support charges of inefficiency, we can not sustain such charges since Respondent was not afforded the written notice and 90 day correction period mandated by N.J.S.A. 18A:6-11.

We also agree with the Commissioner and the ALJ that the Board has established that Respondent has demonstrated a pattern of excessive absenteeism. Initially, we emphasize that it is well established that a teacher's entire record of absenteeism over a reasonably relevant period may be considered by a district board in determining whether to withhold that teacher's increment. Trautwein v. Board of Education of the Borough of Bound Brook, 1980 S.L.D. 1539, certif. den., 84 N.J. 469 (1980). We find that although Trautwein involved an increment withholding, this principle is equally applicable in determining whether a tenured teacher has been guilty of excessive absenteeism so as to constitute just cause for dismissal or reduction in compensation pursuant to N.J.S.A. 18A:6-10.

Respondent's record of absenteeism is as follows:

School Year	Number of Days Absent	
1983-1984	16	
1982-1983	18	
1981-1982	12	
1980-1981	20	
1979-1980	10	
1978-1979	61	(serious illness & convalescence)
1977-1978	19	
1976-1977	12	
1975-1976	0	(maternity leave)
1974-1975	17	
1973-1974	16	
1972-1973	5	
1971-1972	48	
1970-1971	18	
1969-1970	14	
1968-1969	19	
1967-1968	12	

Thus, as the Commissioner found, the Respondent's pattern of absenteeism is long-term, persistent and chronic.

Although we conclude that in a case such as this, where the determination to be made involves the right of a tenured teacher to continued employment in her position, consideration of her entire record of attendance is appropriate, in assessing Respondent's absenteeism over the course of her employment, we have focused on the pattern indicated by her absences in recent years, specifically from 1976-77, when she returned from maternity leave. Prior to 1976-77, Respondent's absences were in excess of statutory amounts every year with the exception of 1972-73. Subsequent to returning from leave in 1976, the only year in which Respondent's absenteeism did not exceed statutory amounts was 1979-80, the year following the Board's first action to withhold her increment. The Board acted to restore Respondent's increment in 1980, but her absenteeism for the 1980-81 school year increased to 20 days. The next year, Respondent was absent 12 days, and the Board again acted to withhold her

increment based on her absenteeism. In contrast to the improvement shown in 1979-80 following the Board's first action to withhold, Respondent's attendance deteriorated following the Board's second action, and her absenteeism during the next two years was well in excess of statutory amounts.

Although her absences were not of lengthy duration except for 1978-79 when she was seriously ill, and the number was not in any one year dramatically high, the pattern demonstrated is one of persistent sporatic absence during the entire course of her employment. This pattern continued following her return from maternity leave, and, again, her absences increased rather than decreased following the Board's second action to withhold her increment, and despite warnings and counseling. P-13, in evidence.

We reiterate that frequent absences are disruptive of the instructional process, and emphasize that:

> [f]requent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic program. The entire process of education requires a regular continuity of instruction with the teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process.

In the Matter of the Tenure Hearing of Catherine Reilly, 1977 S.L.D. 403.

The continuity of instruction is disrupted as much by sporatic absences as by lengthy absences where the impact on instruction may be controlled to some extent by the use of a long term substitute teacher. Although Respondent continues to maintain that because her absences were within the number permitted by contract, she should not be penalized, this does not alter the impact of her absenteeism on the continuity of instruction. Further, the disruptive effect of Respondent's persistent pattern of absenteeism was exacerbated by her failure to maintain emergency substitute plans. P-13, in evidence. The record also indicates that her absences impacted her students since substitutes who had knowledge of Spanish were not readily available.

We emphasize that Respondent's absenteeism, year in and year out, was well in excess of the statutory allowance under N.J.S.A. 18A:30-2. The fact that the collective negotiations agreement may have provided for a greater allowance of compensated leave can not excuse Respondent from fulfilling her obligations as a teacher, nor shield her from disciplinary action under N.J.S.A. 18A:6-10 based on her persistent pattern of absenteeism.

Nor does the fact that the reasons provided by Respondent for her absences may be contractually allowable reasons alter our conclusion that she has been persistently and excessively absent. Moreover, although we emphasize that this is not a case involving abuse of leave, based on the record, we concur with the ALJ that Respondent failed to adequately explain much of the absenteeism.

We now turn to the question of the appropriate penalty to be imposed in this case. See In the Matter of the Tenure Hearing of David Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). As set forth above, we recognize that although long-term, persistent and excessive, Respondent's absenteeism was not dramatically egregious. See, for example, In the Matter of the Tenure Hearing of Claire DeKrafft, 1981 S.L.D. 1308. We however reiterate that because of the importance of maintaining continuity in the instructional process, regular attendance of teaching staff members is essential. The importance of regular staff attendance is recognized in the monitoring process, which requires that in order to be certified, a district's annual rate of occasional staff absenteeism may not exceed 5%, and if such rate exceeds 3.5% a review/improvement process is required. MANUAL FOR THE EVALUATION OF LOCAL SCHOOL DISTRICTS PURSUANT TO THE PUBLIC SCHOOL EDUCATION ACT OF 1975, New Jersey Department of Education (January, 1984). Although individual cases are not judged on the basis of the absenteeism rate with which all districts must conform, we again emphasize that regular attendance by teaching staff members is essential to the educational process and that excessive absenteeism on the part of an individual teacher is a serious offense. Again, Respondent has been persistently and excessively absent during the entire course of her employment, and the seriousness of her failure to attend school regularly is not dispelled by the fact that her absenteeism is not dramatically egregious.

Further, although Respondent asserts that the Board had tolerated her absences over a long period of time and suggests that given the Board's past inaction, it is unfair to seek dismissal, the Board did in fact withhold her increments for 1979-80 and for 1981-82 because of her absenteeism. Further, Respondent was clearly warned in July 1982, that if her attendance did not improve she would be subject to tenure charges seeking her dismissal and she did receive counseling. We find that the seriousness of her absenteeism is compounded by the persistence of her pattern in the face of the Board's efforts to reverse that pattern.

Although we acknowledge Respondent's length of service, we find that any mitigation of the penalty based on her length of

service is overshadowed by her persistent pattern of absenteeism and total unresponsiveness to the Board's exhortations that she improve her attendance. Fulcomer, supra. We further find that although the record does not support a conclusion of incompetency, it clearly establishes that Respondent's performance has been less than satisfactory since the 1982-83 school year. Thus, her record of attendance is not mitigated by the quality of her performance, and we can find no indication in the record of any improvement in her attendance. See In the Matter of the Tenure Hearing of Theodore Augustine Burns, decided by the Commissioner, aff'd with modif. by the State Board, October 24, 1984.[1]

Accordingly, for the reasons expressed, we affirm the Commissioner's determination that Respondent's persistent pattern of excessive absenteeism warrants dismissal from her position.

Attorney exceptions are noted.
April 1, 1987

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[1] Although Respondent argues that she should not be dismissed because her record of absenteeism approximates that in Burns, see Respondent's exceptions, at 13, and Mr. Burns did not show any improvement, id. at 15, we note that in determining that dismissal was not the appropriate penalty in that case, the ALJ emphasized that "... it is important to note that both the principal and the chairman of the English department...indicate that Mr. Burns is a good teacher, is reaching out to help students and is improving his attendance record." Burns, supra, Initial Decision, at 29. As set forth above, this is not the case here.

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : STATE BOARD OF EDUCATION
BRIDGEWATER-RATITAN REGIONAL : : DECISION
SCHOOL DISTRICT, SOMERSET COUNTY. :
:

Decided by the Commissioner of Education, October 23, 1986

For the Petitioner-Appellant, Lowenstein, Sandler, Brochin, Kohl, Fisher, Boylan & Meanor (Kevin Kovacs, Esq., of Counsel)

For the Respondent-Respondent, Soriano and Gross (Daniel Soriano, Esq., of Counsel)

After carefully reviewing this case, we find that the standards set forth in N.J.S.A. 19:29-1 et seq. were applicable in judging the violations alleged in this case, and in determining the validity of the results of the election. We further find that the Commissioner applied the correct legal standard in deciding the case, Application of James T. Murphy, 101 N.J. Super. 163 (App. Div. 1968), certif. denied, 52 N.J. 172 (1968). Accordingly, for the reasons expressed therein, we affirm the decision of the Commissioner.

January 7, 1987

EDWARD BUZINKY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Remanded by the Commissioner of Education, April 24, 1986

Decided by the Commissioner of Education, October 20, 1986

For the Petitioner-Appellant, Wayne J. Oppito, Esq.

For the Respondent-Respondent, Dines and English
(Patrick C. English, Esq., of Counsel)

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

March 4, 1987

JOYCE CAPRA,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Remanded by the State Board of Education, February 4, 1987

Decided by the Commissioner of Education, February 26, 1987

For the Petitioner-Appellant, Klausner, Hunter & Oxfeld (Nancy Iris Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Gagliano, Tucci, Iadanza and Reisner (Eugene Iadanza, Esq., of Counsel)

The question raised by this appeal is whether an individual who has filed written charges with a district board as specified by N.J.S.A. 18A:6-11 has standing to appeal to the Commissioner of Education a district board's determination not to certify tenure charges where the individual filing the charges is no longer employed by the district, and is neither a resident of the district nor a resident of New Jersey.

The matter was initiated when, in March 1986, Joyce Capra, a former employee of the Eatontown Board of Education (hereinafter "Board") filed with the Board a written charge against the district's Superintendent of Schools. The basis of Ms. Capra's charge was alleged conduct by the Superintendent that Ms. Capra asserted constituted conduct unbecoming a Superintendent of Schools. In support of her charge, Ms. Capra filed a written statement under oath, attesting that she had been employed by the Board from July 24, 1984, through July 5, 1985, as a bookkeeper assigned in the administration office of the Board, reporting in that capacity to the Board Secretary and Business Administrator. In her statement, Ms. Capra attested to several incidents involving comments made by the Superintendent to her and to other employees pertaining to those employees, an incident involving the transfer of another employee, instances of intoxication and parties held at the office, and conduct related to Ms. Capra's attempts to get a pay increase.

By letter dated April 9, 1986, the Board Secretary confirmed to counsel representing Ms. Capra that the Board had considered the charges she had filed, along with a responsive statement made under oath, in executive session at its regular meeting of April 7, 1986, and had adopted a detailed resolution dismissing the charges by an 8-0 roll call vote. The letter further stated that, on advice of counsel, the resolution was not being made public.

On July 1, 1986, Ms. Capra filed a Petition of Appeal with the Commissioner of Education, alleging that the Board's action in dismissing the tenure charges was in violation of N.J.S.A. 18A:6-11 in that there was probable cause to credit the evidence in support of the charge and that the charge, if credited, was sufficient to warrant dismissal or reduction of salary. She further alleged that the Board had failed to make any determination as to whether there was probable cause to credit the charge and whether penalty was warranted, and that the Board had violated N.J.S.A. 18A:6-11 in failing to plainly articulate the reasons for its determination of those questions and to supply Ms. Capra with its determination and its reasons. In her Petition, Ms. Capra requested that the Commissioner require the Board to expressly determine whether probable cause supported the charge and whether penalty would be warranted, to require the Board to articulate its reasons, and to require it to provide her with its determination and its reasons.

Based upon review of the papers and conference call of counsel, the Director of the Bureau of Controversies and Disputes dismissed the petition on July 10, 1986, on the grounds that Ms. Capra would not be substantially, specifically and directly affected by the outcome of the controversy. Ms. Capra appealed the dismissal, and the State Board remanded the matter to the Commissioner of Education in order that he could render his decision pursuant to N.J.S.A. 18A:6-9.

On February 26, 1987, the Commissioner dismissed the petition pursuant to N.J.A.C. 6:24-1.9, concluding that Ms. Capra was not an interested person as defined by N.J.A.C. 6:27-1.1 in that she would not be substantially, specifically or directly affected by the outcome of the controversy since she is neither a resident of the District nor of New Jersey, she is not any longer an employee of the District and is not challenging her termination. The Commissioner further determined that the matter failed to meet the definition of a contested case under N.J.A.C. 1:1-1.6(a)(6), which provides that contested cases are those involving subject matter susceptible to the receipt of evidence or particularized legal argument.

Ms. Capra appealed, contending that she does in fact have standing to bring the claim, and seeking a directive that the Commissioner consider her petition. She argues that since N.J.S.A. 18A:6-10 confers standing to bring a tenure charge to a district board on any person, such person must also have the right to appeal the board's denial of certification to the Commissioner. She

asserts that to hold otherwise would render ineffective the right conferred by N.J.S.A. 18A:6-10, and that that right together with the public interest in the fitness of the Superintendent of Schools to remain in his position provides standing to challenge the district Board's determination in this matter.

Initially, we reject the Commissioner's conclusion that the matter fails to meet the definition of a contested case. There is no question that the subject matter involved here is susceptible to the receipt of evidence and particularized legal argument. Manalapan-Englishtown Education Assn. v. Bd. of Ed. of Manalapan-Englishtown Regional High School District, 187 N.J. Super. 426 (App. Div. 1981); Ridgefield Park Education Association and Clifton L. West, Jr. v. Board of Education of the Township of Ridgefield Park, decided by the State Board, February 6, 1985, aff'd, Docket #A-2859-84T7 (App. Div. December 24, 1985). See In re Uniform Procedure Rules, 90 N.J. 85, 105 (1982).

Likewise, we find that Ms. Capra is not precluded from pursuing her claim by the fact that she does not meet the definition of an "interested person" set forth in N.J.A.C. 6:24-1.1. Although the regulations require that an individual be an "interested person" in order to petition for a declaratory ruling pursuant to N.J.A.C. 6:24-2.1, the petition here is not one for a declaratory ruling, and there is no requirement in the regulations that petitioners meet that specific criterion in any other instance.

In resolving whether Ms. Capra has sufficient standing to invoke administrative review of the Board's determination in this case, we emphasize that although the language of N.J.S.A. 18A:6-10 provides that the person or persons making a written charge against a tenured employee "may or may not be a member or members of the board of education...", and although N.J.S.A. 18A:6-11 specifies the obligations of a district board where written charge is made against any tenured employee, the statutes in question do not confer standing on the person making such charge to invoke review by the Commissioner of Education of the board's determination concerning certification. Further, although we conclude that N.J.A.C. 6:24-2.1 does not preclude standing in this context, we recognize that even under the liberal approach taken by the New Jersey courts, litigation is generally confined to those situations where the litigant's concern with the subject matter evidences a sufficient stake in the outcome of the litigation and real adverseness. New Jersey State Chamber of Commerce et al. v. New Jersey Election Law Enforcement Commission, 82 N.J. 57, 67 (1980), Crescent Park Tenants Association v. Realty Equities Corp. of New York, 58 N.J. 98, 107 (1971). Nor are proceedings entertained where the plaintiffs are "mere intermeddlers" or strangers to the dispute. Crescent Park Tenants Association v. Realty Equities Corp., supra at 107.

At the same time, the courts have recognized the danger that lack of standing to invoke the power of judicial review may confer on administrative action a conclusive character to the possible great detriment of the public, Elizabeth Federal Savings &

Loan Assn. v. Howell, 24 N.J. 488, 502 (1957), and have further recognized that to take a narrow approach to standing may lose sight of the overriding need of the system to make sure that someone shall in fact be able to secure review of administrative action. Id. Accordingly, where a substantial public interest is involved, a slight interest may be sufficient to give standing to invoke judicial review. N.J. Chamb. Commerce v. N.J. Elec. Law Enforce. Comm., supra at 68; Elizabeth Savings & Loan Ass'n v. Howell, supra at 499.

Although we are mindful of the distinctions between the exercise of judicial power and the nature of the quasi-judicial authority exercised in administrative proceedings, City of Hackensack v. Winner, 82 N.J. 1, 28-29 (1980), we find these principles equally applicable in assessing whether an individual who has made charges to a district board pursuant to N.J.S.A. 18A:6-10 and filed them pursuant to N.J.S.A. 18A:6-11 has sufficient standing to invoke the Commissioner's review of a district board's determination under N.J.S.A. 18A:6-11 not to certify the charges. In reaching this conclusion, we recognize that even under the limited review to which such determinations are subject, Manalapan-Englishtown Education Assn. v. Bd. of Ed. of Manalapan-Englishtown Regional High School District, supra; Ridgefield Park Education Association v. Board of Education of the Township of Ridgefield Park, supra, litigation of challenges to those determinations will impact the tenured staff member who is the subject of the substantive charge. At the same time, we can not ignore the danger that in some cases great harm to the public, and particularly to students, may result from a determination not to certify charges where certification would be mandated under N.J.S.A. 18A:6-11. We further recognize, however, that such danger is not present in all cases where a board determines not to certify charges. We find that the principles ennunciated by the courts properly balance the conflicting considerations present in cases of challenge to a board's decision not to certify charges, and would hold that where the potential for harm to the public is great in a particular case, a slight interest is sufficient to provide standing to invoke administrative review of the district board's determination.

In the case now before us, the sole interest asserted by Ms. Capra, beyond the fact that she made the charges at issue, is the interest of the public. However, the charges here are limited to allegations of conduct pertaining to the Superintendent's relations with administrative employees of the Board, and include no allegations concerning conduct occurring on school premises or involving students. Insofar as the conduct asserted affected Ms. Capra, any particular interest she may have had based on her status as an employee of the District is negated by the fact that she no longer has any connection with the District. Although we recognize that the public may have some general interest in the fitness of a superintendent of schools to remain in his position, we conclude that the charges here do not implicate any substantial public interest so as to provide Ms. Capra, whose interest in the

Loan Assn. v. Howell, 24 N.J. 488, 502 (1957), and have further recognized that to take a narrow approach to standing may lose sight of the overriding need of the system to make sure that someone shall in fact be able to secure review of administrative action. Id. Accordingly, where a substantial public interest is involved, a slight interest may be sufficient to give standing to invoke judicial review. N.J. Chamb. Commerce v. N.J. Elec. Law Enforce. Comm., supra at 68; Elizabeth Savings & Loan Ass'n v. Howell, supra at 499.

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matter is limited to the fact that she filed the charges, with sufficient standing to invoke review by the Commissioner of Education.

Thus, although the State Board of Education rejects the grounds upon which the Commissioner determined to dismiss the petition in this case, we affirm dismissal of the petition for the reasons set forth in this decision.

November 4, 1987

WILLIAM F. CARROLL, JR.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE SUSSEX-WANTAGE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 26, 1985

For the Petitioner-Appellant, Klausner and Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Chase, Clark and Leonard
(R. Webb Leonard, Esq., of Counsel)

In April 1984, the Board of Education of the Sussex-Wantage Regional School District resolved to withhold Petitioner-Appellant William F. Carroll, Jr.'s salary and adjustment increments for the 1984-85 school year. On April 25, 1984, the Board informed Mr. Carroll, who is a tenured physical education teacher, that it had determined to withhold the increment because of his failure: 1) to carry out his assigned duties with regard to training playground/cafeteria aides, 2) to follow a directive to escort students to and from adaptive physical education classes, 3) to follow repeated directives to meet with a parent who had requested a conference and 4) to follow directives relative to the supervision of students during recess periods. P-1, in evidence. Those failures were viewed by the Board as reflective of Petitioner-Appellant's "unwillingness to cooperate with administration for the improvement of programs offered our students and improvement of student discipline and supervision." Id. Petitioner-Appellant challenged the Board's action by filing a Petition of Appeal with the Commissioner, alleging that the Board's action was illegal, arbitrary, capricious and unfounded. Petition, Para. 5.

In his Initial Decision, the Administrative Law Judge (ALJ) found that Petitioner-Appellant had discussed with his playground aide the essential rules of kickball and certain aspects of the game over the December-January period. Findings of Fact, #4. He further found that prior to September 1983, Petitioner-Appellant had a discussion with his Principal regarding the time that was being provided to allow him to escort students to and from adaptive physical education classes, id. at #5, that during the first few

days of the program teachers were sending students unescorted, but that Petitioner-Appellant spoke to teachers about it, id at #6, and that subsequently, on one occasion, some students came to class unescorted. Id. at #7. The ALJ also found that Petitioner-Appellant was directed on November 18, 1983, to schedule a new conference date with a parent who had requested a conference, id. at #11, but that as of January 4, 1984, the conference had not been held. Id. at #12. Petitioner-Appellant met with the parent on January 7, 1984, since he happened to see her in school that day. Id. at #13. Finally, concerning the incident on December 19, 1983, which involved Petitioner's alleged failure to adequately supervise students during recess, the ALJ found that Petitioner-Appellant could exercise adequate supervision from the spot where he was positioned at that time. Id. at #16.

Based on the proofs, the ALJ determined that Petitioner-Appellant had provided training to the playground aide to the extent that those responsibilities were spelled out. Initial Decision, at 13. He further determined that although Petitioner-Appellant had failed to escort students to adaptive physical education class on one occasion, "no culpability should be placed upon petitioner" since teachers were sending students unescorted during the "start-up" period of the program and did not know that Petitioner-Appellant was to "collect them." Id. at 13. The ALJ also concluded that Petitioner-Appellant was satisfactorily supervising students during recess and that his location during recess on December 19, which was somewhat removed from the students, was due to his undisputed medical ailment and not to any desire to shirk his duties. Id.

The ALJ, however, concluded that the proofs established that Petitioner-Appellant had failed to obey a directive to meet with a parent who had requested a conference and that his conduct in this regard was not proper. Id. at 13-14. Nonetheless, he found that this "charge" alone did not warrant withholding Petitioner-Appellant's increment. Therefore, in light of Petitioner-Appellant's overall performance, the ALJ recommended that the increment be restored without interest and that Petitioner-Appellant instead be given a written reprimand. Id. at 14.

The Commissioner concurred with "the findings of fact as determined by the ALJ," Commissioner's Decision, at 21, but disagreed with his conclusion that Petitioner-Appellant had proved "the absence of a sound basis for the withholding." Id. However, in determining that the Board had a reasonable basis for withholding the increment, id. at 22, the Commissioner relied on "admissions" contained in the transcript.

Specifically, the Commissioner found that Petitioner-Appellant admitted the "on at least one occasion he failed to escort students to their adaptive gym classes, despite a written directive from the principal that he do so." Id. at 22. The Commissioner further noted Petitioner-Appellant's concession that he did not train the aides on a regular basis, as he was instructed to do, id.,

and Petitioner-Appellant's admission that he was standing at a remote distance from the student activity on December 19, 1983, without seeking excusal from his duties due to his physical infirmities. The Commissioner concluded that the facts relating to non-supervision were alone sufficient to support a withholding of increment.

After carefully reviewing the entire record in this case, we find that the record does not support the Board's conclusion that Petitioner-Appellant failed to carry out his assigned duties to train playground/cafeteria aides, nor its conclusion that he failed to follow directives regarding the supervision of students during recess. We, however, find that the record does demonstrate that Petitioner-Appellant failed to follow instructions to meet with a parent who requested a conference and that he failed to fulfill his assigned responsibilities to escort students to and from adaptive physical education classes. We further conclude that these failures provided the Board with "good cause" to withhold Petitioner-Appellant's increment pursuant to N.J.S.A. 18A:29-14.

As set forth above, the ALJ concluded that Petitioner-Appellant had provided training to the playground aide to the extent that those responsibilities were spelled out. We agree. The only documentation of Petitioner-Appellant's duties in this area included in the record are two memos from Anthony Mistretta, the Principal, to Petitioner-Appellant and a health teacher. The first, dated December 21, 1983, states that "[w]hen there is a fifteen minute outdoor recess period held [the Principal] would like you to utilize the remaining available time to review games and procedures with the aides." R-4, in evidence. The second, dated January 6, 1984, indicates that "[e]ach teacher will be responsible to train aide(s) in their respective sections." R-3, in evidence. Mr. Mistretta also met with both teachers involved in January, 1984 and discussed the training. He testified the intent of the training was to make the aides competent in the games so as to eliminate any unforseeable problems, Tr. 68, and told Petitioner-Appellant that he was to do more than just review the rules. Tr. 76-77. He further testified that he expected Petitioner-Appellant to "place the person in situations so they can handle and be competent in the game," Tr. 82, and so that he or she could "handle or eliminate any unforeseeable problems..." Tr. 83. However, Petitioner-Appellant had ascertained in informal discussions with his aide at the time that she was very knowledgable with the kickball activity, and he remained available for any questions she might have. Tr. 127, 153. In view of the lack of specificity concerning the scope and substance of training that Petitioner was required to provide and the fact that Petitioner did review the games with the aide, ascertained that she was competent in kickball and remained available for questions, we find that the record does not support the conclusion that Petitioner failed to carry out any duties that were assigned with regard to training aides.

Likewise, we agree with the ALJ that the record does not support the Board's conclusion that Petitioner-Appellant failed to

adequately supervise students during recess. The one incident in this regard occurred on December 19, 1983. Pupils in the fifth grade were playing football on a large field in the extreme cold, and Petitioner-Appellant's feet were swelling. He suffered from an arthritic condition, and therefore stationed himself on a hill overlooking the field, which was shielded from the wind by a building. The playfield at given points was from twenty to sixty yards from his vantage point. Petitioner-Appellant taught classes in football and felt he had full command of the field. Tr. 123-124. When observed by Mr. Mistretta, the students were between 100 and 150 feet away from Petitioner-Appellant. Tr. 109. Based on these facts, we concur with the factual finding of the ALJ that Petitioner-Appellant was in a position to exercise adequate supervision.

We however find that the record shows that petitioner failed to fulfill his responsibilities to meet with a parent who had requested a conference and to escort students to and from adaptive physical education class. As to Petitioner's failure to meet with the parent, the ALJ and the Commissioner agreed that Petitioner had in fact disregarded instructions to conduct such parent conference. Petitioner-Appellant, however, disputes this finding, asserting that Mr. Mistretta's testimony is not credible.

The parties agree that Petitioner-Appellant did not wish to meet alone with the parent because the parent had previously accused him of "touching young girls." It was therefore concluded that the conference should be conducted in the presence of Mr. Mistretta. The conference was scheduled for November 8, 1983, but the parent notified Petitioner through her spouse that she was cancelling the conference. Despite the cancellation, she presented herself on the designated date and requested that the conference be held. Petitioner-Appellant's conference times, however, were filled. The parent communicated her desire to see Petitioner-Appellant both to Mr. Mistretta and Petitioner.

According to Mr. Mistretta, he spoke with Petitioner on the day of the conference, November 7, and instructed Petitioner to arrange another conference time with the parent. On November 18, Mr. Mistretta again instructed Petitioner to meet with the parent. Tr. 50 et seq. Petitioner denied talking with Mr. Mistretta on November 7, and, in fact, he was not in attendance on that specific date. Additionally, the parent's cancellation note was dated November 8. As to his conversation with Mr. Mistretta on November 18, Petitioner asserts that Mr. Mistretta merely asked if he had met with the parent and Petitioner replied that he had not. Petitioner asserted that the parent did not request that the meeting be rescheduled.

Based on our review of the record, we are satisfied that Petitioner was aware that the parent desired a conference and that his principal did instruct him to meet with the parent. We find that althrough Mr. Mistretta did not correctly specify the date of his first conversation with Petitioner concerning rescheduling the

conference, his failure to accurately specify that date does not negate either his credibility or our conclusion that the record establishes that Petitioner was reminded of his responsibility to reschedule the conference on two occasions. However, Petitioner made no effort to reschedule the conference. His meeting with the parent on January 7, 1984, was the consequence of a chance encounter, and discussion was initiated entirely by the parent. Because the semester was by that time concluded, the meeting appears to have been completely superfluous. We therefore concur with the ALJ and Commissioner that Petitioner's responsibility to meet with the parent and his failure to do so is supported by the record.

We further find that Petitioner's failure to escort students from their regular classroom to his adaptive physical education class is also supported by the record. Petitioner was advised of this responsibility in September 1983. However, from October 17, when the class commenced, until October 21, when Petitioner received a memorandum of inquiry from Mr. Mistretta, he failed to perform this task. We find that Petitioner's assertion that he could not get to all teachers to remind them to hold their students, Tr. 122-123, does not provide a basis for excusing his failure since it is established that he required only one day to rectify the problem once Mr. Mistretta intervened. Tr. 124.

In sum, we conclude that the record in this case substantiates that Petitioner had been advised of his responsibilities to meet with a parent who had requested a conference and to escort students to and from adaptive physical education, and that he failed to fulfill those responsibilities. We further conclude that his failures to fulfill these responsibilities provided the Board with a reasonable basis for its determination to withhold his increment pursuant to N.J.S.A. 18A:29-14. Kopera v. W. Orange Board of Educ., 60 N.J. Super. 288 (App. Div. 1960). Nor does the fact that Petitioner's overall evaluation for 1983-84 was satisfactory negate the reasonableness of the Board's conclusion. Petitioner's evaluation of June 1984 notes improvement in his performance "over the past month," and we find that the overall satisfactory rating was clearly related to Petitioner's "recent improvement." P-2, in evidence.

Accordingly, for the reasons set forth above, we conclude that Petitioner has not shown that the withholding of his increments for the 1984-85 school year was either arbitrary or unreasonable.

February 4, 1987

ERICA A. COHEN,	:	
PETITIONER/CROSS-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EMERSON, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT,	:	
AND	:	
SUZANNE CARTER,	:	
INTERVENOR-APPELLANT.	:	

Decided by the Commissioner of Education, September 3, 1985

For the Petitioner/Cross-Appellant, Klausner and Hunter
(Stephen B. Hunter, Esq., of Counsel)

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

For the Intervenor-Appellant, Alfred F. Maurice, Esq.

This case involves questions relating to the seniority entitlement of a speech correctionist employed by the Board of Education of the Borough of Emerson and assigned by the Board prior to February 1, 1981, exclusively at the elementary level, with additional employment by the Board during 1978-79 that included providing services to parochial school students in grades K-8. Petitioner was initially employed by the Board on January 7, 1974, and assigned on a two day a week basis to provide services to an elementary school. During the 1974-75 school year, she served in the same assignment on a full-time basis. She continued assignment at the elementary level during 1975-76 on at least a four day a week basis, also providing services without being so assigned in the cases of two secondary students during that year. For the 1976-77 school year, Petitioner was assigned at the elementary level. She filled this assignment until January 11, 1977, when she commenced maternity leave. During that period, she consulted with the staff members who were responsible for providing services to a former sixth grader with whom she had worked, who was then in junior high school.

Petitioner returned to work following her maternity leave on February 1, 1978, at which time she served at the elementary level on a four day a week basis. In 1978-79, Petitioner was again assigned to an elementary school, this time on a two and a half day basis. In addition, she was employed by the Board to provide services one and a half days per week to eligible students in kindergarten through eighth grade who attended Assumption School, which is a parochial school.

From September 1979, until March 30, 1980, Petitioner was assigned two and a half days per week at the elementary level. From that date, her employment was increased to three and a half days per week. From September 1980 through January 31, 1981, Petitioner was again on maternity leave, receiving compensation only for nine days of accumulated sick leave. Upon her return on February 1, 1981, she was again employed on a two and a half day per week basis, but specifically assigned to provide services to students at the secondary as well as elementary level. During the next three years, Petitioner was employed on a two and a half day per week basis and was assigned exclusively at the elementary level.

On May 21, 1984, the Board acted to reduce Petitioner's employment for the 1984-85 school year to one and one half days per week. While reducing Petitioner's employment, the Board retained another speech correctionist, Intervenor Suzanne Carter, assigned at the secondary level on a three day a week basis. On July 6, 1984, Petitioner filed a Petition of Appeal to the Commissioner of Education, in which she claimed that she was entitled by virtue of her seniority to the three fifths position, and that by reducing her assignment while retaining the Intervenor Suzanne Carter on a three fifths basis, the Board had violated her tenure and seniority rights.

I

In his Initial Decision, the Administrative Law Judge (ALJ) concluded that Petitioner had been entitled to employment on a three fifths basis for 1984-85 on the basis of her seniority. In arriving at his decision, the ALJ first resolved the factual disputes in the matter, finding such dispute to be limited to the nature of Petitioner's assignments during the 1975-76, 1976-77 and 1978-79 school years. He found that Petitioner's limited involvement with two secondary students during 1975-76 did not alter the character of her assignment from elementary to secondary, emphasizing that the Board had not assigned her to provide such services and that contact with these students was limited, constituting professional courtesy rather than performance of the duties of speech therapist for these students. Similarly, the ALJ concluded that her availability on a consulting basis the subsequent year to those staff members responsible for providing services to Petitioner's former student was nothing more than assistance provided to ease the transition of a former student from elementary to junior high school.

The ALJ however found that Petitioner's employment by the Board during 1978-79 to provide services to eligible parochial school students in the District who attended Assumption School was district-wide because her caseload included six students who were in seventh and eighth grades and received departmentalized instruction at Assumption School. In so finding, the ALJ emphasized that in contrast to her public school assignments, Petitioner's caseload at Assumption School ranged from kindergarten through eighth grade. The ALJ further emphasized that these services were arranged and paid for by the district Board as part of its obligation to provide special education to all children in the District.

Based on application of the seniority regulations now in effect, the ALJ concluded that Petitioner had accrued 3.15 years of district-wide seniority at the time of the Board's action, in contrast with Intervenor's Suzanne Carter's 3.08 years of district-wide seniority. He specifically rejected Petitioner's claims that she was entitled to district-wide seniority from the date of her initial employment based on her minimum contacts with secondary students during 1975-76 and 1976-77, emphasizing that the Board had assigned Petitioner during this period to the elementary level and that both the scope and duration of her duties concerning the secondary students was limited.

He however found that pursuant to N.J.A.C. 6:3-1.10(1)(15), Petitioner's service to seventh and eighth grade students who received departmentalized instruction at the parochial school they attended, which was provided by Petitioner pursuant to her assignment by the Board, entitled Petitioner to district-wide seniority during 1978-79, to which, pursuant to N.J.A.C. 6:3-1.10(h), her subsequent service at the elementary level was to be "tacked on."

The ALJ further concluded that credit for her service pursuant to assignment to Assumption School was to include credit for time spent fulfilling responsibilities required by the assignment, including preparation and reporting requirements, regardless of the fact that the Board did not allocate compensation to the hours required to fulfill those responsibilities. He further concluded that Petitioner should not be penalized by loss of seniority credit because the academic year at Assumption School was shorter than that in the District.

The ALJ however rejected Petitioner's claim that she was entitled to 30 days' seniority credit during her maternity leave in 1980-81 pursuant to N.J.A.C. 6:3-1.10(b), finding that such credit is mandated only if a leave of absence is less than 30 days. He also rejected Petitioner's contention that the seniority regulations now in effect grant district-wide seniority from date of employment to anyone who subsequently serves on a district-wide basis, and that her seniority rights had vested under the regulations in effect prior to September 1, 1983. The ALJ further rejected the argument

that the Commissioner's decision in Felper v. Board of Education of the Town of West Orange, decided by the Commissioner January 28, 1985, entitles a staff member who, as here, suffered a reduction in force prior to September 1, 1983, but who continued to be employed by the District after that date, to calculation of seniority under the previous regulations for the portion of his service rendered up to the time of the earlier reduction.

Based on his conclusions, the ALJ determined that Petitioner had greater seniority at the time of the reduction than Intervenor Suzanne Carter, and he therefore recommended directing correction of Petitioner's seniority for assignment for the then upcoming 1985-86 school year, and payment of $6,529 representing the difference between her salary in the three fifths position minus mitigation for the 1984-85 school year, and restoration of benefits and emoluments she would have received if she had served in the three fifths position during 1984-85.

The Commissioner adopted the Administrative Law Judge's determination of the matter with several significant modifications. First, the Commissioner concluded that Petitioner was entitled to credit for district-wide seniority from her initial date of employment, reasoning that when she suffered a reduction in force in 1978, she had achieved tenure, and her seniority entitlement should have been calculated under the regulations in effect at that time. Second, the Commissioner concluded that Petitioner's service to Assumption school could not be construed as creditable for seniority purposes since that service was not by virtue of her regular contractual assignment with the school district. The Commissioner found that such service was in addition to her "regular teaching assignment, similar to that of staff who have coaching or extracurricular assignments," Commissioner's decision, at 23, and that her compensation was not based on her regular contracted salary with the District, but was by way of vouchers. Third, the Commissioner found that Petitioner should have been credited with .05 year seniority credit for the first 30 days of unpaid leave in 1980 pursuant to N.J.A.C. 6:3-1.10(b), as well as .03 year for the nine days of accumulated sick leave she utilized in September 1980. As stated, these modifications did not alter the Commissioner's concurrance with the ultimate conclusion reached by the ALJ and, accordingly, the Commissioner adopted the recommended orders as modified by his determination.

The Board appealed, contending that Petitioner was not entitled to district-wide seniority based on her service prior to February 1981. The Board argues that both the ALJ and Commissioner's decisions are in error in this respect, that neither by virtue of her parochial school assignment nor the reduction in force occurring in 1978, prior to which she spent the majority of her time with elementary students, did Petitioner gain entitlement to seniority credit on a district-wide basis. The Board further argues that Petitioner is not entitled to 30 days credit for her maternity leave in 1980 since the regulation applied by the

Commissioner was not in effect at that time and, in any event, Petitioner never started the school year in question and therefore time during September should not count toward seniority. Intervenor Suzanne Carter also appealed, essentially arguing that Petitioner's secondary seniority is far less than Intervenor's and therefore Petitioner has no claim to any position in this category given to Intervenor. Petitioner cross-appealed the Commissioner's denial of seniority credit for services provided to students at the Assumption School.

After careful consideration, we agree with the Commissioner's conclusion that the Board failed to properly credit Petitioner for her prior service when it reduced her employment for the 1984-85 school year. In determining Petitioner's seniority, we however reverse the Commissioner's determinations: 1) that Petitioner was entitled to seniority credit on a district-wide basis from the date of her initial employment by virtue of the reduction in her position in 1978, 2) that she was entitled to seniority credit for the first 30 days of her unpaid maternity leave and 3) that Petitioner was not entitled to seniority credit for her service in her assignment to Assumption School. Rather, for the reasons that follow, we conclude that Petitioner is not entitled to district-wide credit for seniority purposes by virtue of having been affected by reductions in force prior to September 1, 1983, but that she did acquire seniority on a district-wide basis commencing with the 1978-79 school year on the basis of her employment by the Board to provide services to parochial school students K-8, which included 7th and 8th grade students receiving departmentalized instruction. We further conclude that Petitioner is not entitled to credit for the first 30 days of her unpaid maternity leave, and also reverse the Commissioner's determination on that issue.

II

The threshold questions in this case are whether determination of Petitioner's seniority necessitated by the Board's action of May 21, 1984, is controlled by the seniority regulations that became effective on September 1, 1983, and whether those regulations control the categories to which her service from her date of initial employment is to be credited.

Initially, we emphasize that seniority is a concept which applies to certain rights of tenured personnel and only has meaning when a reduction in force is necessary. Howley v. Board of Education of the Township of Ewing, 1982 S.L.D. 1328, 1340, aff'd by the State Board, June 1, 1983; In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Board of Education and the Edison Township Board of Education, Docket #A-2241-8416 and #A-2531 - 84T6 (App. Div. June 17, 1986). When a board acts pursuant to N.J.S.A. 18A:28-9 to reduce the number of teaching staff members employed in the district, dismissal resulting from such reduction must be made on the basis of seniority. N.J.S.A. 18A:28-10. The standards upon which seniority is to be

determined, however, are those "...established by the commissioner with the approval of the state board," N.J.S.A. 18A:28-10, and, as specifically provided by N.J.S.A. 18A:28-13, the Commissioner "...may, in his discretion, determine seniority upon the basis of years of service and experience within ... fields or categories of service as well as in the school system as a whole, or both." Further, any member dismissed as the result of Board action pursuant to N.J.S.A. 18A:28-9 must be placed and remain "...upon a preferred eligible list in order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified ... and in computing length of service for reemployment, full recognition shall be given to previous years of service...." N.J.S.A. 18A:28-12. Thus, although the statutes mandate that determinations concerning which tenured staff members are to be retained following a reduction in staff must be based on seniority, thereby mandating that prior service be recognized, the categories to which such service is to be credited are controlled by the categories established by the Commissioner within the broad parameters set forth in N.J.S.A. 18A:28-13.

It is now settled that the categories in which prior service is to be credited when a seniority determination was necessitated by Board action taken pursuant to N.J.S.A. 18A:28-9 after September 1, 1983, are defined by the regulations now in effect, and that a teaching staff member affected by such action has no right to be credited for service prior to September 1, 1983, according to the categories defined by the regulations previously in effect. Elsa Hill v. Board of Education of the Town of West Orange, decided by the Commissioner, January 21, 1985, aff'd by the State Board, May 1, 1985, aff'd, Docket # A-4355-84T1 (App. Div. Feb. 19, 1987). In this case, the Board acted on May 21, 1984, to reduce Petitioner's employment for the 1984-85 school year from two and a half days a week to one and a half days per week. Such action constitutes a reduction in force pursuant to N.J.S.A. 18A:28-9, Klinger v. Cranbury Township Board of Education, 190 N.J. Super. 354, 357 (1982), thereby requiring the Board to arrive at a seniority determination pursuant to N.J.S.A. 18A:28-10. Thus, as found by the ALJ, the regulations now in effect controlled Petitioner's seniority entitlement, and pursuant to those rules, she was entitled to credit for her prior service only in the categories in which she had actual experience. Based on our conclusion that Petitioner's experience prior to September 1978 was entirely at the elementary level, we find that under the regulations now in effect, she was entitled to credit in that category only for her service from 1974, when she was initially employed, until the 1978-79 school year, when, as subsequently discussed, she acquired seniority on a district-wide basis.

That Petitioner was affected by reductions in force prior to September 1, 1983, does not alter our conclusion. Again, seniority rights are inchoate until such time as dismissal or reduction actually occurs. Howley, supra. Since the Commissioner has the statutory authority to establish, and therefore to alter,

the definition of the categories to which prior service is to be credited, a member has only an expectency interest in the existing seniority rules until such time as a reduction actually occurs. The nature of this interest is not altered by the fact that a member currently employed by a board was previously affected by a reduction which required that his seniority be determined under the prior regulations.

Again, when a reduction occurs, seniority rights are triggered and the necessary seniority determinations are to be made under the rules in effect at that time. Elsa Hill, supra. Once the seniority determinations necessitated by a reduction have been made and such determinations mandate the continued employment or subsequent reemployment of the staff members having the most seniority in the categories defined by the applicable regulations, the mandates of N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-12 have been fulfilled as to those staff members, and we can find no basis under the regulations that became operative on September 1, 1983, for concluding that when subsequently affected by a reduction after that date, such staff member is entitled to credit now for service prior to the earlier reduction on the basis of the categories defined by the regulations in effect when the earlier reduction occurred.

We emphasize that in such cases, the prior service of teaching staff members affected by reductions in staff prior to September 1, 1983, was recognized at the time of the earlier reduction and was credited under the regulations then in effect. Those regulations required that prior service be credited in all areas of endorsement regardless of whether or not the member had provided any service under such endorsements. Thus, the regulations in effect prior to September 1, 1983, mandated the retention of individuals in assignments in endorsement areas in which they had not previously served. See Mulhearn v. Board of Education of the Sterling Regional High School District, Docket #A-5123-81T1 (App. Div. Oct. 31, 1983). By virtue of their continued employment, such members directly benefited from the previous regulations, and enactment of the current rules in no way deprived them of such benefit. Further, a member who was retained or reemployed under the prior regulations in an endorsement area or at a grade level at which he had not previously served continues to benefit from the determination made under those rules.

We reiterate that the intent of the current regulations is to insure that seniority is based on actual experience in a subject area or category rather than on the mere possession of a certificate endorsement. In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Board of Education and the Edison Township Board of Education, Docket #A - 2241 - 84T6 and #A-2531-84T6 (App. Div. June 17, 1986); Proposed Amendment: N.J.A.C. 6:3-1.10, 15 N.J.R. 464, 465 (1983). See SUB-COMMITTEE ON SENIORITY, NEW JERSEY STATE BOARD OF EDUCATION, REPORT ON PROPOSED AMENDMENTS TO N.J.A.C. 6:3-1.10 (June 1, 1983). Although the regulations specifically provide for the recognition of all prior

service, N.J.A.C. 6:3-1.10(c), nothing in the regulations purports to freeze categories defined by the prior regulations for those who have served in them. To hold that the seniority of those affected by reductions in force prior to September 1, 1983, who were retained or reemployed by a board on the basis of seniority credited under the regulations then in effect should now be credited to the categories defined in the previous regulations for service prior to such reduction would have the effect of freezing the categories defined by the previous regulations for service prior to any reduction occurring before September 1, 1983. At the same time, those members who also served prior to September 1, 1983, but who were not affected by a reduction in force before that date would not receive the same benefit despite the fact that actual service may have been identical. Not only would such result undermine our intent that seniority be based on actual experience, but would conflict with the purpose of seniority to provide a mechanism for ranking tenured teaching staff members so that reductions in force can be effected in an equitable fashion in accord with sound educational policies. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 368 (1983). We conclude that when a reduction in staff occurs, the policy embodied in the seniority regulations now in effect is furthered and equity best served by determining the seniority of all members currently employed by a board under the regulations now in effect regardless of whether such members had been affected by a reduction in force prior to September 1, 1983. To the extent that our conclusion conflicts with that in Felper, supra, we overrule that decision.

III

As set forth above, we conclude that Petitioner's service from her date of initial employment is to be credited according to the seniority categories defined by the regulations now in effect. We turn now to the question of whether, pursuant to those regulations, Petitioner acquired seniority on a district-wide basis during her employment by the Board.

As stated, Petitioner was assigned upon her initial employment as a speech correctionist at the elementary level. Had her assignment been throughout her employment entirely at the elementary level, she would have earned seniority only in the elementary category and could not claim entitlement to assignment in the secondary category by virtue of seniority. However, N.J.A.C. 6:3-1.10(1)(16)(iii) provides that:

> Persons employed and providing services on a district-wide basis under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis.

Thus, if Petitioner provided services on a district-wide basis during her employment by the Board as a speech correctionist so as to entitle her to assert seniority in the secondary category, and if by virtue of such service she had at the time of the reduction superior seniority in the secondary category to that of Intervenor, Petitioner would have been entitled to the assignment filled by Intervenor following the reduction, and the monetary award in this case would be warranted. We therefore are required to resolve whether during her employment Petitioner provided service on a district-wide basis and the effect of such service on her seniority.

Initially, we emphasize that seniority on a district-wide basis for persons serving under special subject field or educational services endorsements is limited to those persons whose actual duties were assigned on a district-wide basis, such as a child psychologist who as a member of the child study team provided services on a K-12 basis. In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Board of Education and the Edison Township Board of Education, supra. In essence, this provision recognizes that those staff members whose assignments require them to provide services simultaneously to students at both the elementary and secondary level have by virtue of such assignment acquired experience in both the elementary and secondary categories. Consistent with the purpose of the current rules, this provision mandates that the experience of the member in both categories be recognized, and, as is the case where a member serves under different subject area endorsements during the same year, see N.J.A.C. 6:3-1.10(f), requires that simultaneous service be credited fully in each category within which the member served. Thus, a member whose assigned duties required that he provide services to students at all grade levels K-12 has earned and may assert seniority in both elementary and secondary categories. Additionally, although neither N.J.A.C. 6:3-1.10(l)(16)(iii) nor N.J.A.C. 6:3-1.10(l)(15)(iv) establish an additional seniority category, seniority acquired on a district-wide basis controls entitlement to assignments made on a district-wide basis, such as speech correctionist K-12.

Further, once having acquired seniority on a district-wide basis, a member is to be credited in both elementary and secondary categories for his subsequent service pursuant to N.J.A.C. 6:3-1.10(h). Application of this provision in such cases is no different than in cases where members are credited in categories in which they are not currently serving by virtue of their sequential assignments in different categories. Moreover, we emphasize that while the current regulations require that a member have actual experience in a category in order to earn seniority credit in that category, once that requirement is met, the regulations control the allocation of credit for such service in particular cases, and do not permit the denial of credit on the basis that the amount of actual experience in a category was minimal in comparison to an individual's overall experience.

Based on the foregoing, we now will consider whether Petitioner acquired seniority on a district-wide basis so as to entitle her to assert seniority in the secondary category, which is the seniority category applicable to the three fifths assignment filled by Intervenor during 1984-85. After careful review of the record in this matter, and for the reasons expressed in his Initial Decision, we concur with the ALJ that Petitioner's service from her date of employment through the 1977-78 school year is to be credited in the elementary category only. As found by the ALJ, Petitioner was assigned during this period at the elementary level only and her involvement in the cases of two secondary students during 1975-76 and, as well as her assistance to staff members during 1976-77 in the case of her former student, was outside the scope of her assignment. Such involvement did not constitute the provision of services on a district-wide basis. However, for the reasons that follow, we conclude that in 1978-79, Petitioner acquired seniority on a district-wide basis pursuant to N.J.A.C. 6:3-1.10(1)(16)(iii) by virtue of her employment by the Board to provide services to eligible parochial school students K-8 who attended Assumption School.

Initially, we reject the proposition that employment by a public school district to provide special education services to eligible parochial school students is akin to "coaching or extracurricular" assignment regardless of contractual employment or the manner of compensation. See Commissioner's decision, at 23. In contrast to such assignments, Petitioner's employment to provide mandated services to parochial school students was of such character that she was required to hold valid certification, and her assignment therefore was as a teaching staff member. See N.J.S.A. 18A:1-1. Further, not only was the District required to provide special education services to the Assumption School students pursuant to Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. sec. 241, superceded by Chapter I of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 20 U.S.C. sec. 3801 et seq., as amended, but was required to control and supervise the provision of these services. 45 C.F.R. sec. 116 (1975-80) (now codified at 34 C.F.R. sec. 200.70) Petitioner provided such services as an employee of the District, and in view of the character of her employment, we can not, in the absence of statutory exception or contrary legislative intent, deny the creditability of the service she provided as a teaching staff member in the District on the basis of the contractual relations between the parties. Spiewak v. Rutherford, 90 N.J. 63 (1982).

The record indicates that during 1978-79, Petitioner was employed to provide services to eligible students attending Assumption School on a K-8 basis. Pursuant to her assignment, in addition to a global screening, Tr. 11/19/84, at 24, 39, 61-2, Petitioner provided services to approximately six 7th and 8th grade students. Id. at 26. The record indicates that students at

Assumption School received departmentalized instruction at those grade levels. Id. at 71.[1] Pursuant to N.J.A.C. 6:3-1.10(1)(15), Petitioner's service to students receiving departmentalized instruction was in the secondary category for seniority purposes, and since her assignment was K-8, that assignment must be considered as assignment on a district-wide basis. We therefore conclude that Petitioner acquired seniority on a district-wide basis by virtue of her service at Assumption School.

We now must determine the amount of credit that Petitioner is entitled to assert on a district-wide basis for the 1978-79 school year. As stated, Petitioner was employed that year to provide services to the District's public school students as well as to the students at Assumption School. Her public school assignment was two and one half days a week. Based on our review of the record, we concur with the ALJ that Petitioner's assignment to Assumption School was a one and a half day a week assignment. Petitioner's responsibilities in this assignment went beyond the student contact hours to which compensation was allocated, and included parent-teacher conferences, consultation, medical follow-up and reporting. C-5(c), in evidence. Petitioner testified that, in fulfilling her responsibilities, she provided services to Assumption School one and one half days per week. Tr. 11/19/84, at 23. In the absence of any indication to the contrary, we hold that she is to be credited for one and a half days per week for seniority purposes for her assignment to Assumption School.

Petitioner's assignment to Assumption School, however, was not for the full academic year as established by the district Board's calendar. We emphasize that Petitioner was not an employee of Assumption School, but rather was employed by the District and was tenured in the District. We conclude that pursuant to N.J.A.C. 6:3-1.10(b), Petitioner is to be credited for her service to Assumption School only for that portion of the academic year as established by the district Board's calendar during which she was

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[1] In its exceptions, the Board argues that Petitioner's testimony concerning whether Assumption School was departmentalized was hearsay and that therefore our conclusion on that question is not supported by competent evidence. As indicated above, upon specific inquiry by the ALJ, Petitioner testified that seventh and eighth grade students at Assumption School did not have one teacher and that she knew it was departmentalized because she had conferences with the individual teachers. Tr. 11/19/84, at 71. Her testimony was direct testimony rather than hearsay, and in the absence of any indication to the contrary, see Tr. 11/19/84, at 124, we have concluded, as set forth above, that seventh and eighth grade students received departmentalized instruction at Assumption School during the period that Petitioner provided services to students at that school.

employed in the Assumption School assignment. Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Educational Services Commission, decided by the State Board, January 7, 1987.

The record indicates that although the District's academic year commenced on September 6, Petitioner began her assignment at Assumption School on September 25. C-2(a), in evidence; Tr. 11/19/84, at 59. Likewise, Petitioner's assignment ended before the close of the District's academic year on June 15. Id. Although the Board would deny credit for any service in June, C-2(a), in evidence, we find that the Board's pay records, C-2(c), in evidence, and Petitioner's testimony, Tr. 11/19/84, at 59, indicate that she did not complete her assignment until June 1, and we would credit her for that service. Thus, based on the academic year as established by the Board's calendar, Petitioner is entitled to .26 (.872 x .30) credit for her service to Assumption School students.

Further, although Petitioner served in her elementary assignment for the full academic year, she did not serve in the District on a district-wide basis until she commenced her assignment to Assumption School. She is therefore entitled to credit on a district-wide basis for all service that year only from September 25. However, as stated, she continued her employment in the District after June 1 on a two and a half day basis until the end of the 1978-79 academic year, and is therefore entitled to .46 (.928 x .50) credit on a district-wide basis for that year for her concurrent service to the District's public school students.

IV

We must now resolve the impact of Petitioner's maternity leave from September 1980 through January 31, 1981, on her seniority entitlement. N.J.A.C. 6:3-1.10(b) specifically provides that

> ...The periods of unpaid absences not exceeding 30 calendar days aggregate in one academic or calendar year, leaves of absence at full or partial pay and unpaid absences granted for study or research shall be credited toward seniority. All other unpaid absences or leaves of absence shall not receive seniority credit.

Thus, the regulation insures that a member is not deprived of credit as the result of short-term leaves and specifically provides for credit in cases of unpaid leave of longer duration for purposes of study or research. We find that the language of the regulation clearly precludes credit for any portion of an unpaid

leave which, when totaled with all other unpaid leaves during that calendar or academic year, is in excess of 30 days. Such interpretation is consistent with the purpose of the seniority system to insure equitable determinations on the basis of actual service, and we find that to broaden the exception provided by N.J.A.C. 6:3-1.10(b) would undermine that purpose.

As found by the ALJ, Petitioner's five month maternity leave was unpaid, with the exception of payment she received for nine accumulated sick days. We conclude that since her unpaid maternity leave was in excess of 30 days, Petitioner is entitled to credit during this period only for the nine days for which she was paid. As found by the Commissioner, nine days equals .03 of the academic year. We therefore conclude that Petitioner is entitled to to .02 credit (.03 x .50) for this portion of the 1980-81 academic year based on her two and a half day a week employment during that academic year.

V

In sum, we conclude that the regulations now in effect control the determination of Petitioner's seniority necessitated by the Board's reduction of May 1984. We further conclude that her seniority from 1974 through 1977-78 is to be credited only in the elementary category since her service pursuant to her assignment during that period was at the elementary level. We however find that Petitioner acquired seniority on a district-wide basis pursuant to N.J.A.C. 6:3-1.10(1) (16) (iii) during the 1978-79 school year on the basis of her assignment to provide services to eligible students K-8 who attended Assumption School, and that such seniority is to be credited for both her public and parochial school assignments during that year on the basis of the academic year as established by the Board's calendar. We further find that Petitioner is entitled to seniority credit only for the nine days for which she was paid during her maternity leave during the 1980-81 academic year.

These conclusions, however, do not resolve whether at the time of the Board's reduction, Petitioner had greater seniority creditable to the secondary category than Intervenor so as to warrant the monetary award in this case. The validity of Petitioner's seniority claim must be determined by comparison of Intervenor Carter's seniority with Petitioner's. As stated, the assignment at issue is in the secondary category. As set forth above, Petitioner is able to assert seniority in the secondary category by virtue of her district-wide service. Likewise, although Intervenor Carter is currently assigned at the secondary level, she may assert seniority in that category from January 21, 1980, on the basis of her employment as of that date on a district-wide basis.

Ms. Carter's seniority assertable in the secondary category is stipulated to be 3.08. In comparison, Petitioner's seniority assertable in that category is:

School Year		Portion of School Year	Portion of Full-Time Position	Seniority Credit
1978-79	Public School	.928	.50	.46
	Assumption	.872	.30	.26
9/1/79-3/3/80		.6	.50	.30
3/4/80-6/30/80		.4	.70	.28
9/1/80-1/31/81		.03	.50	.02
2/1/81-6/30/81		.50	.50	.25

School Year	Portion of School Year	Portion of Full-Time Position	Seniority Credit
1981-82	1	.50	.50
1982-83	1	.50	.50
1983-84	1	.50	.50
	TOTAL		3.07[2]

Thus, at the time of the Board's action, Petitioner did not have superior seniority assertable in the secondary category to Intervenor Carter, and we therefore reverse the Commissioner's award of monetary damages in this matter. We however direct the Board to adjust its records to reflect Petitioner's seniority entitlement as set forth above.

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[2] As set forth above, to assure greatest accuracy in calculating Petitioner's seniority credit, we have computed to three decimal places Petitioner's seniority assertable in the secondary category for the portion of the 1978-79 school year during which she earned seniority on a district-wide basis. Had we limited computation to two decimal points, Petitioner's seniority in the secondary category would total 3.08 (.928 = .93, .872 = .87). Although as a result of such computation, Petitioner's seniority credit in the secondary category would equal that of Intervenor Carter, we note that Petitioner did not have superior seniority in that category at the time of the Board's action and, therefore, had no entitlement by virtue of seniority to the assignment in which the Board retained Intervenor Carter during the 1984-85 school year regardless of whether computation is limited to two decimal places.

Attorney exceptions are noted.
June 3, 1987

Pending N.J. Superior Court

MARY C. COMSTOCK ET AL.,

PETITIONERS-RESPONDENTS,

V.

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

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 15, 1983

For the Petitioners-Respondents, Bucceri and Pincus
(Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Appellant, McCarter and English
(Steven B. Hopkins, Esq., of Counsel)

This is another case involving supplemental teachers who petitioned the Commissioner of Education prior to the New Jersey Supreme Court's decision in Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), challenging the district Board's failure to recognize their status as teaching staff members within the meaning of N.J.S.A. 18A:1-1. Petitioners in this case were initially employed by the Board of Education of the City of Summit prior to 1977 as supplemental teachers on a part-time basis, and were compensated at an hourly rate. In November 1977, they petitioned the Commissioner asserting that their service was in tenurable positions, that the Board had failed to compensate them properly and had failed to enroll them in the Teachers' Pension Annuity Fund (TPAF). The matter was transmitted to the Office of Administrative Law as a contested case on July 2, 1979, but was held in abeyance on agreement of the parties, first in pending resolution of Point Pleasant Beach Teachers Ass'n v. Bd. of Ed. of the Borough of Point Pleasant Beach, 173 N.J. Super. 11 (App. Div. 1980), certif. den., 84 N.J. 479 (1980), and then of Spiewak, supra.

On August 1, 1983, the Administrative Law Judge (ALJ) rendered his Initial Decision in the matter, finding that Petitioners' service as supplemental teachers was in tenurable positions, and that they should have been accorded all salary, enrollments and benefits of part-time teachers under the applicable collective negotiations agreements. He further found that Petitioners Comstock, Goldberg, Hobbie, Lummer, York and Pedicini had acquired tenure, but that Petitioners Levinson[1] and Nozik had

[1] We note that Petitioner Levinson has withdrawn her claim and is no longer involved in this litigation.

not met the statutory requirements and therefore had not achieved tenure.

He found that the retroactive relief to which Petitioners were entitled was limited to a three month period prior to the filing of the Petition of Appeal. He determined that Petitioners were entitled to statutory benefits such as accumulated sick leave, which they would have acquired had they been recognized as teaching staff members. He directed reinstatement of Petitioners Comstock and Goldberg, who had been terminated by the Board after the Petition of Appeal had been filed in the matter. Finally, he directed that the Board notify TPAF of pertinent employment data concerning Petitioners. The Commissioner adopted the ALJ's substantive findings and determinations. He, however, directed full retroactive relief to Petitioners, except Petitioner Pedicini, whose service as a supplemental teacher was prior to April 1977.

The Board appealed, arguing that Petitioners were not entitled to retroactive relief and that the salary and benefits that had been afforded Petitioners had been proper. Petitioners appealed the Commissioner's denial of relief to Petitioner Pedicini, arguing that the Commissioner's decision in all other respects should be affirmed.

The threshold issues in this case are whether the individually named Petitioners in this case are entitled to retroactive application of Spiewak and, if so, the extent of such relief. We find that the New Jersey Supreme Court's decision in Rutherford Education Association v. Board of Education of the Borough of Rutherford, 99 N.J. 8 (1985), settles these questions.

In Rutherford, the court settled that petitioners who, like the Petitioners in this case, had filed Petitions of Appeal with the Commissioner prior to the date of the Spiewak decision are entitled to the retroactive benefit of that decision. The court, however, placed two limitations on such benefit. First, because of the administrative confusion that would result from retroactive application of Spiewak to teachers terminated prior to the decision in that case, the court in Rutherford held that Spiewak would not be applied retroactively to any teacher who was not employed by a board on the date of the Spiewak decision. 99 N.J. at 29-30. Second, because of its concern with the financial impact on district boards if Spiewak were given unlimited retroactivity as to those teachers still employed on the date of the Spiewak decision, the court held that even with respect to those teachers, calculation of the retroactive benefits that each teacher is entitled to receive is limited to a date six years prior to the court's decision in Rutherford, Id. at 30.

Based on the clear mandate of Rutherford, we conclude that the Petitioners in this case who were employed by the Board on the date of the Spiewak decision, specifically Petitioners Hobbie and York are entitled to benefit retroactively from the decision in Spiewak and to calculation of any benefits due them as a result of our decision in this matter from the date six years prior to the court's decision in Rutherford. We, however, find that retroactive

relief pursuant to our decision is precluded in the cases of all other Petitioners still involved in this litigation since none were still employed by the Board on the date of the Spiewak decision.

We turn now to the question of whether by virtue of their status as teaching staff members, Petitioners were entitled under the education laws to salary and benefits equal to that of other teaching staff members in the District.

Initially we emphasize that in determining the validity of this claim, Petitioners are entitled to retroactive application of the substantive holding of Spiewak, although calculation of any retroactive benefits due them by virtue of the State Board's decision in this case is limited to the period commencing on April 11, 1979. Rutherford, supra. It is no longer disputed that Petitioners' service in the District from their initial employment as supplemental teachers was in tenurable positions and that both have achieved tenure. However, as we found in Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A-2508-84T7 (App. Div. Feb. 26, 1986), certif. denied, Docket #25,352 (June 30, 1986), tenure status does not entitle Petitioners to compensation based on a negotiated schedule applicable to other teaching staff members. Nor did the court's decision in Spiewak confer such entitlement. Rutherford, supra at 14. Rather, as set forth in Hyman, any entitlement to compensation under the education laws is controlled by N.J.S.A. 18A:29-1 et seq., which are the statutory provisions applicable to the compensation of teaching staff members.[2] Again, those statutes are applicable only to the compensation of full-time teaching staff members. N.J.S.A. 18A:29-4.1; N.J.S.A. 18A:29-6 (repealed 1985) (provision now codified at N.J.S.A. 18A:29-5). We reiterate that, although the education laws prohibit reduction in the compensation of any tenured teaching staff member, N.J.S.A. 18A:28-5, they do not prescribe any standards governing the rate or manner of the compensation of teaching staff members who are not full-time. See Hyman, supra. As stipulated, Petitioners' service as supplemental teachers was on a less than full-time basis, and we therefore conclude that they have no entitlement under the education laws to additional compensation for their service as part-time supplemental teachers during the period commencing in April 1979.

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[2] We note that, effective September 9, 1985, the compensation statutes were substantially altered. N.J.S.A. 18A:29-6, N.J.S.A. 18A:29-7, N.J.S.A. 18A:29-8, N.J.S.A. 18A:29-10 and N.J.S.A. 18A:29-12 were repealed. Teacher Quality Employment Act, N.J.S.A. 18A:29-5, L. 1985, c. 321 sec. 16 (1985). We further note that, in addition to repealing those statutory provisions, the Teacher Quality Employment Act raised the minimum salary for full-time teaching staff members to $18,500. N.J.S.A. 18A:29-5. Although the entitlement to retroactive benefits in this case is to be determined under the statutes in effect prior to September 9, 1985, we emphasize that the new statutory minimum, like the predecessor statutes, is applicable only to full-time teaching staff members.

We further conclude that although both Petitioners were subsequently employed by the Board as full-time teaching staff members, they are not entitled under the education laws to salary adjustment based on credit for their prior service as part-time supplemental teachers. In so concluding, we emphasize that nothing in the education laws entitles a teaching staff member to credit for prior part-time experience when, as here, initial placement on a salary schedule occurs pursuant to N.J.S.A. 18A:29-9, so long as the statutory minimums, which for the years relevant to this litigation were set forth in N.J.S.A. 18A:29-7 (repealed 1985), are met and no reduction in the compensation of a tenured teaching staff member results from the placement. Ball et al. v. Board of Education of the Township of Teaneck, decided by the State Board, January 7, 1987.

Although the Board in this appeal has not challenged Petitioners' statutory entitlement to be credited for accumulated sick leave pursuant to N.J.S.A. 18A:30-3, we emphasize that both Petitioners are entitled to calculation of such sick leave from April 11, 1979. Finally, although the record indicates that from September 1980, Petitioners have been receiving all employment benefits specified in the collective negotiations agreement to which they are entitled, for the reasons set forth in Scotch Plains-Fanwood Education Association v. Board of Education of Scotch Plains-Fanwood, which we also are deciding today, we direct that they be credited with any carry-over benefits from April 11, 1979, for which they qualified under the terms of the collective agreement by virtue of their status as teaching staff members within the meaning of N.J.S.A. 18A:1-1.

Attorney exceptions are noted.
March 4, 1987

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 30, 1985

For the Petitioner-Appellant, Golden, Shore, Zahn & Richmond (Philip H. Shore, Esq., of Counsel)

For the Respondent-Respondent, Mathews, Woodbridge, Goebel, Pugh & Collins (Dennis J. Helms, Esq., of Counsel)

This case calls upon us to determine whether the application of the Board of Education of the Township of Cranbury, which was made by the Cranbury Board through its Petition of Appeal to the Commissioner of Education filed in August 1982, to terminate its sending-receiving relationship with the Board of Education of the Township of Lawrence should be granted pursuant to N.J.S.A. 18A:38-13. For the reasons set forth in this opinion, we conclude that under the statute in effect when appeal to the State Board was made, termination of this relationship is warranted, and that subsequent amendment of the statute by the Legislature does not alter our disposition of this case.[1]

I

The sending-receiving relationship between the Cranbury and Lawrence Boards for grades nine through twelve originally was established by a five year contract approved by the Commissioner of Education on May 31, 1978. As stated, this case was initiated in August 1982, when the Cranbury Board petitioned the Commissioner seeking termination of the relationship pursuant to N.J.S.A. 18A:38-13. Thus, the proceedings were governed by the statute in effect prior to November 24, 1986,[2] and both the Administrative Law Judge and the Commissioner made their determinations under that statute. Prior to its amendment, N.J.S.A. 18A:38-13 provided that

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[1] As subsequently discussed, effective November 24, 1986, N.J.S.A. 18A:38-13 was substantially amended. L. 1986 c. 156.

[2] See supra note 1.

no designation of a receiving district made by a district board lacking high school facilities for the attendance of its pupils "...shall be changed or withdrawn... except for good and sufficient reason...."

A prehearing conference was held in this case on November 16, 1982, and, following extensive discovery and efforts by the parties to settle the matter,[3] the hearing commenced in February 1985. The only parties to the case are Cranbury and Lawrence.[4] In its petition, the Cranbury Board asserted twelve reasons warranting termination. Ten of the reasons constituted Cranbury's affirmative reasons for desiring withdrawal and two related to the impact of its withdrawal on Lawrence. Cranbury asserted that it desired termination because: 1) Princeton High School was closer to Cranbury Township than to Lawrence High School, 2) the bus routes from Cranbury to Princeton involved fewer traffic hazards than those to Lawrence, 3) Cranbury had more significant community ties to Princeton than to Lawrence, 4) student transition would be easier at Princeton since it was a four year high school, 5) Princeton High School had more and varied advanced placement courses than Lawrence, 6) participation in extracurricular activities would be facilitated since Princeton was closer, 7) Princeton High School offered free attendance at Princeton University for qualified students, 8) Princeton had a better computer program, 9) Princeton High School offered greater opportunities for participation in sports because it has a "no cut" policy and 10) Lawrence's projected growth might result in termination of the relationship at some time in the future. In addition to its affirmative reasons for desiring termination, Cranbury asserted that withdrawal of Cranbury's students would have a negligible effect on Lawrence's student population and would not have a significant negative financial impact on the Lawrence Board.

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[3] The success of such efforts was contingent on the success of the Washington Township Board of Education's efforts to obtain approval for withdrawal from its relationship with the Upper Freehold Regional Board of Education. Although no final determination had been made on Washington Township's application for withdrawal at the time hearing commenced in this case, we note that ultimately Washington Township was not successful in its efforts to terminate its relationship with Upper Freehold. See Board of Education of the Township of Washington v. Board of Education of the Upper Freehold Regional School District, decided by the State Board, June 5, 1985, aff'd, Docket #A-5164-84T1 (App. Div. September 17, 1986).

[4] We note that, during the proceedings, the Lawrence Board moved to join the Princeton Board as a third party petitioner. Both Cranbury and the Princeton Board opposed the motion, which was denied.

In her Initial Decision, the Administrative Law Judge (ALJ) determined that, under the applicable standard, the Cranbury Board was required to show that there were good and sufficient reasons underlying its determination to terminate its relationship with Lawrence that outweighed any adverse impact on the Lawrence Board, and that such reasons must be directly associated with the education and well-being of the students affected by the termination. Based on this standard, she denied the Lawrence Board's motion to dismiss the matter and considered the question of whether termination was warranted in this case.

The ALJ, however, recommended that the matter be dismissed based on her conclusions that the Cranbury Board had not shown that there were good and sufficient reasons underlying its preference to send its students to Princeton High School and that it had not shown that there would be no adverse impact on Lawrence as a result of withdrawal. Specifically, she found that, although travel time from Cranbury to Princeton High School was less than that between Cranbury and Lawrence High School, Cranbury had not shown that travel to Lawrence was more hazardous or that travel time would increase in the future. She further found that Cranbury had failed to show that travel time to Lawrence had any negative effect on the participation of Cranbury students in extracurricular activities or that a reduction in travel time of fifteen minutes would increase participation. She determined that although Cranbury had shown substantial community ties to Princeton, the Lawrence Board had shown that differences in socio-economic factors between Princeton and Cranbury might cause difficulties in the adjustments of some Cranbury students if they were to attend Princeton High School. She found that both Lawrence and Princeton had excellent academic programs, and concluded that Cranbury had not shown any educational advantage to sending its students to Princeton High School. The ALJ further found no evidence to show the superiority of extracurricular programs at either school and no proof that Princeton's no-cut policy allowed more students to participate in athletics than the program at Lawrence High School.

The ALJ then assessed the impact that Cranbury's withdrawal from the relationship would have on Lawrence. She found that in the first year of phased withdrawal, Lawrence would lose approximately $154,000 in tuition payments, and that, by the fourth year, total annual loss would be approximately $500,500. She found that the loss would be partially offset by state aid as a result of an increase in Lawrence's student population. However, she further found that although new construction in Lawrence should increase tax ratables, there was no evidence submitted to show how much additional money would be available to the Lawrence Board. She therefore determined that if the increase in state aid and money from new ratables was not sufficient to offset the loss in tuition, Lawrence would have to request an increase in property taxes or cut its budget, which might affect its educational program. The ALJ therefore concluded that Cranbury had not shown that there would not be any adverse financial impact resulting from its withdrawal and

had not shown that such impact would not affect Lawrence's educational program.

The Commissioner affirmed that the applicable legal standard required that the Cranbury Board show that good and sufficient reason outweighing any adverse impact on Lawrence supported its determination to withdraw from the relationship, and that such reason must be directly associated with the education and well-being of the students affected by the termination. He found that the ALJ had applied the standard properly, and following his review of the affirmative reasons profferred by Cranbury and the impact of withdrawal, the Commissioner concluded that good and sufficient reason supported by a definite presentation of facts and outweighing any negative impact on Lawrence had not been established. The Commissioner however did not concur with the ALJ's conclusion that Lawrence had shown that some Cranbury students might have difficulty in adjusting, specifically rejecting any argument that socio-economic factors should serve as a basis for determining where students attend school.

In reaching his conclusion, the Commissioner determined that although there would be no negative educational or racial impact as a result of termination, it could not be said that there was an absence of negative financial impact. Rather, he found that tuition loss would cause Lawrence to exert significantly greater financial effort and to face budgetary constraints. He specifically found that loss of tuition could conceivably be as high as $7,000 per pupil, that the loss of tuition paid by Cranbury would require a substantial financial burden to be borne by Lawrence taxpayers if the current level of programs and services were to be maintained, and concluded that Cranbury's withdrawal might therefore conceivably adversely affect Lawrence's programs. In so concluding, he noted that tuition from Cranbury students represented 4.3% of Lawrence's current expense budget.

In assessing Cranbury's affirmative reasons for desiring termination, the Commissioner found that Cranbury had established by a definite presentation of the facts that Princeton High School is closer to Cranbury than Lawrence High School, that travel time to Princeton would require fewer miles on Route 1 than currently required to reach Lawrence and that Cranbury has community ties to Princeton. He however found that no one of these reasons, or combination of them, rose to the level of good and sufficient because: a) Cranbury failed to show travel on Route 1 was more dangerous than travel on local roads, and b) proximity was not shown to be a negative factor in the education of Cranbury students. The Commissioner further found that Cranbury's community ties with Princeton did not provide support for termination given that Cranbury and Princeton were not part of a single community and were not integrally related. Thus, the Commissioner concluded that, in addition to having failed to establish an absence of negative impact, Cranbury had failed to demonstrate good and sufficient reason to terminate its relationship with Princeton.

As set forth above, the Commissioner's determination that withdrawal in this case was not warranted was made under N.J.S.A. 18A:38-13 prior to its amendment by the Legislature. Again, prior to amendment, the statute provided that withdrawal would be permitted only for "good and sufficient reason." Although it was not required by the standards developed under the statute that the petitioning district prove that the receiving district was unable to offer a thorough and efficient education, the petitioning district was required to demonstrate by a definite presentation of facts that there was good and sufficient reason to approve withdrawal. Board of Education of the Borough of Brielle v. Board of Education of the Borough of Manasquan et al., decided by the State Board, August 7, 1985, limited remand by the Appellate Division, Docket #A-5701-84T6 (App. Div. Sept. 20, 1985), decided by the State Board, March 5, 1986, appeal dismissed, Docket #A-5701-84T7 (App. Div. July 17, 1986); Board of Education of the Township of Washington v. Board of Education of the Upper Freehold Regional School District, supra. In determining whether good and sufficient reason had been presented, the Commissioner was required to "weigh all the relevant factors." Branchburg Township Board of Education v. Somerville Board of Education, 173 N.J. Super. 268, 276 (App. Div. 1980). Those factors included the educational impact, financial impact, facilities considerations and racial impact on all pupils and districts involved. Board of Education of the Township of Washington v. Board of Education of Upper Freehold Regional School District, supra.

Under the standard established in Washington Township, a petitioning district was permitted to withdraw once good and sufficient reason was demonstrated if negative impact was not shown. Brielle, supra at 8. Although the State Board recognized that community preference could be considered, the standard that we developed through our decisional law required that the reasons for such preference be established by a definite presentation of facts and be based upon the educational interests of the students in the petitioning district. Brielle, supra, at 8; Washington Township, supra, at 6-7.

After careful review of the record in this case, including the arguments presented by counsel before the Legal Committee, we find that a proper resolution under N.J.S.A. 18A:38-13 prior to its amendment requires that we once again review the Legislative policies embodied in the statutory scheme that governs sending-receiving relationships. Initially, we emphasize that this statutory scheme was intended to make unused facilities available to those in need of education in outside districts, specifically to students in districts that lack high school facilities. See Berkeley Heights Twp. v. Board of Ed. of Union County Regional School Dist. No. 1, 40 N.J. Super. 549 (App. Div. 1956), aff'd, 23 N.J. 276 (1957). Although application of the statutory scheme has long reflected the policy of insuring stability in sending-receiving relationships, see Board of Education of the Borough of Merchantville v. Board of Education of the Township of Pennsauken,

204 N.J. Super. 508 (App. Div. 1985), certif. denied, 103 N.J. 469 (1986), we emphasize that the policy favoring stability did not create in a receiving district a statutory right to continue as the receiving district for a particular sending district indefinitely or to perpetuity. Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale, Docket #A-3587-83T2 (App. Div. Feb. 8, 1985).

Further, in addition to effectuating the policy favoring stability when determining whether termination is warranted in a particular case, the State Board also is required to effectuate the legislative policy of this state to guarantee local participation in educational matters. See N.J.S.A. 18A:7A-2. In effectuating this policy, we recognize that the involvement of a sending district in decisions affecting the education of its students is limited by the fact that another district actually provides the educational programs to its students. However, we find that the fact that a district does not have the facilities to educate its students within its own district and therefore must enter into a sending-receiving relationship in order to insure a thorough and efficient education for its students should not totally deprive a sending district of involvement in any of the decisions affecting the education of its students. We further find that, given the reality that the substance and direction of the educational programs provided to students of a sending district by the receiving district are largely determined by the receiving district, the most significant educational decision made by a sending district is the decision concerning where its students will be educated. Again, the purpose of the applicable statutory scheme is to make unused facilities available to students in districts that lack facilities. Because the statutory scheme is intended to benefit the students of sending districts and because the decision of where those students are to be educated is the most significant decision concerning its students' education in which the citizens of the sending district are involved, we conclude that proper application of the standards developed under N.J.S.A. 18A:38-13 prior to its amendment requires that we effectuate to the desire of a sending district to educate its students in another district so long as its preference is educationally based and termination of its existing relationship does not create unwarranted instability.

Our dual responsibility to both insure stability in sending-receiving relationships and to effectuate local involvement in the fundamental educational decision of where a district's students are to be educated requires that we achieve the proper balance between these two policies in each individual case. As indicated in our previous decisions involving terminations of sending-receiving relationships, we have concluded that the proper balance between these policies is to be achieved by granting approval for withdrawal when a sending district presents an educationally based reason for seeking withdrawal that is supported by a definite presentation of facts and no negative impact on the receiving district is shown. Board of Education of the Borough of Brielle v. Board of Education of the Borough of Manasquan et al.,

supra. Additionally, because of the importance we attached to furthering the legislative policy of local involvement in educational matters, we also have given approval for withdrawal when the reason favoring withdrawal outweighed the negative impact on the receiving district. Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale, supra.

We again emphasize that in applying the standard developed under N.J.S.A. 18A:38-13 prior to its amendment, the sending district is required to establish by a definite presentation of facts that there is an educationally based reason underlying its desire for withdrawal. Brielle, supra. We found such requirement necessary under the applicable statutory scheme in order that we could insure that even the minimal instability inherent in the termination of any established sending-receiving relationship was warranted in a particular case and, in cases where the impact on the receiving district would be more than minimal, to assess whether the reasons favoring termination outweighed such impact.

Furthermore, the intent of the statutory scheme to make unused facilities available to districts that lack facilities would be undermined if withdrawal were permitted where the receiving district would suffer significant negative impact since the risk of such impact upon termination would cause potential receiving districts to hesitate to enter sending-receiving relationships. Therefore we would not approve withdrawal in such circumstances. Because it is the sending district in a particular case that makes the initial assessment that withdrawal is warranted, and because that district must assess the impact of its withdrawal before seeking approval for termination, we conclude that under N.J.S.A. 18A:38-13 prior to amendment, in addition to providing factually supported educationally based reasons for its desire to withdraw, the sending district also bears the initial burden of producing some evidence that withdrawal will not significantly impact the receiving district racially, educationally, financially or in the area of facilities. See Washington Township, supra; Brielle, supra.

However, the requirement that the sending district produce some factual support for its claim that withdrawal will not significantly impact the receiving district does not impose on the sending district the obligation to prove that no negative impact on the receiving district would result. See Brielle, supra. In applying the statute prior to amendment, once the sending district provides educationally based reasons for its desire to terminate, provides factual support for those reasons and provides some evidence in support of its claims concerning the impact of its withdrawal, the burden shifts to the receiving district to demonstrate that it will suffer significant negative impact as the result of the withdrawal. If the sending district has established educationally based reasons for its desire to withdraw and the receiving district does not demonstrate that withdrawal will impact it negatively, we will effectuate the sending district's determination concerning where best to educate it students by approving withdrawal. We reiterate that the receiving district has

no claim on the students of the sending district and that, under the applicable standard, it is legitimately concerned only with the negative effect of withdrawal on its continued ability to educate its students. See Brielle, supra.

We recognize that in every instance where a sending district seeks to withdraw from an established relationship, in the absence of immediate replacement by a new sending district with the same student population, the receiving district generally will bear the loss of tuition previously paid by the sender. We however reiterate that the statutory scheme was designed to make unused facilities available to students from districts that lack facilities and that tuition payments to the receiving district are intended to permit receiving districts to accommodate students from the sending districts without additional cost to them. The statutory scheme was not intended to create a revenue source for districts, to subsidize the expansion of facilities and programs for the benefit of the receiving district, or to protect the receiving district's citizens from tax increases. Thus, we conclude that where educationally based reasons for withdrawal are substantiated, approval for withdrawal will be granted unless the receiving district can show that withdrawal will result in negative impact beyond the fact of the loss of tuition. We further conclude, as we did in Brielle, that such impact must be definite and tangible. Specifically, we will not find negative impact based on speculation regarding the future of the receiving district's programs where the future direction of such programs will be determined by decisions, both financial and educational, made by that district and the continued ability to achieve its educational goals is within the control of the receiving district.

III

Based on the principles enunciated above, we now turn to the question of whether under the applicable statute, there is good and sufficient reason to permit the Board of Education of the Township of Cranbury to withdraw from its sending-receiving relationship with the Board of Education of the Township of Lawrence. Again, the standard under which we make this judgment requires us to assess whether Cranbury has demonstrated educationally based reasons for seeking withdrawal and whether Cranbury's withdrawal would negatively impact Lawrence.

As reflected in its petition in this matter and established through these proceedings, Cranbury seeks withdrawal in order to send its students to Princeton High School. During the proceedings, it was established that the factual basis for Cranbury's preference to educate its students at Princeton High School is that Princeton High School is closer to Cranbury, the travel route to Princeton involves fewer miles on Route 1, Cranbury has substantial ties to Princeton, the curriculum at Princeton includes varied advanced placement courses and an excellent computer program, Princeton offers free attendance to Princeton University to qualified students, and it has a no-cut athletic policy. Although Cranbury

also asserted that geographic proximity would facilitate participation in extracurricular activities and that growth in Lawrence's student population might result in termination of the relationship at some point in the future, these assertions have not been substantiated in this litigation. We emphasize that there is no indication in the record that Lawrence High School is overcrowded, and, at oral argument before the Legal Committee, Lawrence reaffirmed that it had a commitment to accommodate the Cranbury students which it was prepared to continue to meet in the future without overcrowding. Tr. 4/9/86, at 43-5. We therefore conclude that the reason profferred by Cranbury related to Lawrence's population growth was not supported by a definite presentation of the facts, and therefore we would not authorize termination in this case on that basis alone. We, however, find that those affirmative reasons underlying Cranbury's preference to educate its students at Princeton High School that have been substantiated by a presentation of the facts are sufficient to permit withdrawal if it is not shown that termination would significantly impact Lawrence.

Essentially, Cranbury has made a judgment that because of geographic proximity, the travel routes involved, its community ties with Princeton and the educational opportunities afforded by the Princeton curriculum, the educational interests of its students would be furthered by attendance at Princeton High School. See Tr. 4/9/86, at 28. In reviewing Cranbury's affirmative reasons for seeking withdrawal, we recognize that it has not established that the program at Princeton High School is better than that offered by Lawrence. We however emphasize that under the applicable standard, the receiving district has no "claim" to the sending district's students, other than that their withdrawal must not result in significant negative impact on the receiving district. Brielle, supra, at 9. Thus, the applicable standard does not require that positive benefits accrue to the students sufficient to overcome the "claims" of the receiving district to these students, id., and where, as here, it has been established that both districts involved provide quality education programs, we need not balance the relative academic merits of the proposed receiving district against those of the current receiving district. Id. at 13. Rather, as stated, where the reasons underlying the sending district's preference to educate its students in another district are factually and educationally based, we will effectuate the sending district's decision of where its students are to be educated by permitting withdrawal if no significant negative impact is shown. As indicated above, we find that Cranbury's preference is educationally based and has been factually substantiated.

As stated, however, although we find that Cranbury's preference is educationally based, we would not approve withdrawal if withdrawal would result in significant negative impact on Lawrence. Thus, we now must determine whether Cranbury's withdrawal would produce such impact. In making this determination, we emphasize that it is uncontroverted that withdrawal would not impact racial balance or facilities. The assertions here are limited to

Lawrence's claims that Cranbury's withdrawal would have a negative financial impact on it and that such impact might affect its educational programs in the future. The Commissioner found that Cranbury had failed to show that Lawrence would not suffer negative financial impact. He found that the loss of tuition from Cranbury students would cause Lawrence to exert greater financial efforts and to face greater financial constraints, which might conceivably adversely affect its programs. The Commissioner buttressed his conclusion with information provided by the Division of Finance, which, incorporating estimates of tuition increases, projected that tuition loss would be greater than that projected by the ALJ.

As set forth above, we conclude that a sending district need not prove that negative impact would not result from its withdrawal. Rather, in this case, the receiver was required to establish definite negative impact beyond the fact of tuition loss. We find that such impact was not established in this case. Rather, we find that the only impact definitely established was that Lawrence would be required to engage in planning and decision making in order to adjust to the loss of tuition payments.

Our review of the record indicates that the impact of the loss would depend on a number of variables, including growth in Lawrence's student population. However, even if Lawrence's population growth does not produce an optimum increase in state aid and revenues from new tax ratables are not allocated to education in the amounts desired by the Board, the future direction of Lawrence's educational programs will be determined by the decisions of the Lawrence Board and its ability to generate the necessary financial support among the citizens of its community, including support for any necessary tax increases required if Lawrence's citizens desire to maintain the District's current educational standards. We recognize that such tax increase may be required, but, as stated, sending-receiving relationships are not intended to insulate receiving districts from financial constraints or its citizens from tax increases. Moreover, Lawrence's argument before the Legal Committee indicates to us that any increase in municipal taxes in this case would be necessitated primarily by expenses associated with the Township's development, rather than by the loss of continued tuition payments from Cranbury. Tr. 4/9/86, at 24-6. We emphasize that although a district board can not insulate itself from financial considerations, it is not the responsibility of the district board to set tax rates or to operate the district on the basis of municipal tax requirements.

Thus, although we find that the Commissioner's reliance on information provided by the Division of Finance to buttress his conclusions was improper, N.J.A.C. 1:1-15.3(b); N.J.A.C. 6:24-1.13, consideration of those figures does not alter our conclusion that the phased withdrawal of a total of 90-95 students would not significantly impact Lawrence if that district engages in sound fiscal planning during the phase-out period. Even if the higher figures, which included incorporation of estimated tuition increases, were accurate and reliable projections of the revenues

that would be received by Lawrence if Cranbury students continued to attend school in Lawrence, Lawrence has not shown that the failure to receive the higher amount would impact it differently or prevent it from maintaining its educational programs at current levels. Again, regardless of the amount of revenue that Lawrence expected to receive from tuition payments, Lawrence was not entitled to rely on revenue from tuition payments from Cranbury into perpetuity and, as stated above, we will not prohibit withdrawal based solely on the fact that the receiving district will lose tuition payments.

In sum, even using the more conservative figures relied on by the ALJ, we recognize that the loss of revenue from Cranbury's tuition payments would require adjustment by Lawrence over the period of phased withdrawal. However, as stated, we conclude that the fact that adjustment to tuition loss is required does not in itself represent a significant negative impact on the receiving district, especially in a case such as this where the district has the option of maintaining its educational programs at current levels despite withdrawal. Such a case stands in sharp contrast to a situation where loss of tuition revenue would impair the receiving district's ability to provide a thorough and efficient education to it students or to meet its educational goals and objectives.

IV

As set forth above, we conclude that Cranbury has presented and substantiated educationally based reasons for its preference to educate its students at Princeton High School. We further conclude that it has not been shown that Cranbury's withdrawal would result in significant negative impact on Lawrence, and we therefore find that good and sufficient reason has been established under the N.J.S.A. 18A:38-13 prior to amendment to authorize withdrawal. We now must consider whether the statute as amended by the Legislature subsequent to appeal to the State Board is controlling in this case.

As stated, N.J.S.A. 18A:38-13 was amended effective November 24, 1986, while the appeal in the present case was pending before the State Board.[5] As the result of the legislative enactment, N.J.S.A. 18A:38-13 now provides that:

> No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except upon application made to and approved by the

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[5] We note that the present case was the only case pending before the State Board on the effective date of the amendment that involved application of N.J.S.A. 18A:38-13.

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> commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil populations of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances including the educational and financial implications for the effected districts, the impact on the quality of education received by pupils and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.

(emphasis added).

The statute as amended now further provides that:

> Any school district entering into a sending-receiving relationship subsequent to severing a prior sending-receiving relationship pursuant to N.J.S.A. 18A:38-13 shall remain in the subsequent relationship for not less than five years. If, after that five year period that sending-receiving relationship is severed, any student in the sending district shall be permitted to complete his secondary education within the receiving district.

Thus, the Legislature has modified the standard to be applied when considering requests to alter or terminate sending-receiving relationships. See Assembly Education Committee Statement accompanying Assembly Bill No. 2072 (May 22, 1986); Senate Education Committee Statement accompanying Assembly Bill No. 2072 (October 2, 1986). Specifically, the Legislature has eliminated the language that required that "good and sufficient reason" be presented before approval for termination could be granted. Instead, the new law requires that prior to making its application to the Commissioner, a district wishing to sever a sending-receiving relationship prepare and submit a feasibility study considering the educational, financial and racial implications, and mandates that the Commissioner grant the request to sever the relationship if no substantial negative impact will result. Further, if a district enters a new sending-receiving relationship subsequent to severing a prior relationship, it must remain in the new relationship for not less than five years, and any student in the sending district must be allowed to complete his/her secondary education in the receiving district. See Statement to L. 1986 c. 156.

In determining the affect of the legislative enactment on the case now before us, we have carefully reviewed the supplemental briefs submitted by the parties and the relevant law. We conclude that the new law does not apply to this case so as to alter the conclusions we have reached by application of the statute prior to amendment.

Initially, we emphasize that the courts of this state have long followed the general rule of statutory construction that favors the prospective application of statutes. Gibbons v. Gibbons, 85 N.J. 515, 521 (1981). However, when legislation affecting a cause is amended while the matter is on appeal, an appellate court will apply the statute in effect at the time of its decision, at least where the Legislature intends that its modification be retroactive to pending cases. State, Dept. of Environ. Protect. v. Ventron Corp., 94 N.J. 473, 498 (1983); Kruvant v. Mayor & Council Twp. of Cedar Grove, 82 N.J. 435, 440 (1980). The purpose of this principle is to effectuate the current policy declared by the legislative body, Kruvant, supra, at 440, and it is therefore applicable where the Legislature has clearly indicated that a statute should be given retroactive effect unless such effect will violate the constitution or result in a manifest injustice. State, Dept. of Environ. Protec. v. Ventron Corp., supra, at 498. Further, the Legislature's intent that the statute in effect at the time of decision be applied will be effectuated and may be either express or in the legislative history, or implied so as to make the statute workable or to give it the most sensible interpretation. Gibbons v. Gibbons, 86 N.J. 515, 522 (1982).

In this instance, the Legislature did not provide that the amended statute was to have retroactive effect. Rather, the language of the statute provides only that it would be effective immediately, and the Legislature did not explicitly address its application to cases already in litigation. However, our review of the terms of the enactment, as well as the legislative history, indicates that the Legislature did not intend that the new law apply to cases such as the case before us, in which, following lengthy litigation, the final agency determination in the matter is now to be made on appeal and where the resolution achieved under the predecessor statute would be consistent with the legislative policy expressed in the new law.

As set forth above, the new law requires that prior to its application for severance, the district seeking to sever a sending-receiving relationship must prepare and submit a feasibility study. This requirement was added to the proposed legislation by the Assembly Education Committee, and as indicated by the Committee's Statement which repeats the language incorporated into the statute as enacted, the requirement was added at the sponsor's request. Assembly Education Committee Statement accompanying Assembly Bill No. 2072 (May 22, 1986). We conclude that by its inclusion of a threshold requirement to be met prior to litigation of cases to be resolved under the statute as amended, the Legislature demonstrated its intent that the statute be applied

prospectively, at least where the evidentiary proceedings had been completed and compliance with the statutory requirement would require relitigation of the matter.

Again, the purpose of the principle that an appellate court on direct review will apply the statute in effect at the time of its decision, at least where the legislature intended retroactive application to pending cases, is to effectuate the current policy declared by the legislative body. Kruvant v. Mayor & Council Twp. of Cedar Grove, supra at 440. We find that, as expressed by its modification of the standard to be applied in considering requests for alteration or termination of sending-receiving relationships, the statute as amended does not represent a departure from the legislative policies embodied in the statutory scheme applicable to sending-receiving relationships prior to amendment of N.J.S.A. 18A:38-13, but rather gives further definition to the balance between those policies.

By elimination of the requirement that the petitioning district establish educationally based reasons for its preference of where to educate it students, the Legislature has furthered the policy favoring local involvement. It however also has given further guidance in effectuating the policy favoring stability by the adoption of specific statutory criteria to be applied in assessing the impact of termination, criteria that we emphasize were developed through our decisional law under the predecessor statute. See Washington Township, supra. The Legislature has further defined the balance between the legislative policies through the requirement that upon severance, a subsequent relationship must be of at least five years duration.

As set forth above, in making our judgment in this case under the statute prior to amendment, we have concluded under the standards developed under that statute, termination in this case will not result in significant negative impact on Lawrence. We therefore conclude that by approving Cranbury's withdrawal from its current relationship under N.J.S.A. 18A:38-13 prior to amendment, we are acting consistently with the current legislative policy as expressed in the new law.

Furthermore, the petition in this case was filed over five years ago. Extensive litigation followed in which both parties submitted their proofs on the question of the impact of withdrawal and, as discussed previously, we have carefully considered that impact. We find that under these circumstances, further prolonging this litigation would place an undue burden on the petitioning district and, in light of our conclusions concerning the substantive questions involved, would not contribute in any meaningful way to furthering the legislative policy as expressed in the statute as amended. See Kruvant v. Mayor & Council Twp. of Cedar Grove, supra.

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As set forth above, under the standards developed under N.J.S.A. 18A:38-13 prior to its amendment, we conclude that good and sufficient reason for termination of the sending-receiving relationship between the Cranbury and Lawrence Boards has been presented. We specifically find that Cranbury has established educationally based reasons for its preference to educate its students at Princeton High School and that its withdrawal will not result in significant negative impact on Lawrence. We therefore direct termination of the sending-receiving relationship currently existing between Cranbury and Lawrence.

However, although we conclude that N.J.S.A. 18A:38-13 as amended effective November 24, 1986, does not govern disposition of this case, we recognize our responsibility to effectuate the legislative policy favoring stability in sending-receiving relationships, which is embodied in the statute both prior and subsequent to amendment. We therefore direct Cranbury's withdrawal on a four year phase out basis commencing with the 1987-88 school year contingent upon the establishment of a new relationship with Princeton of at least five years' duration.

Maud Dahme opposed.
Attorney exceptions are noted.
April 1, 1987

KENNETH DEVENEY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 25, 1986

For the Petitioner-Appellant, Katzenbach, Gildea and Rudner
(Peter Wint, Esq., of Counsel)

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

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

January 7, 1987

IN THE MATTER OF THE TENURE :
HEARING OF ROBERT E. DOYLE, :
SCHOOL DISTRICT OF THE TOWNSHIP : STATE BOARD OF EDUCATION
OF PEMBERTON, BURLINGTON COUNTY. : DECISION ON REMAND
:

Decided by the Commissioner of Education, March 15, 1984

Decided by the State Board of Education, November 7, 1984

Remanded by the Appellate Division, May 14, 1985

Decision on Motion by the State Board of Education, August 9, 1985

Decision on Remand by the State Board of Education, June 6, 1986

Remanded by the Appellate Division, November 13, 1986

For the Petitioner-Appellant, Sever and Hardt
(Ernest N. Sever, Esq., of Counsel)

For the Respondent/Cross-Appellant, Selikoff and Cohen
(Joel S. Selikoff, Esq., of Counsel)

This matter is again before us pursuant to a remand by the Appellate Division. In its decision, the court affirmed our determination of June 4, 1986, that Appellant Robert Doyle's conduct as to count 6 of the tenure charges against him was in violation of N.J.S.A. 18A:6-1. In the Matter of the Tenure Hearing of Robert Doyle, Docket #A-4885-85T5 (App. Div. Nov. 13, 1986). The court, however, remanded the matter to us for clarification of:

> ...whether the penalty [we] imposed is to be reduced by the periods of suspension and dismissal that were imposed on appellant as a result of these charges....

The court further directed that we

> ...express precisely the extent of any credit to be given to avoid further disputes.

Thus, we are not called upon today to reconsider the penalty that we assessed in our decision of June 4, 1986, but rather to clarify that penalty.

As stated in our decision, after consideration of the relevant factors and the additional proofs submitted by Appellant,

ROBERT P. DURKIN,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 25, 1985

Remanded by the Appellate Division, April 14, 1986

Decided by the State Board of Education, June 4, 1986

Transferred by the Appellate Division, December 4, 1986

For the Petitioner-Appellant, Thomas E. Durkin, Esq.

For the Respondent-Respondent, Vickie A. Donaldson, General Counsel (J. Issac Porter)

This case was initiated by the Newark Teachers' Union and thirteen individual teachers, including Appellant Robert Durkin. Petitioners alleged that the Board's actions in withholding their increments for 1984-85 were improper because they were not notified within ten days of the Board's actions and, in some instances, were not provided with reasons. In Appellant's case, the Board notified him that the Human Resources Services Committee would conduct a hearing on July 21, 1984, concerning denial of his increment. On September 25, 1984, the Board advised Appellant that it had taken action at a special meeting on August 31, 1984, to withhold his increment. The Board's action was based on his principal's recommendation to withhold his increment because of his excessive absenteeism. R-51, in evidence.

The Administrative Law Judge (ALJ) found the Board's actions to be factually and procedurally flawed in three cases so as to warrant setting them aside. He further found that the Board had failed to give reasons for the withholdings within ten days as required by N.J.S.A. 18A:29-14, and directed that it do so within ten days of the final decision in the matter. He however sustained

the withholdings in the cases of seven of the Petitioners, including that of Appellant, finding that the Board had a reasonable basis to withhold the increments in those cases.[1] In his decision of June 25, 1985, the Commissioner adopted the Administrative Law Judge's findings and determination in the case. Of the ten remaining Petitioners, Appellant is the only one who sought to challenge the Commissioner's decision in this matter.

On August 8, 1985, Appellant filed notice of appeal to the Appellate Division. On September 17, 1985, Appellant filed a notice of appeal to the State Board, enclosing a copy of the notice filed with the Appellate Division. Pursuant to a consent order entered into on April 14, 1986, the Appellate Division retained jurisdiction, but remanded the matter to the State Board for the limited purpose of allowing the State Board to act on the appeal. On June 4, 1986, we concluded that we were without authority to hear the matter since Appellant had not filed an appeal with the State Board within the statutory period set forth in N.J.S.A. 18A:6-28, and his appeal to the Appellate Division was not filed within that period.

On motion, the Appellate Division dismissed the matter on November 28, 1986, and transferred it for adjudication by the State Board with directions that "the appeal be adjudicated as brought within time." On January 30, 1987, we notified the parties of the court's directive and established a briefing schedule in the matter. Appellant filed his brief on March 6, 1987, notifying the State Board that he intended to rely on his submission to the Appellate Division in the case and enclosing copies. Respondent filed its answer brief on March 27, 1987.[2]

After reviewing the record in this matter, including the briefs filed by the parties, we conclude that Appellant has failed to show that the Board's action in withholding his increment was arbitrary or unreasonable. Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960). As found by the ALJ, the Board withheld Appellant's increment because of his excessive absenteeism, and he has not challenged the validity of that substantive determination in these proceedings. Further, although we join with the Commissioner in cautioning the Board that it is required to conform with the ten day notice requirement of N.J.S.A. 18A:29-14, we find that Appellant has not provided any basis in this appeal for rejecting the Commissioner's determination concerning the effect of the Board's failure to provide such notice

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[1] The three other individual Petitioners had withdrawn their claims.

[2] We note that because Appellant failed to serve his adversary with his appeal brief, the briefing schedule was extended.

in his case. We find that the record adequately supports the Commissioner's conclusions, and we therefore affirm the Commissioner's determination that while Appellant is entitled to written reason for the withholding of his increment, the Board had a sufficient basis to withhold his increment.

June 3, 1987

FAIR LAWN EDUCATION ASSOCIATION, KATHERINE SOLOMON, ARLENE ALBALAH, ELAINE PAVON AND PHYLLIS STOLAR,	:	
PETITIONER-APPELLANT.	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Remanded by the New Jersey Supreme Court, April 11, 1985

Decided by the Commissioner of Education, October 27, 1986

For the Petitioner-Appellant, Bucceri and Pincus
(Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Jeffer, Hartman, Hopkinson, Vogel, Coomber and Peiffer (Ronald F. Hopkinson, Esq. of Counsel)

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

March 4, 1987

we concluded that the pattern of the use of force demonstrated by Appellant's conduct called for more severe disciplinary action than the 120 day suspension without pay, the loss of an additional 30 days' salary and withholding of increment for 1983-84 ordered by the Commissioner. We, therefore, increased the penalty to suspension without pay for one full academic year, representing a monetary loss of $26,875, as well as withholding of increments for 1983-84. We, however, were cognisant that prior to our decision, Appellant had been suspended without pay for the statutory period set forth in N.J.S.A. 18A:6-14, and had suffered dismissal from his position during two separate periods by virtue of the Administration Law Judge's determination and our first decision in this case. Since Appellant had returned to work, we determined to leave him the choice of returning salary to the Board or accepting any additional suspension required to fulfill our penalty of suspension without pay for one full academic year.

As stated, the total penalty that we judged to be warranted in this case was suspension without pay for one full academic year, representing a financial loss of $26,875, which would have been the salary due him for his services during the ten month academic year of 1983-84. Such salary was based on service he would have provided had he worked on each day required by the Board during the academic year, and it was our intent that he suffer the full extent of the loss of salary for that year.

However, as stated, we were well aware that Dr. Doyle had already suffered disciplinary action, which included loss of salary, as a result of the prior determinations made in this matter, and by such action had already suffered the greater portion of the penalty that we found warranted by his conduct. Thus, although we defined the total penalty in terms of the academic year rather than the calendar year specified in N.J.S.A. 18A:6-14, thereby precluding credit for the periods after school closed and before it opened, calculation of the portion of the penalty not yet served was to made by crediting Appellant for each day designated by the Board's calendar as a required work day but on which Appellant did not work as a result the disciplinary actions he suffered during the 1983-84 and 1984-85 academic years, and subtracting the total of such days from the number of required work days in the 1983-84 academic year. If Appellant chose to suffer additional days' suspension without pay in order to fulfill the full terms of the penalty rather than to return salary received, he was to be credited for each such day by allocation of his current salary on a per diem basis.

Maud Dahme opposed.
January 7, 1987

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT FERENZ, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
PAULSBORO, GLOUCESTER COUNTY.	:	
	:	

Decided by the Commissioner of Education, August 1, 1985

For the Petitioner-Respondent, Eugene P. Chell, Esq.

For the Respondent-Appellant, Selikoff and Cohen
(Steven R. Cohen, Esq., of Counsel)

This appeal is from a decision of the Commissioner, which found that a tenured graphic arts teacher was guilty of conduct unbecoming a teacher based on an incident during which he permitted a seventeen year old female student to sit on his lap, and which directed Respondent's dismissal from his position.

The record establishes that, on November 16, 1984, during the regular class period and in the presence of students, Respondent permitted the student to sit on his lap while instructing her in the use of a camera. The student did so on her own impulse and without invitation. However, the Respondent did not seek to dissuade or remove the student. In addition to the students who were present, the incident was witnessed by the school nurse, who entered the room to remit her faculty coffee club dues to Respondent. The incident concluded only when the Respondent eased the student off his lap in order to reach to his wallet to make change.

The record indicates that Respondent had an unorthodox teaching style that was well received by students. He was popular and considered his students as "friends." The Respondent's abilities were also generally well regarded by fellow teaching staff members.

In determining whether Respondent's conduct constituted conduct unbecoming a teacher, the Administrative Law Judge (ALJ) concluded that the teacher-student distinction had diminished to a degree where the student "does not recognize, or may be confused as to the outer limits or bounds of the relationship," Initial Decision, at 14, and that the Respondent's behavior was wanting of the high degree of exemplary behavior expected of those who teach. He specifically found that:

> Respondent's failure to act, on November 16, 1984, to immediately remove T.P. from his lap when she determined, under impulse, to sit

> thereon does not demonstrate the degree of "self-restraint" or "controlled behavior" requisite to his professional standing. Respondent's acquiescence to T.P.'s impulsive act goes beyond the boundaries of impropriety and poor judgment to confirm the Board's charge that such behavior constitutes conduct unbecoming a teaching staff member.

Id. at 15.

The ALJ however concluded that the incident was not so flagrant as to warrant the penalty of dismissal. In so concluding, he rejected the Board's contention that Respondent's prior disciplinary record and warning concerning future misconduct coupled with the charges here could only result in dismissal.

In the prior incident Respondent, as a "joke," and "without apparent malevolence," printed and disseminated within the school a "Nigger Application for Employment." In consequence thereof, the Board received complaints and was the subject of an investigation by the United States Department of Education, Division on Civil Rights. The Board at that time passed a resolution wherein it cautioned that it would seek the Respondent's dismissal for any alleged future misconduct. The ALJ observed:

> Such a predetermination by the Board ignores the gravity of the alleged offense and the statutory duty of the Commissioner to set the penalty against the alleged offender based upon the facts of the particular case.

Initial Decision, at 17.

While emphasizing that unfitness to teach might be shown by one incident, if sufficiently flagrant, or by many instances, Redcay v. State Board of Education, 130 N.J.L. 369 (1943), aff'd, 131 N.J.L. 326 (E.&A. 1944), the ALJ concluded that the present charge was "not sufficiently flagrant to warrant Respondent's dismissal." Although he noted that Respondent's prior offense could not be ignored, the ALJ did not explicitly consider Respondent's prior offense in reaching this conclusion. He however determined that a penalty was warranted, and recommended directing Respondent's reinstatement at the same rate of pay at which he was compensated during his suspension with the forfeiture of 120 days' pay.

The Board excepted to the ALJ's decision and the Respondent filed reply exceptions, which included a cross-exception. The Commissioner declined to review the Respondent's exceptions on the grounds that they were untimely filed, and focused upon the Board's exceptions, which essentially concerned penalty. The Commissioner first sustained the ALJ's determination that the tenure charge in the instant proceedings could not be based on other alleged, but

unspecified instances of lap sitting. The Commissioner next affirmed that the Board, by a preponderance of evidence, had proven its charge based on the incident of November 16 of unbecoming conduct.

Regarding the appropriate penalty to be imposed in this case, the Commissioner however disagreed with the ALJ, concluding:

> The Commissioner concurs with the legal premise upon which the judge considered the assessment of a penalty to be imposed herein against respondent. However, the Commissioner is not persuaded that the judge did, in fact, weigh both incidents of respondent's misconduct. Instead, it appears from a reading of the above-cited language in the initial decision that the judge preemptorily made a determination with respect to the tenure charge prior to weighing both incidents or respondent's misconduct before such a determination was made. Redcay, supra. Therefore, the Commissioner does not agree with the judge's finding that the nature and gravity of circumstances related to the incidents of respondent's unbecoming conduct warrant the imposition of a penalty less than his dismissal from tenured employment. In arriving at this finding and determination the Commissioner finds that Fulcomer, supra, is distinguishable from the arguments presented in these proceedings with regard to the appropriateness of the penalty to be imposed upon respondent herein. In Fulcomer, respondent had served in the Board's employ for 23 years with an unblemished record of service until the time of the incident resulting in the tenure charge against him.
>
> Respondent's conduct complained of in the instant matter involves two serious incidents which occurred within a period of less than three years. These incidents of misconduct as stated in the record of this matter are, in the Commissioner's judgment, "sufficiently flagrant" to establish that respondent is deemed to be "unfit" to continue in his tenured position as a teacher in the Board's employ. Redcay, supra.

Commissioner's decision, at 27-28.

Respondent appealed, challenging the penalty imposed on him by the Commissioner. He seeks reversal of the Commissioner's determination that dismissal is warranted and urges adoption of the ALJ's decision in that regard. He argues that the Commissioner's determination is improper in that the Commissioner failed to consider his

cross-exception, that the Commissioner substantially modified the ALJ's decision without setting forth separately stated findings of fact, that the Commissioner reached his decision without the benefit of transcripts, and that the penalty of dismissal was imposed on the basis of his prior conduct thereby depriving him of due process. By incorporation of his cross-exception, Respondent further contends that the purpose of severely reprimanding him for the conduct charged here and deterring other school employees from engaging in similar conduct would be accomplished by either loss of increment or loss of 120 days' pay, and seeks modification of the penalty recommended by the ALJ to one of these two "fines."

Initially we reject Respondent's contention that the Commissioner was required under N.J.S.A 52:14B-10(d) to set forth in his decision separately stated findings of fact and conclusions of law because of his "substantial" modification of the ALJ's Initial Decision. Rather than rejecting either the ALJ's factual findings or his legal conclusion that Respondent engaged in conduct unbecoming a teaching staff member, the Commissioner adopted the ALJ's findings and conclusions. The Commissioner was not required to restate the ALJ's findings and conclusions in his decision in order to justify the penalty he assessed based on those findings and conclusions. See In re Morrison, 216 N.J. Super. 143 (1987).

Nor did the Commissioner's conclusion that the ALJ's findings warranted a more severe penalty than that imposed by the ALJ obligate the Commissioner to direct production of and to consider the transcript. In re Morrison, supra. In so concluding, we emphasize that had Respondent sought to challenge the ALJ's factual findings before the Commissioner, it was incumbent upon him to provide the Commissioner with the necessary transcripts. N.J.A.C. 1:1-16.4(b); In re Morrison, supra.

We further conclude that the failure of the Commissioner to consider Respondent's exceptions, which were filed on July 8, within the five working days permitted by N.J.A.C. 1:1-16.4(c), does not in itself constitute "reversable error." However, having the benefit of the entire record, including the transcripts and the exceptions, for the reasons that follow, we reverse the Commissioner's determination that dismissal is warranted in this case.

Again, Respondent has not challenged the conclusion below that his conduct in permitting a student to sit on his lap during the regular class period was conduct unbecoming a teacher. However, dismissal does not automatically follow such conclusion, and in assessing the proper penalty to be imposed, we must consider all of the relevant circumstances, including the nature and gravity of his offense, any evidence as to provocation, extenuation or aggravation, and any harm or injurious effect that Respondent's conduct may have had on the maintenance of discipline and the proper administration of the school system. In re Fulcomer, 93 N.J. Super. 404 (1967). We emphasize that although the proper penalty in a particular case is not assessed under this standard solely on the basis of a

teacher's past record, such record is one of the relevant circumstances to be considered.

We, like the ALJ and the Commissioner, view Respondent's conduct in permitting a seventeen year old female student to sit on his lap during class as a serious departure from the degree of self-restraint and controlled behavior required of teachers. e.g. In the matter of the tenure Hearing of Jacque L. Sammons, 1972 S.L.D. 302. However, the record shows that the incident was initiated by the student, and that it was reflective of Respondent's unorthodox pedagogical approach. While not diminishing the seriousness with which we view Respondent's failure to exercise appropriate judgment under the circumstances, we agree with the ALJ that the incident in itself does not warrant dismissal. Further, the record shows that Respondent is considered a good teacher despite his unorthodox teaching style, which to some degree contributes to his good rapport with his students. We hesitate to direct dismissal where an otherwise effective teacher has committed an offense that, while departing from the standards of proper student-teacher relationships, was caused by a lapse of judgment and was not in itself of such character or magnitude to warrant dismissal.

Although our conclusion is not altered by consideration of Respondent's prior disciplinary record, we can not ignore the fact Respondent's increment was withheld within two years of the incident here for conduct reflecting another serious departure from the level of professional judgment expected of teaching staff members within the public school system. However, even considering that Respondent has failed to exercise appropriate judgment on two occasions, we conclude that dismissal is not the appropriate penalty given the nature of his offense viewed in the context of his seventeen years of service as an effective and committed teacher.

Although we conclude that dismissal is not the appropriate penalty in this case, we reject Respondent's claim that either withholding of increment or loss of salary alone would be sufficient reprimand under these circumstances. While we do not find Respondent's conduct of November 16 of such magnitude to warrant dismissal even viewed in light of his prior disciplinary record, we reiterate that his failure to exercise the level of professional judgment expected of teachers was not inconsequential, and the resulting conduct represents a serious departure from the standards under which teachers are expected to conduct their relations with students. We conclude that Respondent's failure to exercise the professional judgment expected of teachers even after his increment had been withheld because of conduct resulting from another failure to exercise the level of professional judgment expected of teachers calls for a penalty more severe then either withholding of increment or loss of salary alone. Therefore, although we direct Respondent's reinstatement with back pay minus mitigation, we direct forfeiture of salary that would otherwise be due him for the first 120 days of his suspension and loss of increment for 1985-86.

Maud Dahme, Betty Dean, Anne Dillman and Robert Woodruff opposed.
Attorney exceptions are noted.
October 1, 1987

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DR. JENNIFER FIGURELLI,	:	
PETITIONER-RESPONDENT.	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, December 11, 1986

For the Petitioner-Respondent, Jeffrey A. Bartges, Esq.

For the Respondent-Appellant, William A. Massa, Esq.

For the reasons expressed in his decision, we affirm the Commissioner's determination that Petitioner is entitled to reinstatement to the senior administrative position for Pupil Personnel Services from which she was wrongfully transferred effective January 6, 1986. We further affirm the Commissioner's determination that Petitioner is entitled to back pay and emoluments minus mitigation from the date of her transfer, and emphasize that such emoluments include any rights that she would have accrued had the Board complied with the Commissioner's previous decision directing her reinstatement, which we affirmed on appeal to the State Board. Figurelli v. Board of Education of the City of Jersey City, decided by the Commissioner, July 23, 1984, aff'd by the State Board December 15, 1984, appeal dismissed Docket #A-2034-84T7 (Dec. 18, 1985).

Further, we share the Commissioner's concern about the Board's failure to assure equal employment opportunity when filling administrative positions, and join with him in reminding the Board that it is obligated to act consistently with all state and federal laws related to equal employment when filling vacancies.

May 6, 1987

PETER FISCHBACH ET AL.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, February 19, 1985

Decision on Motion by the State Board of Education, August 7, 1985

For the Petitioner/Cross-Appellant Fischbach, Bucceri and Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Petitioner-Respondent Farley, Greenberg, Kelley and Prior (John B. Prior, Jr., Esq., of Counsel)

For the Petitioner/Cross Appellant Gattoni, Schneider, Cohen and Solomon (Bruce D. Leder, Esq., of Counsel)

For the Respondent-Appellant, Giblin and Giblin (David F. Lyttle, Esq., of Counsel)

After carefully reviewing and considerating the entire record in this case, including all documentary and testimonial evidence, we fully concur with the decision of the Commissioner of Education, and, therefore, we affirm that decision for the reasons expressed therein.

In affirming the Commissioner's decision, we share his certainty that if the Board of Education of the Township of North Bergen is truly committed to wresting itself away from its past and steering onto a course of sound fundamental education for its students, it will acknowledge the necessity and wisdom of the Commissioner's directive that the County Superintendent oversee the selection process for filling the position of Supervisor of Instruction.

October 1, 1987

JERSEY CITY EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, September 22, 1983

For the Petitioners-Respondents, Philip Feintuch, Esq.

For the Respondent-Appellant, William A. Massa, Esq.

This is another case which involves the question of whether the New Jersey Supreme Court's decision in Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), is to be afforded retroactive application to Petitioners so as to entitle them to relief pursuant to that decision. The Petitioners-Respondents (hereinafter "Petitioners") are fourteen bilingual teachers, who were compensated by federal funds received by the District through the Title I program, and the Jersey City Education Association, which is the collective negotiations representative for all of the teachers in the District. The Petition of Appeal in this case was filed on January 4, 1982, approximately six months prior to the Spiewak decision. In their petition, Petitioners sought salary adjustment for each of the individually named Petitioners based on the negotiated schedule applicable to teaching staff members in the District retroactively from the date of employment, and retroactive employment benefits under the terms of the collective negotiations agreement in effect during the relevant years.

The Administrative Law Judge (ALJ) found that Petitioners were tenured teaching staff members and that they were entitled to the relief they sought. However, based on the language of Spiewak that the court's decision in that case would apply prospectively to those not before the court, the ALJ determined that such relief was to be prospective only. In addition, he concluded that litigation of a similar claim by the Association prior to initiation of the instant proceedings, see Jersey City Education Association v. Board of Education of the City of Jersey City, decided by the Commissioner August 26, 1980, aff'd by the State Board, March 4, 1981, barred relief in this case for the period before the Spiewak decision was rendered.

The Commissioner of Education adopted the ALJ's finding that Petitioners were tenured, but rejected that part of the ALJ's determinations that limited Petitioner's relief to prospective relief only. He found that because the individual Petitioners were not involved in the previous case initiated by the Association, they should not be denied retroactive relief. The Commissioner concluded that Petitioners were entitled to the benefits of salary, sick leave and personal days retroactively to the date of first employment.

The Board appealed. Although not challenging the Commissioner's determination that Petitioners had achieved tenure, nor his determinations of the substantive relief to which individual Petitioners were entitled, the Board argues that Petitioners are not entitled to retroactive relief. Thus, the sole issue on appeal is whether Petitioners are entitled to retroactive relief under Spiewak.

In Rutherford Education Association v. the Board of Education of the Borough of Rutherford, 99 N.J. 8 (1985), the New Jersey Supreme Court settled that Petitioners, like those here, who had filed Petitions of Appeal with the Commissioner of Education prior to the date of the Spiewak decision are entitled to the retroactive benefit of that decision. The court, however, placed two limitations on such benefit. First, because of the administrative confusion that would result from retroactive application of Spiewak to teachers terminated prior to the decision in that case, the court in Rutherford held that Spiewak would not be applied retroactively to any teacher who was not employed by a board on the date of the Spiewak decision. 99 N.J. at 29-30. Second, because of its concern with the financial impact on district boards if Spiewak were to be given unlimited retroactivity as to those teachers still employed on the date of the Spiewak decision, the court held that calculation of retroactive benefits that each teacher is entitled to receive is limited to a date six years prior to the Rutherford decision. Id. at 30.

We conclude that the mandates set forth in Rutherford are applicable to the individual Petitioners in this case, notwithstanding the fact that the Association was involved in litigation of a similar claim prior to the New Jersey Supreme Court's decision in Spiewak. In arriving at the conclusion that the mandates of Rutherford are applicable here, we are mindful that although court-fashioned doctrines such as res judicata have genuine utility in administrative proceedings such as these, the application of such precepts by the State Board must be tempered by our appreciation of this agency's statutory foundations, its executive nature and its special jurisdictional and regulatory concerns. City of Hackensack v. Winner, 82 N.J. 1, 28-31 (1980). We emphasize that the question of whether the individually named Petitioners in this case were entitled to the salary benefits they seek by virtue of the New Jersey Supreme Court's determination in Spiewak that such teachers are teaching staff members within the meaning of N.J.S.A. 18A:1-1 has not previously been resolved, and we find that a fair resolution of this case would be precluded if we were to apply the doctrine of res judicata on the basis of litigation that occurred

prior to the court's decision in Spiewak and to which, as the Commissioner emphasized, the individually named teachers in this case were not parties. See City of Hackensack v. Winner, 162 N.J. Super. 1 (App. Div. 1978), aff'd with modif., 82 N.J. 1 (1980).

Applying the mandate of Rutherford, however, we conclude that Nancy Mulvaney is precluded from retroactive application of the rule announced in Spiewak since she was no longer employed by the Board on the date of the Spiewak decision. All of the other individually named Petitioners in this case were still employed by the Board on that date and we therefore conclude that, pursuant to Rutherford, all are entitled to the benefit of the rule announced in Spiewak, although calculation of any retroactive benefits due them as a result of our decision in this matter is limited to the period commencing April 11, 1979.

The Board has not challenged in this appeal the Commissioner's determination that Petitioners in this case are entitled to the salary benefits, including compensation, that were afforded other teaching staff members under the terms of the collective negotiations agreements in effect during the years relevant to this litigation. Further, the record demonstrates that Petitioners were employed full-time during the relevant years, Stipulation of Facts, and we conclude that by virtue of their status as full-time teaching staff members, they were entitled under the education laws to salary benefits for which that status qualified them under the terms of the collective agreement. In so concluding, we emphasize that although a district board is not required to adopt a single salary schedule for all full-time members, if a board adopts a schedule covering one group of full-time members, N.J.S.A. 18A:29-4.1 requires that it adopt schedules for all such members. Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A-2508-84T7 (App. Div. Feb. 26, 1986), certif. denied, 104 N.J. (1986). We find that by virtue of the Board's adoption of a single salary schedule applicable to full-time members for each year relevant to this litigation, Petitioners were entitled under the education laws to be compensated pursuant to that schedule. Therefore, we would direct that the Board pay Petitioners the difference in compensation between that which they received and that which they would have received had they been paid in accordance with the salary schedule applicable to full-time teaching staff members during the relevant years. We would specifically direct that, pursuant to Rutherford, such compensation be calculated from April 11, 1979, to the date on which each was afforded appropriate placement on the applicable schedule.

We further emphasize that in addition to the specific authorization conferred on district boards by N.J.S.A. 18A:29-4.1 to adopt salary schedules applicable to all full-time teaching staff members, the statute permits a district board to adopt a salary policy. Such policy may include employment benefits, Newark Teachers Assn. v. Bd. of Ed. of Newark, 108 N.J. Super. 34 (App. Div. 1969), aff'd, 57 N.J. 100 (1970), and we find that the

agreements adopted by the Board in this case must be considered as a salary policy adopted by the Board under the authority of N.J.S.A. 18A:29-4.1. We therefore conclude that Petitioners, as full-time teaching staff members during the years relevant to this litigation, were entitled under the education laws to sick leave and personal days for which they qualified by virtue of that status under the terms of the policy adopted by the Board and expressed in the collective negotiations agreements in effect during the relevant years, again calculated from April 11, 1979.

In sum, we conclude that the individually named Petitioners in this case are entitled pursuant to Rutherford to retroactive application of the rule announced in Spiewak, except for Petitioner Mulvaney, who was not still employed by the Board on the date of the Spiewak decision. We further conclude that by virtue of their status as full-time teaching staff members during the relevant years, the individually named Petitioners were entitled under the education laws to compensation and employment benefits for which they qualified by virtue of that status under the terms of the collective negotiations agreement. We however emphasize that pursuant to Rutherford, calculation of such relief is limited to the period commencing on April 11, 1979.

April 1, 1987

CONSTANCE JOHNSON,	:	
PETITIONER-RESPONDENT,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 13, 1985

For the Petitioner-Respondent, Klausner and Hunter
(Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Appellant, Gutfleisch and Davis
(Susan Raymond, Esq., of Counsel)

This is an appeal from a Commissioner's decision which directed the reinstatement of Petitioner Constance Johnson, a tenured School Social Worker, to the position of "Bilingual Social Worker", a position title established by the Board, on the basis of her seniority as a School Social Worker. Ms. Johnson had been continuously employed by the Board as a School Social Worker from January 29, 1973. On April 26, 1984, as part of a reduction in staff necessitated by declining enrollment and economic constraints, the Board resolved to terminate Ms. Johnson and Olga Godinez, who had been employed by the Board since November 12, 1979, as a "Bilingual Social Worker".

On August 16, 1984, Ms. Godinez was recalled to the position of "Bilingual Social Worker". Ms. Johnson filed a Petition of Appeal to the Commissioner, alleging that the Board had violated her seniority rights by reemploying a less senior social worker, i.e., Ms. Godinez, as a "Bilingual Social Worker".

The record shows that the position of "Bilingual Social Worker" was established in 1979 when the Board employed Ms. Godinez in that capacity. In addition to possessing certification as a School Social Worker or being willing to pursue certification, the Board also required proficiency in spanish for such service. It did not however seek at that time the approval of the County Superintendent for the use of an unrecognized position title.

In 1982, the Board applied for a federal grant to fund its Title VII Basic Secondary School Project. C-1, in evidence. In its grant application, the Board proposed that the project include one "Bilingual Social Worker". It further proposed that all personnel in the Bilingual Education Program be fluent in english and

spanish. Appended to its application was its job description for the "Title VII Bilingual Social Worker", which specified that, in addition to certification as a School Social Worker or commitment to pursue graduate studies leading to certification in school social work, evidence of successful experience in bilingual education and oral and written proficiency in spanish and english were required for employment in the position. C-1, in evidence.

In contrast to the District's job description for School Social Worker, C-4, in evidence, the responsibilities of the Bilingual Social Worker were delineated with particular reference to the non-english speaking and limited english speaking students and parents to whom the "Bilingual Social Worker" would provide services. Those responsibilities included: 1) facilitating adjustment of non-english speaking students by aiding staff in accommodating the student's social and emotional needs and fostering educational placement by academic assessment and transcript evaluation, 2) administering the Language Assessment Battery, 3) providing career guidance and placement services, 4) administering interest inventories, 5) fostering career exploration, 6) recommending materials to the district in the area of career education, 7) developing potential community work sites for students for after school and easing transition, 8) planning, organizing and monitoring orientation, 9) developing an operation manual for improvement of services, 10) conducting parental involvement activities, 11) providing individual consultations, and 12) providing technical assistance to staff.

On March 26, 1984, Janice L. Dime, the Assistant Superintendent for Curriculum and Personnel, requested that the County Superintendent review the job description and approve the title of "Bilingual Social Worker". C-6, in evidence. On April 5, 1984, the County Superintendent approved the title for the 1983-84 school year pursuant to N.J.A.C. 6:11-3.6. C-7, in evidence. On July 30, 1984, the District's Superintendent requested approval for the position title for the 1984-85 school year, indicating that the request was being made so that the District could fulfill the requirements of the Title VII Bilingual Grant. C-11, in evidence. On August 3, 1984, the County Superintendent again approved the title, specifying that he understood that the request was being made so that the District could fulfill its grant requirements. C-12, in evidence.

On April 16, 1984, the Manager of the New Jersey Department of Education's Bureau of Bilingual Education responded to inquiry by the District's Director of Pupil Services concerning whether the grant required that the social worker be bilingual. It was the Manager's opinion that it did, and, further, that in her view, a person unable to speak spanish would be unable to meet the responsibilities of the position such as administering a native language inventory and interpreting results. C-8, in evidence.

On April 19, 1984, the Grants Officer for the Bilingual Grant Section of the U.S. Department of Education responded to an inquiry from the Director of Pupil Services concerning whether the

Board could utilize a non-bilingual social worker who has greater seniority to fulfill the grant requirements of the program. The Grants Officer advised that the federal government does not supercede local policies so that it was up to the district to retain or dismiss based on seniority as established by the district. C-9, in evidence.

At prehearing conference, the parties agreed to submit the matter for summary decision based on the pleadings and evidentiary documents submitted. Included in those documents were affidavits submitted by Ms. Johnson, Ms. Godinez and Dr. Janice Dimes, Acting Superintendent.

In her affidavit, Ms. Godinez attested that during her employment as the "Bilingual Social Worker" she had worked exclusively with Hispanic students of limited ability in english with the exception of a one month period during 1983-84. She further attested that her fluency in spanish was essential in interviewing students and parents, referring students to outside agencies with spanish speaking professionals, career and vocational counseling and conducting formal parent advisory meetings. She likewise attested that spanish fluency was essential in evaluating students in the bilingual program for referral to the Child Study Team. In her affidavit, Janice Dimes, the Board's Acting Superintendent, also attested that certain tasks, like testing bilingual handicapped students, required a bilingual professional.

Constance Johnson attested that she readily acknowledged that Ms. Godinez's ability to speak fluent spanish had resulted in her being utilized in a broad spectrum of social worker educational duties involving Hispanic families and students. Nonetheless, Ms. Johnson found that in actual practice there was little or no difference between the duties performed by a "Bilingual Social Worker" and a School Social Worker in the District. She attested that in fulfilling her responsibilities as a School Social Worker, she dealt when necessary with students and parents whose primary language was not english, and whenever necessary utilized the services of an interpreter supplied by the Board. She further attested that after review of the job description for "Title VII Bilingual Social Worker", it was her conclusion that only three of the twelve duties listed required any level of proficiency in spanish. All other duties could easily be performed by her without any need to be bilingual, and the three responsibilities requiring spanish fluency could be fulfilled with the use of other bilingual professionals within the Title VII program or the use of in-district interpreters.

In his Initial Decision, the Administrative Law Judge (ALJ) found that the Board's action in recalling Ms. Godinez was reasonable in its attempt to achieve the goals of the bilingual program. He concluded that a strict construction of the applicable regulatory framework would result in the conclusion that no "category" could exist for a bilingual social worker since the Board of Examiners does not issue such endorsement and no specific State

Board rule deals with it. He however further concluded that the State Board of Education had recognized the educational problems created by the influx of pupils whose native language was not english, specifically noting that N.J.A.C. 6:28-2.4 requires communication with the parents and such pupils in the language used for communication by them, and requires the use of interpreters when necessary. He further noted that N.J.A.C. 6:31-1.3 appears to require a district board to establish a bilingual education program when there are twenty or more pupils of limited english speaking ability in any one language classification, and that N.J.A.C. 6:31-1.6 recognizes the need to provide bilingual support services for pupils of limited english speaking ability.

Indicating his belief that the absence of a bilingual endorsement for education services was an oversight rather than intentional, the ALJ emphasized that the State Board of Education had demonstrated its desire to provide flexibility to district boards in implementing State required programs, as illustrated by N.J.A.C. 6:29-7.1 concerning who may teach family life education. His review of the documentary evidence in this case revealed to the ALJ "... a sincere intent and attempt by the Englewood Board to exercise its discretionary authority to do what it perceived to be the proper course of action...." Initial Decision, at 5. Review of the District's application for the Title VII grant and the job description revealed the need for proficiency in spanish for effectiveness, which the ALJ found the County Superintendent also perceived in approving the use of an unrecognized title. Such perception was reinforced by the agreement of the Manager of the Bureau of Bilingual Education with this conclusion. The ALJ found that little weight could be given to the response to the District's inquiry to the Bilingual Grant Section since it shifted the issue back to the district Board for resolution with no indication of the impact on Title VII funding. Finally, he found that the District had demonstrated good faith in its letter to Ms. Johnson concerning reimbursement policy for pursuing spanish proficiency, which showed that the District had not precluded Petitioner from consideration for recall as a "Bilingual Social Worker".

The ALJ concluded that the Board did not abuse its discretionary authority to recall Ms. Godinez, and that its action was not inconsistent with the spirit and intent of the regulatory scheme of the State Board of Education. He therefore recommended dismissal of the petition.

The Commissioner rejected the ALJ's recommended decision. He emphasized that the standards for determining seniority are set forth in N.J.A.C. 6:3-1.10. Quoting the language of N.J.A.C. 6:3-1.10(g) and N.J.A.C. 6:11-3.6, the Commissioner noted with approval the complaint by Ms. Johnson that the Board made no attempt to comply with N.J.A.C. 6:11-3.6 for the first five years of its employment of Ms. Godinez. Further, in his opinion, proof was not made that the title of "Bilingual Social Worker" is a prerequisite to the Title VII Bilingual Grant. He observed that N.J.A.C. 6:3-1.10 provides for additional seniority categories of specific

educational services endorsements, but that the regulations relating to certification revealed no special endorsement entitled "Bilingual Social Worker."

The Commissioner noted with approval Ms. Johnson's argument that she is fully certified as a School Social Worker and capable of performing the work required as part of the District's Title VII Grant and that, if needed, the use of an occasional interpreter could be supplied. Finding that Ms. Johnson was a fully certified School Social Worker and senior in that category to Ms. Godinez, the Commissioner rejected the ALJ's determination and directed Ms. Johnson's reinstatement to the position of School Social Worker.

The Board appealed, arguing that its establishment of the position of "Bilingual Social Worker" was a proper exercise of its managerial prerogative, that its action established a position separate and distinct from that of School Social Worker and that the Board's delay in seeking approval from the County Superintendent for the use of an unrecognized position title did not entitle Petitioner Johnson to reinstatement to a position of "Bilingual Social Worker", for which, it argues, Ms. Johnson is not qualified. For the reasons that follow, we reject the Board's arguments and affirm the Commissioner's decision.

Initially, we reject the Board's contention that it had the managerial prerogative to establish the position of "Bilingual Social Worker" so as to preclude Ms. Johnson's claim to the assignment on the basis of seniority. In rejecting this contention, we emphasize that the right to reemployment in order of seniority is statutory. N.J.S.A. 18A:28-12. Thus, although the education laws permit a district board to establish qualifications for employment in or promotion to a particular position title beyond the threshold qualifications established by statute and regulation, N.J.S.A. 18A:27-4; Bd. of Ed Tp. N. Bergen v. N. Bergen Fed. Teachers, 141 N.J. Super. 97 (App. Div. 1976), we find that a Board's desire to employ or retain individuals with such additional qualifications can not defeat the seniority rights conferred by statute on teaching staff members. N.J.S.A. 18A:28-10; N.J.S.A. 18A:28-12. See Lichtman v. Board of Education of the Village of Ridgewood, 93 N.J. 362, 368 n.4 (1983).

We also reject the Board's argument that either the legislative mandate providing for the establishment of Bilingual Education Programs in the public schools, N.J.S.A. 18A:35-15 et seq., L. 1974 c. 197 (1975), or the regulations promulgated by the State Board to effectuate this mandate, N.J.A.C. 6:31-1 et seq., required or authorized the Board to establish a "job category" of "Bilingual Social Worker" so as to create a separate category for purposes of seniority or to defeat the entitlement to the position of a tenured teacher based on seniority in the category otherwise applicable to the position. Rather, review of the statutory and regulatory framework applicable to Bilingual Education Programs indicates that it does not alter the operation of the seniority system as established by statute and regulation.

In providing for the establishment of Bilingual Education Programs, the Legislature recognized that instruction given only in english is often inadequate for the instruction of children whose native language is not english. N.J.S.A. 18A:35-15. Accordingly, the Legislature specifically mandated that when there are twenty or more pupils of limited english-speaking ability in any one language classification, the district must establish a program in bilingual education for these students. N.J.S.A. 18A:35-18. The Legislature, however, entrusted implementation of Bilingual Education Programs in this state to the Commissioner and the State Board of Education, N.J.S.A. 18A:35-23, -24, -26, and, in doing so, did not alter the operation of the seniority system as it applies to teaching staff members serving in Bilingual Education Programs.

In fulfilling the Legislature's mandate, the State Board of Education adopted regulations establishing criteria for the development of Bilingual Education Programs. N.J.A.C. 6:31-1.1 et seq. In N.J.A.C. 6:31-1.9, we addressed certification requirements for teachers of bilingual and ESL classes, requiring specialized certification for these staff members. However, we did not alter the certification requirements applicable to teaching staff members providing educational support services so as to establish specialized qualifications or separate categories for seniority purposes for those members providing support services to students in Bilingual Education Programs. See N.J.A.C. 6:11-12.1 et seq.

Nor do the requirements of N.J.A.C. 6:31-1.6 require or authorize district boards to require specialized qualifications for the provision of educational support services to students in Bilingual Education Programs so as establish separate positions for seniority purposes. N.J.A.C. 6:31-1.6(a) requires that pupils enrolled in Bilingual and ESL Education Programs have full access to educational services available to other students in the district, and N.J.A.C. 6:31-1.6(b) requires that districts "use full and part-time bilingual personnel to provide supportive services (such as counselling) to pupils of limited English speaking ability." The regulation however does not require that a district employ bilingual personnel so as to mirror each educational support service offered to all students by the district, and does not require that districts employ a bilingual staff member in any particular educational support services position.[1] Thus, the regulation does not alter the operation of the seniority system.

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[1] We note, as did the ALJ, that in addition to the requirements of N.J.A.C. 6:31-1 et seq., the regulations controlling the provision of special education to students require that notice to parents, student evaluation and parent conferences required by those regulations must be conducted "in the language used for communication by the parent and pupil unless it is not feasible to do so." N.J.A.C. 6:28-2.4. That requirement applies whether or not a student is in a Bilingual Education Program mandated by N.J.A.C. 6:31-1.3. This regulation does not however mandate that the conferences be conducted in the native language under all circumstances, and specifically permits the use of interpreters when necessary.

Nor does the authority of the County Superintendent to approve the use of unrecognized position titles pursuant to N.J.A.C. 6:11-3.6(b) alter the operation of the seniority system in this context. That regulation provides the one exception to our mandate that district Boards must assign position titles to teaching staff members that are recognized in the certification rules. N.J.A.C. 6:11-3.6(a). In the event that a district determines that the use of an unrecognized title is desirable, or if a previously unrecognized title exists, N.J.A.C. 6:11-3.6(b) confers on the County Superintendent the authority to approve the use of an unrecognized title on an annual basis based on a detailed job description, and authorizes him to determine the appropriate certificate and title for the position. The regulation alters the operation of the seniority system insofar as the County Superintendent's determination concerning title and certificates required for unrecognized positions is binding upon future seniority determinations on a case by case basis.

We however emphasize that the authority of the County Superintendent in approving unrecognized titles is limited to determining the appropriate title and certification for the proposed position. Neither statute nor regulation authorize the County Superintendent to establish new certifications. Nor does the applicable legal framework permit the County Superintendent to approve the use of an unrecognized position title based on additional qualifications for employment in recognized positions within the public school system. Cf. Appel v. Board of Education of the City of Camden, 1975 S.L.D. 562.

Rather, threshold qualification for employment as a teaching staff member within the public school system is controlled by statute and regulation, N.J.S.A. 18A:1-1; N.J.S.A. 18A:6-38; N.J.A.C. 6:11-1 et seq., and acquisition of the tenure and seniority rights conferred by statute is based on the statutory and regulatory framework establishing threshold qualification for employment as a teaching staff member. N.J.S.A. 18A:28-5; N.J.S.A. 18A:28-10; N.J.S.A. 18A:28-12; N.J.S.A. 18A:28-13; N.J.A.C. 6:3-1.10; N.J.A.C. 6:11-1 et seq. See, for example, N.J.A.C. 6:11-12.10, which specifies the requirements to be met for issuance of the endorsement required to serve as a School Social Worker. Careful review of the statutory and regulatory framework reveals no authority that would permit the County Superintendent to approve the use of an unrecognized position title where there is no functional difference between the proposed title and a titled recognized in the Administrative Code on the basis of qualifications beyond those established by the regulations controlling certification[2] so as to

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[2] We note that prior to October 15, 1984, the certification regulations did permit certification not covered by the regulations to be granted. N.J.A.C. 6:11-3.14, effective January 23, 1981, deleted effective October 15, 1984. That authorization, however, was limited to situations involving experimental curriculum and it was the Commissioner, not the County Superintendent, who was authorized to grant such certification.

render inapplicable categories established by the seniority regulations. See N.J.S.A. 18A:7-5, N.J.S.A. 18A:7-8; N.J.A.C. 6:11-3.5. As subsequently discussed, we find no functional difference between the duties of School Social Worker and those of "Bilingual Social Worker".

In any event, the District did not seek the County Superintendent's approval in this case until April 1984, when it sought approval for 1983-84. Although the County Superintendent did not indicate the basis on which he granted approval for that year, in granting approval in August 1984 for the use of the title for 1984-85, he specified that approval was based on his understanding that use of an unrecognized title was necessary so that the district could fulfill its grant requirements. Like the Commissioner, we note that it has not been established that employment of a social worker who was proficient in spanish was in fact a requirement of the grant, and we further emphasize that, as the Grants Officer informed the District, the grant did not supercede local policies such as seniority. We conclude, therefore, that in this case any obligation the district otherwise had to recognize Ms. Johnson's seniority rights was not altered by the County Superintendent's approval for use of an unrecognized position title for 1983-84 and 1984-85.

We now turn to the question of whether Ms. Johnson's seniority as a School Social Worker entitled her to reemployment for 1984-85. Pursuant to N.J.S.A. 18A:28-12,

> [i]f any teaching staff member shall be dismissed as a result of reduction [pursuant to N.J.S.A. 18A:28-9], such member shall be and remain upon a preferred eligibility list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified an he shall be reemployed by the body causing dismissal...

(emphasis added).

It is undisputed that Ms. Johnson's seniority as a School Social Worker in the secondary category is superior to Ms. Godinez's. It is also undisputed that Ms. Johnson meets the qualifications established by N.J.A.C. 6:11-12.10 to serve as a School Social Worker. Accordingly, if the category applicable to the position at issue is that of School Social Worker, Ms. Johnson had a statutory right to reemployment for 1984-85.

Under the current seniority regulations, seniority is acquired in specific categories. N.J.A.C. 6:3-1.10(1). Again, N.J.A.C. 6:11-3.6 mandates that district boards "...shall assign position titles which are recognized..." in the administrative code, specifically in the rules pertaining to the certification required to serve in those positions. In the case of a recognized position title, such as that of School Social Worker, N.J.A.C. 6:11-12.10,

seniority is acquired in the category defined by the endorsement required to serve in the position title in either the elementary or secondary category. N.J.A.C. 6:3-1.10(1)(15)(iii); N.J.A.C. 6:3-1.10(1)(16)(ii).

Where, as here, the title for the employment is not to be found in the certification rules or elsewhere in the administrative code, the holder of the employment must "be classified as nearly as may be according to the duties performed, pursuant to the provisions of N.J.A.C. 6:11-3.6." N.J.A.C. 6:3-1.10(g). As set forth above, N.J.A.C. 6:11-3.6 in turn mandates that district boards assign position titles to teaching staff members that are recognized in the certification rules, and establishes the procedures required for obtaining approval for the use of an unrecognized position title. As previously discussed, operation of N.J.A.C. 6:3-1.10(g) is not affected in this case by the approval of the County Superintendent for use of the title of "Bilingual Social Worker" for 1983-84 and 1984-85.

Review of the duties specified in the District's job description shows that, as the Commissioner found, the responsibilities of the position, although delineated with reference to the limited english proficiency of the students to whom services would be provided, were those of a School Social Worker. Consideration of Ms. Godinez's affidavit reinforces this conclusion. In fulfilling her duties related to evaluation and classification as part of the Child Study Team, parental and student interviews, agency referrals and career and vocational counseling, Ms. Godinez performed functions properly assigned to a School Social Worker. We recognize that Ms. Godinez's fluency in spanish, as well as her "community background", no doubt enhanced Ms. Godinez's effectiveness as a social worker in this context. However, that one staff member may possess qualities or proficiencies not required for certification that enable her to be more effective in some areas of performance cannot defeat the seniority rights of other teaching staff members who are qualified by virtue of their certification to perform the duties attending the position. In the absence of endorsement establishing that qualifications different from those required to provide social work services to all students are necessary in order to provide such services to students in Bilingual Education Programs, or to fulfill social work responsibilities that include the involvement of parents of such students, we conclude, as did the Commissioner, that the proper classification for this position for seniority purposes is that of School Social Worker. Since Ms. Johnson was properly certified as a School Social Worker, we would affirm the Commissioner's determination that she was entitled to reemployment in the position on the basis of her seniority.

In sum, we reject the contention that a district board has the prerogative to establish positions for seniority purposes distinct from those recognized in the certification rules on the basis of qualifications beyond those established by those rules. We conclude that the district's obligation to recognize seniority rights conferred by statute is not obviated by the Legislature's

mandate for the provision of Bilingual Education Programs, nor by our regulations implementing that mandate. We reiterate that districts are required to assign position titles that are recognized in the Administrative Code, and that although the County Superintendent may approve the use of an unrecognized title in a proper case, the regulation does not authorize him to do so based solely on the district's desire to impose qualifications beyond those in the certification rules. We conclude that in this case, County Superintendent approval of use of the title for 1983-84 and 1984-85 did not alter the operation of the seniority regulations. Under those regulations, since the position title is not to be found in the certification rules, proper classification pursuant to N.J.A.C. 6:3-1.10(g) is, based on the job description and the duties performed under that job description, that of School Social Worker. Because Ms. Johnson's seniority in that category was superior to Ms. Godinez's, Ms. Johnson had a statutory right to reemployment in the position for 1984-85. In light of the fact that Ms. Johnson was recalled as a Social Worker by the District for 1986-87, her relief however is limited to emoluments and compensation minus mitigation from 1984-85 until 1986-87, when she was reemployed by the district.

Attorney exceptions are noted.
October 1, 1987

JOSEPH KOSLICK,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, August 20, 1986

For the Petitioner-Respondent, Klausner & Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, R. Joseph Ferenczi, Esq.

The Petitioner, a tenured teaching staff member employed by the Board of Education of the Township of Edison as an English teacher, claims that the Board improperly denied him an appointment as head varsity basketball coach for the 1985-86 season. Petitioner was not recommended to the Board following his application for the assignment and his interview by the screening committee. Instead, the Board appointed the school athletic director, Robert Coward, who had been on the screening committee and who did not submit a written application. Petitioner is seeking a declaration that Mr. Coward's appointment is void, and an order for reimbursement of the stipend attached to assignment.

The facts in this case are not complicated. Petitioner had been head boys' basketball coach from 1975-76 through 1980-81. He was terminated from this assignment due to concerns over his ability to motivate and develop the players. Petitioner sought reappointment to the same assignment for the following year, and was advised by an assistant superintendent that if the Board had intended to continue him in the position, it would not have terminated him.

In the Spring of 1985, a vacancy for head boys' basketball coach was posted. Petitioner applied for the opening, and was interviewed by both the District Athletic Director and the school Athletic Director, Robert Coward, during September 1985. Each advised Petitioner that it would be difficult to recommend him based on his prior record and that the Board would be unlikely to appoint him.

Three out-of-district candidates also applied for the appointment and submitted resumes. Two of those candidates were thought inappropriate by the District Athletic Director, and one withdrew from consideration after being invited for an interview. Petitioner was the only Edison staff member interviewed, and the only in-district candidate. The District Athletic Director, finding all of the applicants for the position, including Petitioner, unsatisfactory, spoke to the school Athletic Director, Robert Coward, about filling the assignment. Mr. Coward did not, however, submit a written application, and the opening was not reposted.

Agreeing that appointing Coward to the position was the best course of action, the Deputy Superintendent and the Principal recommended his appointment to the Superintendent. The Superintendent agreed with the recommendation. The recommendation to appoint Mr. Coward was the only one submitted to the Board members, who accepted the Superintendent's recommendation.

In his Initial Decision, the Administrative Law Judge (ALJ) found that a district board is free to adopt rules and regulations which are not inconsistent with the provisions of N.J.S.A. 18A:1-1 et seq. or N.J.A.C. 6:1-1.1 et seq. He further emphasized that there is no right to employment as a coach, and that tenure does not attach to coaching positions. He concluded that the selection and appointment process followed in this case was "well within the borders of administrative and board discretion," and therefore recommended dismissing the petition with prejudice.

The Commissioner concurred with the ALJ that there is no right to employment as a coach. The Commissioner therefore concluded that reappointment as a coach is not required as long as the board's reasons for not reappointing are not arbitrary. The Commissioner found that the action of the Administration in this case with respect to screening candidates for suitability for the assignment was "entirely reasonable" and "certainly within [the Administration's] function." The Commissioner also found that the Administration was acting "within its role" by approaching Mr. Coward and inviting him to apply for the position since the posting and screening process had not generated any acceptable candidates.

The Commissioner, however, rejected the ALJ's conclusion that Petitioner was not entitled to relief. Emphasizing that he was not finding that Petitioner was entitled to the appointment or that there were not valid reasons for rejecting him, the Commissioner directed that the Petitioner be paid the stipend attached to the coaching assignment for the 1985-86 school year because Mr. Coward was appointed "without having so much as filled out an application" and had been part of the interviewing committee.

We, like the Commissioner and ALJ, emphasize that there is no right to employment as a coach, and tenure does not attach to coaching positions. Furlong v. Kearny Board of Education, 1980 S.L.D. 1420. Like the Commissioner, we find that Petitioner has

demonstrated no entitlement to have his candidacy submitted to the Board or to selection as head basketball coach. Nor has he shown that there were not valid reasons for rejecting his candidacy. Further, we can find no obligation imposed by the school laws that required the Board to repost the opening in these circumstances. Nor is there any requirement for written application as a prerequisite to the appointment of an in-district staff member to an opening as coach where posting and interviewing procedures have been followed, but have failed to generate any acceptable candidates. We therefore decline to invalidate the Board's selection of its Athletic Director to fill the assignment for the 1985-86 season, and, in the absence of any entitlement on the part of Petitioner to be selected as coach, we reverse the Commissioner's award to Petitioner of the stipend attached to the coaching assignment.

April 1, 1987

Pending N.J. Superior Court

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

Decided by the Commissioner of Education, June 18, 1986

For the Petitioner-Respondent, Harvey C. Johnson, Esq.

For the Respondent-Appellant, Hannold, Caulfield, Marshall and McDonnell (Anne McDonnell, Esq., of Counsel)

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

October 1, 1987

IN THE MATTER OF THE TENURE HEARING OF JOYCE MALLEY, SCHOOL DISTRICT OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	
AND	:	STATE BOARD OF EDUCATION
JOYCE MALLEY,	:	DECISION
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 29, 1986

For the Petitioner-Appellant, Joyce Malley, pro se

For the Respondent-Respondent, Feldman, Feldman, Hoffman and Fiorello (John Fiorello, Esq., of Counsel)

The State Board concludes that Petitioner-Appellant's desire to now be represented by an attorney does not provide good and sufficient cause to reopen her case and remand the matter to the Office of Administrative Law for further proceedings, and we therefore deny the Petitioner-Appellant's request to reopen. In re Marvin Gastman, 147 N.J. Super. 101 (App. Div. 1977).

After careful review of this matter, the State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

We further direct, as did the Commissioner, that a copy of the Commissioner's decision in this matter, together with a copy of this State Board of Education decision, be forwarded to the State Board of Examiners.

April 1, 1987

IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICIA MARSDEN,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF TOMS RIVER	:	DECISION
REGIONAL, OCEAN COUNTY.	:	
	:	

Decided by the Commissioner of Education, October 10, 1985

For the Petitioner-Appellant, Gelzner, Kelaher, Shea and Novy (Milton H. Gelzner, Esq., of Counsel)

For the Respondent-Cross/Appellant, Gaetano J. Alaimo, Esq.

This case involves tenure charges of conduct unbecoming a teacher and incapacity to teach certified by the Board of Education of the Toms River Regional School District (hereinafter "Board") based on Respondent Patricia Marsden's record of absenteeism during her eighteen years of employment by the Board. The charges alleged that Respondent had established a pattern of "outrageously irregular attendance" that had become more apparent during the five years immediately prior to her suspension by the Board, that she had failed to give adequate notice that she would be absent for a gall bladder operation during the fall of 1983, and that she had manipulated her absences in order to maximize her income in callous indifference to the welfare of her students. In her answer, Respondent asserted seventeen affirmative defenses, including that 1) all her absences were for legitimate purposes that were accepted by the Board, which never provided her with counseling or warning that the number of her absences was not acceptable, 2) her absences did not adversely affect her classes, 3) the charge of incapacity was really one of inefficiency requiring statutory notice, 4) the Board should have applied for involuntary disability on her behalf since it charged her with incapacity, 5) the Board failed to conform with notice requirements in the collective negotiations agreement when it initially considered the charges, 6) the Board's attendance records are not accurate, and 7) the Board discriminated against her by initiating disciplinary action.

Prior to hearing, the issues involved were agreed to be: 1) whether Respondent had a record of excessive absenteeism, and, if so, whether that record warranted dismissal, 2) whether her alleged manipulation of scheduled work days constituted conduct unbecoming a teacher, 3) whether Respondent's actions show an incapacity to teach and, if so, whether the Board was obligated to initiate an involuntary disability pension on her behalf, 4) whether the filing of charges was discriminatory in motivation and 5) whether there were procedural errors attending the certification and filing of charges. Following agreement of the parties as to the issues, both parties requested that the matter be placed on the inactive list so as to permit them to attempt settlement. Such attempts were not successful and by order of the Administrative Law Judge (ALJ), the matter was listed to be heard following extension of the discovery period.

Prior to hearing, the ALJ indicated during telephone conference call that she would limit evidence regarding Respondent's attendance record to the seven school years prior to her suspension since absences prior to that time were too remote to be relevant in this matter. Following denials of the Board's motion for summary judgment and Respondent's motion to dismiss, the matter was heard during May and June 1985. During the hearing, the ALJ determined not to allow reports concerning Respondent's attendance prior to 1977-78 into evidence due to their remoteness in time.

After presentation of her case, Respondent again moved for dismissal. The ALJ denied Respondent's motion to dismiss, but did dismiss the question of whether Respondent had manipulated her scheduled work days so as to have constituted conduct unbecoming a teacher, finding that the Board had not presented a prima facie case in this regard. The ALJ also again denied the Board's motion for summary judgment and likewise denied Respondent's motion for dismissal on the grounds that the Board had acted improperly.

Based on the testimony and Respondent's permanent attendance records, the ALJ found that her absences during the period at issue were as follows:

SCHOOL YEAR	SICK DAYS	PERSONAL DAYS	MISCELLANEOUS DAYS[1]	TOTAL
1977-78	12	5	1	18
1978-79	38[2]	2½	1	41½
1979-80	1½	3	79[3]	83½
1980-81	27	3	0	30
1981-82	31	3	0	34
1982-83	53½[4]	2½	1	57
1983-84	48[5]	0	0	48
TOTALS	211	19	82	313

Following review of the testimony, the ALJ further found that 1) Respondent's absences during the period in issue had a detrimental effect on her students, 2) Respondent tried to mitigate the impact of her absences by providing some lesson plans and suggestion to the substitute teachers, 3) no other teacher employed by the Board had a pattern of absenteeism comparable to Respondent's, 4) Respondent told two administrators that the timing of her gall bladder operation was a decision of her doctors, 5) as of October 7, 1983, one of Respondent's doctors recommended that the operation occur on November 7, and sometime thereafter her other doctors concurred, 6) Respondent did not notify the administration after October 7 that there was a possibility that the operation would occur on November 7, 7) she did not attempt to work out a date for the operation that would permit reasonable notice, 8) she was concerned about her salary and had the right to question how salary payments are calculated, 9) her return to work before Christmas recess may have been prompted by salary concerns, but there was no showing that she was physically unable to perform her job responsibilities, 10) there was no evidence to show that the Board acted improperly in certifying the charges.

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1 Includes legal holidays, death in family days off, workers compensation days off, leaves of absence

2 Includes 24 days off because of injuries resulting from an automobile accident

3 Includes 73 workman compensation days off

4 Includes 48½ days off because of injuries resulting from an automobile accident

5 Absences prior to suspension, including 20 days for a maternity absence and 25 days off because of the gall bladder operation

Based on the facts, the ALJ concluded that although the administration had not strictly complied with the collective negotiations agreement prior to submitting information to the Board as to the tenure charges, there had been no showing that Respondent had been prejudged or that such non-compliance had a direct bearing on the issues before her. She also concluded that Respondent had not shown that the charges should be classified as inefficiency rather than incompetency, and she determined that the Board was under no obligation to file an application on Respondent's behalf for involuntary disability pension as a result of filing charges of incapacity. The ALJ found no showing of discrimination had been made notwithstanding counsel's argument that the Board had never initiated disciplinary action based on a history of excessive absenteeism and that a number of teaching staff members had records of frequent absences.

The ALJ then turned to the question of whether the Board had shown that Respondent's record of absenteeism was excessive, concluding that, based on the facts, it had. Emphasizing that excessive absenteeism causes disruption in learning and has a negative impact on students, the ALJ noted that although withholding of increment for excessive absenteeism may be proper even where there are legitimate medical reasons, most cases involving dismissal were accompanied by a finding that the underlying reasons for the absenteeism had not been abated and that there was a likelihood that the pattern would continue in the future.

The ALJ's review of Respondent's absenteeism showed that many of Respondent's absences were the result of traumatic events such as accidents, the birth of her children and an operation. The ALJ further recognized that Respondent's absences resulting from her chronic bronchitis and other reasons were not inordinate. She therefore concluded that the Board had not shown that Respondent's record of absences constituted conduct unbecoming a teacher or incapacity. The ALJ however did conclude that Respondent's record warranted forfeiture of salary for the first 120 days of her suspension as well as a reprimand that included advising her that she must significantly improve her attendance in the immediate future or that she may be subject to future disciplinary action.

The ALJ further concluded that it had been established that Respondent did not provide the Board with adequate notice that she was going to have a gall bladder operation and that this failure impacted on the Board's ability to provide for a smooth transition to a substitute teacher. The ALJ determined that this failure constituted conduct unbecoming a teacher so as to warrant loss of salary increment for 1983-84. She however concluded that the Board had not shown that Respondent's concern about her salary constituted conduct unbecoming a teacher or that such concern was paramount to her concern about the welfare of her students.

Declining to consider Respondent's exceptions, which he found were not timely filed as required by N.J.A.C. 1:1-16.4(a) and (b), the Commissioner, following summary of the Board's exceptions

and Respondent's reply exceptions and upon his review of the record, concurred with the ALJ's determination that Respondent's absences for the period at issue constituted a pattern of excessive absenteeism. Emphasizing that the fact that the ALJ did not find that such absenteeism constituted conduct unbecoming a teacher or incapacity did not render the recommended penalties erroneous, the Commissioner found that Respondent's pattern of chronic, persistent excessive absenteeism alone constituted other just cause pursuant to N.J.S.A. 18A:6-10 and warranted disciplinary action. The Commissioner concluded that the loss of 120 days' salary plus reprimand and loss of increment were warranted even if Respondent had not been found guilty of unbecoming conduct on the basis of the sick leave incident of November 1983.

In assessing the proper penalty to be imposed in this case, the Commissioner rejected dismissal as the appropriate penalty. He determined that, as deplorable as Respondent's excessive absenteeism was, it had not been proven that her absenteeism constituted incapacity or conduct unbecoming a teacher. The Commissioner further determined that the record failed to establish that either the Board or its administrators had taken any corrective action to improve Respondent's pattern of attendance prior to suspending her and certifying tenure charges. The Commissioner's consideration of the exhibits concerning aspects of Respondent's performance in part related to her absences on particular occasions did not alter his conclusion.

Emphasizing that the Commissioner does not hesitate to order dismissal for chronic persistent absenteeism where it can be demonstrated that attempts to correct such patterns have been taken but have failed to elicit change, the Commissioner found that here the Board clearly failed in its responsibility to take measures sooner. Given the inaction of the Board and its administrators, the Commissioner concluded that he could not but deny the Board's request for dismissal. The Commissioner however directed the Board to examine Respondent's attendance pattern for 1985-86 to determine whether her pattern of chronic absenteeism continued despite the determination in this matter and emphasized that if the Board determined that an unsatisfactory pattern persisted, tenure charges could again be instituted.

Finding that the Board had borne its burden of proof that Respondent had a chronic persistent pattern of absenteeism constituting "other just cause" for disciplinary action pursuant to N.J.S.A. 18A:6-10 and that she was guilty of unbecoming conduct in regard to her November 1983 sick leave, the Commissioner adopted the determination recommended by the ALJ with the modification that the Respondent's increment was to be withheld for 1985-86, rather than 1983-84.

The Board appealed the Commissioner's decision, contending that dismissal is warranted on the basis of Respondent's record. In this respect, the Board argues that it can no longer afford the luxury of an excessively absent teacher and that notwithstanding her

satisfactory evaluations or the legitimacy of her absences, Respondent's record is the worst of any other employee in the District. The Board further asserts that Respondent's monetary concerns motivated her above educational concerns and resulted in manipulation of her schedule so as to constitute conduct unbecoming a teacher and, in conjunction with her absentee record, to warrant dismissal. The Board contends that Respondent knew that the Board was concerned about her absenteeism and yet disregarded this advice so that any alleged lack of diligence on its part does not militate against dismissal. Finally, the Board contends that the ALJ erred in excluding from consideration the reports relating to years prior to 1977-1978, arguing that Respondent's entire record is relevant as background evidence, if not as evidence of the charges.

Respondent cross-appealed, asserting that her cross-exceptions should have been considered by the Commissioner and that based on those arguments, the monetary penalties imposed on Respondent should be set aside. Those arguments, in turn, reiterate that Respondent's absences included worker's compensation leaves, sabbaticals, maternity leaves and other lawful leaves, that she was not cleared for gall bladder surgery until October 31, 1983, and that she is a teacher of good caliber, as demonstrated by her evaluations.

After careful consideration of the record, we affirm the decision of the Commissioner. We agree with the Commissioner that Respondent's record of absenteeism is excessive and that, notwithstanding the legitimacy of her absences, disciplinary action is called for. We further concur with the Commissioner the proper penalty to be imposed in this case is loss of 120 days' salary, reprimand and loss of increment for 1985-86.

The record in this case clearly demonstrates that Respondent has been excessively absent over a seven year period. That Respondent's absences were for legitimate medical reasons does not alter the fact that her absenteeism was excessive so as to warrant disciplinary action. The level of absenteeism shown by Respondent's attendance record inevitably impacts on the instructional process, and the record here shows that in this case, Respondent's absences did have a detrimental effect on her students despite her efforts to mitigate such effect.

The pattern here however is not one of short term sporadic absences. Rather the majority of Respondent's absences are unquestionably attributable to traumatic events, which included automobile accidents, miscarriages, child birth, a work-related accident and surgery. As the ALJ recognized, her absences for other reasons were not inordinate, and the largest proportion of those were attributable to her chronic bronchitis.

As found by both the Commissioner and the ALJ, the Board has not established either that Respondent's absenteeism demonstrates incapacity or that her absences or the circumstances attending her absences constituted conduct unbecoming a teacher,

with the exception of Respondent's failure to properly advise the administration concerning her gall bladder operation of November 1983. Further, as emphasized by the Commissioner, the record shows that, although Respondent was criticized for her performance of particular tasks and that her failure to adequately perform those tasks may be attributable in part to being absent on particular days, at no point prior to the initiation of tenure charges did the Board or the administration advise Respondent that her absenteeism was a problem.

We emphasize that excessive absenteeism does not necessarily constitute inefficiency so as to require a board to certify such charge thereby entitling the staff member to statutory notice and opportunity to correct pursuant to N.J.S.A. 18A:6-14. Since the Board in this case did not charge Respondent with inefficiency, N.J.S.A. 18A:6-14 is not controlling in this matter. However, we agree with the Commissioner that dismissal is not the appropriate penalty where, as here, there is no allegation that any absences were other than legitimate, the level of absenteeism is attributable to traumatic events causing temporary medical disability but not resulting in incapacity, and the Board has taken no action to address the problem before initiating tenure charges.

Nor does further examination of the record convince us otherwise. Respondent was considered to be a good teacher, she attempted to mitigate the effects of her absences and the record fails to support a conclusion that she improperly manipulated her work schedule. We reject the Board's assertion that Respondent's concern about her salary demonstrates that monetary concerns motivated her above educational concerns so as to warrant dismissal. Nor does the fact that Respondent may have been absent more than any other teacher during this period or that the Board has concluded at this time that it can no longer afford the luxury of employing Respondent warrant dismissal. Further, although we emphasize that a teacher's entire record of attendance may be considered in determining whether disciplinary action based on that record is warranted, e.g., Trautwein v. Board of Education of the Borough of Bound Brook, 1980 S.L.D. 1539 (App. Div. April 18, 1980), and we recognize, as did the Commissioner, that Respondent's absenteeism may extend beyond the seven years considered in these proceedings, under the circumstances with which we are presented, the fact that Respondent's level of absenteeism was high prior to 1977-78 would not alter our conclusion that dismissal is not the appropriate penalty in this particular case.

However, we reiterate Respondent's long term record of absenteeism calls for disciplinary action, regardless of whether or not the Board had ever taken disciplinary action in the cases of other teachers with high levels of absenteeism. We find that, given the persistence of the problem, the appropriate penalty must be severe enough to convey to Respondent the importance of her regular attendance at school. The necessity for such penalty is heightened in our view by Respondent's failure under the circumstances to

advise the administration that her gall bladder surgery that occurred in the fall of 1983 was not going to be put off until the summer. Although we find that the Commissioner properly declined to review Respondent's exceptions that were not timely filed, consideration of the arguments contained in those exceptions that were raised by Respondent in her cross-appeal does not alter our conclusion. Therefore, for the reasons stated, as well as those articulated by the Commissioner in his decision, we concur with the Commissioner that the appropriate penalty in this case is loss of 120 days' salary, reprimand and loss of increment. We also join the Commissioner in directing the Board to review Respondent's attendance records for 1985-86 to determine whether Respondent's absenteeism has continued.

Attorney exceptions are noted.
November 4, 1987

THOMAS C. McHUGH,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 8, 1985

For the Petitioner-Appellant, Ricardo M. Ryan, Esq.

For the Respondent-Respondent, Nichols, Thomson, Peek & Myers (William D. Peek, Esq., of Counsel)

For Intervenors Senyk and Konet, Robert M. Schwartz, Esq.

This case involves the question of whether a tenured assistant principal employed on a twelve month basis and generally assigned as an assistant junior high school principal has accrued seniority under the seniority regulations now in effect in the category of high school assistant principal by virtue of assignment during his employment with the District as principal and assistant principal of senior high school summer sessions so as to entitle him upon reduction of his position as assistant junior high school principal to assignment as assistant high school principal on the basis of his seniority. Petitioner-Appellant Thomas C. McHugh was employed by the Board of Education of the Town of Westfield as an assistant principal from December 1, 1969, through June 30, 1984. During his employment by the Board, which was on a calendar year basis, he was assigned as a junior high school assistant principal with the exception of two six week periods when he was assigned as principal of the senior high school summer session (June-August 1978) and as assistant principal of the senior high school summer session (June-July 1983). He was properly qualified to fill these assignments, holding a school administrator's certificate issued in 1972, and endorsements qualifying him for assignment as both elementary and secondary school principal. It is undisputed that Petitioner acquired tenure in December 1972, while serving as assistant junior high school principal.

By letter dated April 25, 1984, Petitioner was advised by the Board that a position of junior high school assistant principal was being abolished due to a reduction in force, and that he would not be offered a contract for employment as a junior high school assistant principal for the 1984-85 school year. Petitioner applied

for a position as assistant high school principal, but was rejected. He then petitioned the Commissioner of Education, claiming that the Board had improperly continued to employ two untenured members[1] in positions as assistant high school principals in violation of his tenure and seniority rights.

The Administrative Law Judge (ALJ) found that although Petitioner's certification authorized him to be employed as a principal or vice-principal under N.J.A.C. 6:11-10.4(b), his seniority rights depended on the number of academic or calendar years of employment in specific categories under N.J.A.C. 6:3-1.10(b). The ALJ concluded that since the seniority categories of high school assistant principal and junior high school assistant principal are different, Petitioner had no seniority as a senior high school assistant principal.

The ALJ further found that Petitioner's "collateral" service as high school principal and assistant principal during summer sessions did not confer on him any tenure or seniority rights. The ALJ reasoned that since seniority follows tenure, Petitioner's rights must be measured against the tenurability of his service in those two summer sessions under N.J.S.A. 18A:28-6, emphasizing that prior Commissioner's decisions had held that such service is part-time and temporary and, as such, not countable towards tenure or seniority in the cases of classroom teachers. The ALJ however further found that even if such service could be counted towards tenure under N.J.S.A. 18A:28-6, Petitioner's service was far short of that required in order for him to have achieved tenure in the new position.

The ALJ therefore concluded that although Petitioner was tenured as a junior high school assistant principal, he had no tenure in any other position and, thus, no seniority that would entitle him to the position of assistant principal at the high school. The Commissioner adopted the ALJ's determination, finding that Petitioner's seniority entitlement was limited to junior high school vice-principal or assistant principal.

Initially, although we agree that seniority follows the acquisition of tenure, we emphasize that tenure is achieved in a position as defined by statute. See N.J.S.A. 18A:28-5. In contrast, seniority is credited in a category or categories established by the Commissioner for seniority purposes. N.J.S.A. 18A:28-10; -13. Accordingly, the scope of the position in which tenure is achieved is not necessarily the same as the category in which seniority is to be credited pursuant to the seniority regulations now in effect. Capodilupo v. Board of Education of the Town of West Orange, decided by the State Board, September 3, 1986.

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1 We note that the record indicates that one of those individuals, Richard Konet, achieved tenure on October 3, 1983. Initial Decision, at 4.

See Howley v. Bd. of Ed. of the Township of Ewing, 1982 S.L.D. 1328, aff'd by the State Board, June 1, 1983.

As we concluded in Capodilupo after careful examination of the statutes, the position in which tenure is achieved and to which tenure protection attaches is either one of those specifically ennumerated in N.J.S.A. 18A:28-5 or other employment for which a certificate is required, either Instructional, Educational Services or Administrative and Supervisory. Capodilupo, supra at 8. The scope of the position in which a member is entitled to tenure protection is however limited by the scope of the endorsements held by such member that define the assignments within the tenurable position for which he is qualified. Id. at 11. Again, as we emphasized in Capodilupo, under the current regulations, endorsements are not limited by grade level, with the exception of elementary and nursery school endorsements. Id. at 11.

The position in which Petitioner was employed was that of assistant principal, one of those specifically ennumerated in N.J.S.A. 18A:28-5 and for which an Administrative and Supervisory certificate is required. Since the endorsements held by Petitioner under that certificate do not limit his qualification for assignment within the position to particular grade levels, we conclude that Petitioner is tenured in the position of assistant principal. See N.J.A.C. 6:11-10.4.

It does not automatically follow, however, that because Petitioner is tenured as an assistant principal, he is to be credited with seniority in the category applicable under the current regulations to the assignment of assistant high school principal. As emphasized by the Commissioner, junior high school vice-principal or assistant principal, N.J.A.C. 6:3-1.10(1)(12), and high school vice-principal or assistant principal, N.J.A.C. 6:3-1.10(1)(11), are separate categories in which seniority is credited only where an individual has actual experience in that category. As indicated in the record, Petitioner's service was in the category of assistant junior high school principal, with the exception of two six week periods during which he was assigned as high school principal and assistant high school principal during summer sessions. Therefore, the question of whether Petitioner is entitled to seniority credit in the category of assistant high school principal turns on whether his service during either of these summer sessions is creditable to the category of assistant high school principal.

Under the current regulations, seniority is 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" provided in the regulations. N.J.A.C. 6:3-1.10(b). In contrast to teaching staff members employed on an academic year basis, as in the cases cited by the

ALJ, Petitioner was employed on a calendar year basis.[2] Accordingly, his service in summer sessions was assignment within the scope of his contractual employment, and we conclude that such assignment can not be considered in this case to be temporary employment outside of the scope of N.J.S.A. 18A:28-5, N.J.S.A. 18A:28-6 or the seniority regulations.

During June through August 1978, Petitioner was assigned as principal of the senior high school summer session.[3] Although tenured as an assistant principal and qualified to serve as a principal by virtue of his certification, Petitioner was not tenured as a principal. See N.J.S.A. 18A:28-5. Nor did he serve the requisite time as a principal in order to acquire tenure in that position pursuant to N.J.S.A. 18A:28-6. Therefore, his service as principal during 1978 is to be credited for seniority purposes in his former position, i.e., assistant principal. N.J.S.A. 18A:28-6. We specifically find that since Petitioner had served only as an assistant junior high school principal at the time of his assignment as principal of the high school summer school, such service is to be credited in the seniority category of junior high school assistant principal. N.J.A.C. 6:3-1.10(h).

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[2] We emphasize that the instant case involves a teaching staff member employed on a calendar year basis and that we therefore are not called upon to resolve the question of the effect of additional employment during summer sessions in the case of a member employed on an academic year basis. We however note that in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), the New Jersey Supreme Court specifically rejected the proposition that whether a professional employee of a board qualifies as a teaching staff member eligible for tenure depends on the nature of the employment so as to exclude teachers from tenure eligibility on the basis tht the contractual relationships with the employing board were intended and understood to be temporary. Spiewak, supra at 76-81.

[3] Although the Board in its exceptions to our Legal Committee's Report now argues that the matter must be remanded for a determination of the actual duties of a summer school administrator, we note that those duties are delineated in the record in this matter, J-11, in evidence, J-12, in evidence, and that there is no suggestion that the titles assigned by the Board are not properly descriptive of the duties performed. See N.J.A.C. 6:3-1.10(g). Nor are those duties inconsistent with the authorization set forth in N.J.A.C. 6:11-10.4(b). As set forth above, it is established that by virtue of his certification as a principal, Petitioner was qualified to perform those duties. Further, whether or not the Board was required to assign a principal or assistant principal to administrate its summer sessions, the Board in this case chose to do so. Thus, this is not a case requiring further proceedings to establish the duties performed by Petitioner or the proper qualificiations for service as either principal or assistant principal of the District's 1978 and 1983 summer sessions.

In contrast to his assignment as principal, Petitioner's assignment as a senior high school assistant principal during the 1983 summer session[4] was an assignment within the scope of his tenured position of assistant principal and, therefore, this assignment did not constitute a transfer to another position within the meaning of N.J.S.A. 18A:28-6. See Capodilupo, supra. Pursuant to N.J.A.C. 6:3-1.10(b), he is entitled to be credited with his fractional year's service in this assignment in the applicable seniority category, i.e., that of assistant high school principal, and, pursuant to N.J.A.C. 6:3-1.10(h), to be credited with this service in any and all categories in which he previously held employment. Further, upon the Board's reduction in force, he was entitled pursuant to N.J.A.C. 6:3-1.10(h), to be credited in the category of assistant high school principal for his service subsequent to that assignment.

In sum, we conclude that Petitioner achieved tenure in the position of assistant principal. We further conclude that he is entitled to be credited for his service in the course of his employment by the Board on a twelve month basis rendered pursuant to assignment by the Board as principal and assistant principal during summer sessions. We find that Petitioner's service as principal of the senior high school summer session is to be credited pursuant to N.J.S.A. 18A:28-6, but that such service is creditable for seniority purposes only to the category of assistant junior high school principal since Petitioner did not fulfill the statutory requirements to achieve tenure in the position of principal and had served only in the category of assistant junior high school principal at the time of his assignment as principal of the high school summer session. However, Petitioner's service as assistant principal of the senior high school summer session during June-July 1983 is to be credited to the category of assistant high school principal. Accordingly, he is to be credited in that category for his subsequent service during 1983-84 as assistant junior high school principal pursuant to N.J.A.C. 6:3-1.10(h), and is entitled to assignment as assistant high school principal in preference to other staff members with less seniority in this category.

Although the record indicates that Richard Konet achieved tenure on October 3, 1983, Affidavit of Laurence F. Greene, at 5, Mr. Konet's employment history is not established in the record and, therefore, we are unable to determine his seniority in the category of assistant high school principal. However, in light of our conclusion that Petitioner was entitled by virtue of his seniority to the assignment as assistant high school principal that the Board continued to fill with an untenured member following its reduction in staff, we need not resolve whether Mr. Konet has superior seniority to Petitioner in the applicable category.

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4 See supra note 3.

For the reasons set forth above, we direct Petitioner's reinstatement to the position of assistant principal assigned to the high school that was filled by the Board by an untenured teacher following it's reduction in staff, and to back pay minus mitigation from the date on which he was terminated as the result of the Board's failure to properly recognize his seniority entitlement.

Attorney exceptions are noted.
April 1, 1987

Pending N.J. Superior Court

MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION EDUCATION ASSOCIATION,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF DIRECTORS OF THE MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, April 30, 1981

Decided by the State Board, March 24, 1982

Remanded by the Appellate Division, March 2, 1983

Decided by the Commissioner of Education, October 29, 1984

Decision on Motion by the State Board, April 3, 1985

Decision on Motion by the Appellate Division, June 24, 1985

Decision on Motion by the Appellate Division, October 4, 1985

For the Petitioner-Respondent, Klausner and Hunter (Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl (James F. Clarkin, III, Esq. of Counsel)

This is another case that calls upon us to determine the benefits to which supplemental and remedial teachers are entitled under the education laws by virtue of the New Jersey Supreme Court's holding in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), that such teachers are teaching staff members within the meaning of N.J.S.A. 18A:1-1. This case, however, differs from those that we have decided previously in that the teaching staff members represented by the Middlesex Educational Services Commission Education Association (hereinafter "Association"), who is the Petitioner in this case[1], are not employed by a district board of

[1] The Middlesex Educational Services Commission Education Association is the certified collective negotiations representative for the teaching staff members employed by the Commission.

education. Rather, they are employees of an educational services commission operating pursuant to N.J.S.A. 18A:6-51 et seq.

The case is before us pursuant to a remand by the Appellate Division. In Middlesex County Educational Services Commission Educational Association v. Board of Directors of the Middlesex County Educational Services Commission, Docket #A-3813-81T1 (App. Div. March 2, 1983), certif. denied, 94 N.J. 583 (1983), the Appellate Division held that the teachers represented by the Association were tenure eligible teaching staff members and that those employed on the date of the Spiewak decision were entitled to calculation of their tenure eligibility from the beginning of their employment. In so holding, the court concluded that, although there were differences between a district board and an educational services commission, those differences were not so significant as to "place educational services commissions beyond the reach of Spiewak". Slip. op. at 4. In so concluding, the court emphasized that N.J.S.A. 18A:6-66 expressly provides that those employed by a commission shall enjoy the same rights and benefits as employees of a district board.

The court further held that the teaching staff members involved in the litigation specifically were entitled to retroactive relief pursuant to Spiewak. However, aside from its determination concerning calculation of tenure eligibility and its conclusion that, pursuant to N.J.S.A. 18A:30-2, members of the Association were entitled to sick leave benefits as of the date they achieved tenure, the court did not resolve the Association's claims to additional benefits. Rather, the court stated that

> [a]s we earlier pointed out, the petition of appeal also claims payment for public holidays, minimum employment increment, a salary schedule, credit for military service and enrollment in the Teachers' Pension and Annuity Fund. With regard to enrollment in the Teachers' Pension and Annuity Fund, such claims are not within the purview of the Commissioner of Education, but must be addressed to the Division of Pensions... With regard to the other items, petitioner has not referred us to any statute mandating them. We should not be expected to do independent research for petitioner.
>
> ....At any rate, deferring to and relying on the expertise of the Commissioner or Education, we shall refer the matter to him for a determination as to the statutory basis for the additional entitlements claimed by petitioner.

Id. at 6-7 (citations omitted).

Thus, the Appellate Division remanded this case to the Commissioner for a determination of whether the teaching staff members represented by the Association were entitled to the additional benefits claimed by the Association on their behalf in the Petition of Appeal. The appeal now before us is an appeal from the Commissioner's decision resolving those claims.

I

As previously stated, the claims involved in this case included claims for the calculation of tenure eligibility, paid sick leave, compensation for public holidays and additional salary compensation based on a salary schedule containing increments and credit for military service. As indicated above, the Appellate Division determined only that the members involved were entitled to calculation of tenure eligibility and, upon achieving tenure, to paid sick leave. Thus, it did not determine either which statutory provisions governed the calculation of tenure or to what additional benefits, including additional sick leave benefits, the teaching staff members employed by the Commission were entitled by statute. In this context, Administrative Law Judge (ALJ) addressed all of the claims for additional benefits still in dispute between the parties.[2]

In his Initial Decision, the ALJ found since, based on the Commission's calendar, the Commission's members were employed for 38 weeks a year, they could achieve tenure only through the operation of N.J.S.A. 18A:38-5(c), and he calculated the date of tenure acquisition of those hired in or after 1980-81 accordingly.[3] Recognizing that the Appellate Division had addressed only the entitlement of tenured teaching staff members to paid sick leave, the ALJ determined that, pursuant to N.J.S.A. 18A:30-2, all of the members steadily employed by the Commission were entitled to the use and accumulation of sick leave benefits from date of employment. Noting that there was no claim that the compensation of any member was below statutory minimums, the ALJ found that there was no statutory requirement that a salary schedule be imposed or increments paid so long as the minimums were met. Finally, observing that the Association had not provided information concerning which public holidays had fallen on Saturday or Sunday or on which holidays members had worked, the ALJ refrained from making any finding on the question of whether the members were entitled to

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[2] We note that although the Association had also claimed remuneration for its members for attending New Jersey Education Association conventions, as indicated in the Initial Decision, this was no longer at issue when the Administrative Law Judge considered the case since the Association did not challenge the Commission's representation that it has paid such remuneration.

[3] The ALJ found he was unable to calculate the date of tenure acquisition for members hired prior to 1980-81 because the school calendars for those years were not of record. Id. at 5

additional compensation for public holidays during the years in question.

Although finding that the Initial Decision went beyond the scope of Appellate Division's directive, the Commissioner, rejecting the ALJ's determination, found that, based on the Commission's calendar, 38 weeks constituted an academic year in this case, and he directed the Commission to calculate the dates of tenure acquisition on this basis pursuant to N.J.S.A. 18A:25(c). He further determined that a full school day of at least four hours was to be used in determining tenure eligibility.

The Commissioner adopted the ALJ's determinations concerning retroactive sick leave benefits, but found that the Commission was required by the education statutes to have adopted a minimum salary schedule with employment increments for the full-time teaching staff members in its employ. The Commissioner therefore directed that all such members were to be compensated retroactively from date of employment based on a salary schedule containing minimum increments to be adopted by the Commission and that, upon placement on the schedule, each member entitled to military service credit must receive such credit. Finally, the Commissioner found that the Commission was required to compensate its teaching staff members for any public holidays that fell on weekdays, and directed retroactive payment to those members who had not received compensation for such holidays. The Middlesex Educational Services Commission appealed the Commissioner's decision in its entirety.

II

In resolving the specific statutory claims involved in this case, we recognize, as did the Appellate Division, that there are differences between a district board of education and an educational services commission. See Remedial Educ. & Diag. v. Essex Cty. Educ. Ser., 191 N.J. Super. 524 (App. Div. 1983), certif. denied, 97 N.J. 601 (1984). However, we emphasize that, as found by the Appellate Division, those differences are not so significant as to place the Commission outside of the reach of Spiewak. We further emphasize that N.J.S.A. 18A:6-66 specifically requires that persons employed by an educational services commission "...shall enjoy the same rights and benefits as are enjoyed by persons holding office, position or employment under a public school district board of education."

As we consider the claims in this case, we are mindful that the teaching staff members employed by the Middlesex County Educational Services Commission are entitled under the education laws to the same statutory rights and benefits as members employed by district boards of education. Further, we recognize that the statutory mandate that these members be afforded such rights and protections requires that, in the employment context, the Commission's actions be judged by the same standards as would those of a district board. At the same time, we emphasize that the rights and benefits to which the teaching staff members employed by the Commission are entitled by the education statutes are no greater

than those to which members employed by a district board are entitled.

We further emphasize that, pursuant to the Appellate Division's decision in this matter, we are entrusted with the task of determining whether the teaching staff members employed by the Commission are entitled to the specific benefits that were claimed by the Association in its Petition of Appeal. Although we may not revisit the determinations made by the Appellate Division concerning those benefits, specifically the court's determinations that the teaching staff members involved in this litigation were entitled to to calculation of tenure eligibility and to paid sick leave following the acquisition of tenure, we find that the court's determinations that the the members involved in this case are entitled to these specific benefits does not relieve us of the responsibility for determining the full extent of the entitlements still at issue under the applicable statutes.

Finally, we can not ignore the Appellate Division's determination that the teaching staff members involved in this case who were employed on the date of the Spiewak decision are entitled to retroactive relief. We emphasize that the Appellate Division's determination is entirely consistent with the New Jersey Supreme Court's decision in Rutherford Educ. Ass'n. v. Bd. of Educ., 99 N.J. 8 (1985), which held that retroactive benefit of the Spiewak decision is to be afforded those petitioners who, like the Petitioner in this case, filed petitions of appeal with the Commissioner prior to the date of the Spiewak decision and who were still employed on that date. We therefore conclude that the teaching staff members involved in these proceedings are to benefit retroactively from any relief to which they are entitled by virtue of our decision.

The Court in Rutherford, however, placed a second limitation on retroactive relief to be afforded teachers who, like the teachers represented by the Petitioner in this case, had filed petitions with the Commissioner prior to the date of the Spiewak decision. Because of its concern with the financial impact on district boards if Spiewak was given unlimited retroactivity as to those teachers still employed on the date of the Spiewak decision, the court held that even with respect to those teachers, calculation of the retroactive benefits that each teacher is entitled to receive is limited to a date six years prior to the court's decision in Rutherford. 99 N.J. at 30.

Accordingly, we conclude that although each member still employed by the Commission on the date of the Spiewak is entitled to retroactive benefit of the decision in Spiewak, such relief is limited to the period six years prior to the date of the Rutherford decision. In so concluding, we emphasize that while, consistent with the court's decision in Rutherford, the Appellate Division in this case specifically directed calculation of tenure eligibility from date of employment, it did not direct that retroactive benefits be awarded from date of employment.

Based on these principles, we turn now to the specific statutory entitlements that have been claimed by the Association on behalf of the teaching staff members it represents.

III

It is settled that all of the teachers involved in this litigation who possess the appropriate certificate required for their positions are entitled to calculation of their tenure eligibility from the date of their employment. Accordingly, in this appeal, we are required only to determine the length of employment after which a teaching staff member employed by the Middlesex County Education Commission would achieve tenure pursuant to N.J.S.A. 18A:28-5.

We emphasize that tenure is a legislatively conferred status. Spiewak, supra. If the other statutory prerequisities are met tenure is acquired

> ...after employment...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;

N.J.S.A. 18A:28-5 (emphasis added).

The statutory provisions applicable in this case are N.J.S.A. 18A:28-5(b) and (c), both of which condition the acquisition of tenure on employment for the specified number of academic years.

In this appeal, the Commission contends that its members can achieve tenure only through application of N.J.S.A. 18A:28-5(c), and that calculation under this provision should not include "...those periods of time when petitioner's teachers did not serve in each academic year."[4] Appellant's brief, at 14. For the reasons that follow, we reject this contention.

Initially, we emphasize that N.J.S.A. 18A:28-5 specifically provides that tenure is achieved after employment for the requisite period, and that the requisite period under either N.J.S.A. 18A:28-5(b) or (c) is measured by the "academic year." As found by the Commissioner, N.J.S.A. 18A:1-1 defines "academic year" to mean

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[4] We note that Appellant does not specify what periods of time would be excluded.

> ...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...

Pursuant to the statutory definition the only determinant of the length of the academic year is the date on which school opens and the date on which it closes for summer vacation. We emphasize that, pursuant to N.J.S.A. 18A:36-2, a board of education is obligated to determine annually, in accordance with law, the dates between which school shall be open. Although a district board's discretion is limited by requirements imposed by law, see, e.g., N.J.S.A. 18A:36-1; N.J.S.A. 18A:58-16; N.J.A.C. 6:27-1.13, the dates of commencement and termination of the school year and the scheduling and length of intermediate vacations during the school year are matters of educational policy and are the exclusive responsibility of those entrusted with administering the schools. Board of Education of the Woodstown-Pilesgrove Regional School District v. Woodstown-Pilesgrove Regional Education Association, 81 N.J. 582 (1980); Burlington Cty. Col. Fac. Assoc. v. Bd. of Trustees, 64 N.J. 10 (1973).

We recognize that an educational services commission is not subject to the same requirements of law when it establishes its calendar as is a district board. This fact does not, however, lead to the conclusion that the calendars adopted by the district boards for whom a commission provides educational services define the academic year for purposes of determining whether a teaching staff member has been employed the requisite length of time to achieve tenure with a commission.

Again, the acquisition of tenure status is contingent on employment in a district or by a board for a specified number of academic years, which in turn, pursuant to statute, is measured by a period designated by the employing board. We emphasize that the rights and benefits of tenure attach only to positions with the employing board, and that, pursuant to N.J.S.A. 18A:6-51 et seq., an educational services commission is an agency separate and distinct from the districts with which it contracts. Accordingly, where a teaching staff member is employed by an educational services commission, tenure is achieved with the commission, not the districts for whom the commission provides services.

We further emphasize that N.J.S.A. 18A:6-66 mandates that employees of a commission be afforded the same rights and benefits as those employed by a district board. Because the right to achieve tenure and the benefits conferred by that status is contingent on employment for a specified number of academic years by the commission, we conclude that when an educational services commission establishes its calendar for the purpose of providing educational services pursuant to N.J.S.A. 18A:6-51, it establishes the length of the academic year for purposes of determining tenure acquisition with the commission under N.J.S.A. 18A:28-5.

Again, we recognize that, in establishing its calendar, an educational services commission is not subject to the same constraints under the education statutes as a district board of education. However, we reiterate that the obligations imposed on district boards by other provisions of the education statutes are not part of the statutory definition of an academic year.

In this case, the Commission did establish its calendar for the years relevant to this litigation. In exercising its managerial prerogative, it considered the calendars of the private and parochial schools to whom it provided services, and established a 38 week calendar. As stated, we find that in establishing its calendar, it established the length of the academic year as defined by N.J.S.A. 18A:1-1. Accordingly, any member employed by the Commission for the requisite number of 38 week academic years or their equivalent, either under N.J.S.A. 18A:35(b) or (c), achieved tenure pursuant to N.J.S.A. 18A:28-5. We specifically find that any member who was employed by the Commission for three consecutive academic years of 38 weeks as established by the Commission's calendars with employment at the next succeeding academic year, acquired tenure pursuant to N.J.S.A. 18A:28-5(b).[5] Finally, we emphasize that the tenure protection acquired through employment as a part-time teaching staff member is not limited to tenure in a part-time position. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983).

IV

We turn now to the question of whether the teaching staff members employed by the Commission were entitled to sick leave benefits pursuant to N.J.S.A. 18A:30-2. That statute provides that

> All persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of

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[5] We are aware that in Camden Education Association v. Camden Board of Education, decided by the Commissioner, January 12, 1984, the Commissioner held that those employed by a district in a program the length of which is less than the academic year established by the district have not been employed for a full academic year. However, as set forth above, an educational services commission is a distinct entity from the districts with which it contracts, and we therefore do not find the principles articulated in Camden to be applicable in determining whether an individual has been employed by a commission for a full academic year.

> the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.

Thus, an employee is entitled to the benefit conferred by N.J.S.A. 18A:30-2 if his employment is within any one of the categories included in the statute. Prior to achieving tenure, a teaching staff member is entitled to minimum sick leave by virtue of being steadily employed by the district. The record in this case clearly indicates that the teachers employed by the Commission during the period relevant to this litigation were steadily employed, e.g., Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Educational Services Commission, 1981 S.L.D. 505, 508, and we therefore find that they were entitled to the benefit conferred by N.J.S.A. 18A:30-2.

As set forth above, all members who were employed for the academic year established by the Commission's calendar were employed for the full academic year. Each such member, therefore, was entitled to 10 days sick leave each year, which, pursuant to N.J.S.A. 18A:30-3, must be accumulated if not utilized in that year.

We emphasize, however, that the entitlement conferred by N.J.S.A. 18A:30-2 is to "...sick leave with full pay for a minimum of 10 school days in any school year," and that the statute grants no entitlement to compensation beyond that which a member would have received had he worked on the days that he was absent. Further, since accumulation pursuant to N.J.S.A. 18A:30-3 is of the sick leave not utilized in a particular year and of "...the specified number of days of sick leave with pay allowed...", in cases where a member was not employed full-time, the accumulation mandated by N.J.S.A. 18A:30-3 is based on the actual amount of time in a day that a member was scheduled to work that year.

We find that the Commission's records in this case permit calculation of the remuneration that is due each member pursuant to N.J.S.A. 18A:30-2 for each day that the member did not work because of illness. In the event that any member did not utilize the number of days allowed by the statute in any year, he is to be credited with accumulated sick days pursuant to N.J.S.A. 18A:30-3. We emphasize, however, that the entitlement of any member who was not employed at the start of the academic year as established by the Commission's calendar is to be prorated according to the portion of the academic year during which he was employed. Schwartz v. Dover Public Schools, 180 N.J. Super. 222 (App. Div. 1981). We, however, further emphasize that any member who, as subsequently discussed, is determined to have been a full-time teaching staff member during this period is entitled to full days' credit for sick leave not utilized and thereby accumulated. As set forth above, pursuant to Rutherford, retroactive remuneration pursuant to N.J.S.A. 18A:30-2 is limited to the date six years prior to the court's decision in Rutherford, as is calculation of accumulated sick leave pursuant to N.J.S.A. 18A:30-3.

The Association claims that the teaching staff members employed by the Commission are entitled to payment for public holidays pursuant to N.J.S.A. 18A:25-3. That statute 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 and any term of any contract made with any such member which is in violation of this section shall be void.

There is no question that teaching staff members employed by an educational services commission are entitled to the protection afforded by this statute. N.J.S.A. 18A:6-66. However, after carefully examining the statute, we conclude that it does not grant to teaching staff members, whether employed by an educational services commission or by a district board of education, a statutory entitlement to payment for public holidays on which the member is not required to work.

Essentially, N.J.S.A. 18A:25-3 protects the right of teaching staff members to be absent on public holidays without financial loss. Moldovan et al. v. Board of Education of the Township of Hamilton, 1971 S.L.D. 246. Thus, although a district board may determine that school will be open on a public holiday when it establishes its calendar, it may not require its teaching staff members to work on that day. Id. Accordingly, if a member is absent on that day, the district board is prohibited from penalizing him by deducting an amount from his salary proportionate to his daily rate. Id.

We emphasize that the statute is applicable only when a public holiday occurs on a day when school is open. It does not prohibit a district board from deducting from a member's salary when the designated day on which the public holiday fell was a day when school was not in session and the member chose to celebrate it on a day when school was open. Rumson-Fair Haven Education Association et al. v. Board of Education of the Rumson-Fair Haven Regional High School District, decided by the Commissioner, February 3, 1984. Nor does the statute require that additional compensation be paid when a member is scheduled to work additional days because he was absent on public holidays. See Black Horse Pike Regional Board of Education. 10 NJPER 448 (par. 15200 1984). Rather, the question of such additional compensation is a mandatorily negotiable subject. See id.

There is no indication in the record in this case that the Commission deducted any amounts from the compensation of its teaching staff members for public holidays designated to fall on days when they were scheduled to provide their services. Because the statute grants no entitlement to additional compensation for public holidays designated to fall on days when they were not

scheduled to work, we conclude that the teaching staff members involved in this litigation are not entitled under the education laws to such additional compensation. In so concluding, we emphasize that the question of additional compensation for public holidays is subject to the collective negotiations process governed by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and that violations of that act do not lie within our jurisdiction.

VI

We turn finally to the Association's claims that the education statutes mandate that the Commission have adopted a salary schedule containing minimum increments, that the teachers involved in this litigation were entitled to payment on such schedule, and that they were entitled to credit for military service.

As set forth in Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 26, 1986, aff'd, Docket #A-2508-84T7 (App. Div. Feb. 26, 1986), certif. denied, Docket #25,352 (June 30, 1986), any entitlement to compensation based on placement on a salary guide is governed by N.J.S.A. 18A:29-1 et seq., which are the statutory provisions applicable to the compensation of teaching staff members.[6] Again, those statutes are applicable only to full-time teaching staff members. N.J.S.A. 18A:29-6 (repealed 1985) (provision now codified at N.J.S.A. 18A:29-5). We reiterate that, although the education laws prohibit reduction in the compensation of any tenured teaching staff member, N.J.S.A. 18A:28-5, they do not prescribe any standards governing the rate or manner of the compensation of teaching staff members who are not full-time. See Hyman, supra.

Thus, the threshold question in resolving the Association's compensation claims is whether the members employed by the Commission were full-time teaching staff members during the years relevant to this litigation. As set forth in Hyman, "full-time" is defined by statute as the number of days of employment each week and the period in each day required to qualify any person as a full-time member. N.J.S.A. 18A:29-6 (repealed 1985) (provision now codified at N.J.S.A. 18A:29-5). Under the applicable regulation, district boards are given the authority to define full-time so long as the number of hours required each day is more than four hours. N.J.A.C.

[6] We note that, effective September 9, 1985, the compensation statutes were substantially altered. N.J.S.A. 18A:29-6, N.J.S.A. 18A:29-7, N.J.S.A. 18A:29-8, N.J.S.A. 18A:29-10 and N.J.S.A. 18A:29-12 were repealed. Teacher Quality Employment Act, N.J.S.A. 18A:29-5, L 1985, c. 321 sec. 16 (1985). In addition to repealing those statutory provisions, the Teacher Quality Employment Act raised the minimum salary for full-time teaching staff members to $18,500. N.J.S.A. 18A:29-5. Although the entitlement to compensation benefits in this case is to be determined under the statutes in effect prior to September 9, 1985, we emphasize that the new statutory minimum, like the predecessor statutes, is applicable only to full-time teaching staff members.

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6:3-1.13. Although the language of this regulation does not specifically include educational services commissions, the authorizing statute is among those encompassed by the mandate of N.J.S.A. 18A:6-66, and we conclude that, pursuant to N.J.A.C. 6:3-1.13, the Commission had both the discretion and the responsibility to define, within the perimeters established by the regulation, full-time employment for the period relevant to this litigation. In so concluding, we emphasize that hours of work is a mandatory subject of collective negotiations. In re Byram Township Board of Education, 152 N.J. Super. 12 (App. Div. 1977); Bd. of Education of Englewood v. Englewood Teachers, 64 N.J. 1 (1973).

In this case, the Commission did not prescribe the number of hours in each day required for full-time employment by formal action of its Board of Directors. See N.J.S.A. 18A:6-57. Nor does the record indicate that an applicable collective negotiations agreement specified the number of hours that the members employed by the Commission were required to work.

Rather, in these proceedings the Commission maintains that "...by Commission practice since the Commission first hired employees in 1978..." it has prescribed a standard of seven hours per day, which is applicable to each of its teaching staff members for each of the years involved in this litigation. Supplemental memorandum, January, 1986. The Commission further maintains that all teachers were hired on an "as needed" basis and were not hired as full-time employees, and that all of the teaching staff members involved in this litigation were part-time employees. Id.

Initially, we find that the question of whether the teaching staff members employed by the Commission were full-time members for the years relevant to this litigation is not determined by the Commission's designation of their employment as "as needed." See "As Needed" Basis, M86-80202 (September 10, 1986). Furthermore, we emphasize that it is well established in the record that the teachers involved here were regularly employed by the Commission and that their hours of employment did not change once the school year began. Accordingly, we conclude that the question of whether they were full-time teaching staff members during the relevant period requires a determination of whether they were employed for the number of hours required for full-time employment.

Again, the Commission maintains that it prescribed through practice during this period an applicable standard of seven hours a day for determining whether its members were employed the requisite number of hours to be considered full-time teaching staff members. However, the record in this case shows that, in practice, none of the members employed by the Commission were employed during this period on a seven hour per day basis.

The record indicates that for the years in question, the teaching staff members employed by the Commission provided supplemental instruction to students enrolled in private and parochial schools. Each worked an assigned number of hours a week during the school year and the schedule of each was established at

the beginning of the school year. The record shows that the daily schedules of the Commission's teachers ranged from approximately two hours a day to a maximum of six hours a day. e.g. Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Educational Services Commission, 1981 S.L.D. 505, at 508.

We find that the fact that none of the Commission's members were employed for the seven hours per day that the Commission now maintains it required in practice for full-time employment belies the validity of this standard. Furthermore, our acceptance of a standard, ostensibly prescribed through practice, which, in application, deprives every single teaching staff member employed by the Commission of the rights and benefits conferred on full-time teaching staff members by the education laws would permit the Commission to circumvent the clear statutory mandate of N.J.S.A. 18A:6-66.

As set forth above, the maximum number of hours per day that any member was employed was six. We therefore conclude that, in practice, the Commission required no more than six hours a day for full-time employment. Thus, all teaching staff members employed for at least six hours a day during the period relevant to this litigation must be considered full-time teaching staff members within the meaning of N.J.S.A. 18A:29-6 (repealed 1985) (provision now codified at N.J.S.A. 18A:29-5), and therefore entitled to the benefits conferred by N.J.S.A. 18A:29-1 et seq.[7] After carefully reviewing the record, we further conclude that because the hours of work required in practice by the Commission began when the member reported to work and ended upon completion of the last scheduled assignment, the number of hours per day that each member was employed for purposes of determining whether the member was employed full-time is to be determined by the number of hours between reporting for work and the conclusion of the work day regardless of whether the Commission allocated compensation on the basis of the total number of hours that constituted the work day.

Our conclusions concerning the proper standard for determining full-time status for the members employed by the Commission during this period, however, do not resolve the Association's substantive claims that the teaching staff members employed by the Commission are entitled by the education laws to additional compensation. In considering these claims, we emphasize that the Association made no claim that any individual was compensated at below the salary levels required by the applicable statutes. Rather, its claim is that the teachers employed by the Commission are entitled to additional compensation because the statutes required the Commission to adopt a salary schedule that included minimum increments and employment credit for military service.

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[7] See supra note 6.

We reiterate that if, pursuant to N.J.S.A. 18A:29-4.1, a board adopts a salary policy that includes salary schedules, see N.J.S.A. 18A:29-4.3, that policy may include more than one schedule so long as, prior to the 1985-86 school year, the schedules met the requirements set forth in N.J.S.A. 18A:29-7 (repealed 1985) and N.J.S.A. 18A:29-8 (repealed 1985),[8] and all full-time members were included in some schedule. Placement on such schedules, in turn, was required to conform with N.J.S.A. 18A:29-8 (repealed 1985), N.J.S.A. 18A:29-9, N.J.S.A. 18A:29-10 (repealed 1985) and N.J.S.A. 18A:29-11. Finally, a board was required to compensate members not covered by the categories set forth in N.J.S.A. 18A:29-7 at least $2,500 per year. N.J.S.A. 18A:29-5 (repealed 1985).

Essentially, the applicable compensation statutes established statutory minimums for the compensation of full-time teaching staff members up to a maximum salary set forth in the statutory schedule for a teacher with a doctorate and maximum experience. Whalen v. Sayerville Bd. of Educ., 192 N.J. Super. 453 (1983). See Sponsor's Statement accompanying Ass. Bill No. 9 (1957) and Statement accompanying Ass. Bill No. A463 (1963). They did not mandate the payment of adjustment increments once the minimums were met, they did not confer an entitlement to an employment increment once the maximums in the statutory schedule were achieved and they did not mandate the adoption of salary schedules in the same form as that set forth in N.J.S.A. 18A:29-7. In sum, the applicable compensation statutes did not require the Commission to adopt a salary schedule that included increments, nor entitle the teaching staff members here to any compensation beyond the statutory minimums. We therefore conclude that the teaching staff members involved in this litigation are not entitled under the education laws to additional compensation based on a salary schedule containing increments.

We further conclude that N.J.S.A. 18A:29-11 does not confer an entitlement to additional compensation on the members involved in this litigation. That statute provides that a member who has served in the military is entitled to "...receive equivalent years of employment 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... except that the period of such service shall not be credited toward more than four employment or adjustment increments." As set forth above, entitlements to adjustment or employment increments under the applicable statutes extended only to teaching staff members whose compensation was below the statutory minimums specified in N.J.S.A. 18A:29-7, and to those members who had not yet reached the statutory maximum. In the absence of any claim that any member employed by the Commission who was entitled to military service credit was compensated less than the statutory amounts, we find that N.J.S.A. 18A:29-11 does not confer on the teaching staff members involved in this litigation an entitlement to additional compensation. Cape May County Vocational Technical

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[9] See supra note 7.

VII

In sum, we hold that, for the purposes of calculating tenure eligibility pursuant to N.J.S.A. 18A:28-5, the academic year for teaching staff members employed by an educational services commission is determined by the calendar established by the commission. Specifically, in this case, we hold that the academic year for the relevant period was 38 weeks, and direct the calculation of the date of tenure acquisition of each member employed by the Commission during the relevant period on this basis. We further direct that where employment was for 38 weeks for three consecutive years with employment at the next succeeding academic year, tenure was acquired pursuant to N.J.S.A. 18A:28-5(b).

We find that all of the teaching staff members involved in this case are entitled to sick leave benefits pursuant to N.J.S.A. 18A:30-2 from the date six years prior to the court's decision in Rutherford, and direct compensation for days that members were absent due to illness based on the Commission's records. We further direct that minimum sick leave not utilized be accumulated pursuant to N.J.S.A. 18A:30-3, with the specific directive that all members who were full-time teaching staff members during this period are to be credited from the date six years prior to the decision in Rutherford with full days' credit toward accumulated sick leave. We, however, find that the teaching staff members involved have no entitlement to additional compensation for public holidays on which they were not required to work.

We conclude that the number of hours required by the Commission in practice for full-time employment was six and hold that all members whose scheduled hours, measured from reporting time until completion of last assignment, totaled six hours per day are to be considered full-time teaching staff members during the period relevant to this litigation. We, however, find that the compensation statutes that were in effect during the years in question do not entitle the teachers involved here to additional compensation.

We recognize that we have not made determinations of the specific relief to which particular individuals are entitled by virtue of our decision. Nor could we do so on the basis of the record before us. We therefore direct the Commission to determine the specific entitlements of each individual involved consistently with our decision. In so directing, we emphasize that any relief to the individuals involved here are entitled is to be afforded retroactively for the period six years prior to the court's decision in Rutherford.

Finally, we remind the Commission that pursuant to N.J.S.A. 18A:6-66, it is required to insure that the teaching staff members it employs are afforded the same rights and benefits as those conferred by the education laws on members employed by district

boards of education. We further remind the Commission that as an agency authorized under the education statutes to provide educational services to public school districts, it is part of our state's system of public education. Although we recognize that the Commission is not subject to the requirements of all of the education statutes that define the perimeters within which a district board may exercise its discretion, we emphasize that this fact does not excuse the Commission from properly fulfilling its responsibilities as part of our system of public education or from meeting its statutory obligations as the employer of teaching staff members.

John Klagholz abstained.
Attorney exceptions are noted.
January 7, 1987

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS MOLINEUX,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MEDFORD, BURLINGTON COUNTY.	:	
	:	

Remanded by the Commissioner of Education, December 23, 1985

Decided by the Commissioner of Education, August 8, 1986

For the Petitioner-Respondent, Eleuteri, Wilkins and Dyer
(John G. Dyer, III, Esq., of Counsel)

For the Respondent-Appellant, Freeman, Zeller and Bryant
(Allen S. Zeller, Esq., of Counsel)

After careful consideration of the record in this case, including all transcripts provided by the parties pursuant to N.J.A.C. 1:1-3.3, the State Board of Education affirms the Commissioner's Decision for the reasons set forth therein.

January 7, 1987

Date of Mailing _____

SHIRLEY ODENWALD ET AL.,	:	
PETITIONERS-RESPONDENTS.	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, August 6, 1984

For the Petitioner-Respondents, Bucceri & Pincus, (Gregory T. Syrek, Esq., of Counsel)

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

The Petitioners-Respondents in this case (hereinafter "Petitioners") were continuously employed by the Board of Education of the Borough of Oakland (hereinafter "the Board") as Compensatory, Supplemental and Title I teachers. While so employed, Petitioners worked on a less than full-time basis and were compensated on an hourly basis pursuant to the negotiated agreement. In their petition, Petitioners alleged that they had acquired tenure in their positions, and were therefore entitled to pro-rata compensation based on the salary schedule applicable to full-time teachers, as well as to pro-rata benefits under the collective negotiations agreement.

The Administrative Law Judge (ALJ), relying on Spiewak v. Borough of Rutherford, 90 N.J. 63 (1982), found that each of the Petitioners had acquired tenure under N.J.S.A. 18A:28-5. Initial Decision, at 12. Finding that Spiewak did not determine the emoluments of tenure, the ALJ relied on Rutherford Education Association et al. v. Rutherford Board of Education, Docket #A-2014-92T3, #A-2016-82T3, #A-2018-82T3, #A-2021-82T3 and #A-2023-82T3 (consolidated) (App. Div., January 11, 1984)[1] and Hyman v. Board of Education of the Township of Teaneck, decided by

[1] We note that subsequent to the Commissioner's decision in the instant case, the New Jersey Supreme Court rendered its decision in Rutherford, holding that the Petitioners in that case were entitled to retroactive relief under Spiewak, but specifying that Spiewak had not addressed the question of what constituted the emoluments of tenure. Rutherford Educ. Ass'n v. Bd. of Educ., 99 N.J. 8 (1985).

the Commissioner, August 15, 1983,[2] and determined that a board is only free to negotiate differences in salary between supplemental or auxiliary and full-time teachers when the tenure eligibility of the former is clearly recognized. Finding no such clear recognition of tenure eligibility in this case, the ALJ determined that the negotiated agreement was not made at "arm's length" and, therefore, with respect to Petitioners' compensation, was invalid. He concluded Petitioners that were entitled to pro-rata compensation, and calculated such compensation based on the number of minutes each worked per day.

The ALJ further determined that seven of the eight Petitioners had an "in-school work week of more than 20 hours," and, therefore, based on the language of the negotiated agreement which conferred such benefits on "those teachers working 20 hours or more per week," he concluded that they were entitled to contractual benefits on a pro-rata basis.

The Commissioner adopted the ALJ's determination that the negotiated agreement was not made at arm's length. In adopting that determination, he relied on his decision in Bassett v. Board of Education of Oakland, decided by the Commissioner, March 19, 1984, which involved the same negotiated agreement, finding, as he had in Bassett, that the agreement at issue was not in conformity with Spiewak and Rutherford, and was self-violative in that it included no provision for the recognition of hourly rate teachers. As in Bassett, the Commissioner concluded that Petitioners in the instant case were entitled to be compensated based on the formula set forth in the agreement that was applicable to part-time teachers who were compensated on the basis of the salary schedules applicable to full-time teachers. Finally, the Commissioner adopted the ALJ's determination that Petitioners employed more than 20 hours per week were entitled to contractual benefits.

The sole issue presented in this appeal is whether Petitioners are entitled to pro-rata compensation based on the salary schedule set forth in the collective negotiations agreement for full-time teachers. Initially, we affirm the Commissioner's conclusion that Petitioners were employed in tenurable positions, and have achieved tenure. Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). However, as set forth in our decision in Bassett, which we have decided today, we conclude that the provision of the collective negotiations agreement involved in this case does not contravene the requirements of the education laws, and we therefore reverse the Commissioner's determination that Petitioners

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[2] We note that on March 6, 1985, the State Board reversed the Commissioner's decision in Hyman, and that the State Board's decision was subsequently affirmed by the Appellate Division. Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A-2508-84T7 (App. Div. February 26, 1986), certif. denied, Docket #25,352 (June 30, 1986).

are entitled to pro-rata compensation based on the negotiated salary schedule applicable to full-time teachers.

Initially, we emphasize, as did the New Jersey Supreme Court in its decision in Rutherford Education Association v. Rutherford Board of Education, 99 N.J. 8 (1985), that the court in Spiewak did not determine what benefits constituted the emoluments of tenure, and that, as we concluded after extensive analysis in Hyman, entitlement to compensation is not controlled by the tenure laws, but by the compensation statutes, N.J.S.A. 18A:29-1 et seq.[3]

As set forth in Hyman, application of the compensation statutes is limited to full-time teaching staff members. In addition, the compensation statutes do not mandate that full-time members be compensated based on a uniform salary schedule applicable to all teachers, although any schedule applicable to full-time teaching staff members must conform to the statutory minimums. Hyman, supra. See also, Hamilton Township Supplemental Teachers Association, et al. v. Hamilton Township Board of Education, decided by the State Board, September 3, 1986. Moreover, although the applicable compensation statutes establish statutory minimums up to a maximum set forth in the statutory schedule, they do not mandate the payment of adjustment increments once the minimums are met, they do not confer an entitlement to an employment increment once the maximums in the statutory schedule are achieved and they do not mandate the adoption of salary schedules in the same form as that set forth in N.J.S.A. 18A:29-7 (repealed 1985). See Whalen v. Sayerville Bd. of Educ., 192 N.J. Super. 453 (App. Div. 1983); Sponsor's Statement accompanying Ass. Bill. No. 9 (1957) and statement accompanying Ass. Bill No. A463 (1963). In sum, the applicable compensation statutes do no more than guarantee to full-time members compensation in conformity with statutory amounts.

Moreover, we reiterate that compensation is a mandatory subject of collective negotiations, and that the education laws do not specify any standards governing the compensation of members who are not full-time, aside from the requirement that the compensation of a tenured teacher may not be reduced, N.J.S.A. 18A:28-5, except as provided by N.J.S.A. 18A:6-10. Bergenfield Education Association v. Board of Education of Bergenfield, decided by the State Board, September 3, 1986. Thus, as in the case of full-time members, there

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[3] We note that, effective September 9, 1985, N.J.S.A. 18A:29-6, N.J.S.A. 18A:29-7, N.J.S.A. 18A:29-8, N.J.S.A. 18A:29-10 and N.J.S.A. 18A:29-12 were repealed. Teacher Quality Employment Act, N.J.S.A. 18A:29-5,L. 1985, c. 321 sec. 16 (1985). We further note that, in addition to repealing those statutory provisions, the Teacher Quality Employment Act raised the minimum salary for full-time teaching staff members to $18,500. N.J.S.A. 18A:29-5. Although the entitlement to benefits in this case is to be determined under the statutes in effect prior to September 9, 1985, we emphasize that the new statutory minimum, like the predecessor statutes, is applicable only to full-time teaching staff members.

is no requirement under the education laws that all categories of part-time teachers be compensated at the same rate or in the same manner. Therefore, as we concluded in Bassett, we find the agreement between the Association and the Board establishing a category designated as "hourly rate teachers" does not contravene the requirements of the education laws, so long as application of the provision does not result in reduction in the compensation of a tenured teaching staff member.

In so concluding, we emphasize that the record in this case establishes that Petitioners were employed less than full-time. e.g., Findings of Fact; Exhibit J-4, in evidence; J-1, in evidence. Although Petitioners now argue that the fact that they may have been employed more than twenty hours a week, thereby qualifying for contractual benefits pursuant to Article IV of the collective negotiations agreement, requires a conclusion that they were full-time teaching staff members for all purposes, we find that the criteria specified in Article IV applies only to qualification for benefits under that article, and is not applicable in determining status as a full-time teacher under the compensation statutes. The hours of employment required by the Board for employment as a full-time member are clearly set forth in Article V of the agreement. As stated, it is established by the record that Petitioners did not meet those requirements.

Again, we will not negate the provisions of a collective negotiations agreement where the agreement does not contravene the specific requirements of the education laws, see e.g., Bergenfield, supra, and, as indicated in our decision in Bassett, we decline to do so in this case. Because we find that the relevant provision does not on its face contravene the education laws, we reverse the Commissioner's determination that agreement as to the category of "hourly rate teachers" is ultra vires. We further conclude as we did in Bassett, that this is not the proper forum for determining the validity of the provision based solely upon the contract language and we therefore set aside the Commissioner's finding that the provision is invalid because it is not consistent with the recognition clause and other provisions of the agreement.

In conclusion, we find that Petitioners in this case have no entitlement under the education laws to compensation based upon the negotiated salary schedule applicable to full-time teachers, and therefore are not entitled under the education laws to compensation beyond that provided by the collective negotiations agreement. Accordingly, we reverse the Commissioner's directive that the Board establish Petitioners' salaries at the same rate as other part-time teachers.

Attorney exceptions are noted.
Feburary 4, 1987

OLD BRIDGE EDUCATION ASSOCIATION ET AL., AND MARILYN JACLIN ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT/CROSS-APPELLANT.	:	

Decided by the Commissioner of Education, August 8, 1985

Decision on Motion by the State Board of Education, February 5, 1986

Decision on Motion by the State Board of Education, March 5, 1986

For the Petitioners-Appellants, Ruhlman, Butrym and Friedman (Richard A. Friedman, Esq., of Counsel)

For the Petitioner-Appellant Marilyn Jaclin, Weinberg and Kaplow (Richard J. Kaplow, Esq., of Counsel)

For the Petitioners-Appellants Lenore Pearlman and Theresa Nason, Klausner and Hunter (Stephen E. Klausner, Esq., of Counsel)

For the Intervenors-Appellants, Oxfeld, Cohen and Blunda (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent/Cross-Appellant, Wilentz, Goldman and Spitzer (Stephen J. Tripp, Esq., of Counsel)

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

January 7, 1987

PISCATAWAY TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, October 13, 1983

For the Petitioner-Respondent, Oxfeld, Cohen & Blunda
(Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Appellant, Rubin, Lerner and Rubin
(David B. Rubin, Esq., of Counsel)

This case involves the issues of whether teachers of English as a Second Language (ESL) and supplemental teachers represented by the Piscataway Township Education Association, who are employed by the Board of Education of the Township of Piscataway and compensated on an hourly basis, are entitled to benefit retroactively from the New Jersey Supreme Court's decision in Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), and, if so, whether that decision entitles them to the substantive relief that they are seeking through these proceedings.

I

The matter was initiated in December 1981, when the Association petitioned the Commissioner of Education, seeking an order directing that each ESL and supplemental teacher be given all emoluments and benefits afforded other teaching staff members by the Board on a pro-rata basis. Prior to petitioning the Commissioner, the Association had successfully sought a clarification from the Public Employment Relations Commission (PERC) that ESL teachers were members of the collective negotiations unit represented by the Association. Following the clarification by PERC, the Association pursued through arbitration the question of whether the ESL teachers were entitled to receive pro-rata benefits under the collective negotiations agreement. In May 1981, the arbitrator issued his award, concluding that the ESL teachers were not entitled to pro-rata benefits under the agreement, and this award was confirmed in superior court when the Association sought to have it vacated.

As of the 1981-82 school year, following the Board's recognition of the supplemental teachers as part of the collective negotiations unit, provisions specifying the terms and conditions of employment for both supplemental and ESL teachers were negotiated by the Association and Board, and were included in the collective negotiations agreement. Subsequent to that school year, on September 8, 1982, an individually named teacher, the Association and the Board reached a settlement in proceedings before the Commissioner, in which the Association and the teacher had sought for supplemental teachers tenure and all the benefits and emoluments afforded classroom teachers.

Thus, prior to initiating these proceedings, the Association had sought pro-rata benefits before the Commissioner and in other forums for both the supplemental and ESL teachers respectively. However, although the petition in the instant proceedings was filed prior to the New Jersey Supreme Court's decision in Spiewak, these proceedings represent the only consideration of the Association's claims subsequent to the court's decision in that case.

A pre-hearing conference was held in the instant matter on May 11, 1982, at which time it was agreed that the issue involved in the case is whether the ESL and supplemental teachers employed by the Board are entitled to the emoluments and benefits afforded other teaching staff members as a matter of law. In a summary decision based on stipulation of the facts by the parties, the Administrative Law Judge (ALJ), applying the relevant judicial decisions, found that the teachers in this case were not barred from retroactive relief by the court's holding in Spiewak that its decision would apply prospectively to those not before the court. Relying on the Appellate Division's decision in Hackensack v. Winner, 162 N.J. Super. 1 (App. Div. 1978), aff'd with modif., 82 N.J. 1 (1980), the ALJ further concluded that because the facts in this case were of a type capable of repetition, and because facts of this type had been reviewed by the Appellate Division in its decisions following Spiewak, he could not overlook the direction being taken by the courts. He therefore concluded that res judicata should not be applied so as to bar retroactive relief under Spiewak in this case.

The ALJ determined that the ESL and supplemental teachers employed by the Board were employed in tenurable positions and should have been accorded all salary, emoluments and benefits of part-time teachers under the applicable collective negotiations agreements and that they were entitled to such other statutory benefits as accumulated sick leave that they would have acquired if they had been accorded their rightful places as part-time teaching staff members. He further determined that they were entitled to any other emoluments guaranteed to teaching staff members by the collective agreement in effect since September 1981, or as of 90 days prior to the filing of the Petition of Appeal. Finally, he directed that the Board provide the Teachers' Pension and Annuity Fund with the pertinent information concerning the matter. The

Commissioner adopted the ALJ's determinations with the modification that the teachers involved were entitled to full retroactive relief.

The Board appealed the Commissioner's decision, arguing that because the Association had unsuccessfully sought pro-rata benefits for ESL teachers through the arbitration process, its claims concerning those teachers were barred by res judicata, and that its claims on behalf of the supplemental teachers were similarly barred by the settlement concerning those teachers that had been approved by the Commissioner after the instant proceedings had been initiated. The Board further argues that the Spiewak decision precludes retroactive relief to the teachers involved in this case and that the court's decision in Spiewak does not in any event entitle them to the same compensation as other teachers employed by the Board.

In response, the Association argues that res judicata does not bar its claims since Spiewak had not yet been decided when the arbitration proceedings involving the ESL teachers were completed. It contends that the settlement involving supplemental teachers has no bearing on these proceedings since the individual teachers involved are not the same. As to its substantive claims, the Association renews its assertion that Spiewak entitles the ESL and supplemental teachers involved here to the same statutory and collectively negotiated benefits as other teachers in the District and that such benefits should be accorded them from the date on which the Association sought clarification from PERC that the ESL teachers were members of the collective negotiations unit represented by the Association.

II

The threshold issue in this case is whether the ESL and supplemental teachers represented in these proceedings by the Association are entitled to retroactive application of the decision in Spiewak. In Rutherford Educ. Ass'n v. Bd. of Educ. of Rutherford, 99 N.J. 8 (1985), the New Jersey Supreme Court settled that petitioners, who like the Petitioner in this case, had filed a Petition of Appeal to the Commissioner prior to the date of the Spiewak decision are entitled to the retroactive benefit of that decision. The court, however, placed two limitations on such benefit. First, because of the administrative confusion that would result from retroactive application of Spiewak to teachers terminated prior to the decision in that case, the court in Rutherford held that Spiewak would not be applied retroactively to any teacher who was not employed by a board on the date of the Spiewak decision. 99 N.J. at 29-30. Second, because of its concern with the financial impact on district boards if Spiewak were given unlimited retroactivity as to those teachers still employed on the date of the Spiewak decision, the court held that even with respect to those teachers, calculation of the retroactive benefits that each teacher is entitled to receive is limited to a date six years prior to the court's decision in Rutherford. Id. at 30.

Thus, pursuant to Rutherford, the teachers involved in these proceedings would be entitled to retroactive application of the rule of law announced in Spiewak, although calculation of any benefits due them as a result of our decision in this matter would be limited to the period commencing six years prior to the court's decision in Rutherford. After careful consideration, it is our judgment that the ESL and supplemental teachers in this case are entitled to retroactive application of the decision in Spiewak, subject to the limitations of Rutherford.

In arriving at the conclusion that the mandate of Rutherford is applicable here, we are mindful that although court-fashioned doctrines such as res judicata have genuine utility in administrative proceedings such as these, the application of such precepts by the State Board must be tempered by our appreciation of this agency's statutory foundations, its executive nature and its special jurisdictional and regulatory concerns. City of Hackensack v. Winner, 82 N.J. 1, 28-31 (1980). We find that a fair resolution of this case would be precluded if we were to apply the doctrine of res judicata on the basis of arbitration occuring prior to Spiewak or a settlement of claims made before that decision. Again, in no forum has the question been resolved of whether the ESL and supplemental teachers involved in these proceedings are entitled to the same benefits on a pro-rata basis afforded other teaching staff members in the District by virtue of the court's determination in Spiewak that Title I and compensatory education teachers are teaching staff members within the meaning of N.J.S.A. 18A:1-1. We therefore conclude that, consistent with our responsibility to assure that Title I and compensatory education teachers employed within the public school system are afforded the benefits to which their status as teaching staff members entitles them under the education laws, the mandate of Rutherford is applicable to this case so as to afford the teachers involved in this case retroactive application of the rule announced in Spiewak.

III

Our determination concerning the retroactive application of Spiewak in this case, however, does not resolve the substantive question of whether the teachers involved in this case are entitled as a matter of law to the same emoluments and benefits on a pro-rata basis as afforded other teaching staff members.

Again, in Spiewak, the New Jersey Supreme Court held that public school teachers who provide part-time remedial or supplemental instruction are teaching staff members within the meaning of N.J.S.A. 18A:1-1 and may acquire tenure if they meet the specific criteria in N.J.S.A. 18A:28-5. While finding that the teachers involved in the consolidated cases were entitled to retroactive benefits resulting from the court's holding that they were tenure eligible teaching staff members, the court did not decide to what retroactive benefits the teachers were entitled. Rutherford, supra at 14. Rather, the court remanded two of the individual cases involved in the consolidated appeal to the

Commissioner for a determination of what benefits were owed to those teachers who had acquired tenure.[1] Id. at 84. In remanding the cases, the court stated:

> We do not decide what, if any, additional benefits the teachers in these cases are entitled to, either retroactively or prospectively. That is primarily a matter of contract and the relevant collective bargaining agreements are not part of the record. Further, the parties for the most part did not brief this question and the Appellate Division did not address it. We therefore remand to the Commissioner of Education to make that determination in accord with the principles laid down in this opinion.

Id. at 84 n. 3.

The court's decision in Spiewak is based on analysis of the tenure statutes. Although the court acknowledged that supplemental teachers may be entitled to additional benefits, it clearly stated that such benefits, unlike tenure rights are primarily a matter of contract, and did not grant to supplemental teachers any entitlement to benefits, including compensation, beyond that which may be conferred on them by existing statutes.

Thus, the decision in Spiewak did not confer on teachers such as those represented by Petitioner an entitlement under the education laws to pro-rata benefits afforded other members in the District. Nor, as we found in Hyman v. Board of Education of the Township of Teaneck, decided by the State Board March 6, 1985, aff'd, Docket #A-2508-84T7 (App. Div. Feb. 26, 1986), certif. denied, 104 N.J. 469 (1986), do the tenure laws confer such entitlement.

We recognize that specific statutory benefits such as sick leave are mandated by the education laws, N.J.S.A. 18A:30-2; N.J.S.A. 18A:30-3, and that the record indicates this benefit was not provided to ESL and supplemental teachers by the Board. We therefore direct that, pursuant to Rutherford, the Board calculate accumulated sick leave for the teachers involved here from April 11, 1979, the date six years prior to the court's decision in Rutherford.

Petitioner however has not presented any statutory basis for its claim that as a matter of law the ESL and supplemental teachers it represents must be afforded the same benefits as other members in the Board's employ on a pro-rata basis. Thus, Petitioner has not claimed that the teachers represented by the Association are

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[1] In the third case, Anderson v. Summit Bd. of Ed., the court reversed the decision of the State Board and reinstated the decision of the Commissioner. 90 N.J. 63, at 84.

entitled by the statutory provisions of the education laws to compensation based on a negotiated salary schedule applicable to full-time members. We, however, reiterate that, as we found in Hyman, supra, the statutory provisions governing the compensation of teaching staff members are applicable only to full-time members and do not specify any standards governing the rate or manner for the compensation of members who, like the teachers involved in this case, are not full-time. N.J.S.A. 18A:29-1 et seq.[2] Thus, the compensation statutes do not mandate that members who are not full-time receive pro-rata compensation based on that of full-time members.

We find that any entitlement under the education laws to contractual benefits, including compensation, beyond those mandated by particular statutes is to be found in N.J.S.A. 18A:29-4.1, which provides in pertinent part that

> [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....

Thus, in addition to the specific authorization to adopt salary schedules applicable to all full-time teaching staff members, the statute permits a district board to adopt a salary policy. Such policy may include employment benefits such as health insurance, Newark Teachers Assn. v. Bd. of Ed. of Newark, 108 N.J. Super. 34 (App. Div. 1969), aff'd, 57 N.J. 100 (1970), and, although the collective negotiations agreements applicable in this case are not part of the record, we conclude that such agreements must be considered as the salary policy adopted by the Board under the authority of N.J.S.A. 18A:29-4.1.

We reiterate that if a board acting pursuant to N.J.S.A. 18A:29-4.1, adopts a salary schedule applicable to one group of full-time members, it must provide schedules for all such members. Hyman, supra. We emphasize, however, that N.J.S.A. 18A:29-4.1 does not preclude the adoption of a policy that provides salary benefits

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[2] As indicated above, effective September 9, 1985, the compensation statutes were substantially altered. N.J.S.A. 18A:29-6, N.J.S.A. 18A:29-7, N.J.S.A. 18A:29-8, N.J.S.A. 18A:29-10 and N.J.S.A. 18A:29-12 were repealed. Teacher Quality Employment Act, N.J.S.A. 18A:29-5, L. 1985, c. 321 sec. 16 (1985). We further note that, in addition to repealing those statutory provisions, the Teacher Quality Employment Act raised the minimum salary for full-time teaching staff members to $18,500. N.J.S.A. 18A:29-5. Although the entitlement to retroactive benefits in this case is to be determined under the statutes in effect prior to September 9, 1985, we emphasize that the new statutory minimum, like the predecessor statutes, is applicable only to full-time teaching staff members.

to other staff members. We further emphasize that so long as specific statutory requirements are met, the education laws do not mandate that a board provide uniform compensation or benefits for all classifications of members when it adopts a salary policy pursuant to N.J.S.A. 18A:29-4.1, and that such benefits, including compensation, are a mandatory subject of collective negotiation within statutory limits.

As stated, we conclude that the employment benefits, including compensation, specified in the collective negotiations agreements adopted by the Board during the years relevant to this litigation must be construed as its salary policy, and therefore the Board was required to apply the terms of that policy to all teaching staff members. From the 1981-82 school year, compensation and benefits to which the terms of the Board's salary policy would entitle ESL and supplemental teachers were set forth in the provisions of the collective negotiations agreement applicable to them. In the absence of any indication that the terms of that agreement contravene specific requirements of the education laws, we will not set aside such agreement and we find that the ESL and supplemental teachers represented by Petitioner have demonstrated no entitlement in these proceedings to benefits or compensation beyond that conferred by the agreement.

Nor has Petitioner demonstrated entitlement to additional compensation or benefits for the period prior to the 1981-82 school year. As set forth above, the education laws do not specify standards governing the rate or manner of compensation of members who are not full-time and do not mandate the provision of uniform employment benefits. Thus, although by virtue of their status as teaching staff members within the meaning of N.J.S.A. 18A:1-1, the ESL and supplemental teachers represented by Petitioner were entitled to application of the Board's salary policy expressed in the collective agreement in effect from April 11, 1979, through the end of the 1980-81 school year, they have no entitlement to benefits beyond those for which they qualified during that period under the terms of the agreement. Although we have concluded that the doctrine of res judicata does not bar our consideration of whether Petitioners are entitled under the education laws to the relief they seek, we find that the question of whether ESL teachers were entitled by the terms of the collective agreement to pro-rata benefits is settled by the arbitration award in this case. In the absence of any indication that ESL and supplemental teachers involved here were deprived of specific contractual benefits for which they qualified by virtue of their status as teaching staff members under the terms of the agreement, we conclude that there is no relief for this period to which they are entitled as a result of these proceedings.

In sum, we conclude that the mandate of Rutherford entitles Petitioner in this case to retroactive application of the rule announced in Spiewak, and that res judicata should not be applied in these proceedings so as to bar our consideration of whether the teachers repesented by Petitioner are entitled under the education

laws to the benefits afforded other members in the District on a pro-rata basis. We find that the teachers involved here were entitled to statutory sick leave and, pursuant to Rutherford, direct calculation of accumulated sick leave under N.J.S.A. 18A:30-3 from April 11, 1979. We however conclude that they are not entitled by the education laws to the salary benefits, including compensation, afforded other members in the District under the terms of the collective negotiations agreements on a pro-rata basis during the years relevant to this litigation.

April 1, 1987

JEANNE PRIOR,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARDS OF EDUCATION OF BERGENFIELD, DUMONT, TENEFLY, ORADELL, RIVER EDGE, NEW MILFORD, ROCHELLE PARK AND RIVER DELL REGIONAL, BERGEN COUNTY,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	
	:	

Decided by the Commissioner of Education, August 11, 1986

For the Petitioner-Appellant, Bucceri and Pincus (Sheldon H. Pincus, Esq., of Counsel)

For the Respondent-Respondent, River Edge Board of Education, Schwarz, Pisano, Simon and Edelstein (Irving C. Evers, Esq., of Counsel)

For the Respondent-Respondent, River Dell Regional Board of Education, Stein, Joseph and Rosen (Marc Joseph, Esq., of Counsel)

For the Respondent-Respondent, Oradell Board of Education, Breslin, Herten and LePore (Andrew Cevasco, Esq., of Counsel)

For the Respondent-Respondent, New Milford Board of Education, Gerald L. Dorf, Esq.

For the Respondents-Respondents, Bergenfield and Dumont Boards of Education, Greenwood and Sayovitz (Sidney A. Sayovitz, Esq., of Counsel)

For the Respondent-Respondent, Tenafly Board of Education, Aron, Salsberg, and Rosen (Frank N. D'Ambra, Esq., of Counsel)

For the Respondent-Respondent, Rochelle Park Board of Education, Beattle, Padovano, Breslin and Dunn (Robert M. Jaworski, Esq., of Counsel)

Petitioner-Appellant Jeanne Prior has appealed the decision of the Commissioner of Education, which held that Petitioner had not presented any evidence that supported her contention that by their provision of special education services, the Respondent Districts

involved in this litigation had constituted themselves as a de facto jointure commission, and that, based on the existence of such entity, she had acquired tenure so as to render her non-renewal by the Bergenfield Board of Education following three years employment by the River Edge Board and employment the subsequent year by the Bergenfield Board violative of her tenure and seniority rights. After carefully reviewing the entire record in this case, including the transcripts and documentary evidence, we affirm the Commissioner's decision for the reasons expressed therein.

Like the Commissioner, we emphasize that the mandates of N.J.S.A. 18A:46-24 and N.J.S.A. 18A:46-25 were not followed by the Districts involved here and that, therefore, a jointure commission was never established by the Respondent Districts. Further, despite the voluminous documentary evidence submitted by Petitioner, she did not establish that in performing its coordinating functions, Region V exercised the powers of a jointure commission set forth in N.J.S.A. 18A:46-26, or that the Respondent Districts performed the mandated functions specified by N.J.S.A. 18A:46-27. Nor does the record indicate that the services provided by the Respondent Districts were those provided by a regional school district pursuant to N.J.S.A. 18A:13-1 et seq. Accordingly, in the absence of proofs establishing that Petitioner was employed during the relevant period by either of these statutorily defined entities rather than by the individual Boards with whom she contracted and served, we concur with the Commissioner that, as set forth in his decision, Petitioner did not acquire tenure by virtue of her employment by the River Edge and Bergenfield Boards of Education.

We further affirm the Commissioner's determination that the Administrative Law Judge's (ALJ) limitation on admission into evidence of exhibits P-241, P-242, P-250 and P-254 on the basis of attorney-client privilege was proper. As found by the ALJ, the excluded material involved legal advice rendered by counsel to the Districts involved here concerning this litigation and there was no knowing waiver of the privilege by the Respondent Districts. Tr. 4/14/86, at 51-2; 69-73; 147-50. See, e.g., Aysseh v. Lawn, 186 N.J. Super. 218 (Ch. Div. 1982).

March 4, 1987

HENRY R. PRZYSTUP,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 23, 1986

For the Petitioner-Appellant, Robert M. Schwartz, Esq.

For the Respondent-Respondent, William A. Massa, Esq.

Petitioner-Appellant Henry R. Przystup is a former Chief Administrator of the Bureau of Pupil Personnel Services (BPPS), who was transferred from that position by the Board to the position of Principal of the Regional Day School following his service as Interim Superintendent of Schools from May 16, 1984, through July 10, 1985. Dr. Przystup claimed tenure as Chief Administrator (BPPS) and, on that basis, claimed that his transfer to the position of principal was improper. He also claimed he was improperly compensated for his services as Interim Superintendent, for which he was compensated at one-tenth of his salary as principal on a monthly basis based on the Board's resolution of July 18, 1984.

The Commissioner held that Dr. Przystup was not tenured in the position of Chief Administrator (BPPS) because, as established in Figurelli v. Board of Education of the City of Jersey City, decided by the Commissioner July 23, 1984, aff'd by the State Board, Dec. 5, 1984, appeal dismissed, Docket # A-2034-84T7 (App. Div. December 18, 1985), he did not possess the requisite certification for the position. In resolving this question, the Commissioner expressed his grave concern and displeasure over the long history of litigation arising from the position at issue, which had been known by a variety of titles for which the Board had not sought approval from the County Superintendent as required by regulation. Viewing the litigation surrounding this position in conjunction with that surrounding other cases involving failures of the Jersey City Board of Education to conform with the requirements of the education laws with respect to administrative and supervisory positions, the Commissioner found it necessary to direct the County Superintendent to conduct a comprehensive review of all supervisory and administrative positions in the District.

The Commissioner then turned to the question of Dr. Przystup's compensation for his period of service as Interim Superintendent. Recognizing that the Commissioner would not ordinarily act with respect to a dispute about the salary of an Interim Superintendent, the Commissioner emphasized that he had the right to review the actions of a board where bad faith was alleged and where a board had failed in its obligation to act on a matter it had promised to act on by way of prior board resolution.

Citing the Board's resolution of July 18, 1984, the Commissioner concluded that the record left no doubt that the Board intended to compensate Dr. Przystup at a rate other than that of principal. The Board's resolution had approved Dr. Przystup's compensation "... based on one-tenth of his annual salary, effective June 26, 1984," and further resolved that "such compensation is to continue until negotiations are completed." J-3. The Commissioner found that there was no doubt from the record that negotiations had occurred relative to salary and had culminated in a proposed salary agreed to by Dr. Przystup and the Board's personnel committee, which was never acted upon by the Board. The Commissioner however found sufficient bad faith exhibited by the Board's failure to act to require a remedy.

The Commissioner rejected Dr. Przystup's argument that he be compensated at one-tenth of his principal's salary for each month of service as Interim Superintendent based on the Board's resolution, finding that this construction would impermissibly enrich Dr. Przystup. Likewise, he rejected the Board's interpretation that the resolution entitled Dr. Przystup to only one-tenth above his principal's salary. He found another option could be to base compensation on the current superintendent's salary. Rejecting all of these options, the Commissioner concurred with the ALJ that the "just, reasonable and equitable figure" was the one in the proposed contract, on which the Board would have had the opportunity to act but for its bad faith. The Commissioner therefore directed compensation of the sum equal to the difference between the amount set forth in the proposal and that which Dr. Przystup actually received from September 1, 1984, to July 10, 1985.

For the reasons expressed by the Commissioner, we affirm his determination that Dr. Przystup was not tenured in the position of Chief Administrator of the Bureau of Pupil Personnel Services. We also join the Commissioner in his concerns regarding the continual litigation arising from the Board of Education of the City of Jersey City's use of administrative and supervisory titles, and fully concur with the Commissioner's directive for comprehensive review of all such titles in the District by the County Superintendent. We however reverse the Commissioner's determination that Dr. Przystup is entitled to compensation as Interim Superintendent on the basis of the proposed amount that was never acted upon by the Board.

The Commissioner's determination concerning Dr. Przystup's salary entitlement was based on his conclusion that the Board's failure to act on the contract proposal was the result of bad faith. In this he relied on the Administrative Law Judge's finding that the omission was motivated by bad faith. Commissioner's decision, at 20. In his Initial Decision, the ALJ discussed the testimony of witnesses that the lack of quorum at the Board's meeting of June 26, 1985, resulted from intervention by the mayor, but concluded that no findings could be made on the basis of that testimony because it was pure hearsay. Initial Decision, at 9. Both the ALJ and the Commissioner base their conclusion that the Board's failure to act was in bad faith on the fact that the board did not act. Nor does the record reveal more.

In the absence of any evidence of bad faith beyond the fact that the Board did not act on the proposal, we find no basis for implementing the terms of that salary proposal. Although the Board had a statutory obligation to "fix" Dr. Przystup's salary during his employment as Interim Superintendent, N.J.S.A. 18A:17-19, this obligation was met when the Board acted on July 18, 1984, to establish his salary until such time as negotiations were completed. As set forth above, negotiations occurred, resulting in agreement concerning the salary proposal to be submitted to the Board, but this proposal was never acted upon. Accordingly, although Dr. Przystup may now desire a higher rate of compensation based on the nature of the services he provided, his salary was fixed during his employment as Interim Superintendent by the terms of the resolution.

The terms of the resolution provide that Dr. Przystup was to be compensated "based on one-tenth of his annual salary, effective June 26, 1984." Thus, in addition to amounts earned during the 1983-84 academic year, for which payment was deferred until July and August, Dr. Przystup was entitled to one-tenth of his annual salary of $45,692 for each month of service as Interim Superintendent, with proration on that basis for that portion of July 1985 during which he served in that capacity. Whether or not it was the Board's intention at the time it acted to adopt the resolution to compensate Dr. Przystup at a principal's rate of pay during his entire year of service as Interim Superintendent, it did not act to alter the terms of the resolution, and we find no reasonable basis in the language of the resolution for directing compensation beyond the amounts set forth above.

S. David Brandt opposed.
September 2, 1987

RAHWAY EDUCATION ASSOCIATION, AND NANCY LAZUR,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 19, 1986

For the Petitioners-Appellants, Klausner and Hunter
(Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, Magner, Orlando, Kahn, Schnirman, Hamilton, Kress and Charney
(Leo Kahn, Esq., of Counsel)

For the Intervenor-Respondent, Ruhlman, Butrym and Friedman (Susan Holley, Esq., of Counsel)

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

Deborah Wolfe abstained.
January 7, 1987

PETER J. ROMANOLI,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 16, 1985

Decision on Motion by the State Board of Education, February 4, 1987

For the Petitioner-Respondent, Jeffrey A. Bartges

For the Respondent-Appellant, Paul Ferrell, Jr., Esq.

The facts in this case are straightforward. At a special meeting on October 20, 1982, the Willingboro Township Board of Education established the salary for its Superintendent, Peter J. Romanoli, for the 1982-83 and 1983-84 school years at $63,945 and $68,741 respectively. On June 27, 1983, the Board determined to withhold Mr. Romanoli's scheduled salary increase for 1983-84, and to compensate him for the 1983-84 school year at his then current salary of $63,945. Mr. Romanoli challenged the Board's action as violative of N.J.S.A. 18A:29-14. The Commissioner found that the withholding of the increment was not improper, and that decision was affirmed on appeal by the State Board and the Appellate Division. Romanoli v. Willingboro Township Board of Education, decided by the Commissioner, November 13, 1984, aff'd by the State Board, March 6, 1985, aff'd, Docket #A-3668-8416 (App. Div. Jan. 24, 1986).

The Board did not establish a new salary for Mr. Romanoli for the 1984-85 school year, but continued to compensate him during that year at the same salary level at which he had been compensated during 1982-83 and 1983-84, $63,945. In this action, Mr. Romanoli has challenged the Board's continuation of his salary at that level, asserting that since the Board failed to act pursuant to N.J.S.A. 18A:29-14 to withhold a salary increment for 1984-85, he is entitled to receive a retroactive increment of $4,796, the salary increase he would have received for 1983-84 had the Board not acted to withhold his increment for that year.

In his Initial Decision, the Administrative Law Judge (ALJ) observed that the salaries of superintendents have historically been set following personal negotiations between the superintendent and employing board. He found that this approach was not altered by enactment of N.J.S.A. 18A:29-4.3, which authorizes, but does not mandate, district boards to adopt salary schedules applicable to their superintendents.

The ALJ concluded that by listing Mr. Romanoli's recompense for services to be performed to take place on a regular basis, the Board in this case had adopted a salary schedule within the meaning of N.J.S.A. 18A:29-4.3 when it established Mr. Romanoli's salary for a two year period. Accordingly, pursuant to that statute, the provisions of N.J.S.A. 18A:29-4.1 were applicable to the case.

Relying on Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978)[1], the ALJ found that based on the court's holding in that case and the fact that the Board did not act to withhold an increment for 1984-85, Mr. Romanoli was entitled by virtue of the Board's adoption of a salary schedule applicable to him to receive the difference between the salary he was presently receiving and $68,741, the amount established by the Board for the 1983-84 school year.

The Commissioner concurred with the ALJ's conclusions that the Board's action in establishing Mr. Romanoli's salary for a two year period constituted setting a two year salary schedule for him, that the difference between the amount established for 1982-83 and 1983-84 constituted an increment of $4,796 and that, absent evidence of an action to withhold pursuant to N.J.S.A. 18A:29-14 for the 1984-85 school year, Mr. Romanoli was presumed to have earned that increment. Although recognizing that N.J.S.A. 18A:29-4.1 does not require a salary schedule to be binding for longer than two years from the effective date of the schedule and that Galloway involved a one year schedule, the Commissioner adopted the ALJ's determination in the case. The Commissioner found that by virtue of adoption of the schedule in October 1982, Mr. Romanoli was entitled to progress to the next salary level specified in that schedule following withholding of his increment for 1983-84. The Commissioner further found that even assuming the schedule expired on June 30, 1984, Mr. Romanoli would be entitled to the increase of $4,796 incorporated in the prior schedule because that schedule represented the status quo in terms of salary and the Board took no affirmative steps to alter that schedule or to withhold the increment.

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1 We note that the ALJ cited Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 1. However, since that case involved questions entirely unrelated to the issues in this case, we conclude that this represented merely on error in citation.

After careful review of the relevant law, we agree with the ALJ and the Commissioner that by establishing Mr. Romanoli's salary for the 1982-83 and 1983-84 school years, the Board exercised its discretionary authority conferred by N.J.S.A. 18A:29-4.3 to adopt a salary schedule applicable to its superintendent. We further agree that, pursuant to that statute, the schedule it adopted was subject to the provisions of N.J.S.A. 18A:29-4.1. We, however, conclude that nothing in N.J.S.A. 18A:29-4.1, nor under any other provisions of the education laws, entitles Mr. Romanoli to receive any compensation for 1984-85 beyond his salary of $63,945.

N.J.S.A. 19A:29-4.1 provides that

> 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.

Thus, when a board acts under authority of N.J.S.A. 18A:29-4.3, it is, pursuant to N.J.S.A. 18A:29-4.1, bound by the terms of the schedule it adopts for a two year period, unless it modifies such schedule as provided in the statute. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978); Cliffside Park Bd. of Education v. Mayor and Council of Cliffside Park, 100 N.J. Super., 490 (App. Div. 1968). Therefore, when a board adopts a one year schedule, but fails to adopt a new schedule the next succeeding year, the previous schedule remains operative and the Board is obligated by the education laws to pay non-discretionary salary increments specified in the previous schedule. Galloway, supra at 51-2. However, we can find nothing in N.J.S.A. 18A:29-4.1 that confers an entitlement under the education laws to receive salary benefits beyond the two year statutory period where, as in this case, a two year schedule has expired.

We further conclude that in contrast to collective negotiations to which the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., is applicable, the requirement that the status quo be maintained during negotiations concerning terms

and conditions of employment, see N.J.S.A. 34:13A-5.3, is not applicable in this case. As recognized by the ALJ, the authority conferred by N.J.S.A. 18A:29-4.3 on district boards to establish salary schedules for their superintendents does not alter the fact that any negotiation involved in establishing such schedule is individual and not collective. Thus, we conclude that the only requirements concerning maintenance of the status quo upon expiration of a two year salary schedule applicable to a superintendent under the education laws are those embodied in the specific statutory mandates of the education laws.

Our examination of the requirements of the education laws indicates that although the Board was prohibited from reducing Mr. Romanoli's salary from then his current level upon expiration of the two year schedule that it had adopted, N.J.S.A. 18A:28-5; N.J.S.A. 18A:17-19, it had no legal obligation under the education laws to increase his salary from that amount. We emphasize that as a result of the Board's action in June 1983, the salary increase to which Mr. Romanoli would otherwise have been entitled for 1983-84 was permanently withheld unless the Board chooses to act affirmatively to restore that increase, North Plainfield Education Association v. Board of Education, 96 N.J. 587 (1984), and that payment at the same level for 1984-85 as for 1983-84 did not constitute a reduction in compensation. Williams v. Board of Ed. of Plainfield, 176 N.J. Super. 154 (App. Div. 1980).

In sum, we affirm the Commissioner's determination that the Board in this case adopted a two year salary schedule applicable to its Superintendent, Mr. Romanoli, within the meaning of N.J.S.A. 18A:29-4.3, and that such schedule was subject to the provisions of N.J.S.A. 18A:29-4.1. We conclude that the board was bound by the terms of the schedule pursuant to N.J.S.A. 18A:29-4.1 during the two year period it was in effect, but that, notwithstanding the Board's withholding of increment during the second year that the schedule was in effect, N.J.S.A. 18A:29-4.1 did not create any obligation on the part of the Board to pay Mr. Romanoli in 1984-85 the salary increase to which he would have been entitled for 1983-84. Rather, we find that the schedule expired by its terms following the two year statutory period specified in N.J.S.A. 18A:29-4.1, and that, because the establishment of a new schedule in this case was not subject to the provisions of the New Jersey Employer-Employee Relations Act, the Board was not subject to requirements of that Act concerning the maintenance of the status quo, although it was prohibited by the education laws from reducing Mr. Romanoli's salary. Since the Board continued to compensate Mr. Romanoli in 1984-85 at the same salary he received in 1983-84, we conclude that Mr. Romanoli has no entitlement under the education laws to any additional compensation for that year.

For the reasons set forth above, the decision of the Commissioner is reversed.

Attorney exceptions are noted.
April 1, 1987

RUMSON-FAIR HAVEN EDUCATION ASSOCIATION,	:	
PETITIONER-RESPONDENT,	:	
AND	:	STATE BOARD OF EDUCATION
NEW JERSEY EDUCATION ASSOCIATION, INTERVENOR-RESPONDENT,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE RUMSOM-FAIR HAVEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 16, 1986

For the Petitioner-Respondent, Oxfeld, Cohen and Blunda (Mark J. Blunda, Esq., of Counsel)

For the Intervenor-Respondent New Jersey Education Association, Ruhlman, Buthyrm and Friedman (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, Reussille, Mousner, Carotenuto, Bruno and Barger (Morton M. Barger, Esq., of Counsel)

This case calls upon the State Board of Education to resolve whether the Teacher Quality Employment Act, N.J.S.A. 18A:29-5, L. 1985, c. 321, applies to substitute teachers employed by a board on an annual basis pursuant to contract so as to entitle them to a minimum salary of $18,500 per year. The case was initiated by a Petition of Appeal to the Commissioner filed on February 6, 1986, by the Rumson-Fair Haven Education Association (Association), which is the collective negotiations representative for all classroom teachers employed by the Board, and Brad Wilbur, who was employed by the Board in the 1985-86 school year pursuant to an employment contract as a "Permanent Substitute Teacher" at a salary of $9,250.00.[1] The New Jersey Education Association (NJEA)

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[1] We note that in their Petition, Petitioners asserted that the Association "represented" Mr. Wilbur, but that in its answer, the Board denied this assertion.

was granted leave to intervene in support of Petitioners' position in May 1986. On May 13, 1986, Brad Wilbur withdrew his claim against the Board.

The ALJ considered the matter on a summary basis based on Petitioner's motion for summary judgment and the affidavit and exhibits filed in support of that motion. Those documents included a job description for "Permanent Substitute," which specifies that the Board requires a New Jersey Secondary Teacher Certificate in order to qualify for this service, and designates the primary function as "substitutes for absent teacher as assigned by principal or designee." Exhibit II. The specific responsibilities are designated as follows: 1) reports to school and remains at school in accordance with current teacher contract hours, 2) prepares for assignment as directed by principal, 3) reports to specific location as directed by the principal, 4) attends all faculty meetings, 5) completes appropriate reports as required by the administration regarding substitute activities, 6) covers classes as assigned, 7) supervises cafeteria, corridors, auditorium, gymnasium, resource rooms, or other locations as assigned by the principal, 8) assists the librarian when assigned to the library, 9) performs other appropriate tasks as assigned by the superintendent, principal or other designee. The job description also provides that the permanent substitute will be evaluated by the principal.

The exhibits also included an observation report, Exhibit III, and a summative evaluation. Exhibit IV. The observation report assesses command of subject matter, teaching techniques, teacher-student relations and class-management, and concludes that the individual observed had done a commendable job as a "permanent substitute" during her brief tenure at Rumson-Fair Haven High School. The Summative Evaluation assesses an individual who had served as a permanent substitute for one year, concluding that this individual had performed her duties in specified areas, but that she could improve in 1) implementing the lesson plans prepared by the teacher, 2) adjusting to the fact that, as a substitute, her expected assignment would be changed and 3) should not release classes early when the plans left by the regular teacher were not adequate to fill an entire class period, but should attempt to carry in alternative plans for such contingency.

Based on this documentation and the briefs submitted by the parties, the Administrative Law Judge (ALJ) found that there was no dispute as to the fact that permanent substitute teachers were certified teachers who substituted on a full-time daily basis and were assigned to various classes. They were employed on a contractural basis for the entire year and worked the same work day as full-time teaching staff members. The ALJ noted that they were evaluated and that they were expected to attend faculty meetings and perform other duties as assigned by the principal. He also observed that their assignments included classes outside their area of certification. He found that they performed the same functions as regular substitutes except that they reported to school each day

rather than waiting at home, and that this arrangement was an administrative convenience for both the school and the substitute. Although recognizing that if assigned to fill in for a full-time teacher on leave for an extended period, the permanent substitute might perform long-term teaching functions, he found that they were not generally involved in long term functions such as homework and testing.

Noting that this case does not present the issue of a substitute assigned over an extended period of time to cover the classes of a teacher on leave, the ALJ concluded that permanent substitutes are not entitled to the minimum salary provided by N.J.S.A. 18A:29-5. He noted that the only substantive and functional difference between permanent substitutes and those working on a day-to-day basis was that the former report to school each day under contract. He again emphasized that unlike full-time teaching staff members, the substitutes do not become involved in long term duties unless they were assigned to fill in over an extended period for regular teachers. He concluded that by any other name, a substitute is a substitute, and that the daily work arrangement established for administrative convenience does not alter the substance of the daily work.

Although he found that it was possible to conclude based on the language of N.J.S.A. 18A:29-5 that the Legislature intended to pay permanent substitutes the same salary as full-time teaching staff members, he further concluded that this would be an unreasonable and absurd result which was not mandated by the language of the statute, and that such result would fail to consider other sections of the Act that express the Legislature's intent. Emphasizing that the Legislature was specifically concerned with the starting salary for new teachers, and that it expressly excluded any teacher employed as a substitute on a day-to-day basis, he concluded that the legislative concern with establishing competitive starting salaries for teachers simply did not apply to substitute teachers, who perform an inherently different function from a full-time teacher. The ALJ therefore concluded that the minimum salary provisions of the Teacher Quality Employment Act did not apply to "permanent" substitutes performing the same functions as regular substitutes who did not have an annual contract and who waited for a call at home. He further concluded, however, that the Act did require that the minimum salary be provided to a teacher who is filling in for a teacher on leave of absence for an extended period amounting to some proportion of the academic year. The ALJ recommended that the action of the district Board in denying payment of the minimum salary provided by the Teacher Quality Education Act be affirmed and that the petition be dismissed.

After recounting the arguments made by NJEA and the Association, the Commissioner rejected the ALJ's findings and determination. He found that the permanent substitutes meet the definition for teaching staff members set forth in N.J.S.A. 18A:1-1 because the Board required an instructional certificate for such

employment, which he noted was appropriate for the office, position or employment of a permanent substitute. Further, since permanent substitutes were paid annually, the Commissioner concluded that they were not day-to-day substitutes, the single excluded group from the Act. The Commissioner's final inquiry was whether permanent substitutes functioned as full-time employees. Based on the job description, the Commissioner resolved this inquiry in the positive.

The Commissioner concluded that since permanent substitutes in the District were not employed on a day-to-day basis, but were contracted on a year-to-year basis to hold a position under an appropriate certificate, they were entitled to the benefits of N.J.S.A. 18A:29-5. Since he found that the permanent substitutes were full-time employees, the Commissioner found it unnecessary to reach a discussion of whether they would be entitled to such benefit by virtue of filling an assignment of a teacher on leave on an extended basis.

The question presented by this case is whether persons employed on an annual basis by a board to substitute as assigned by the principal for absent teaching staff members are entitled to the minimum annual salary established by the Teacher Quality Employment Act, L. 1985, c. 321, N.J.S.A. 18A:29-5 (1985). That statute provides that:

> The minimum salary of a full-time teaching staff member, in any school district, who is certified by the local board of education as performing his duties in an acceptable manner for the previous academic year pursuant to N.J.A.C. 6:3-1.19 and 6:3-1.21 and who is not employed as a substitute on a day-to-day basis, shall be $18,500 for an academic year and a proportionate amount for less than and academic year.

(emphasis added).

Thus, pursuant to the statute an employee of a district must be a full-time teaching staff member in order for the statute to be applicable to him. There is no dispute that "permanent substitutes" employed by the Board are employed on a full-time basis. However, as stated, they must also be teaching staff members in order to qualify for the benefit provided by the statute. We therefore must resolve whether the substitutes employed by the Board are teaching staff members as defined by statute. In resolving this question, we emphasize that if these employees meet the statutory criteria for teaching staff membership, they would be entitled to application of N.J.S.A 18A:29-5 regardless of the contractual relationships between the parties. Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982).

N.J.S.A. 18A:1-1 defines a teaching staff member as

> ...a member of the professional staff of any district or regional board of education,

> ...holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners...

Careful review of the applicable statutory and regulatory scheme indicates that employment as a substitute teacher is not of a character that requires an individual so employed to hold a valid standard, provisional or emergency certificate appropriate to employment as a substitute in order to be qualified. To the contrary, there is no standard, emergency or provisional certification appropriate to employment as a substitute teacher. N.J.A.C. 6:11-6.1 et seq. See N.J.A.C. 6:11-3.6 (requiring district boards to assign titles to teaching staff members that are recognized in the certification rules and establishing the procedure for obtaining a determination of the appropriate certification from the County Superintendent in the event the use of an unrecognized title is desirable). Furthermore, N.J.A.C. 6:11-4.4 specifically provides that any person who does not hold a standard instructional certificate may serve as a day-to-day substitute teacher when granted a County Substitute Certificate based on the completion of a minimum of sixty semester hours credit at an accredited college. Such individuals may not serve however for more than twenty consecutive days in the same position in any one school district during the school year. N.J.A.C. 6:11-4.4 (c). Likewise, although a County Substitute Certificate is not required in order for persons holding a New Jersey Instructional Certificate to be employed as substitutes, such individuals may serve in areas outside the scope of their certification in one position within a district only for twenty consecutive days during a school year. N.J.A.C. 6:11-4.4(f). Although the regulations do not address the assignment of persons holding instructional certificates within their area of certification, we conclude that the authorization set forth in N.J.A.C. 6:11-4.4(f) establishes that service as a substitute as defined by the regulation is not of such character to require such certification, and that possession of the certification applicable to any particular substitute assignment filled by an individual does not alter the character of the employment.

In essence, as established by the certification rules, the character of employment as a substitute serving in particular assignments on a short-term basis is not such as to require certification and, accordingly, there is no requirement under New Jersey law that an individual possess standard, provisional or emergency certification "appropriate" to employment as a substitute in order to serve in that capacity within the limitations established by the regulations. Furthermore, those limitations do not preclude the District from contracting substitutes on an annual basis so long as no substitute so employed is assigned to fill one position for more than twenty consecutive days within a single a

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single school year, and we emphasize that there is no claim in this case that the Board assigned any "permanent substitute" to the same position beyond the regulatory period. Moreover, although the Board required a "New Jersey Secondary Teacher Certificate"[2] for employment as a "permanent substitute," it did not require that an individual possess the certification required for any particular teaching assignment, N.J.A.C. 6:11-6.1(a), and we therefore conclude that it did not alter the character of the employment at issue by establishing this criteria for employment.

Nor does the fact that individuals employed by the Board as "permanent substitutes" contracted to serve as substitute teachers on an annual basis alter our conclusion that the character of the employment is not such to require appropriate certification within the meaning of N.J.S.A. 18A:1-1. Examination of the job description indicates that, as concluded by the ALJ, regardless of their contractual relationship with the Board on an annual basis, the function performed by the "permanent substitutes" in this case is to substitute for absent staff members. Assignments are made by the Principal, and the substitute covers classes as assigned. Evaluation is as a substitute, with focus on the ability of the substitute to implement lesson plans prepared by the absent teacher. Review of the job description further indicates that permanent substitutes are not responsible for providing instructional services on a regular basis to an assigned group of students, and, accordingly, are not responsible for lesson plans in any curriculum area, homework, testing or grading. Quite simply, "permanent substitutes" do not have full responsibility for instructing a class of pupils for a designated course of study for credit, Arthur Jones et al. v. Board of Education of the Borough of Leonia, et al., 1976 S.L.D. 495, modified, 1978 S.L.D. 1022, and do not fill teaching assignments so as to require certification. See N.J.A.C. 6:11-6.1(a). We therefore conclude that employment as a "permanent substitute" is not that of a teaching staff member.

Review of the auxiliary functions required by the Board of substitute teachers does not alter our conclusion that such employment is not as a matter of law employment as a teaching staff member. No certification is required to perform such duties as attending faculty meetings, supervising cafeteria or other locations and assisting the librarian. Although substitute teachers performing such duties in addition to covering classes for absent teachers may legitimately desire additional compensation, we emphasize that the prerequisite for the entitlement conferred by N.J.S.A. 18A:29-5 is employment as a teaching staff member, which in turn requires that the employment be of such character so as to require appropriate certification.

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[2] We note that the Board of Examiners does not issue a certificate with such designation. See N.J.A.C. 6:11-4.1 et seq.

As stated, we conclude that employment as a "permanent substitute" is not employment as a teaching staff member, and therefore we find that the "permanent substitutes" employed by the Board are not entitled as a matter of law to the benefit conferred on teaching staff members by N.J.S.A. 18A:29-5. In so concluding, we again emphasize that this is not a case involving employment by the Board of teachers possessing appropriate certification to fill for extended periods of time teaching assignments from which staff members are on leave. See Sayreville Education Association v. Board of Education of the Borough of Sayreville, 193 N.J. Super, 424 (App. Div. 1984). See also N.J.S.A. 18A:16-1.1 (authorizing district boards to designate a person to act in the place of a staff member who is absent, but providing that no person so acting will acquire tenure).

In light of our conclusion, that "permanent substitutes" employed by the district are not teaching staff members, we need not decide whether employment as a "permanent substitute" falls within the Legislature's exclusion from the benefit of N.J.S.A. 18A:29-5 of those employed as substitutes on a day-to-day basis. However, neither the petitioning Association nor the NJEA presented any evidence to indicate that, regardless of the contractual commitment of "permanent substitutes" to report each day, their employment was other than substituting for absent staff members as assigned by the principal on a day-to-day basis. In the absence of any indication otherwise, we concur with the ALJ that the only functional difference between "permanent substitutes" and "regular" substitutes is that the former report to school each day rather than waiting at home.

For the reasons set forth above, we reverse the decision of the Commissioner.

Attorney exceptions are noted.
August 5, 1987

S.T., on behalf of her minor child, N.T.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 24, 1986

For the Petitioner-Appellant, Joseph F. Shanahan, Esq.

For the Respondent-Respondent, Jacob and Robinson
(Frederick Jacob, Esq., of Counsel)

For the reasons expressed in his decision, we concur with the Commissioner that N.J.S.A. 18A:35-4.7 does not preclude a district board from requiring alternative health assignments for students who have been excused from any part of the instruction in health pursuant to that statute. We further agree that when presented with alternative topics, the Petitioner in this case had the right and opportunity to invoke the statutory right of excusal from the alternative program, but did not do so. We find, as did the ALJ and Commissioner, that the independent study program in this case provided a proper alternative to the part of the instruction in health from which Petitioner's daughter had been excused. We affirm that a failing grade may properly be awarded as a consequence of a failure to complete outstanding assignments required for completion of an alternative program where there has been no excusal from the alternative program. However, in light of the fact that the student in this case did not complete her assigned work because her mother advised her that legal action would relieve her of the need to do so, a question that we have settled today, we direct that the district Board afford this student two months from the date of this decision to complete her outstanding assignments and, if she does so, that it award her the grade she earns for the third marking period.

Alice Holzapfel opposed.
May 6, 1987

SCOTCH PLAINS-FANWOOD EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, October 11, 1983

For the Petitioner-Respondents, Bucceri & Pincus
(Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Appellant, Boehm & Campbell
(Casper P. Boehm, Jr., Esq. of Council)

This consolidated case involves eleven individually named Petitioners who were initially employed prior to 1978 by the Scotch Plains- Fanwood Board of Education (hereinafter "Board") as Title I, supplemental and compensatory education teachers and were compensated at an hourly rate. In 1978, Petitioners filed Petitions of Appeal with the Commissioner of Education[1], seeking a declaration that the positions in which they served were tenurable and an order directing payment of retroactive benefits, including pro-rata compensation based on the salary schedule set forth in the collective negotiations agreement between the Scotch Plains-Fanwood Education Association and the Board.

The matter was transmitted to the Office of Administrative Law on July 2, 1980, but, on request of the parties, was held in abeyance, first pending a decision in Point Pleasant Beach Teachers Ass'n, 173 N.J. Super. 11 (App. Div. 1981), and then pending the New Jersey Supreme Court's decision in Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). After the court rendered its decision in Spiewak and following the submission of supplemental stipulations, the record was closed and the Administrative Law Judge (ALJ) made his initial determination in the matter.

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[1] Petitions of Appeal on behalf of ten individually named Petitioners were filed on July 24, 1978, and on behalf of Petitioner Esposito on September 5, 1978. The cases were consolidated prior to transmittal to the Office of Administrative Law.

The ALJ first determined that pursuant to Spiewak, each individually named Petitioner who held a valid certificate to teach and was employed the requisite amount of time achieved tenure. He further determined that Petitioners, whether tenured or not, were entitled to retroactive relief. He, however, concluded that such relief was limited to the three month period prior to the date on which the Petitions of Appeal had been filed and that Petitioners who had achieved tenure but had been terminated prior to the decision in Spiewak were entitled to reinstatement only if termination occurred within three months of the filing date of the petitions.

The ALJ then made his determinations concerning the substantive relief to which Petitioners were entitled. He found that for each Petitioner who was properly certified, such relief included retroactive compensation based on the salary schedule negotiated between the Board and the Association during the relevant years for the period commencing three months before the petitions were filed. Although he found that the Petitioners who had not achieved tenure prior to their termination were not entitled to reinstatement, he further determined that Petitioners Strudler and Esposito had acquired tenure when terminated within three months of the filing date of their petitions and that therefore each was entitled to reinstatement, and to compensation for the period following termination if seniority entitled either to reinstatement.

Although observing that the Commissioner had refused to assert jurisdiction over disputes involving enrollment in the Teacher Pension Annuity Fund (TPAF), the ALJ found that the Commissioner did have the authority to direct the Board to inform TPAF of the pertinent details regarding the employment of individual Petitioners, and directed that the Board do so. He found that Petitioners were eligible for all statutory benefits accorded regular teaching staff members similarly situated, including accumulated sick leave, and, although the collective negotiations agreement was not part of the record, to carry-over benefits conferred on other teaching staff members covered by that agreement. The Commissioner adopted the ALJ's determination in the matter with the modification that petitioners were entitled to full retroactive relief.

The Board appealed, arguing that Spiewak does not confer on Petitioners an entitlement to be compensated on the basis of the negotiated salary schedule set forth in its collective agreement with the Association or to receive other benefits conferred by the collective agreement on other teachers. It further argues that Petitioners who were terminated prior to the date of the Spiewak decision are not entitled to reinstatement, and that any relief due to any Petitioner is limited to the period subsequent to the date of the Spiewak decision. The Board, however, maintains that no relief is due any Petitioner, that all tenure rights including calculation of seniority should be from the date when Petitioners were appointed to their current full-time positions and that Petitioners' compensation claims are barred by N.J.A.C. 6:24-1.2. In response,

Petitioners urge affirmance of the Commissioner's decision, arguing that they are entitled to retroactive relief from date of employment and renewing their claim that Spiewak prohibits negotiation of salary or benefits for supplemental teachers which are less than those agreed to for other teaching staff members.

I

The threshold issues in this case are whether the individually named Petitioners in this case are entitled to retroactive application of Spiewak and, if so, the extent of such relief. We find that the New Jersey Supreme Court's decision in Rutherford Education Association v. Board of Education of the Borough of Rutherford, 99 N.J. 8 (1985), settles these questions.

In Rutherford, the court settled that petitioners who, like the Petitioners in this case, had filed Petitions of Appeal with the Commissioner prior to the date of the Spiewak decision are entitled to the retroactive benefit of that decision. The court, however, placed two limitations on such benefit. First, because of the administrative confusion that would result from retroactive application of Spiewak to teachers terminated prior to the decision in that case, the court in Rutherford held that Spiewak would not be applied retroactively to any teacher who was not employed by a board on the date of the Spiewak decision. 99 N.J. at 29-30. Second, because of its concern with the financial impact on district boards if Spiewak was given unlimited retroactivity as to those teachers still employed on the date of the Spiewak decision, the court held that even with respect to those teachers, calculation of the retroactive benefits that each teacher is entitled to receive is limited to a date six years prior to the court's decision in Rutherford. Id. at 30.

Based on the clear mandate of Rutherford, we conclude that the Petitioners in this case who were employed by the Board on the date of the Spiewak decision, specifically Petitioners Armstrong, Helfrich, O'Shea and Smith, are entitled to benefit retroactively from the decision in Spiewak and to calculation of any benefits due them as a result of our decision in this matter from the date six years prior to the court's decision in Rutherford. We, however, find that retroactive application of Spiewak, and therefore retroactive relief pursuant to that decision, is precluded in the cases of Petitioners Bruno, Bruns, Jenkins, Markowitz, Paskowitz, Strudler and Esposito since none of these Petitioners were still employed by the Board on the date of the Spiewak decision.

Our determination concerning retroactive application of Spiewak to the Petitioners in this case does not, however, resolve Petitioners' claims to substantive relief, and we are now called upon to determine to what, if any, substantive relief Petitioners Armstrong, Helfrich, O'Shea and Smith are entitled by virtue of the New Jersey Supreme court's determination in Spiewak that service as a Title I, compensatory education and supplemental teacher is as a teaching staff member within the meaning of N.J.S.A. 18A:1-1.

II

Petitioners claim that by virtue of their status as teaching staff members during the relevant years, they were entitled to receive the same salary and benefits as other teaching staff members in the District. They specifically claim that they are entitled to retroactive compensation based upon the District's salary schedule for their service as Title I, compensatory education and supplemental teachers, and, as a consequence, to salary adjustment upon their subsequent assignments as Teachers of the Handicapped.

Initially we emphasize that in determining the validity of this claim, Petitioners are entitled to retroactive application of the substantive holding of Spiewak, although calculation of any retroactive benefits due them by virtue of the State Board's decision in this case is limited to the period commencing on April 11, 1979. Rutherford, supra. It is no longer disputed that Petitioners' service in the District from their initial employment as Title I, compensatory education and supplemental teachers was in tenurable positions and that each has achieved tenure. However, as we found in Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A-2508-84T7 (App. Div. Feb. 26, 1986), certif. denied, Docket #25,352 (June 30, 1986), tenure status does not entitle Petitioners to compensation based on a negotiated schedule applicable to other teaching staff members. Nor did the court's decision in Spiewak confer such entitlement. Rutherford, supra at 14. Rather, as set forth in Hyman, any entitlement to compensation under the education laws is controlled by N.J.S.A. 18A:29-1 et seq., which are the statutory provisions applicable to the compensation of teaching staff members.[2] Again, those statutes are applicable only to the compensation of full-time teaching staff members. N.J.S.A. 18A:29-4.1; N.J.S.A. 18A:29-6 (repealed 1985) (provision now codified at N.J.S.A. 18A:29-5). We reiterate that, although the education laws prohibit reduction in the compensation of any tenured teaching staff member, N.J.S.A. 18A:28-5, they do not prescribe any standards governing the rate or manner of the compensation of teaching staff members who are not full-time. See Hyman, supra.

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[2] We note that, effective September 9, 1985, the compensation statutes were substantially altered. N.J.S.A. 18A:29-6, N.J.S.A. 18A:29-7, N.J.S.A. 18A:29-8, N.J.S.A. 18A:29-10 and N.J.S.A. 18A:29-12 were repealed. Teacher Quality Employment Act, N.J.S.A. 18A:29-5, L. 1985, c. 321 sec. 16 (1985). We further note that, in addition to repealing those statutory provisions, the Teacher Quality Employment Act raised the minimum salary for full-time teaching staff members to $18,500. N.J.S.A. 18A:29-5. Although the entitlement to retroactive benefits in this case is to be determined under the statutes in effect prior to September 9, 1985, we emphasize that the new statutory minimum, like the predecessor statutes, is applicable only to full-time teaching staff members.

Thus, the threshold question in resolving Petitioners' compensation claims is whether they were full-time teaching staff members during the years relevant to this litigation. As set forth in Hyman, "full-time" is defined by statute as the number of days of employment each week and the period in each day required to qualify any person as a full-time member. N.J.S.A. 18A:29-6 (repealed 1985) (provision now codified at N.J.S.A. 18A:29-5). Under the applicable regulation, district boards are given the authority to define full-time so long as the number of hours required each day is more than four hours. N.J.A.C. 6:3-1.13.

The Board in this case maintains that for the years in question, it defined full-time status through practice and considered a member to be full-time if he was on school grounds for a minimum of seven hours, which included classroom instruction, lunch duty, hall duty, free periods and "any other services which may be expected of a teacher." Supplemental memorandum, January 30, 1986. Based on this standard, the Board contends that none of the Petitioners were full-time employees.

The record shows that Petitioner Helfrich was employed from February through June 1977, from September 1977 through June 1978 and from September through October 26, 1978 on a six hour a day basis, and provided with a one hour unpaid lunch. Likewise, Petitioner Armstrong was employed on that basis from September through June 1980, as was Petitioner Smith from September through October 14, 1978. We find that although the Board did not allocate compensation to lunch, the one hour each day allocated to Petitioners' lunch must be considered part of their work day. We therefore conclude that the work day of these Petitioners during the periods specified above totaled seven hours, and that under the Board's standard they were employed as full-time teaching staff members during those periods. In so concluding, we emphasize that pursuant to N.J.A.C. 6:3-1.15, the Board was required to provide each member employed to teach in both morning and afternoon sections, including Petitioners, a duty free lunch period of 30 minutes or of the length provided to students if less than 30 minutes. Because we conclude that Petitioners Helfrich, Smith and Armstrong were employed as full-time members during specific periods, we find that the standards set forth in N.J.S.A. 18A:29-1 et seq. are applicable in judging the propriety of their compensation.

We reiterate that, as set forth in Hyman, a district board is not required to adopt a single salary schedule for all full-time members. However, if, as here, a board adopts a salary policy that includes a schedule covering one group of full-time members, it must adopt schedules for all such members. N.J.S.A. 18A:29-4.1 Hyman, supra at 8-9. We emphasize that although the statutes neither require the adoption of a single schedule for all full-time members nor prescribe a particular form for schedules adopted pursuant to N.J.S.A. 18A:29-4.1, N.J.S.A. 18A:29-4.1 requires that all schedules be adopted by formal action of the Board. Newark Teachers Association v. Board of Education of Newark, 57 N.J. 100, 104

(1970). We further conclude that by authorizing the inclusion of salary schedules as part of a board's salary policy, the statutes contemplate that when acting under authority of N.J.S.A. 18A:29-4.1, a board is required to adopt salary schedules of general application, and that, accordingly, statements of compensation established for individual employees such as contained in individual employment contracts are not in themselves salary schedules within the meaning of the statute.

Having found that Petitioners Helfrich, Armstrong and Smith were full-time teaching staff members during specific periods of their employment as compensatory education and supplemental teachers, we find that the action of the Board in adopting the single salary schedule applicable to full-time members that was set forth in its collective negotiations agreement must be construed to have entitled these Petitioners under the education laws to be compensated pursuant to that schedule for the periods during which they served as full-time members.

However, we reiterate that Rutherford limits the calculation of any benefits due Petitioners to the period commencing six years from the date of the court's decision in that case, i.e., April 11, 1979. As of that date Petitioners Helfrich and Smith were employed by the Board on a full-time basis as Teachers of the Handicapped. Accordingly, we hold that the relief due these Petitioners as a consequence of Board's failure to compensate them pursuant to the District's salary schedule during their periods of full-time service as compensatory education and supplemental teachers is limited to salary adjustment as of April 11, 1979, and to any difference between the compensation they received from that date and the amount of their salary after adjustment.

Although Petitioner Armstrong was assigned as a Teacher of the Handicapped on a full-time basis in September 1981, she was, as of April 1979, employed as a supplemental teacher on a full-time basis. As set forth above, she was entitled during this period to be compensated pursuant to the salary schedule applicable to full-time teachers. We therefore conclude that she is entitled to receive the difference between the compensation she received between April 11, 1979 through June 1980, and that to which she was entitled pursuant to the District's salary schedule applicable to full-time teachers.

During the 1980-81 school year, however, Petitioner Armstrong was employed as a half-time Title I teacher, and additionally, from February through June 1981, was assigned as a supplemental teacher 2¾ hours per day. The record shows that she achieved tenure prior to September 1980, and therefore was entitled pursuant to N.J.S.A. 18A:28-5 to compensation for this period at a rate equivalent to that of her salary as a full-time member. Therefore, we conclude that she is entitled to receive the difference between the compensation she received for the 1980-81 school year and that which she would have received had she been compensated at a rate equivalent to the rate of her salary as a

full-time member, as well as to retroactive salary adjustment as of the date of her assignment as a Teacher of the Handicapped in September 1981. Although we are unable to determine whether Petitioner Armstrong's employment from February through June 1981 was employment as a full-time member, we direct the Board to calculate her compensation for that period on the basis of employment as a full-time teaching staff member if her assignment was equivalent to employment as a full-time Title I, compensatory education and supplemental teacher under the criteria set forth above.

Petitioner O'Shea was never employed on a full-time basis prior to September 1978 when she accepted employment as a full-time Teacher of the Handicapped, at which time she was placed on Step 2 of the negotiated guide. When, as in this case, initial placement on a salary schedule is determined pursuant to N.J.S.A. 18A:29-9, a board is not required to credit prior part-time experience in the district beyond the requirements specified for the years relevant to this litigation in N.J.S.A. 18A:29-7 (repealed 1985) and the requirement to such placement may not result in reduction in the salary of a tenured teacher. Ball et al. v. Board of Education of the Township of Teaneck, decided by the State Board, January 7, 1987. Accordingly, we conclude that Petitioner O'Shea has no entitlement under the education laws to additional compensation based upon her service prior to September 1978.

III

We turn now to Petitioners' claim that they are entitled by Spiewak to benefits conferred on other teaching staff members in the District by the collective negotiations agreement. Initially, although no longer in dispute, we emphasize that as persons steadily employed by a board of education, Petitioners Helfrich, Armstrong, Smith and O'Shea were entitled to statutory sick days pursuant to N.J.S.A. 18A:30-2, and to accumulation of unused sick leave pursuant to N.J.S.A. 18A:30-3, and to calculation of such statutory benefits from April 1979. Petitioners, however, maintain that they are entitled further by Spiewak to all contractual benefits negotiated between the Association and the Board.

Again, in Spiewak, the New Jersey Supreme Court held that public school teachers who provide part-time remedial or supplemental instruction are teaching staff members within the meaning of N.J.S.A. 18A:1-1 and may acquire tenure if they meet the specific criteria in N.J.S.A. 18A:28-5. While finding that the teachers involved in the consolidated cases were entitled to retroactive benefits resulting from the court's holding that they were tenure eligible teaching staff members, the court did not decide to what retroactive benefits the teachers were entitled. Rutherford, supra at 14. Rather, the court remanded two of the individual cases involved in the consolidated appeal to the Commissioner for a determination of what benefits were owed to those

teachers who had acquired tenure.[3] Id. at 84. In remanding the cases, the court stated:

> We do not decide what, if any, additional benefits the teachers in these cases are entitled to, either retroactively or prospectively. That is primarily a matter of contract and the relevant collective bargaining agreements are not part of the record. Further, the parties for the most part did not brief this question and the Appellate Division did not address it. We therefore remand to the Commissioner of Education to make that determination in accord with the principles laid down in this opinion.

Id. at 84 n. 3.

The court's decision in Spiewak is based on analysis of the tenure statutes. Although the court acknowledged that supplemental teachers may be entitled to additional benefits, it clearly stated that such benefits, unlike tenure rights are primarily a matter of contract, and did not grant to supplemental teachers any statutory entitlement to benefits beyond that which may be conferred on them by existing statutes. Thus, the court in Spiewak did not decide the issue of whether the education laws mandate the provision of uniform contractual benefits to all teaching staff members.

Initially, we emphasize that while affording teachers significant rights and protections, nothing in the tenure laws confers the right to employment benefits. Although the education statutes mandate the provision of specific statutory benefits such as sick leave, N.J.S.A. 18A:30-2; N.J.S.A. 18A:30-3, Petitioners have not asserted that the benefits that they seek in these proceedings are mandated by statute. Rather, the issue presented is whether by virtue of their status as teaching staff members, Petitioners are entitled to contractual benefits provided by the collective negotiations agreement adopted by the Board during the relevant years.

We find that any entitlement under the education laws to contractual benefits beyond those mandated by particular statutes is to be found in N.J.S.A. 18A:29-4.1 which provides in pertinent part that

> [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....

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[3] In the third case, Anderson v. Summit Bd. of Ed., the court reversed the decision of the State Board and reinstated the decision of the Commissioner. 90 N.J. 63, at 84.

Thus, in addition to the specific authorization to adopt salary schedules applicable to all full-time teaching staff members, the statute permits a district board to adopt a salary policy. Such policy may include employment benefits such as health insurance, Newark Teachers Assn. v. Bd. of Ed. of Newark, 108 N.J. Super. 34 (App. Div. 1969), aff'd 57 N.J. 100 (1970), and, although the collective negotiations agreement applicable in this case is not part of the record, we conclude that such agreement must be considered as the salary policy adopted by the Board under the authority of N.J.S.A. 18A:29-4.1.

We reiterate that if a board acting pursuant to N.J.S.A. 18A:29-4.1, adopts a salary schedule applicable to one group of full-time members, it must provide schedules for all such members. Hyman, supra. We emphasize, however, that N.J.S.A. 18A:29-4.1 does not preclude the adoption of a policy that provides salary benefits to other staff members. We further emphasize that so long as specific statutory requirements are met, the education laws do not mandate that a board provide uniform employment benefits for all classifications of members when it adopts a salary policy pursuant to N.J.S.A. 18A:29-4.1, and that such benefits are a mandatory subject of collective negotiation within statutory limits.

As stated, we conclude that the employment benefits specified in the collective negotiations agreement adopted by the Board in this case must be construed as its salary policy. Accordingly, the Board was bound under N.J.S.A. 18A:29-4.1 by the terms of the policy, and therefore was required to apply the terms of that generalized policy to all teaching staff members. However, we further conclude that in the absence of any indication that the agreement contravenes any statutory requirement imposed by the education laws, the entitlement of the individual teaching staff members involved in this litigation to particular benefits pursuant to the collective negotiations agreement is controlled by the terms of that agreement, which, as indicated above, is not part of the record.

Although the Board's policy is not part of the record, as stated, we conclude that by virtue of their status as teaching staff members within the meaning of N.J.S.A. 18A:1-1, Petitioners were entitled to application of the terms of the Board's salary policy, which was set forth in the applicable agreement. We reiterate that Petitioners are entitled to calculation of any benefits due them by virtue of our conclusion only from April 1979. The record shows that since 1978, Petitioners Helfrich, O'Shea and Smith have received all benefits to which they were entitled under the collective negotiations agreement, and we therefore conclude that there is no further relief to which they are entitled. The record further indicates that since September 1979, Petitioner Armstrong has been afforded all contractual benefits to which her status as a teaching staff member in the district entitled her. We therefore find that any further relief due her is limited to an entitlement to be credited with any carry-over benefits specified in the relevant agreement to which she is entitled on the basis of her status as a teaching staff member from April through June 1979.

IV

In sum, we find that Petitioners Bruno, Bruns, Jenkins, Markowitz, Paskowitz, Strudler and Esposito are not entitled to retroactive application of Spiewak since none was employed by the Board on the date of to the court's decision in that case. Petitioners Armstrong, Helfrich, O'Shea and Smith were still employed by the Board on that date and therefore are entitled to retroactive application of the decision of Spiewak, although pursuant to Rutherford, calculation of any retroactive benefits due them as a result of the court's holding in Spiewak is limited to the period commencing six years prior to the court's decision in Rutherford.

We conclude that by virtue of the Spiewak court's holding that the employment of Petitioners as Title I, compensatory education and supplemental teachers was as teaching staff members within the meaning of N.J.S.A. 18A:1-1, Petitioners were entitled under the education laws to compensation on the only salary schedule adopted by the District for full-time members for all periods during which they were employed full-time. We find that Petitioners' employment on a six hour basis with a one hour unpaid lunch constituted full-time employment under the Board's standard. However, we conclude that relief due Petitioners Helfrich and Smith is limited to retroactive salary adjustment from April 1979, since both of those Petitioners were by that date compensated pursuant to the salary schedule applicable to full-time members. We conclude that Petitioner Armstrong is entitled to retroactive salary adjustment as of April 1979, and to retroactive compensation representing the difference between the amount she received during her subsequent employment on a less than full-time basis and that to which her status as a tenured teacher entitled her. We, however, find that there is no relief to which Petitioner O'Shea is entitled since her entire service prior to April 1979 was on a part-time basis.

We conclude that although Petitioners were entitled by virtue of their status as teaching staff members to application of the Board's salary policy, including all employment benefits for which they qualified, Petitioners Helfrich, O'Shea and Smith are entitled to no further relief since they have been receiving such benefits since April 1979. We, however, direct that Petitioner Armstrong receive credit for any carry-over benefits specified in the collective agreement for which she qualified under the terms of the agreement but did not receive from April through June 1979.

Finally, we emphasize that pursuant to Rutherford, calculation of each Petitioner's tenure is to be from her date of employment and, that in the event that calculation of Petitioners' seniority is required, the seniority of each is to be credited under the regulations then in effect. Under the current regulations, Petitioners' service as Title I, compensatory education and supplemental teachers is to be credited to the applicable category as defined in the regulations. N.J.A.C. 6:3-1.10. We further

emphasize that each Petitioner achieved tenure under her instructional certificate in the position of teacher, and that under the current regulations, the category in which seniority is to be credited is to be determined by the endorsement under which each Petitioner served regardless of how the Board characterized the assignments, N.J.A.C. 6:3-1.10(15), and regardless of whether or not employment was full-time. Lichtman v. Bd. of Ed. of the Village of Ridgewood, 93 N.J. 362 (1983).

Attorney exceptions are noted.
March 4, 1987

MARILYN R. SHEEHAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 3, 1986

For the Petitioner-Appellant, Bruce D. Leder, Esq.

For the Respondent-Respondent, Vickie A. Donaldson, General Counsel (J. Isaac Porter, Esq., of Counsel)

Petitioner, a tenured school psychologist, filed a Petition of Appeal against the Board of Education of the City of Newark (hereinafter "the Board") claiming that the withholding of her increment for the 1984-85 school year was arbitrary and capricious. Her increment had been withheld due to an alleged abuse of sick leave. The Board contends that Petitioner feigned illness and used her sick leave while she was actually attending classes at Antioch Law School.

By letter dated June 17, 1983, Petitioner requested a leave of absence for the period of October 15, 1983, to September 1, 1984, in order to attend law school. That request was granted on September 8, 1983. Petitioner worked for the Board from the first school day in September 1983, through October 14, 1983, when her approved leave of absence began. During this period, Petitioner took sick days on September 12, 13, 14, 21, 23, 27, 28, 29 and 30, and on October 4, 5, 6, 7, 12 and 13. She took personal days on September 20, and 22, and on October 11. Petitioner subsequently withdrew from law school when she broke her leg in February 1984.

The Board's written policy concerning attendance, the "Attendance Improvement Plan," called for an informal conference after 3 days' absence, a formal conference after 5 days' absence, and another formal conference after 8 days' absence. However, it was not until October 14, 1983, the last day before Petitioner's approved leave commenced, that she attended a meeting concerning her

absences. Prior to this meeting she had not been advised that she had taken too much sick time although she had taken a total of 15 sick days and 3 personal days in September and October, 1983.

The following summer, on July 16, 1984, Petitioner was advised that the Board's Human Resource Services Committee "would conduct a hearing on the denial of increments." Petitioner attended the hearing, but due to the Board's lack of preparation it was not held. Although she was not notified of another hearing before the Committee, Petitioner was advised that a recommendation would be made by the Committee to the Board to withhold her increment due to "unsatisfactory teaching performance and for other good cause pursuant to N.J.S.A. 18A:29-14." P-6, in evidence. Subsequently, she received a letter of apology for the Committee's failure to advise her of its recommendation. P-7, in evidence.

The Board took action at a special meeting on August 31, 1984, to withhold Petitioner's increment. Petitioner did not attend, and was notified of the Board's decision by letter dated September 25, 1984. P-8, in evidence. The reason given for the withholding was "Litigation and/or investigation of: Abuse of sick leave."

The Petitioner maintains that she was genuinely ill on the days on which she used sick leave. She had been in an automobile accident on April 15, 1983, after which she was absent for ten days. The accident allegedly caused neck and back pain which persisted during September and October. Although she admits being enrolled at Antioch Law School during this period, Petitioner claims that Antioch's flexible and informal scheduling did not require weekday attendance, and that she never attended law school while using sick leave. In support of her claim, Petitioner submitted into evidence notes from her physician stating that she was under his treatment during the period in question for treatment of injuries sustained in the accident. Only one note is date specific as to an office visit on September 23, 1983, P-11, in evidence, but another states that Petitioner was "diagnosed as having cervical strain and acute lumbosacral strain" and was "advised to rest, swim, have physical therapy treatments three times per week, and not to drive long distances." P-10, in evidence. To support her statement concerning Antioch's scheduling, Petitioner submitted a note from another law student stating that she attended Saturday classes with Petitioner. P-12, in evidence.

The Board submitted two letters from Antioch's Registrar, one stating that Petitioner began to matriculate as a full-time student on August 8, 1983, together with the school's fall 1983 course schedule, R-3, in evidence, and the other indicating that to the Registrar's knowledge no courses beyond those listed had been scheduled. R-8, in evidence. Copies of Petitioner's fall 1983 and spring 1984 registration materials, R-10 and R-11, in evidence, and a copy of the transcript listing her fall 1983 courses, R-4, in evidence, were also submitted.

The Administrative Law Judge (ALJ) noted that the Board had violated the requirements of N.J.S.A. 18A:29-14 by failing to give Petitioner written notice of its action. The statutory defect was not found to be fatal as the ALJ determined that it resulted in no harm to the Petitioner. However, the Board's failure to follow its own Attendance Improvement Plan, and the Board's failure to provide Petitioner with a hearing before its Human Resource Services Committee rendered the Board's action arbitrary and capricious, according to the ALJ's recommendation. The ALJ therefore concluded that Petitioner was entitled to have her increment restored without interest.

The Commissioner rejected the ALJ's conclusion that Petitioner was entitled to have her increment restored. He considered Petitioner's testimony, the transcript of courses in which she was enrolled, and the fact that Petitioner failed to notify the Board when she withdrew from law school due to a broken leg in February 1984. Although the Commissioner agreed with the ALJ's finding that the statutory defect with respect to the ten day notice was not fatal, the Commissioner, having reviewed the evidence in the record, found it "entirely too coincidental that Petitioner's absences ... were for any other reason than to facilitate her attending law classes during the weekdays in Washington, D.C. until the official start of her leave of absence." Commissioner's Decision, at 34. The Commissioner also found that "petitioner acted in bad faith and is guilty of conduct unbecoming a teacher," Commissioner's Decision at 34, because she failed to notify the Board of her withdrawal from law school in February 1984.

Initially, in assessing whether the Board's action in withholding Petitioner's increment was proper, we reject the idea that Petitioner's withdrawal from law school in February 1984 has any bearing in this matter. The Board has stated that its reason for withholding Petitioner's increment was based on "[l]itigation and/or investigation: Abuse of sick leave." P-8, in evidence. Even if the Board had claimed that Petitioner's failure to notify the Board concerning her withdrawal from law school was a basis for withholding her increment, the Board has not demonstrated that it had any knowledge of Petitioner's leave of absence from law school when it acted on August 31, 1984.

In Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960), at 296-297, the court set forth the proper standard of review for the first hearing on the withholding of a salary increment. The court stated that the Commissioner should determine:

> (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant.

Id.

In addition, the facts before the board must include some "legally competent evidence." See Colavita v. Board of Education of the Hillsborough Township School District, Docket #A-4342-83T6 (N.J. App. Div. March 28, 1985). Therefore, we are called upon to resolve whether the facts were as though the Board claimed, and whether, based upon the facts it had before it when it acted to withhold her increment on the basis of abuse of sick leave, the Board's conclusion was arbitrary or unreasonable.

A review of the record indicates that the Board had received a letter dated December 12, 1983, from Antioch's Registrar together with a copy of the school's fall 1983 course schedule. R-3, in evidence. However, it was not until October 7, 1985, more than a year after the Board acted, that the Board requested copies of Petitioner's registration materials, and questioned whether professors conducted classes other than those listed in the course schedule. R-7, in evidence. The response from Antioch's Registrar is dated October 14, 1985, R-8, in evidence, and the copy of Petitioner's transcript is dated April 25, 1985. R-4, in evidence. Therefore, the Board's conclusion that Petitioner had used sick leave while she attended law school was based on a letter stating that she was a full-time student together with a list of the school's fall 1983 course offerings. We find that it was arbitrary and unreasonable for the Board to merely assume that Petitioner had abused her sick leave based on the facts that the Board had before it when it acted on August 31, 1984. Nor does the evidentary record in these proceedings establish that Petitioner was actually attending classes, and that she was not genuinely ill, when she used her sick leave.

In light of our conclusion that the Board's action, based on the facts it had before it, was arbitrary and unreasonable, we need not consider the effect of the procedural irregularities in this case. For the reasons stated, we direct that Petitioner's increment be restored. We however find that in the absence of any indication of bad faith on the part of the Board, this is not a proper case for an award of interest for the period prior to the State Board of Education's decision in the matter.

Finally, in deciding this case, we have determined not to grant the Board's application to supplement the evidentiary record, which would in this instance necessitate administrative rehearing. The information now being offered by the Board was available to it at the time of hearing and the Board has made no claim that it was deprived of the opportunity to present the evidence by virtue of illegality or fraud. To the extent that it claims mistake concerning the issues in dispute, we emphasize that the standard applicable to increment withholdings is well established, and that the Board was represented by counsel throughout the proceedings in this matter.

Further, it does not appear that the evidence, if presented, would alter our determination in this matter. Evidence concerning Petitioner's physical condition basically challenges Petitioner's credibility, and, despite the opportunity we provided

the Board, it has yet to offer to prove the only factor relevant to altering our determination: that the additional information upon which the Board now asserts its administrators based their recommendation was before the Board when it acted. See Yvonne Meli v. Board of Education of Burlington County Vocational Technical Schools, Docket #A-5820-85T7 (App. Div. May 21, 1987), slip. op. at 3-4.

Under these circumstances, we conclude that the Board has not shown good and sufficient cause that the reopening of hearing would "serve the ends of essential justice and the policy of the law." In re Marvin Gastman, 147 N.J. Super. 101, 114 (App. Div. 1977).

S. David Brandt, Betty Dean, Alice Holzapfel, and Deborah Wolfe opposed. Regan Kenyon abstained.
December 2, 1987

BRIAN J. SMALL,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WESTWOOD REGIONAL, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT,	:	
AND	:	
LINDA SCHADT,	:	
INTERVENOR.	:	

Decided by the Commissioner of Education, July 17, 1986

For the Petitioner-Appellant, Bucceri and Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Sullivan and Sullivan (Mark G. Sullivan, Esq., of Counsel)

For the Intervenor-Respondent, Klausner and Hunter (Steven B. Hunter, Esq., of Counsel)

Brian J. Small, a tenured teaching staff member, filed a Petition of Appeal with the Commissioner of Education, claiming that the Westwood Regional Board of Education (hereinafter "the Board") violated his tenure and seniority rights by terminating his employment for the 1985-86 school year and that the Board improperly denied him seniority credit in driver education and health. Linda J. Schadt, a tenured teaching staff member whose employment and seniority credit was potentially affected by the outcome of the case, was granted leave to intervene. Intervenor Schadt's claim is based the seniority regulations that were in effect prior to September 1, 1983, which she contends are applicable to her because she was affected by a reduction in staff before that date. Her claim presents the issue of whether the current seniority regulations control the seniority credit of teaching staff members who were affected by a reduction in staff prior to September 1, 1983, the date on which the current regulations became operative.

The employment histories of Petitioner Small and Intervenor Schadt with the Board are as follows:

Petitioner Small

Dates	Subject Taught	Grades
11/12/79-6/30/80	Physical Education and Driver Education	9-12
1980-1981	Physical Education and Driver Education	9-12
1981-1984	Physical Education and Health	9-12
1984-1985	Physical Education, Driver Education and Health	9-12

Intervenor Schadt

Dates	Subject Taught	Grades
1973-1982	Physical Education	K-6
1982-1984	Physical Education and Health	9-12
1984-1985	Physical Education and Health	7 & 8

As indicated by their employment histories, both Petitioner and Intervenor were continuously employed by the Board on a full-time basis from their respective starting dates. In April 1982, the Board notified Intervenor that her position as an elementary physical education teacher would be reduced from full-time to half-time for the 1982-83 school year. However, before the reduction took effect, the Board terminated a non-tenured teacher instead, and assigned Intervenor to that teacher's full-time position at the secondary level. In the Spring of 1984, the Board acted to terminate the employment of Petitioner Small, but rescinded this termination before it took effect. Instead, the Board acted in June 1984, to terminate the employment of Intervenor Schadt, who was then assigned as a teacher of physical education and health at the secondary level. Intervenor then filed a Petition of Appeal with the Commissioner, but withdrew it when she was offered, and accepted, another assignment. The assignment that Intervenor accepted was one previously filled by Wendy Zalko, a tenured teacher who had been granted a maternity leave from September 27, 1984, to September 1, 1986. Due to a reduction in staff, the Board terminated Petitioner's employment as a physical education, driver education and health teacher at the secondary level for the 1985-86 school year, but retained Intervenor as a health and physical education teacher assigned to teach 7th and 8th grade students, an assignment within the secondary category.

Petitioner Small filed a Petition of Appeal with the Commissioner claiming that the Board had violated his tenure and seniority rights. He originally sought reinstatement, as well as back pay and benefits. However, since he was reemployed by the Board effective November 25, 1985, Petitioner now seeks only back

pay for the period during which he was not employed by the Board, September 1, 1985 to November 25, 1985. Intervenor Schadt sought a determination that she had greater seniority in the secondary category as a teacher of physical education and health than Petitioner.

The Administrative Law Judge (ALJ) found that the current seniority regulations controlled Intervenor Schadt's seniority credit. Although Intervenor had been notified of a future termination in the spring of 1982, the ALJ found that such notice was an "obvious error" which the Board had "corrected" before the termination took effect. Since the reduction in staff of April 1985, which gave rise to the instant case, and the Board's action of March 1984, which was the subject of the petition that was filed and withdrawn by Intervenor, both occurred after the new seniority regulations became operative, the ALJ concluded that the current regulations were applicable in determining intervenor's seniority so as to resolve whether Petitioner or Intervenor had been entitled to the assignment at issue for 1985-86.

Applying the current regulations, the ALJ found that the seniority of Petitioner and Intervenor was to be credited as follows:

Petitioner Small

Secondary physical education	-	5 years, 7½ months
Secondary driver education	-	5 years, 7½ months
Secondary health education	-	4 years

Intervenor Schadt

Elementary physical education	-	12 years
Secondary physical education and health	-	3 years

The ALJ therefore determined that Petitioner had greater seniority than Intervenor as a secondary teacher of health and physical education.

Based on the testimonial evidence, the ALJ rejected Intervenor's argument that the necessary duties and responsibilities of a physical education teacher at the secondary level and the privacy rights of adolescent girls mandated the conclusion that her retention for 1985-86 was based on a bona fide occupational qualification excepting her retention from N.J.S.A. 18A:28-10. In rejecting the argument, the ALJ emphasized that alternative means for locker room supervision are used when Intervenor is unavailable. He further emphasized that such goals as equality in educational programs can not be achieved in violation of the

seniority rights of tenured teaching staff members. The ALJ therefore found that the Board's termination of Petitioner's employment was in violation of his seniority rights, and concluded that Petitioner was entitled to back pay for his period of unemployment from September 1, 1985 to November 25, 1985.

The Commissioner rejected the ALJ's conclusions. Citing Felper v. West Orange Board of Education, decided by the Commissioner January 28, 1985, he held that the notice that Intervenor Schadt received in April 1982, of the reduction of her position from full-time to half-time, triggered her seniority rights under the pre-amendment regulations. Once her seniority rights were triggered they, according to the Commissioner, were vested on a district-wide (K-12) basis in all subject areas endorsed on her Instructional Certificate. The Commissioner held that Intervenor's seniority continued to accrue on a district-wide basis and that she had accumulated twelve years of district-wide seniority in grades K-12 in physical education and health at the conclusion of the 1984-85 school year.

In contrast, Petitioner Small's seniority was held by the Commissioner to be controlled by the current seniority regulations. Therefore, Petitioner was held to have accrued 5 years, 7.5 months of seniority in secondary physical education and 4 years of seniority in secondary health education at the conclusion of the 1984-85 school year. The Commissioner concluded that Intervenor Schadt possessed greater seniority in the subject areas of physical education and health (12 years seniority acquired on a district-wide basis) than did Petitioner Small (5 years, 7.5 months of physical education in the secondary category and 4 years of health education in the secondary category). The Commissioner therefore directed the Board to correct both Petitioner's and Intervenor's seniority credit and dismissed the petition.

Petitioner appealed, contending that Intervenor's seniority must be determined under the current regulations and that Intervenor therefore has not acquired district-wide seniority so as to have entitled her to the assignment at issue. In addition, Petitioner claims that Intervenor waived her tenure and seniority rights by accepting a position as a "substitute."

The State Board of Education has settled the issue of whether the seniority regulations now in effect control the seniority rights of a teacher who was affected by a reduction in staff before September 1, 1983, but who continued to be employed or was subsequently reemployed by a board. Cohen v. Board of Education of the Borough of Emerson, decided by the State Board, June 3, 1987. In Cohen, the State Board reasoned that

> [s]eniority rights are incohate until such time as dismissal or reduction actually occurs. Since the Commissioner has the statutory authority to establish, and therefore to alter, the definition

> of the categories to which prior service is to be credited, a member has only an expectancy interest in the existing seniority rules until such time as a reduction actually occurs. The nature of this interest is not altered by the fact that a member currently employed by a board was previously affected by a reduction which required that his seniority be determined under the prior regulations.
>
> Again, when a reduction occurs, seniority rights are triggered and the necessary seniority determinations are to be made under the rules in effect at that time. Once the seniority determinations necessitated by a reduction have been made and such determinations mandate the continued employment or subsequent reemployment of the staff members having the most seniority in the categories defined by the applicable regulations, the mandates of N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-12 have been fulfilled as to those staff members, and we can find no basis under the regulations that became operative on September 1, 1983, for concluding that when subsequently affected by a reduction after that date, such staff member is entitled to credit now for service prior to the earlier reduction on the basis of the categories defined by the regulations in effect when the earlier reduction occurred.

Id. at 11-12. (citations omitted) (emphasis added).

The State Board therefore concluded

> that when a reduction in staff occurs, the policy embodied in the seniority regulations now in effect is furthered and equity best served by determining the seniority of all members currently employed by a board under the regulations now in effect regardless of whether such members had been affected by a reduction in force prior to September 1, 1983.

Id. at 14. Based on this conclusion, the State Board explicitly overruled the Commissioner's decision in Felper v. West Orange Board of Education, supra, upon which the Commissioner relied in resolving the case now before us.

In considering this case, we therefore conclude that both Petitioner's and Intervenor's seniority are to be determined under

the current regulations. Pursuant to those regulations, as found by the ALJ, Petitioner and Intervenor are entitled to seniority credit based on their service as follows:

Petitioner Small

Secondary physical education	-	5 years, 7½ months
Secondary driver education	-	5 years, 7½ months
Secondary health education	-	4 years

Intervenor Schadt

Elementary physical education	-	12 years
Secondary physical education and health	-	3 years

Thus, Petitioner has greater seniority than Intervenor as a teacher of health and physical education in the secondary category.

In concluding that Petitioner has more seniority as a physical education and health teacher in the secondary category than does Intervenor, we specifically reject Petitioner's argument that pursuant to N.J.S.A. 18A:16-1.1, Intervenor waived all of her tenure and seniority rights by accepting an assignment available because another teaching staff member was on leave of absence from September 27, 1984, until September 1, 1986. N.J.S.A. 18A:16-1.1 provides that:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.
>
> The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

Petitioner, citing Sayreville Education Association v. Board of Education of the Borough of Sayreville, 193 N.J. Super. 424 (App. Div. 1984), claims that Intervenor, while filling the assignment in which Ms. Zalko had served, waived her tenure rights by becoming a "substitute" teacher. In Sayreville, the court held that N.J.S.A. 18A:16-1.1 applies when the services of a substitute teacher are required because of temporary absence of a teaching

staff member, even if protracted, but does not authorize the use of a substitute to fill for a substantial balance of the school year a position vacated through resignation or retirement. Accordingly, N.J.S.A. 18A:16-1.1 would be applicable during her leave to the position in which Ms. Zalko served. However, N.J.S.A. 18A:16-1.1 provides only that when a person is designated to "act in place" of an absent employee, the person so acting does not acquire tenure in the employment. We do not read this statute as depriving a tenured teaching staff member of tenure rights, such as seniority rights, that he previously has acquired because he accepted and assignment within his tenured position that was available as a result of the temporary long-term absence of another teaching staff member. We therefore conclude that Petitioner's argument is without merit, and find that Intervenor was entitled to seniority credit for her service as a physical education teacher in the assignment in which Ms. Zalko was serving prior to her leave.[1]

However, having determined that Petitioner Small has more seniority than Intervenor Schadt in the applicable category, we conclude that Petitioner was entitled by virtue of his seniority to the assignment in which the Board retained Intervenor from September 1, 1985, and therefore to the monetary relief he seeks. For the reasons set forth in the ALJ's Initial Decision in this matter, we reject Intervenor's argument that the duties of the assignment at issue mandated or permitted Intervenor's retention on the basis of her sex regardless of Petitioner's seniority in the applicable category. We therefore direct that Petitioner Small be awarded back pay and emoluments minus mitigation from September 1, 1985, until his reemployment on November 25, and emphasize that such emoluments include any rights that he would have accrued had he not been improperly terminated. See Figurelli v. Board of Education of the City of Jersey City decided by the State Board, May 6, 1987.

For the reasons set forth above, we reverse the decision of the Commissioner.

Attorney exceptions are noted.

August 5, 1987

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1 We note that although not established, the record indicates that the assignment at issue is the one previously filled by Wendy Zalko. Accordingly, if Petitioner's argument had merit, his service in that assignment had he been retained by the Board would have constituted waiver of his tenure and seniority rights.

ROGER SMITH,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT NO. 1, CAMDEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, April 1, 1985

For the Petitioner-Appellant, Selikoff & Cohen, P.A. (Steven R. Cohen, Esq., of Counsel)

For the Respondent-Respondent, Maressa, Goldstein, Birsner, Paterson, and Drinkwater (Robert E. Birsner, Esq., of Counsel)

This is an appeal from a decision of the Commissioner of Education, affirming the propriety of the action of the Board of Education of the Lower Camden County Regional School District No. 1 in withholding Appellant's employment increment for the 1984-85 school year.

Appellant has served as a teaching staff member employed by the Board since 1977. He was among those teachers employed by the Board who frequented an area of the faculty lounge that had been nicknamed the "Dungeon" by the faculty. Tr. 11/19/84, 72-73. This small area, which was the lower level of the lounge, was off-limits to students and smoking was permitted. Id. at 14-15. The Administration never sought to regulate activities in the Dungeon, id. at 98, and the record shows that the teachers using the area engaged in humor, criticism and sarcasm, including racial and ethnic humor, id. at 19; 67, and that the criticism and sarcasm in this area was such that some faculty members found it offensive and chose to spend their free time elsewhere. Id. at 37-38; 61-62. Particular vehicles used for expressing criticism and ridicule were a character created by a group of faculty named "Dr. Academia", who was used in postings on the bulletin board and as a sponsor for faculty socials, and "Teacher of the Week" posters, which were posted in the Dungeon. Id. at 19-23.

In April 1983, Appellant had lunch in the Dungeon area of the faculty lounge. At that time, he added his comments as follows to a form prepared in the District as a guide to District personnel in calling citizens in the community to remind them to vote in the annual regional school election:

> Hello, my name is [Dr. Academia & boy am I messed up.]
>
> I'm calling to remind you to vote in the regional school election on April 12 (today, tommorrow, Tuesday). [I won't get the chance because of marking papers.]
>
> We are hoping you will approve both the school budget and the building referendum. We need the additions badly in order to prevent the need for double sessions. [& elimination of blacks.]
>
> The polls are open from 2:00 p.m. to 9:00 p.m. Can we count on you to come out and vote?
>
> Please inform anyone else you know who might be interested in supporting our schools.
>
> Thank you.
>
> *If any questions arise about details, refer to the brochure from the Board of Education, or have the person call the following numbers if you can't find the answer - 784-9023. Or 227-9017 or 767-1563.
>
> *If transportation to the polls is needed, the Hot Line # is 767-2389.

P-3, in evidence (Appellant's comments are enclosed in the brackets).

Appellant, who had just finished lunch at the table in front of him, then placed the document with his paper bag and sandwich wrapper that were on the table. Tr. 11/19/84, at 88. He left the document on the table for about a fifteen minute period, and then picked up all that he had left there and threw all of the items, including the document, into the trash can. Id. Subsequently, another individual signed Appellant's name to the document. Id. at 88-89.

The record shows that Appellant communicated his alteration of the document to at least one other teacher, and that Mary Harris, a teaching staff member who did not frequent the Dungeon, id. at 35; 55; 73, overheard discussion about the document in the upper level of the faculty lounge. Id. at 100. Ms. Harris then went to the Dungeon area of the lounge and retrieved the document from the trash. Id. at 100-102; 145. At the end of the school day, Ms. Harris brought a copy of the document to the Principal. Id. at 91. She was upset by the document, and the record indicates that it

was she who was responsible for its ultimate distribution.[1] Id. at 91; 129-130.

After Ms. Harris went to the Principal, a group of black teachers, who had evidently heard about the document, went to the Principal, indicating their feeling that something should be done to correct the situation. Id. at 93. Subsequently, some black parents approached the Superintendent about the document, id. at 118, and in May, following several community meetings, id. at 118-120, a meeting was held in which the Principal's handling of the situation was reviewed by the Board and the public.

In April, the Principal inquired of Appellant concerning his knowledge of the comments that had been added to the document. Although the record indicates that such inquiry was made on three occasions, id. at 93-96, prior to the Board's direct inquiry at its meeting with Appellant in the fall of 1983, id. at 141, formal inquiry occurred only once, and it was Respondent's response to that formal inquiry that led to the withholding of his increment by the Board in February 1984.

The record shows that, although he apparently denied any knowledge of the document in response to the Principal's informal inquiries, id. at 94, Appellant at the formal meeting, quite simply, did not answer the Principal's questions concerning the document. Id. at 33-34; 80; 89. His silence was based at that point on the advice of his Union Representative, who was present and represented him at the meeting. Id. at 26-34; 79-80. Appellant maintained his silence concerning his authorship of the comments until the hearing in this matter, at which time Appellant, under protest by his attorney, testified that he had written the comments in question. Id. at 81-88.

Accordingly, prior to the public meeting in May, the Administration was not able to specify who was responsible for the document or take corrective action. During the two hour meeting in May, the public demanded that the Board do something about the document. Id. at 120-121; 131. Consequently, the Board had the document analyzed by a handwriting expert, id. at 121-122; 136, who concluded that although someone else had signed Appellant's name to the document, Appellant had written the comments at issue. In the fall of 1983, the Board met with Appellant concerning the matter, and, again, Appellant maintained silence. Id. at 141-144.

After receipt of the handwriting analyst's conclusions, the Superintendent wrote to Appellant on January 16, 1984 as follows:

> As you are aware, and as indicated to you in my letter of August 3, 1983, a serious issue of substantial concern to the Board of Education

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[1] We note that Mary Harris retired from her position with the District prior to the hearing in this case. Tr. 11/19/84, at 35.

> arose during the Spring term of 1983 over a racial slur that was written on a piece of paper in the teacher's room at Edgewood Senior High School. As you are also aware, a hand writing expert's report procured by the Board of Education clearly indicated that the substantial portion of the writing on the paper in question is your own. The expert's report in this regard is contrary to information supplied by yourself to Dr. McNamara regarding your knowledge of the author and contents of the document found within the teacher's room.
>
> I have been unable to draw a conclusion other than a deliberate misrepresentation of facts by yourself to Dr. McNamara; and on this basis, I intend to recommend to the Board of Education at its next regularly scheduled meeting on February 16, 1984, that your employment step increment for the 1984-85 school year be withheld. I am affording you prior notice of my intentions in this regard in order that you might have an informal opportunity to express your views on this subject, and my intended actions.

P-2, in evidence.

By letter dated February 10, 1984, the Board advised Appellant that it had determined to withhold his employment increment for the 1984-85 school year. P-1, in evidence. The letter further advised Appellant that the reasons for its action were included in the Superintendent's letter of January 16.

On May 14, 1984, Appellant challenged the Board's action by filing a Petition of Appeal to the Commissioner of Education. In his petition, Appellant alleged that the Board's action was factually flawed in that the action was not premised on an admission or eyewitness account as to whether Appellant had authored the document, but rather on the "deficient opinion of an alleged forensic document analyst." Petition, Count 1. He further asserted that regardless of the identity of the author or the contents of the document, the author had a reasonable expectation of privacy in the document and that, therefore, even assuming that Appellant was the author, the Board's action was in violation of Appellant's rights under the first, fourth, ninth and fourteenth amendments of the United States Constitution and Article I of the New Jersey Constitution. Petition, Count 2. Appellant claimed that the Board's action was arbitrary and capricious because the document was susceptible to numerous interpretations contrary to that of a racial slur. Petition, Count 3. Finally, Appellant claimed that the Board lacked good cause for its action because the action was motivated by political considerations resulting from perceived pressures and publicity attributable to conduct by others. Petition, Count 4.

Following transmittal of the matter to the Office of Administrative law and prehearing conference held on July 27, 1984, Appellant moved for summary judgment based on his allegations that the Board's action violated his rights under the United States and New Jersey Constitutions. The Administrative Law Judge (ALJ) denied the motion, determining that there were disputed facts requiring hearing.

At prehearing conference, the issues in this case were determined to be 1) whether Appellant's increment had been properly withheld pursuant to N.J.S.A. 18A:29-14, 2) whether the Board violated any of Appellant's rights in questioning him after it acquired the document that had been placed in the trash and 3) if not, whether Appellant misrepresented facts concerning the origination of the document. Following hearing, the ALJ concluded that: 1) Appellant had added the comments in question to the document, 2) he had shared this information in jest with another teacher or teachers, 3) another teacher had signed Appellant's name to the document, 4) other teachers had discussed the document in the upper level of the faculty lounge and had been overheard by Mary Harris, 5) Ms. Harris was sufficiently disturbed by what she heard to visit the Dungeon, where she found the document in the trash can, 6) Ms. Harris delivered the document to the Principal, informed him that she found that it contained racial slurs and was offensive, and that it was Ms. Harris who was responsible for reproduction and circulation of the document particularly in the black community, 7) Appellant did not answer his Principal's inquiries regarding authorship of the document, 8) as a result, the black community was outraged and demanded action and 9) the resultant determination by the handwriting expert led to the withholding of Appellant's increment.

The ALJ then considered whether the Board had violated Appellant's constitutional rights "...when it interrogated him about his association with written expression composed in the privacy of the faculty lounge, and when it withheld his increment for declining to reveal his association with that document." Initial Decision, at 8-9. The ALJ found it unnecessary to individually review the approximately fifty cases asserted by Appellant as supporting his constitutional claims, concluding that the United States Supreme Court's decision in Connick v. Myers, 461 U.S. 138 (1983), resolved whether the Board's action here offended the first amendment.

In Connick, the Court held that a questionnaire circulated in her office by an Assistant District Attorney, who was discharged as a result, touched on matters of public concern only in the most limited sense and was most accurately characterized as an employee grievance concerning internal office policy and that the limited first amendment interest involved did not require her supervisor to tolerate her action, which he reasonably believed would disrupt the office, undermine his authority and destroy close working relationships. The ALJ found that the case before him could be analogized to Connick and that, therefore, the Board's action here did not offend the constitution. The ALJ further concluded that the

inquiry in this case was into a matter that caused community disturbance involving a teacher in one of its schools and was not an intrusion by government into the affairs of an employee so as to offend the first amendment of the constitution under Griswald v. State of Connecticut, 381 U.S. 479 (1965). Nor did the inquiry violate the fourth amendment.[2]

Rather, the ALJ found that the case involved public school property and a local board of education which has a responsibility to operate and control the conduct of the schools. He found that despite the fact that the teachers had been given free reign in the Dungeon, their actions took place on public school property administered by public officials and that when the document in question came to light, the Administration and the Board had an obligation to get to the bottom of it and put it to rest as quickly as possible. The ALJ found that Appellant's unwillingness to cooperate to that end allowed the matter to get out of hand, and concluded that under those circumstances, Appellant had no right "to be left alone" during the inquiry. He concluded that Appellant had failed to show that the Board's action was unreasonable, and recommended dismissing the petition with prejudice.

The Commissioner found that the record showed that Appellant had altered the document in question, and that his comments were sarcastic and racially derogatory. He found that although someone else had affixed Appellant's signature to the document, Appellant was solely responsible for the contents regardless of whether he was directly responsible for dissemination, and that his conduct in regard to alteration of the document was inflamatory and exceeded the bounds of propriety.

The Commissioner found that Appellant could not escape responsibility for his personal actions by virtue of the fact that the Board had tolerated the conduct in the faculty lounge. He further concluded that Appellant could not claim that the comments he wrote were to remain his own private thoughts since he had thrown the documents in the trash and some other teaching staff member had knowledge of the document, which that member communicated to Ms. Harris. The Commissioner found that Appellant's right to remain silent was not focal, but rather that his refusal to comment was unfortunate since he could possibly have calmed community concerns and eliminated the delay caused by the fact that the Board was required to utilize a handwriting expert.

The Commissioner determined that given the factual context, the Board had a reasonable basis for its action. Although the specific reason given to Appellant for the withholding was technically deficient in that it maintained that Appellant had

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[2] We note that Appellant has not pursued his fourth amendment claim in this appeal. See Appellant's brief, at iii n. 3 and 20.

deliberately misrepresented the facts to his Principal rather than that he refused to answer, the Commissioner found that this was not fatal. He, however, directed the Board to eliminate any references to misrepresentation in Appellant's file. Finally, the Commissioner directed the Administration to control the activities in the Dungeon and strongly censured Ms. Harris for her role in the situation.

Appellant appealed the Commissioner's decision to the State Board. He first claims that he has demonstrated that the Board's action was unreasonable by establishing that the reason given by the Board for withholding the increment was not true in fact. He further renews his constitutional claims, asserting that under the first amendment, compelled disclosure as to his authorship of the document was prohibited and therefore the Board could not compel such disclosure or discipline him based on his silence upon inquiry. He further asserts that first amendment rights of association and expression prohibited the Board from disciplining him based on his authorship of the document, and that the first amendment guaranteed his privacy of expression in a non-work area on non-work time and entitled him to share information anonymously. Finally, Appellant claims that these rights cannot be outweighed by the fact that the community considered the content of the document to be offensive.

After carefully reviewing the record, we reject the Appellant's claim that he has proven the withholding was unreasonable because the Superintendent's letter, which provided Appellant with the reasons for the withholding, characterized his conduct as misrepresentation. As found by the ALJ, despite conflicting testimony concerning whether Appellant affirmatively denied knowledge of the altered document at the formal meeting with his Principal, Appellant at that meeting failed to answer his Principal's questions concerning the comments, which he had in fact authored, and as a result of black community was outraged. Initial Decision, at 8. By February, when the Board acted, the sequence of events triggered by Appellant's comments had occurred, including the series of community meetings, the Board meeting at which the matter was initially discussed, the handwriting analysis and Appellant's appearance before the Board, during which he maintained his silence on direction of his attorney. Thus, in acting, the Board was not considering Appellant's response at the formal meeting with his Principal in isolation, and it had by the time it acted provided Appellant, both through its Administration and directly, with numerous opportunities to respond. In this context, Appellant's failure to respond could be reasonably considered as a denial, and, although Appellant did not affirmatively misrepresent or lie, the characterization of misrepresentation was not unreasonable. We find, as did the ALJ and Commissioner, that under these circumstances, the Board's conclusion to withhold Appellant's increment was reasonable based on the facts it had before it, and that by establishing that he did not affirmatively misrepresent his authorship of the comments, Appellant has not shown that the Board's

action was arbitrary or unreasonable.[3] Kopera v. West Orange Bd. of Educ., 60 N.J Super. 288 (App. Div. 1960). See Colavita v. Board of Education of the Hillsborough Township School District, Docket #A-4342-83T6 (App. Div. March 28, 1985). We however concur with the Commissioner's directive that any references indicating deliberate misrepresentation in Appellant's personnel file be removed.

Nor do we find that the Board's action offends the constitutional guarantees of the first amendment. Initially, we recognize that the employment of a teacher may not be conditioned on a basis that infringes on a teacher's constitutionally protected interest in freedom of expression. Connick v. Myers, 461 U.S. 138, 142 (1983). However, not every employment decision involving employee expression is a constitutional matter, id. at 143, and we emphasize that a teacher's right to speak is not absolute but may be limited for the protection of the State's legitimate interests. Winston v. Bd. of Ed. of So. Plainfield, 64 N.J. 582, 588 (1974). We further emphasize that the freedom to speak is not a license for uncontrolled expressions which are internally destructive of the proper functioning of the institution. Id.

Where expressional rights of a public employee are implicated by an employment decision, a balance is sought "between the interests of the [teacher], as a citizen, in commenting on matters of public concern and the interest of the [board], as an employer, in promoting the efficiency of the public service it performs through its employees." Connick v. Myers, supra at 142, Pickering v. Board of Education, 391 U.S. 563, 568 (1968). Although constitutional protection may attach to a teacher's expression made not to the general public but at meetings of faculty and administrators, Winston v. Bd. of Ed. of So. Plainfield, supra at 588; see Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979), and is not absent from the workplace, Connick v. Meyers, supra, government officials enjoy wide latitude in managing their offices "when employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community...." Id. at 146. Thus, when a public employee such as a teacher speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, no deprivation of fundamental rights has resulted from a personnel decision taken in reaction to the employee's behavior. Id. at 147. In turn, the question of whether the employee's speech addresses a matter of public concern "...must be determined by the content, form, and context of a given statement, as revealed by the whole record." Id. at 147-48.

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[3] As subsequently discussed, we conclude that the protections afforded by the first amendment did not in this case entitle Appellant to avoid inquiry concerning the comments. Accordingly, he had no right in this context to immunity from disciplinary action resulting from his decision to remain silent.

We do not characterize the document as altered by Appellant as constituting speech on a matter of public concern. Rather, we conclude that Appellant's comments are most fairly characterized as those of an employee upon matters of personal interest. Id. at 146-147. Appellant's comment pertaining to grading papers relates entirely to the Administration's work requirements. Although we recognize that comments concerning a district's allegedly racially discriminatory policies may be considered as speech addressing a matter of public concern even if communicated privately with an employer rather than publicly expressed, Givhan v. Western Consolidated School District, supra. See Connick v. Myers, supra at 146, we find that Appellant's comment concerning the "elimination of blacks" was, at best, sarcastic comment concerning the Administration's policy. The comment was included in a document intended by the District for internal distribution, P-3, in evidence, and Appellant in making his comments was not seeking to inform the public concerning the Administration's racial policies. Indeed, the racial comment when released to the public was itself the cause of public concern. See Connick v. Myers, supra at 148-49.

Moreover, insofar as Appellant's comments could be construed to touch on a matter of public concern, we find that the State's legitimate interest in the efficient and harmonious operation of the schools sufficiently justified the Board's actions in this case. Winston v. Bd. of Ed. of So. Plainfield, 64 N.J. 582 (1974). As found by both the ALJ and Commissioner, once public concern was expressed, it was incumbent on the Board to remedy the situation, preliminary to which was ascertaining who was responsible for the comment. Although the Administration was not required to wait until its ability to effectively and efficiently fulfill its public responsibilities in operating the school had been disrupted or working relationships destroyed before taking action, Connick v. Meyers, supra, at 150-52, there is no question that in this case, Appellant's racial comment interfered with harmonious relations between black staff members and the Administration and between the community and the Board, and that Appellant's silence in this context exacerbated the situation.

Consideration of the context in which this dispute arose reinforces our conclusion that the Board's action was justified. We reject the contention that the Board's past failure to regulate the activities in the Dungeon conferred on Appellant's conduct the character of expression made in a public forum. Rather, we fully agree with the Commissioner that the Administration has a responsibility to control activities by its faculty on school premises. That responsibility is heightened where as here, such activity has taken the form of expression involving race and ethnicity that is offensive to other staff members and that concededly would offend others. Again, we emphasize that Appellant's comment, whether arguably subject to other interpretations, was considered racially derogatory and did offend both black staff members and the black community.

We further conclude that the Administration's failure to regulate conduct in the Dungeon does not excuse Appellant from responsibility for his own actions, either in making the comment or subsequently in refusing to answer the Administration's inquiries. Again, this is not a case where a teacher sought to participate in public affairs or comment as a citizen on a matter of public concern. Rather, Appellant made a sarcastic or satirical comment of a racial nature that was offensive to the racial group that was the subject of the comment. We find that the fact that such comment was made during lunch in the lounge area does not remove the conduct from the control of the Administration nor insulate Appellant from the consequences of his actions. Although we recognize that Appellant was not responsible for general distribution of the document, we emphasize that he did share the contents of his comment sufficiently so that other staff members were aware of the document, thereby creating the circumstances leading to its distribution. Once distribution occurred, given the nature of the comment and the fact that it offended both staff and the public, we do not believe Appellant could escape responsibility for his role by his refusal to answer the Administration's inquiries.

Finally, we find no merit to Appellant's claims that he was entitled to remain anonymous under the first amendment. This case implicates neither Appellant's right to participate in public affairs nor to join in association for an inter-change of ideas for bringing about political or social change. See, e.g., Connick v. Myers, supra at 144-45. Further, we find that none of the cases cited by Appellant support his claim that he had a first amendment privacy right in this context, and we emphasize that this is not a case involving infringement on Appellant's right to hold ideas. Rather, the case involves administrative inquiry concerning a document brought to its attention aimed at ascertaining the intended meaning of a racial comment that had been construed as a slur and, accordingly, the situation required the Administration to find out who was responsible for the comment. As stated, we agree with the ALJ and Commissioner that such inquiry was proper in order that the Board could fulfill its public responsibilities.

In sum, we conclude that any limited first amendment interest involved here did not require the Board to tolerate comments made on school premises by a staff member that were reasonably construed to be racially derogatory in the absence of explanation. Therefore, inquiry into Appellant's role was proper and in the face of his steadfast silence, the Board's action in withholding Appellant's increment neither offended the first amendment nor was unreasonable. Further, although Appellant asserts that the State Board has an obligation to consider his claims under the New Jersey Constitution, he chose not to include argument in support of his claim in this appeal that the New Jersey Constitution provides independent grounds for invalidating the Board's action. Appellant's brief, at 6 n. 10. We find no basis for concluding that the Board's action offended the New Jersey Constitution, and decline to invalidate the action on those grounds.

We join with the Commissioner in finding that the Administration has failed to take appropriate affirmative measures to hold its staff members professionally accountable for their conduct in the Dungeon and that Ms. Harris, by disseminating the document without providing school authorities the opportunity to handle the matter internally, contributed to the atmosphere of racial tension that was a consequence of this incident. However, we again emphasize that neither the Administration's tolerance of conditions in the Dungeon nor Ms. Harris' responsibility for dissemination of the document excuses Appellant's conduct.

Finally, we find that oral argument is not necessary for a fair determination of the issues in this case, and, therefore, deny Appellant's request for oral argument.

For the reasons set forth in this opinion, we affirm the decision of the Commissioner.

Attorney exceptions are noted.
May 6, 1987

SOUTH RIVER EDUCATION ASSOCIATION ET AL.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 9, 1985

For the Petitioners-Appellants, Oxfeld, Cohen and Blunda
(Arnold S. Cohen, Esq., of Counsel)

For the Respondent-Respondent, Wilentz, Goldman & Spitzer
(Steven J. Tripp, Esq., of Counsel)

This case involves the issue of whether a district board may impose requirements for qualification for employment as a teaching staff member beyond those established in the certification regulations so as to defeat the claims of tenured staff members who would otherwise have entitlement to the position on the basis of seniority in the category applicable to the position. The case arose from the Board of Education of the Borough of South River's (hereinafter "Board") efforts to implement a computer literacy program in its elementary schools. In doing so, the Board adopted the recommendation of the committee established in the District to develop a formal program for computer literacy at the elementary school level and to issue recommendations for implementation. That committee recommended that a computer literacy course be taught at the elementary level by a teacher who, in addition to appropriate certification, possessed a minimum of nine credits at the college level in computer science.

At its meeting on June 26, 1984, the Board approved the establishment of an elementary computer literacy position. The job description adopted by the Board specified that the responsibilities were to encompass grades K-5, and that a valid New Jersey instructional certificate plus nine credits in computer science were required. Although written request for approval for use of an unrecognized title was made of the County Superintendent, no written response was received.

Notice of vacancy for the position was posted on July 10, 1984. In addition to the job description adopted by the Board, a cover memorandum from the Superintendent was circulated that indicated that willingness to accumulate nine credits in computer science would be considered. Following receipt of applications and interviews of candidates meeting the Board's stated requirements, the Board approved the appointment of an out-of-district candidate who had been employed as a consultant for a computer company.

On November 20, 1984, the South River Education Association (Association) filed a Petition of Appeal with the Commissioner of Education on behalf of individually named Petitioners, each of whom had been employed by the Board prior to a reduction in staff not at issue here, and who were consequently on a preferred eligibility list in the elementary category. The Association claimed that the petitioning teachers were entitled to the position of elementary computer literacy teacher on the basis of seniority in the elementary category.

Following hearing of the matter, the Administrative Law Judge (ALJ) issued his initial decision, recommending dismissal of the petition. In reaching this conclusion, the ALJ determined that the Commissioner has recognized that district boards have the authority to establish greater requirements for positions than the minimum standards for teacher certification in a particular area so long as such requirements were not unreasonable or in contravention of statute or regulation. He found that the Board's requirement in this case of nine credits of computer science was reasonable in light of the Board's philosophy of providing all students in its elementary schools with the opportunity to become computer literate.

Acknowledging that the present certification regulations contain no endorsement specifically authorizing the teaching of computer science in the elementary schools, the ALJ however concluded that computer science was not of the general class of subjects generally taught in elementary schools, but rather was a separate discipline. The ALJ therefore concluded that Petitioners' seniority in the elementary category did not translate into a superior claim over non-tenured teachers for the position of computer literacy teacher in the elementary schools.

The ALJ further concluded that the absence of approval from the County Superintendent was not fatal to the Board's employment of an out-of-district candidate since the District's Superintendent made a good faith effort to secure approval and, beyond that, the Board had demonstrated that the requirement for nine credits in computer science plus elementary endorsement were proper qualifications for such unrecognized title.

The Commissioner, relying on Van Os v. Board of Education of Cinnaminson Township, 1977 S.L.D. 1040, found that the Board's desire to employ an individual to teach computer literacy who had elementary certification and nine college credits in computer

science was a reasonable criterion based upon the established needs of the District and the purposes of setting such requirement. He therefore adopted the ALJ's determination in the matter. Additionally, the Commissioner pointed out that if the Board had been unable to find an individual who had nine credits in computer science, it would have been obligated to look at its preferred eligibility list of elementary certified staff who were willing to accumulate the desired credits.

The Association appealed, contending that pursuant to the certification rules, each individual Petitioner is qualified to teach computer literacy at the elementary level and that their seniority in the elementary category prohibited the Board from imposing additional requirements. Additionally, the Association claims that the individual Petitioners meet the Board's minimum standards for qualification. In this respect, it argues that, under the Board's criteria, nine credits in computer science are not necessary to be competent to teach computer literacy. The Association asserts that the three named Petitioners involved meet the Board's alternative requirements in that one Petitioner has the required expertise and the other two would gladly take computer courses to reinforce their background in curriculum development and elementary instruction, which are the two primary background areas for an elementary computer literacy teacher.

This case turns on whether a district board of education may impose requirements for qualification for employment in a teaching position beyond those established in the certification regulations so as to preclude the claims of tenured teaching staff members to the position based on their seniority in the category otherwise applicable to the position. For the reasons that follow, we conclude that a district board does not have the prerogative to impose such additional requirements so as to preclude claims to assignment to the position based on seniority, and we therefore reverse the Commissioner's decision.

Threshold qualification for employment as a teaching staff member within the public school system is controlled by statute and regulation. N.J.S.A. 18A:1-1; N.J.S.A. 18A:6-38; N.J.A.C. 6:11-1 et seq. Accordingly, a district board may not employ any individual as a teaching staff member unless he holds a valid certificate to teach, administer or supervise instruction or educational guidance. N.J.S.A. 18A:26-2. See N.J.S.A. 6:11-3.1. The regulations further mandate that one of teaching endorsements set forth in the administrative code be required for each of the corresponding teaching assignments N.J.A.C. 6:11-6.1(a). See N.J.A.C. 6:11-3.6, which mandates that district boards assign position titles to teaching staff members that are recognized in the certification rules. Although the education laws permit a district board to establish qualifications beyond the threshold qualifications established by statute and regulation for employment in or promotion to a particular position title, N.J.S.A. 18A:27-4; Bd. of Ed. Tp. N. Bergen v. N. Bergen Fed. Teachers, 141 N.J. Super. 97 (App. Div. 1976), we find that a board's desire to employ or retain individuals

with such additional qualifications can not defeat the seniority rights conferred by statute on teaching staff members. N.J.S.A. 18A:28-10; N.J.S.A. 18A:28-12.[1]

In so concluding, we emphasize that effectuation of the substantive rights conferred by N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-12 is controlled by the regulations establishing the particular categories to which seniority is credited. N.J.A.C. 6:3-1.10. In the cases of those teaching staff members serving in instructional positions, the scope of the category in which seniority is credited is defined by the endorsement under which the member has served in either the elementary or secondary category. N.J.A.C. 6:3-1.10(1)(15); N.J.A.C. 6:3-1.10(1)(16). In turn, the endorsements required for service in particular assignments are specified by the certification regulations which establish the threshold qualification for employment in such assignments. N.J.A.C. 6:11-6.1 et seq. See also N.J.A.C. 6:11-7.1 et seq., the provisions of which establish the substantive components of teacher preparation programs, and which account for computer literacy, N.J.A.C. 6:11-7.3. We find no authority that would permit the district board to establish qualifications beyond those established by the regulations controlling certification so as to render inapplicable categories established by the seniority regulations, or for the County Superintendent to approve the use of an unrecognized position title on that basis. See N.J.S.A. 18A:7-5; N.J.S.A. 18A:7-8; N.J.A.C. 6:11-3.5.

After careful examination of the applicable statutory and regulatory framework, we conclude that under the current framework, qualifications different from those set forth in the certification regulations may be established so as to insulate the position from claims of tenured teaching staff members based on seniority only by the issuance by the State Board of Examiners of an endorsement encompassing such qualifications. N.J.S.A. 18A:6-38; N.J.A.C. 6:11-2.2.[2] As acknowledged by the ALJ, the State Board of

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[1] We note that Van Os, supra, upon which the Commissioner relied in the present case did not involve the question of whether a district board could impose requirements for qualification for employment beyond those included in the certification rules so as to insulate the position for seniority purposes. Rather, that case involved only whether a district board could require a comprehensive field endorsement rather than a specific subject field endorsement for employment so as to permit it to deny the application of a non-tenured teacher for the position.

[2] We note that prior to October 15, 1984, the certification regulations did permit certification not covered by the regulations to be granted. N.J.A.C. 6:11-3.14, effective January 23, 1981, deleted effective October 15, 1984. That authorization, although applicable to situations involving experimental curriculum, authorized the Commissioner, not the district board or County Superintendent, to grant such certification.

Examiners presently issues no separate endorsement for the teaching of computer literacy, and is not currently authorized to do so. N.J.A.C. 6:11-2.2. Nor is the authorization established by N.J.A.C. 6:11-6.2(a)(6) limited by subject matter, but includes authorization to teach in all instructional areas kindergarten through eighth grade, subject to certain limitations not relevant here, whether or not the subject matter is "generally" taught at the elementary level.

Furthermore, the position at issue here, as established by the Board, is that of an elementary teacher with designation of the subject matter being taught, for which there is no corresponding endorsement. Accordingly, elementary certification is the appropriate certification,[3] and, as set forth above, the applicable legal framework does not permit approval for the use of an unrecognized position title for instructional positions based on additional requirements determined by the district board to be necessary because of the nature of the subject matter to be taught.[4] Cf., Appel v. Board of Education of the City of Camden, 1975 S.L.D. 562. To hold otherwise would undermine the seniority system by permitting the creation of positions distinct for seniority purposes based on distinctions in subject matter beyond those made by the certification rules.

In sum, we reiterate that a district may determine to employ or promote individuals possessing qualities or qualifications beyond those set forth in the certification regulations. That prerogative however does not alter the statutory entitlements of tenured teaching staff members to retention or reemployment on the basis of seniority. N.J.S.A. 18A:28-10; N.J.S.A. 18A:28-12. Thus, in filling the position at issue here, for which, as the position was established by the Board, elementary certification was the appropriate certification, the Board was obligated to offer the position to those on its preferred eligibility list in the elementary category in order of seniority. N.J.S.A. 18A:28-12.

In this case, the relief sought by the Association is for an order that the position at issue was improperly offered and assigned to the out-of-district candidate, that the position must be offered to one of the individual Petitioners, and that the Petitioner assigned to the position be awarded back pay and emoluments together with interest. The preceedings here are limited to the three named Petitioners, and the relative seniority of these

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3 We note that although the job description specifies only that a valid New Jersey Instructional Certificate is required for the position, as recognized by the Administration's Suggestions for Computer Literacy in the Middle School, J-1, in evidence, appropriate certification for a teaching position at the elementary level, in the absence of specific subject matter endorsement, is an instructional certificate with elementary endorsement. See N.J.A.C. 6:11-6.1(a).

4 See supra note 2.

individuals was established in the proceedings. We therefore direct the Board to offer the position to the most senior of the individually named Petitioners remaining on its preferred eligibility list in the elementary category and find that, upon acceptance of the position, such individual is entitled to back pay and emoluments minus mitigation from September 1984, when the Board employed the out-of-district candidate in violation of the seniority rights conferred by N.J.S.A. 18A:28-12. We however find that in the absence of any indication of bad faith on the part of the Board, this is not a proper case for an award of interest for the period prior to the State Board of Education's decision in the matter.

Alice Holzapfel, James Seabrook and Deborah Wolfe opposed.
Attorney exceptions are noted.
November 4, 1987

BARBARA SPOONER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, August 22, 1986

For the Petitioner-Appellant, Bucceri and Pincus
(Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Joseph J. Rotolo, Esq.

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

February 4, 1987

ELIZABETH SZPIECH,	:	
PETITIONER-RESPONDENT.	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG, SUSSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, April 1, 1985

For the Petitioner-Respondent, Zazzali, Zazzali & Kroll (Kenneth I. Nowak, Esq., of Counsel)

For the Respondent-Appellant, Rand & Algeier (Robert M. Tosti, Esq., and Ellen S. Bass, Esq., of Counsel)

Petitioner-Respondent, Elizabeth Szpiech, (hereinafter "Petitioner"), has challenged the termination of her full-time employment by the Board of Education of Hopatcong (hereinafter "the Board"), claiming violation of her tenure rights. The facts underlying this controversy are not in dispute. Petitioner, who possesses an Instructional Certificate with elementary endorsement, was initially employed by the Board as a substitute teacher for the 1978-79 school year. On April 27, 1981, she was employed as a basic skills instructor on a three and one half hour per day basis and compensated at an hourly rate. During the 1981-82 and 1982-83 school years, Petitioner was again employed on an hourly basis for 19¼ hours per week as a basic skills instructor. In 1983-84, Petitioner was employed by the Board on a full-time basis, assigned as a second grade teacher and compensated at the first step of the District's salary guide.

By letter dated April 23, 1984, the Board advised Petitioner that it would take formal action at its April 26 meeting to non-renew her contract for 1984-85 for reasons of lack of work and/or economy. By letter dated April 27, the Board further informed her that it had taken formal action not to renew her contract on the basis of lack of work and/or economy. However, commencing in September 1984, the Board employed a non-tenured teacher assigned as a second grade teacher on a full-time basis.

While terminating Petitioner's full-time employment, the Board acknowledged that circumstances might support a claim that Petitioner was tenured, and therefore resolved at a special meeting on June 20, 1984, to withhold Petitioner's employment increment for 1984-85 on the basis of her job performance. Petitioner filed a Petition of Appeal to the Commissioner of Education in July 1984, challenging the Board's action in withholding her increment, as well as the termination of her full-time employment and her placement on the salary guide.[1] She however accepted part-time employment with the Board as a remedial teacher for the 1984-85 school year because of her duty to mitigate damages.

Shortly before Petitioner filed her petition, the Board sought a declaratory judgment from the Commissioner, seeking a determination that Petitioner was not entitled to tenure status as a full-time teacher. Both matters were transmitted to the Office of Administrative Law, where following answers by the parties, the matters were consolidated on motion. At prehearing conference held on September 26, 1984, the issues were determined to be: 1) whether Petitioner was a tenured teaching staff member and, if so, when such tenure attached, 2) whether Petitioner's tenure was full-time or part-time and 3) determination of Petitioner's proper placement on the salary guide.

Following oral argument in the matter, the Administrative Law Judge issued a summary decision. He first determined that, as conceded by the Board, Petitioner acquired tenure in April 1984, following three years of continuous service. Relying on Lichtman v. Ridgewood Board of Ed., 93 N.J. 362 (1983), the ALJ further found that Petitioner acquired tenure as a full-time classroom teacher, the position in which she was serving when she achieved tenure, regardless of the fact that the majority of her service had been part-time. He concluded that once tenured, Petitioner's seniority rights placed her in a preferential position over the nontenured teacher hired by the Board to replace her in the classroom assignment.

The ALJ further found that because Petitioner's service on a part-time basis was employment in a tenure eligible position, she should have been moved up on the salary guide one step each year from 1981-82, with the exception of the 1984-85 school year for which her increment had been withheld. The ALJ determined that Petitioner was also entitled to accumulated sick days, pension credits and all other contractual benefits enjoyed by tenured teachers, and should be compensated for all benefits and sick days retroactive to June 1982, the date on which Spiewak v. Rutherford was decided. 90 N.J. 63 (1982). Therefore, in addition to immediate assignment to the full-time position that the Board had

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[1] Prior to hearing of the matter, Petitioner withdrew her claim concerning the Board's action to withhold her increment for 1984-85.

filled with a non-tenured teacher and payment at step three of the salary guide for 1984-85, retroactive to September 1984, the ALJ directed compensation for the difference between Petitioner's actual earnings and compensation based on the guide from September 1982 through September 1984, as well as contractual benefits, including accumulated sick leave, enjoyed by tenured or tenure eligible teachers since June 1982.

The Commissioner found that the undisputed facts clearly established that Petitioner achieved tenure protection as an elementary teacher in a full-time position during the 1983-84 school year pursuant to N.J.S.A. 18A:28-5(b). He further found that according to the provisions of N.J.A.C. 6:3-1.10(1)(16), Petitioner's service, both full and part-time, was to be credited for seniority purposes in the elementary category. The Commissioner therefore concluded that termination of Petitioner's employment in the absence of abolishment of her position was in violation of her tenure rights. He further concluded that even had the Board abolished Petitioner's position, employment of a nontenured teacher in a vacant elementary teaching position would be in violation of Petitioner's seniority rights. In reaching these conclusions, the Commissioner rejected the proposition that Petitioner's assignment as a full-time classroom teacher for 1983-84 constituted a "transfer" within the meaning of N.J.S.A. 18A:28-6, emphasizing that her entire service as a teaching staff member, both full-time and part-time, was under her Instructional Certificate with elementary endorsement. Based on his conclusions, the Commissioner adopted the ALJ's findings and conclusions in the matter and directed the same remedies as those recommended by the ALJ. For the reasons that follow, we affirm the Commissioner's determination that the Board's action in this case was in violation of both Petitioner's tenure and seniority rights, but modify the relief afforded by the Commissioner's decision in this matter.

Initially, we reiterate that, as we concluded after extensive analysis in Capodilupo v. Board of Education of the Town of West Orange, decided by the State Board, September 3, 1986, appeal pending, Docket #A-943-86T7, the position in which a teaching staff member achieves tenure and to which tenure protection attaches is either one of those specifically enumerated in N.J.S.A. 18A:28-5 or some other employment with a board for which a certificate is required, either instructional, educational services or administrative and supervisory. See Howley v. Board of Education of the Township of Ewing, 1982 S.L.D. 1328, aff'd by the State Board, June 1, 1983. Although the scope of a tenurable position is limited by the certification qualifying a member for assignment within the position, once tenure is achieved, tenure protection extends to service in all assignments within the scope of the endorsement qualifying the member for service within his tenured position. Capodilupo, supra.

We reject the proposition that the scope of a tenurable position is affected by the fact that a member is employed in an assignment within the tenurable position on a part-time basis. In Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983), the New Jersey Supreme Court held that a tenured part-time teaching staff member may claim seniority preference over a non-tenured applicant in seeking appointment to a full-time position where the certification requirements and responsibilities of the full-time position are the same as those required for the part-time position. In reaching this conclusion, the court emphasized that the regulations governing seniority evinced no legislative intent to distinguish between part-time and full-time service, except in so far as service on a part-time basis would affect the calculation of the amount of seniority credit earned.

Like the seniority regulations, the tenure statutes evince no legislative intent to distinguish between full-time and part-time employment for tenure purposes. N.J.S.A. 18A:28-5 conditions tenure on employment by a board for the number of academic years specified in the statute without any qualification that such employment be on a full-time basis. Compare with N.J.S.A. 18A:29-5 (1985), which conditions minimum salary on status as a full-time teaching staff member. Nor do any of the statutory provisions that define the scope of positions for tenure purposes make any distinction between full-time and part-time employment. See N.J.S.A. 18A:1-1; N.J.S.A. 18A:28-1; N.J.S.A. 18A:28-5. Likewise the authorizations set forth in the regulations governing certification requirements make no distinction between service on a full-time or part-time basis. See N.J.A.C. 6:11-1 et seq. In the absence of specific statutory exception or legislative intent, we hold that the distinction between full-time and part-time employment in itself has no bearing on the scope of a position tenurable within the meaning of N.J.S.A. 18A:28-5. Spiewak v. Rutherford, 90 N.J. 82 (1982). Rather, determinations concerning whether tenure has been achieved are to be based solely on whether a teaching staff member has fulfilled the precise conditions of N.J.S.A. 18A:28-5 by virtue of employment for the requisite period in one of the enumerated positions or some other employment for which a certificate is required without reference to whether such employment was full-time or part-time. Id.

Nor does the fact that a particular assignment requiring endorsement under the Instructional Certificate involves individualized instruction alter the scope of the tenurable position. Neither the tenure statutes nor the regulations pertaining to qualification to provide instructional services make any distinction on the basis of the instructional methods utilized in various educational settings within the public school system. See N.J.A.C. 6:11-6.1 et seq. Rather, the regulations that define qualification under the Instructional Certificate for service in particular teaching assignments distinguish between assignments only on the basis of subject matter, N.J.A.C. 6:11-6.1; N.J.A.C. 6:11-6.2, and, in the case of the nursery school and elementary endorsements, on the basis of grade level. N.J.A.C. 6:11-6.1(a). Furthermore, we emphasize that the current regulations pertaining to

teacher preparation and certification insure that all individuals who are issued a standard New Jersey Instructional Certificate receive preparation in the instructional methods utilized within the public school system, including those appropriate to individualized and classroom instruction. N.J.A.C. 6:11-7.3; N.J.A.C. 6:11-8.2(a). Accordingly, we find no basis in either statute or regulation to support the conclusion that service in a teaching assignment involving individualized instruction constitutes service in a position separately tenurable from an assignment that requires the same endorsement in order to be qualified, but involves the provision of classroom instruction.

Petitioner in this case was employed from April 1981 as a teacher, one of the tenurable positions specifically enumerated in N.J.S.A. 18A:28-5. Her assignments as both a basic skills instructor and second grade teacher were pursuant to her Instructional Certificate with elementary endorsement. Therefore, as found by the Commissioner, Petitioner's reassignment from service as a basic skills instructor to that as a second grade teacher did not constitute a transfer from one tenurable position to another within the meaning of N.J.S.A. 18A:28-6. See Capodilupo, supra, at 9-10. Rather, Petitioner met the precise conditions for the acquisition of tenure as a teacher pursuant to N.J.S.A. 18A:28-5(c) in April 1984 by employment requiring certification as an elementary teacher for the equivalent of three academic years within four consecutive academic years. Having achieved tenure as a teacher, she was entitled to tenure protection while serving in particular assignments within the scope of her tenured position. Again, such protection extended to all assignments within the scope of the certification required for her employment, and included protection from termination of her employment or reduction in compensation except as provided by N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-9.

This case does not involve tenure proceedings pursuant to N.J.S.A. 18A:6-10, and, as found by the Commissioner, in terminating Petitioner's full-time employment, the Board did not act pursuant to N.J.S.A. 18A:28-9 to reduce its staff. Rather, it terminated Petitioner's full-time employment as a second grade teacher, an assignment requiring an Instructional Certificate and elementary endorsement, and employed her in a part-time assignment as a basic skills instructor, an assignment requiring the same certification and within the scope of Petitioner's tenured position. While reducing Petitioner's employment in her tenured position, it employed a nontenured teacher in the same tenurable position on a full-time basis. As found by the Commissioner, such action was unquestionably in violation of Petitioner's tenure rights.

Further, although calculation of Petitioner's seniority credit would be based on her actual service on both a full-time and part-time basis, Lichtman, supra, the seniority category to which Petitioner's service is to be credited pursuant to N.J.A.C. 6:3-1.10(1)(16) upon any reduction in force is the elementary category. Accordingly, as the Commissioner concluded, even had the

Board acted validly to reduce its staff pursuant to N.J.S.A. 18A:28-9, employment of a non-tenured teacher on a full-time basis to serve in this category while reducing Petitioner's employment would be in violation of Petitioner's seniority rights.

Therefore, for the reasons stated, we affirm the Commissioner's determination that Petitioner is entitled to reinstatement in the full-time assignment as an elementary teacher in which the Board employed a non-tenured teacher. We however modify the Commissioner's determinations concerning the relief to which Petitioner is entitled.

We reiterate that nothing in the education laws governs the compensation of teaching staff members who are employed less than full-time, and that compensation is a mandatory term of collective negotiation. Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd Docket #A-2508-84T7 (App. Div. Feb. 26, 1986), certif. denied 104 N.J. 469 (1986). Accordingly, nothing in the education laws prohibits payment at an hourly rate or requires that a part-time member be compensated based on the salary schedule applicable to full-time members or other classifications of part-time members. e.g., Comstock et al. v. Board of Education of the Summit, decided by the State Board, March 6, 1987. Petitioner's compensation at an hourly rate during her period of part-time service from April 1981 through the 1982-83 school year did not contravene the education laws and we therefore conclude that she is not entitled to additional compensation based upon her service during this period.

Nor is she entitled to additional compensation as a consequence of her employment on a full-time basis for the 1983-84 school year. Her placement at step 1 of the District's salary guide upon her acceptance of full-time employment constituted an initial placement within the meaning of N.J.S.A. 18A:29-9, and therefore was not controlled by the education laws except to the extent that the Board was required to conform to the statutory minimums set forth in the applicable compensation statutes. e.g., Ball et al. v. Board of Education of the Township of Teaneck, decided by the State Board, January 7, 1987.

Likewise, the education laws do not provide any basis for awarding contractual relief in this case. Although N.J.S.A. 18A:29-4.1 provides that members are entitled to the application of a salary policy adopted by a district board, including provisions for benefits, such entitlement extends only to benefits for which such member is qualified under the terms of such policy. e.g., Scotch Plains-Fanwood Education Association et al. v. Board of Education of Scotch Plains-Fanwood, decided by the State Board, March 6, 1987. There is no indication in the record that Petitioner was deprived of any benefit during her employment for which she qualified, and we therefore reverse the Commissioner's award of contractual relief in this case.

In sum, we conclude that termination of Petitioner's full-time employment and her employment on a part-time basis, in the absence of a valid reduction in staff, was in violation of her tenure rights, and that employment on a full-time basis of a non-tenured teacher in a category in which Petitioner had seniority was violative of her seniority rights. We however conclude that the full extent of the relief to which Petitioner is entitled as result of the Board's violation of her tenure rights is reinstatement to the full-time assignment in which a non-tenured teacher was employed, and compensation at the salary she would have received had the Board not terminated her full-time employment for the 1984-85 school year, minus mitigation. We therefore reverse the Commissioner's award of additional relief in this case.

Attorney exceptions are noted.
June 3, 1987

MARGARET D. TANNENBAUM,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 11, 1987

Reconsideration denied by the Commissioner of Education, June 29, 1987

For the Petitioner-Appellant, Margaret D. Tannenbaum, pro se

For the Respondent-Respondent, Montgomery, McCracken, Walker and Rhoads (Louis A. Petroni, Esq., of Counsel)

This is an appeal by a member of a district board of education from a Commissioner's decision dismissing her Petition of Appeal prior to transmittal of the matter to the Office of Administrative Law. See N.J.A.C. 6:24-1.9. The matter was initiated on March 26, 1987, when Petitioner Margaret Tannenbaum filed a Petition of Appeal to the Commissioner alleging violations of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., against the Board President, the District's Superintendent and the President of the Glassboro Education Association (Association). More specifically, she asserted that the Superintendent and the Board President had prepared an agenda for a non-public meeting of the Board held on March 4, 1987, to discuss charges against her without notifying her. She sought relief in the form of a copy of the charges presented to the Board by the Executive Committee of the Association, a public hearing to determine the validity of the charges, the costs of retaining private counsel and a public apology.

Answers were filed on behalf of the Association's President and the Board's attorney. Counsel for the Association's President asserted that the Commissioner of Education lacked jurisdiction over claims against the Association President in that the Open Public Meetings Act creates a cause of action against public bodies, and not individuals. He further asserted that the Commissioner lacked subject matter jurisdiction over the dispute in that the exclusive remedy available to Petitioner under the Open Public Meetings Act was an action to set aside official action of the public body and no such action had been taken in this case.

In his answer on behalf of the Board President and the District's Superintendent, the Board counsel denied that there had been any violation of the Open Public Meetings Act and denied that any charges were brought or formal action requested against Petitioner. The answer further asserted that the Commissioner lacked subject matter jurisdiction in that violation of the Open Public Meetings Act was not cognizable against individuals and, since no public action had been taken, there was no remedy that could be provided by the Commissioner. Board counsel further claimed that Petitioner has stated no claim upon which relief could be granted, that she was not entitled to counsel fees as a matter of law and that Petitioner had actual notice of the matters discussed in the non-public session.

On May 11, 1987, the Commissioner advised Petitioner by letter that under the Open Public Meetings Act, actions could be taken only against a public body. Accordingly, he informed her that if she wished her petition to be considered, she must amend it to delete causes alleged against individuals. Petitioner filed her amended petition on May 20, naming the Board of Education of Glassboro as Respondent. In her amended petition, she alleged violation of the Open Public Meetings Act and resulting violation of her due process rights by the Board. On May 27, the Board's counsel moved to dismiss the amended petition for lack of subject matter jurisdiction and failure to state a claim.

On June 11, the Commissioner dismissed the petition, determining that: 1) Petitioner had failed to set forth a cause of action in that she was not an employee of the Board who might, under the law, be entitled to an open airing of her status with the Board, and 2) that as a member of the Board against whom no specific charges had been averred, she could not claim deprivation of due process. Petitioner sought reconsideration of the dismissal, which was denied by the Commissioner on June 29, 1987.

Petitioner then appealed to the State Board, again asserting that the Board's actions violated the Open Public Meetings Act, that charges had been brought against her, that she did not have notice of the matters to be discussed, that the Open Public Meetings Act does apply since application of the Act is not conditioned on status as an employee, that she has been deprived of due process and that such violation has continued.

The Board renews its arguments for dismissal, more specifically contending that the Open Public Meetings Act does not preclude non-public meetings for informational purposes and that no relief could be afforded Petitioner since no formal action was taken. It further argues that even if action had been taken, Petitioner was limited to proceeding in lieu of prerogative writ so that there is no subject matter jurisdiction.

Although the pleadings and briefs filed thus far in this matter show that there is dispute concerning the factual circumstances, there is no dispute that the Board met in private session on March 4, 1987. In her original petition, Petitioner alleged that the Association had requested the private session in order to discuss concerns regarding the actions of a "certain board member," that the Executive Committee of the Association and five other teachers attended the Board's meeting of March 4, that, at the meeting, the Association's President read a list of charges against Petitioner, and that she was not informed in advance that the teachers were coming. Her amended petition contained no additional factual allegations. In assessing the propriety of the Commissioner's determination to dismiss the petition, Petitioner's allegations must be taken as true and she must be afforded the benefit of all favorable inferences. e.g., Arcell v. Ashland Chemical Co., Inc., 52 N.J. Super. 471 (Law Div. 1977); Hirsch v. Travelers Ins. Co., 134 N.J. Super. 466 (App. Div. 1975). Based on the facts as alleged, we find that it would be improper to conclude at this juncture that no charges had been averred against Petitioner, or that, as a matter of law, the facts as alleged do not state a cause of action under the education laws. e.g., C.B. Snyder Realty Co. Inc. v. Seeman Bros., Inc., 79 N.J. Super. 88 (App. Div. 1963). See N.J.S.A. 18A:10-6; N.J.S.A. 18A:11-1; N.J.S.A. 18A:12-3.

Our conclusion in this regard, however, does not resolve the question raised by the Board's motion to dismiss and renewed on appeal, that the Commissioner lacks subject matter jurisdiction to consider Petitioner's allegations that the Board violated the Open Public Meetings Act. We reject this contention, emphasizing that, contrary to the Board's arguments, it is settled that the Commissioner of Education has jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to controversies under the school laws. Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184 (App. Div. 1979). As set forth above, based on the facts as alleged, we find that it can not be concluded at this juncture that the petition in this case does not present a controversy under the education laws. Accordingly, it can not be concluded that the Commissioner lacks subject matter jurisdiction to determine the issues arising under the Open Public Meetings Act.

We also reject the Board's argument that the petition should be dismissed on the grounds that the Open Public Meetings Act does not preclude non-public meetings for informational purposes. The clear language of the Act requires that all meetings of public bodies shall be open to the public at all times, N.J.S.A. 10:4-12(a), except as provided by N.J.S.A. 10:4-12(b). Thus, unless one of the enumerated exceptions applies, the public may not be excluded from any gathering attended by or open to all members of a district board held with the intent to discuss the specific business of the board, whether or not formal action occurs, and simply classifying a meeting as informational does not exclude it from the statutory definition of a public meeting. Opinion of the Attorney General, Formal Opinion No. 19-1976 (June 22, 1976). See OFFICE OF

THE ATTORNEY GENERAL, THE OPEN PUBLIC MEETINGS ACT: A GUIDE FOR NEW JERSEY PUBLIC OFFICIALS AND CITIZENS (January 1986). Dismissal of the petition in this matter on the grounds that the Board's meeting of March 4 was informational, therefore, would be improper.

Finally, we reject the Commissioner's determination that the petition be dismissed because Petitioner was not an employee of the Board who might under law be entitled to an open airing of her status with the Board. Neither application of the Open Public Meetings Act nor standing to invoke the Commissioner's incidental jurisdiction to consider whether a district board has acted in conformity with that Act is conditioned on status as an employee of the Board. Rather, the question of whether an individual has standing to invoke the Commissioner's jurisdiction to consider claims under the Open Public Meetings Act turns on whether a controversy arising under the education laws is presented. Sukin v. Northfield Bd. of Ed., supra. As stated, we find no basis for concluding at this point that Petitioner's status as a board member rather than as an employee precludes her from challenging in this forum the Board's actions concerning the March 4 meeting. Accordingly, we could not now properly hold that she had no right under law to an open airing of her status with the Board.

In summary, based on the pleadings in this case, and recognizing that the factual circumstances are in dispute, we can not say at this juncture that Petitioner has failed to state a cause of action cognizable in this forum. We therefore conclude that the Commissioner improperly dismissed the petition, and we remand this matter to the Commissioner for transmittal to the Office of Administrative Law.

November 4, 1987

SHARON TOMPKINS,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Partial Summary Decision by the Commissioner of Education, October 2, 1986

Decision on motion by the State Board of Education, February 4, 1987

For the Petitioner-Respondent, Selikoff & Cohen (Barbara E. Riefberg, Esq., of Counsel)

For the Respondent-Appellant, Sills Beck Cummis Zuckerman Radin Tischman & Epstein (Lester Aron, Esq., of Counsel)

This is an appeal from a Commissioner's decision denying the Board of Education of the Township of Hamilton's (hereinafter "Board") motion to dismiss for lack of subject matter jurisdiction where the petitioning teacher, Sharon Tompkins, sought payment of benefits under N.J.S.A. 18A:30-2.1. Petitioner Tompkins is a non-tenured teacher employed by the Board, who had been absent from work from January 13, 1986, as the result of an illness that she claimed was work related. In March, her accumulated sick leave and additional benefits under the collective negotiations agreement were exhausted.

On April 24, 1986, she filed a Petition of Appeal with the Commissioner of Education, seeking payment of full salary pursuant to N.J.S.A. 18A:30-2.1. The Board denied that her illness arose out of and occurred in the course of employment, and raised as an affirmative defense that the Commissioner lacked subject matter jurisdiction to find a causal connection between an injury and a work related situation.

The matter was transmitted for hearing to the Office of Administrative Law, and, on June 16, 1986, the Board moved for summary judgment. Following submission of briefs on the question of jurisdiction, by which time Petitioner had filed a claim for workers' compensation with the Division of Workmen's Compensation, the Administrative Law Judge (ALJ) issued his Initial Decision, recommending that the Board's motion be dismissed.

The Commissioner adopted the ALJ's recommendation, holding that he was not precluded from rendering a decision under N.J.S.A. 18A:30-2.1 before the matter had been decided by the Division of Workmen's Compensation, although the Division of Workmen's Compensation is not bound by the Commissioner's determination. In so concluding, the Commissioner found that a determination rendered under N.J.S.A. 18A:30-2.1 is a "wholly separate finding with its own standard of review from that rendered under Chapter 15 of Title 34...", although the factual findings may be the same. Noting that there might be a valid reason in any given case to hold consideration of the claim pending determination by the Division of Workmen's Compensation, the Commissioner directed that the matter before him proceed to plenary hearing on the merits. On February 4, 1987, the State Board granted the district Board's motion for a stay of the Commissioner's decision.

In its appeal to the State Board, the district Board does not assert that the Commissioner lacks subject matter jurisdiction to decide whether supplemental benefits should be paid pursuant to N.J.S.A. 18A:30-2.1. Rather, the Board asserts that such determination must be stayed where, as here, the issue of causal connection between the injury and the workplace is in dispute. For the reasons that follow, we agree and hold that where a claim is made under N.J.S.A. 18A:30-2.1 and the question of whether the accident arose out of and in the course of employment is in dispute, determination of whether to award benefits under N.J.S.A. 18A:30-2.1 should be deferred until a determination is made by the Division of Workmen's Compensation.

N.J.S.A. 18A:30-2.1 provides:

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under Chapter 15 of Title 34, Labor and

> Workmens' Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmens' compensation award made for temporary disability.

Thus, pursuant to this statute the Commissioner of Education is authorized to direct benefits in cases of personal injury caused by an accident arising out of and in the course of employment. In accord with the jurisdiction conferred on him by N.J.S.A. 18A:6-9, the Commissioner is authorized to resolve disputes arising under N.J.S.A. 18A:30-2.1, and we emphasize that the jurisdiction conferred on the Commissioner by N.J.S.A. 18A:6-9 is fundamental and indispensable jurisdiction over all disputes arising under the school laws. Theodore v. Dover, 183 N.J. Super. 407 (App. Div. 1982). However, in resolving question before us, we can not ignore that, as here, a petitioning employee whose injury arises out of and in the course of employment may also seek benefits under the Workmen's Compensation Act so as to require a determination concerning the causal connection between the injury and employment by the Division of Workmen's Compensation. Nor can we ignore that N.J.S.A. 34:15-49 confers on the Division of Workmen's Compensation "...exclusive original jurisdiction of all claims for compensation" arising under the workers' compensation statutes. City of Hackensack v. Winner, 82 N.J. 1 (1980).

The question before us is one of first impression. Initially, we recognize, as did the Appellate Division in its decision in Williams v. Bd. of Ed. Deptford Tp., 192 N.J. Super. 31 (App. Div. 1983), aff'd o.b., 98 N.J. 319 (1985), that the Workmen's Compensation Act and N.J.S.A. 18A:30-2.1 both share a concern with methods of compensation of employees for personal injuries sustained in accidents arising out of and in the course of employment. However, as emphasized by the court, N.J.S.A. 18A:30-2.1 is not part of the Workmen's Compensation Act, but rather is part of the statutory scheme governing the educational system of New Jersey, and the statutes were enacted for different purposes. Accordingly, in resolving the specific question before it, the court in Williams held that, in the absence of any suggestion that the time limitation of N.J.S.A. 18A:30-2.1 and the nonchargeability of sick leave during that period was intended to be read in conjunction with a specific provision of the Workmen's Compensation Act, resort to the Workmen's Compensation Act was not necessary in order to construe in N.J.S.A. 18A:30-2.1 the meaning of the phrase "period of such absence for up to one calendar year."

In contrast, the phrase "arising out of and in the course of employment" has been held to have precisely the same meaning under N.J.S.A. 18A:30-2.1 as it does under N.J.S.A. 34:15-7. Theodore v. Dover, 183 N.J. Super. 407 (App. Div. 1982). In Theodore, the court confronted a case in which a district board had denied a school custodian's claim to benefits under N.J.S.A. 18A:30-2.1 where the custodian had injured his back subsequent to his return to work following absence resulting from an earlier

injury to his back, for which he had received workers' compensation benefits. No appeal to the Commissioner had been made in that case, and the matter came before the Appellate Division following a decision by the Chancery Division dismissing the custodian's complaint.

In resolving the case, the court found that because the Commissioner of Education had fundamental and indispensable jurisdiction over all disputes arising under the school laws, appellant's claim should have been made to the Commissioner rather than by bringing an action in the Chancery Division. The court, however, proceeded to consider the legal issue raised because of the undue burden on the appellant custodian that would have been caused by a remand to the Commissioner.

In resolving the matter, the court emphasized the purpose of N.J.S.A. 18A:30-2.1 to provide leave of absence with pay in cases of injuries or illnesses arising from employment and subject to the Workmen's Compensation Act and the express function of the statute to complement workers' compensation benefits for a strictly limited period of time. Accordingly, the court held that the phrase "accident arising out of and in the course of employment" was intended to have precisely the same meaning as it does under N.J.S.A. 34:15-7. Applying that standard to the case before it, the court found that when appellant reinjured his back, he suffered an accident arising out of or in the course of employment so as to entitle him to benefits under N.J.S.A. 18A:30-2.1.

Thus, Theodore settles that the question of whether an injury arose out of and in the course of employment within the meaning of N.J.S.A. 18A:30-2.1 is controlled by the standards established under the Workmen's Compensation Act. The court in that case, however, did not address the question of whether determination of entitlement to benefits pursuant to N.J.S.A. 18A:30-2.1 must be deferred until the Division of Workmen's Compensation decides the matter. Nor does the court's decision provide any indication that appellant in that case had applied to the Division of Workmen's Compensation for benefits on the basis of the back injury at issue.

Again, the Board in the case now before us does not challenge the Commissioner's jurisdiction to resolve disputes arising under the education laws. Rather, the question presented by this appeal is whether this agency should defer to the Division of Workmen's Compensation where a petitioner claims benefits under N.J.S.A. 18A:30-2.1 and the question of whether the injury arose out of and in the course of employment is in dispute. We conclude that although the breadth of the Commissioner's power is great, Theodore v. Dover, supra at 412-13, under these circumstances, this agency should abstain from considering the matter until a determination is made by the Division of Workmen's Compensation. City of Hackensack v. Winner, supra; Hinfey v. Matawan Regional Board of Education, 77 N.J. 514 (1978)

Again, the question of whether an injury arose out of and in the course of employment is controlled by the standards established under the Workmen's Compensation Act. Where, as here, that question is in dispute and a claim has been made under the Workmen's Compensation Act, we conclude that deference to the Division of Workmen's Compensation, the agency with the greatest expertise in resolving the question, is called for. Hackensack v. Winner, supra; Hinfey v. Matawan Regional Board of Education, supra. Such approach also properly recognizes the exclusive original jurisdiction of the Division of Workmen's compensation over claims arising under the Workmen's Compensation Act, and is consistent with the legislative purpose of N.J.S.A. 18A:30-2.1 to provide leave of absence with pay in cases of injuries or illness arising from employment and subject to the Workmen's Compensation Act. See sponsor's statement accompanying Assembly Bill A357 (1967) and sponsor's statement accompanying Assembly Bill A695 (1959). See also Hackensack v. Winner, supra. Furthermore, in cases where questions of the relationship between the injury and employment are in dispute, determination by the Division of Workmen's Compensation may well resolve the entire dispute. Even where questions remain requiring resolution under the education laws, prior determination of the questions controlled by the Workmen's Compensation statutes may permit systematic resolution of the entire matter and avoid conflicting results.

Our conclusion that deference is called for in these circumstances is further supported by our consideration of the Appellate Division's decision in Forgash v. Lower Camden County School, 208 N.J. Super. 461 (App. Div. 1985). In that case, the court considered the question of whether a denial of benefits under N.J.S.A. 18A:30-2.1 by the Commissioner of Education, who had denied benefits on the grounds that the petitioning teacher had failed to show that work related activities were the direct cause of her inability to work, precluded a workers' compensation judge from subsequently entertaining the teacher's claim for benefits under the Workmen's Compensation Act. In holding that the compensation judge was entitled to, if not required to, entertain the claim and proceed to final determination despite the prior denial of benefits under N.J.S.A. 18A:30-2.1, the court emphasized that:

> [t]he distinctive function and expertise of the compensation court qualified it as the more appropriate tribunal for the adjudication of petitioner's controverted claim for her work-related injuries. Furthermore, this agency was entitled to exercise primary jurisdiction over petitioner's claim in view of the "exclusive original jurisdiction" which had been conferred on it with respect to such matters....

> Moreover, as the express function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited time period, a proceeding pursuant to that statute may not be utilized to supplant the function of the compensation court. By its terms, this statute contemplates a prior determination of a compensable injury by the compensation court before consideration by the commissioner of the eligibility of the injured employee for the additional benefits provided by the statute.

Id. at 466-67.

Although the specific question before the court in Forgash was whether the prior determination by the Commissioner of Education barred subsequent litigation of the workmen's compensation claim, we find the considerations articulated by the court in that case especially applicable where, as here, a claim is subject to the Workmen's Compensation Act and the question of whether the injury arose out of and in the course of employment is in dispute. In these circumstances, determination of the claim under N.J.S.A. 18A:30-2.1 prior to resolution by the Division of Workmen's Compensation would result in supplanting the function of the compensation court.

For the reasons set forth above, we reverse the decision of the Commissioner, and, under the circumstances with which we are presented, remand the matter to the Commissioner for determination of any issues relating to Petitioner's claim for benefits under N.J.S.A. 18A:30-2.1 that have not been resolved by determination of the Division of Workmen's compensation.

Regan Kenyon abstained.
Attorney exceptions are noted
December 2, 1987

1. In remanding this matter, we note that although the record indicates that Petitioner filed a claim for workers' compensation, there is no indication of whether the Division of Workmen's Compensation has made its determination, nor of whether any issues pertaining to Petitioner's claim under N.J.S.A. 18A:30-2.1 remain in dispute. We further note that while Petitioneer has raised questions related to the time limits that may be applicable to claims made pursuant to N.J.S.A. 18A:30-2.1 under a variety of circumstances, such issues are not presented by this case. Accordingly, we need not consider those questions in order to decide this matter.

ZALOTTA WALTER ET AL.,	:	
PETITIONERS/CROSS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENTS-APPELLANTS.	:	
	:	

Decided by the Commissioner of Education, July 22, 1985

For the Petitioners/Cross-Appellants, Bucceri and Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondents-Appellants, Greenwood and Sayovitz (Sidney A. Sayovitz, Esq., of Counsel)

This is another case involving the question of salary entitlements under the education laws. It is a companion case to Ball v. Board of Education of the Township of Teaneck, which we also have decided today. Like Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A-2508-84T7 (App. Div. February 26, 1986), certif. denied, Docket #25,352 (June 30, 1986), and Ball, this case involves the Board of Education of the Township of Teaneck, (hereinafter "the Board"), and each of the Petitioners/Cross-Appellants (hereinafter "Petitioners") was also a Petitioner in Ball. The difference between Ball and the instant case is that the Petitioners in this case challenge their placements on the salary schedule for the 1984-85 school year, and, in addition to claims for salary adjustments based on prior in-district experience as auxiliary teachers, Petitioners also seek salary adjustment for prior experience outside of the District.

All of the Petitioners are tenured teaching staff members. Findings of Fact, at 2. For the 1983-84 school year, some had been assigned as full-time classroom teachers, some as full-time auxiliary teachers, some as part-time auxiliary teachers, and three as less than full-time classroom teachers.[1] Prior to the 1983-84 school year, most of the Petitioners served as auxiliary teachers,

[1] One of the three who served as less than full-time classroom teachers served simultaneously as part-time auxiliary teacher and part-time E.S.L. teacher.

either full or part-time.[2] As set forth in Ball, during the 1983-84 school year, some Petitioners served as classroom teachers. Others continued to serve as auxiliaries, both full and part-time.

We have decided the claims of the Petitioners involved in this litigation for salary adjustment in 1983-84 in Ball. Specifically, we concluded that Petitioners who continued to serve as auxiliaries in 1983-84 have no entitlement under the education laws to compensation beyond that provided by the applicable collective negotiations agreement, and that Petitioners who had been assigned as classroom teachers for the 1983-84 school year have no entitlement to additional compensation based on their prior in-district experience.

As stated, Petitioners however now seek salary adjustments for the 1984-85 school year on the basis of their prior experience as auxiliary teachers. In August 1984, the Board placed all Petitioners, both those who had continued to serve as auxiliary teachers in 1983-84 and those who had been assigned as classroom teachers in 1983-84, on the negotiated salary schedule applicable to classroom teachers. In placing Petitioners on that schedule, the Board credited prior full-time classroom experience but did not give credit for auxiliary experience. The Board justified its determination not to credit Petitioners for prior auxiliary experience on the basis of "long standing policy", e.g., Initial Decision, at 20, maintaining that it is the Board's practice to grant salary credit for prior classroom experience, both inside and outside of the district, but not to credit prior auxiliary experience. Stipulation of Facts; Initial Decision, at 4. For the reasons that follow, we conclude that Petitioners have no entitlement under the education laws to salary adjustment as the result of the Board's failure to credit their prior auxiliary experience when it determined their placements on the salary schedule applicable to classroom teachers for the 1984-85 school year.

In resolving Petitioners[1] claims, the Administrative Law Judge (ALJ) first concluded that since Petitioners are now classroom teachers, the provisions of the negotiated agreement applicable to classroom teachers and not those applicable to auxiliary teachers applied. He relied on the Commissioner's decision in Ball, which we have reversed today, to find that "the law requires that classroom teachers receive salary credit for in-district experience as a supplemental or auxiliary teacher." Initial Decision, at 22. He also found that the Board's "policy" of denying credit for auxiliary experience was "unfair and unreasonable," id., and recommended that summary decision in favor of the Petitioners be granted.

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[2] Two Petitioners served as auxiliary teachers in the beginning of the 1982-83 school year, but served as special education teachers during the latter part of that school year. Only one Petitioner served as a special education teacher throughout the 1982-83 school year. All of the other Petitioners served as full or part-time auxiliaries.

The Commissioner of Education adopted the ALJ's determination that the Board improperly denied Petitioners credit for their prior auxiliary experience when it placed them on the salary schedule applicable to classroom teachers. Finding that the challenged placements were not initial placements pursuant to N.J.S.A. 18A:29-9, the Commissioner held that upon transfer to the position of classroom teacher, the Board was required to recognize Petitioners' prior auxiliary service that had been previously recognized by Petitioners' placements on the schedule applicable to auxiliary teachers. He therefore directed the Board to place Petitioners on the salary schedule applicable to classroom teachers for the 1984-85 school year so as to recognize the level each had formerly achieved on the auxiliary schedule.

The Board appealed the Commissioner's decision, asserting that it had no legal obligation to grant step-to-step credit when it placed former auxiliaries on the salary schedule applicable to classroom teachers, whether prior auxiliary experience was full-time or part-time. Petitioners cross-appealed, challenging the Commissioner's limitation on credit for prior auxiliary service to the maximum of six years provided in the schedule that had been applicable to them as auxiliaries. Thus, the threshold issue presented in this appeal is whether, upon placement on the salary schedule applicable to classroom teachers for the 1984-85 school year, Petitioners were entitled under the education laws to credit for their previous experience as auxiliary teachers.

We emphasize that, as set forth in Ball, the placements of Petitioners who had previously served as full-time teachers, whether they had been classroom teachers or auxiliary teachers, on the salary schedule applicable to classroom teachers in 1984 were not initial placements pursuant to N.J.S.A. 18A:29-9. Thus, the placements of those Petitioners reassigned from service as full-time auxiliary teachers to service as a classroom teachers were not initial placements. Rather, the question presented here is whether, upon continuation of full-time service as a classroom teacher or reassignment to such service, the Board was required to credit prior auxiliary service, whether full-time or part-time, in-district or outside of the district, as if entire service had been as a classroom teacher in the district.

As set forth in Ball, we find that the education laws do not mandate that step-to-step credit be given for prior experience as an auxiliary teacher upon reassignment to classroom service, whether or not such prior experience was full-time or part-time, and regardless of whether or not placement on the applicable schedule constitutes initial placement pursuant to N.J.S.A. 18A:29-9. Rather, to the extent prior experience must be recognized in determining placement on the schedule applicable upon reassignment, such requirements are limited to those embodied in N.J.S.A. 18A:29-7 (repealed 1985) and 18A:28-5, and we emphasize that there is no requirement that experience outside of a district be recognized so long as compensation conforms with the statutory amounts set forth in N.J.S.A. 18A:29-7 (repealed 1985). c.f. Whalen v. Sayreville Bd. of Ed., 192 N.J. Super. 452 (App. Div. 1983). We therefore conclude

that when the Petitioners were placed on the salary schedule applicable to classroom teachers for 1984-85, the Board was not required by the education laws to credit them with prior auxiliary experience on a step-to-step basis.

Our conclusion concerning Petitioners legal entitlements under the education laws is not altered by the fact that the Board's determinations of creditable experience for salary purposes when it established the compensation levels of individual Petitioners for 1984-85 were not made pursuant to written Board policy. As set forth above, we find that the education laws include no requirement that prior experience be credited upon reassignment so long as the requirements incorporated in N.J.S.A. 18A:29-7 (repealed 1985) and N.J.S.A. 18A:28-5 are met. Therefore, the distinction drawn by the Board between prior service as a classroom teacher and prior auxiliary service does not contravene the education laws. Although we emphasize that compensation afforded by the placement of individual teachers must satisfy the requirements of the applicable statutes, we find that there is no indication in the record that the Board failed to meet those requirements when it determined the placement of Petitioners on the applicable salary schedule for the 1984-85 school year.

We further find that the fact that the Board did not act pursuant to written policy does not invalidate its determinations of Petitioners placements under the education laws. N.J.S.A. 18A:29-4.1 authorizes district boards of education to adopt salary policies, including salary schedules, but does not require that they do so. Nor is there any requirement that that every aspect of a board's salary policies must be written. See Bloomingdale Teachers Association et al. v. Board of Education of the Borough of Bloomingdale, 1981 S.L.D. 290. Thus, where, as here, a board determines the placement of individual teaching staff members on a negotiated salary schedule applicable upon reassignment, we will disturb such determinations only if the placements contravene the specific requirements of the education laws. As stated, we conclude that the Board's failure to grant step-to-step credit for prior auxiliary experience, whether full-time or part-time, did not contravene those requirements.

In so concluding, we reiterate that compensation is, within statutory limits, a mandatory subject of collective negotiations. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978); Bd. of Education of Englewood v. Englewood Teachers, 64 N.J. 1 (1973). Although the collective negotiations agreement in this case does not on its face mandate how prior experience is to be recognized upon reassignment, we recognize that the Board's past practice in crediting prior experience policy would be relevant in judging, under the collective agreement, the propriety of the placements challenged here. Kearny PBA Local #21v. Town of Kearny, 81 N.J. 208 (1979). However, we emphasize that this is not the appropriate forum for resolving the Board's obligations to Petitioners under the collective negotiations agreement. e.g., Star v. Board of Education of the Township of North Bergen, decided by the State Board, September 3, 1986.

In sum, we conclude, as we did in Ball, that the education laws did not require the Board to credit Petitioners for salary purposes for their prior experience as auxiliary teachers upon their assignment as classroom teachers except insofar as N.J.S.A. 18A:29-7 (repealed 1985) and N.J.S.A. 18A:28-5 required recognition of previous experience. Because there is no indication that those statutory requirements were not met when the placements of Petitioners who continued to serve as classroom teachers and those who were reassigned as classroom teachers for 1984-85 were made on the applicable schedule for the 1984-85 school year, we conclude that Petitioners have no claim under the education laws to the salary adjustments they seek based on their auxiliary experience in the district. Finally, since there is no indication that Petitioners' compensation was below the minimum amounts required by N.J.S.A. 18A:28-7 (repealed 1985), we conclude that they have no claim under the education laws to salary adjustment on the basis of experience outside the district. Therefore, for the reasons stated, we reverse the decision of the Commissioner.

James Jones abstained.
Attorney exceptions are noted.
January 7, 1987

WEST ORANGE EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS/CROSS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 4, 1984

For the Petitioners/Cross-Appellants, Katzenbach, Gildea and Rudner (Ezra Rosenberg, Esq., of Counsel)

For the Respondent-Appellant, Samuel A. Christiano, Esq.

Petitioners, the West Orange Education Association and individually named Title I teachers, who were compensated at an hourly rate during the years relevant to this litigation under the terms of the applicable collective negotiations agreement, petitioned the Commissioner of Education on February 23, 1984, claiming that the West Orange Board of Education (hereinafter "the Board") had improperly denied them placement on the negotiated salary schedule applicable to full-time classroom teachers, fringe benefits and membership in the Teachers Pension and Annuity Fund (TPAF). Although none of the Petitioners had been affected by a reduction in force, they also sought a determination of their seniority status.

In arriving at his determination of the matter, the Administrative Law Judge (ALJ) relied on prior Commissioner's decisions, which had held that an hourly rate of compensation, in the absence of recognition for level of preparation and experience, was in violation of N.J.S.A. 18A:29-5 and N.J.S.A. 18A:29-8, and that therefore any negotiated agreement providing for such compensation was null and void. The ALJ therefore found that Petitioners were entitled to placement on the negotiated salary schedule applicable to classroom teachers in accordance with their level of preparation and experience, and to all statutory and contractual benefits afforded to classroom teachers from the date on which the petition in this case had been filed.

The ALJ further found that the categories in which seniority protection afforded by statute to tenured teaching staff members is accrued are set forth in N.J.A.C. 6:3-1.10(1). Because the regulations do not provide for any additional categories

specifically applicable to service as a supplemental teacher and provide for no endorsement specific to such service, the ALJ rejected the Board's argument that Petitioners' seniority should be credited only to the "position" of supplemental teacher. Emphasizing that the regulations were never intended to limit seniority protection to an assignment within an endorsement, the ALJ concluded that under the regulations now in effect, Petitioners accrued seniority under the endorsements under which each had served as provided by either N.J.A.C. 6:3-1.10(1)(15) or N.J.A.C. 6:3-1.10(1)(16). In the absence of definitive employment data, the ALJ further emphasized that the services of a tenured teacher are to be credited for seniority purposes to the appropriate category whether such service was full-time or part-time. The Commissioner adopted the ALJ's findings and determinations with the modification that, in the absence of a reduction in force and specific information regarding Petitioners' actual assignments, he declined to reach any conclusion as to which specific seniority categories Petitioners may be assigned.

The Board appealed, arguing that Spiewak v. Board of Education of Rutherford, 90 N.J. 63 (1982) did not confer on Petitioners non-statutory benefits provided to classroom teachers in the District. It further asserts that given the dramatic difference between the duties and functions of Petitioners and those of classroom teachers, Petitioners should not be placed in the same categories as classroom teachers when determining their seniority. The Board further argues that because Petitioners were hired solely to provide Title I instruction, interpreting N.J.A.C. 6:3-1.10 to require that their seniority be based on the same categories as classroom teachers would deprive the Board of selecting the best individual for the job to the detriment of the students. Finally, the Board asserts that it has attempted to place Petitioners in TPAF and that subsequent to rejection by TPAF, Petitioners were placed in the Public Employees Retirement System (PERS). Petitioners cross-appealed the Commissioner's limitation on relief to the date of the filing of the petition, arguing that they are entitled to relief from the date of the court's decision in Spiewak. For the reasons that follow, we affirm the Commissioner's determination that under the regulations now in effect, Petitioners' seniority is not limited to service as a supplemental teacher, but is to be credited to the appropriate categories set forth in those regulations. We however reverse the Commissioner's determinations that Petitioners are entitled to compensation based on the negotiated salary schedule applicable to classroom teachers and to contractual benefits provided those teachers under the terms of the collective negotiations agreement.

As in the other cases we have considered involving the entitlements of Title I and supplemental teachers deriving from their status as teaching staff members within the meaning of N.J.S.A. 18A:1-1, our point of departure is the New Jersey Supreme Court's decision in Spiewak v. Board of Education of Rutherford, 90 N.J. 63 (1982). In Spiewak, the court held that part-time supplemental teachers are "teaching staff members" as defined by

N.J.S.A. 18A:1-1, and may acquire tenure if they meet the requirements of N.J.S.A. 18A:28-5. The court, however, did not determine the emoluments of tenure. Rutherford Education Association v. Board of Education of the Borough of Rutherford, 99 N.J. 8, at 14 (1985). Nor did the court grant to supplemental teachers any entitlements beyond those conferred by existing statutes. Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A-2508-84T7 (App. Div. Feb. 26, 1986), certif. denied, Docket #25,352 (June 30, 1986). As set forth in Hyman, the tenure laws do not entitle tenured teaching staff members such as Petitioners to compensation based on a negotiated schedule applicable to other teaching staff members. Rather, entitlement to compensation under the education laws is controlled by N.J.S.A. 18A:29-1 et seq., the compensation statutes. The compensation statutes, however, are only applicable to full-time teaching staff members. N.J.S.A. 18A:29-4.1; N.J.S.A. 19A:29-6 (repealed 1985) (provision now codified at N.J.S.A. 18A:29-5). Although the education laws prohibit a reduction in the compensation of any tenured teaching staff member, N.J.S.A. 18A:28-5, they do not provide any standards for the compensation of teaching staff members who are not full-time. Scotch Plains-Fanwood Education Association et al. v. Board of Education of Scotch Plains-Fanwood, decided by the State Board March 4, 1987; see also Hyman, supra. Nor do they require that compensation be uniform among all classifications of full-time teaching staff members so long as statutory minimums are met. Hyman, supra.

Although the record in this case does not include specific employment data establishing the hours of employment of the individual Petitioners, it indicates that Petitioners were not employed on a full-time basis under the requirements established by the Board for full-time employment. Respondent's Supplemental Memorandum, answer no. 5, Appellant's Supplemental Memorandum, answer no. 5, Agreement between the West Orange Education Association and the West Orange Board of Education, 1983-1985, Art. V and Art. VI. Again, the education laws do not provide standards governing the manner or rate of compensation for teaching staff members who are not full-time. Moreover, the education laws do not prohibit the negotiation of different levels of compensation for different classifications of full-time members so long as statutory minimums are met, Hyman, supra, and we emphasize that no claim has been made in this case that the compensation of any individual Petitioner involved in this litigation who may have been employed on a full-time basis was below the applicable statutory minimum. In the absence of any indication that the compensation of Petitioners contravened the specific statutory requirements of the education laws, we conclude that they have no entitlement under the education laws to compensation beyond that provided by the terms of the applicable collective negotiations agreement.

Likewise, we conclude that neither Spiewak nor any provision of the education laws entitles Petitioners to any contractual benefits beyond those for which they may qualify under the terms of the negotiated agreement. Scotch Plains-Fanwood, supra. Again, there is no indication in the record in this case that Petitioners have been deprived of any benefit for which they qualified under the terms of the applicable agreement by virtue of their status as teaching staff members within the meaning of N.J.S.A. 18A:1-1.

As stated, we affirm the Commissioner's determination that, in the event it is necessary, Petitioners are entitled to have their service as Title I teachers credited for seniority purposes to the categories established by the seniority regulations now in effect, and that those regulations do not provide for a category of "supplemental teacher." We emphasize that each Petitioner achieved tenure under her instructional certificate in the position of teacher, and that under the current regulations, the category in which seniority is to be credited is to be determined by the endorsement under which each Petitioner served regardless of how the Board characterized the assignments, and regardless of whether or not employment was full-time. Lichtman v. Bd. of Ed. of the Village of Ridgewood, 93 N.J. 362 (1983).

We specifically reject the Board's assertion that the duties and functions of Title I teachers are so dramatically different from those of other teachers so as to warrant the creation pursuant to N.J.A.C. 6:3-1.10(g) of a separate seniority category. As emphasized by the ALJ, the endorsements required for qualification for assignment as a supplemental or compensatory education teacher are the same as required for qualification as a classroom teacher and, as recognized in the Board's brief, the distinction lies in the number of students taught and not in the fact that the services provided are instructional. However, in the absence of a reduction in force or the relevant employment data, we like the Commissioner decline to specify to which category the seniority of the individual Petitioners involved in this case is to be credited.

Finally, although we direct the Board to provide TPAF with any pertinent data it has not yet provided, we emphasize that we do not have the authority to determine eligibility for enrollment in TPAF.

In sum, we conclude that the Petitioners in this case have demonstrated no entitlement under the education laws to compensation or benefits beyond those provided by the provisions of the collective negotiations agreement applicable to them. Although we decline to specify to which specific seniority categories Petitioners' service as Title I teachers is to be credited in the event of a reduction in force, we find that the Board is required to credit such service in the applicable category as defined by the regulations and that, pursuant to the regulations now in effect, such category is to be determined by the endorsement under which

each served. Finally, in light of our conclusions concerning Petitioners' entitlements to substantive relief, it is unnecessary for us to determine whether they would have been entitled to relief prior to the date on which they filed their Petition of Appeal to the Commissioner.

May 6, 1987

WEST ORANGE SUPPLEMENTAL INSTRUCTORS ASSOCIATION,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Remanded by the Commissioner of Education, February 2, 1984

Decided by the Commissioner of Education, August 10, 1984

For the Petitioner-Respondent, Bernard Star, Esq.

For the Respondent-Appellant, Samuel A. Christiano, Esq.

This is another case involving the entitlements of supplemental teachers pursuant to the New Jersey Supreme Court's holding in Spiewak v. Rutherford, 90 N.J. 62 (1982), that such teachers are teaching staff members within the meaning of N.J.S.A. 18A:1-1. In these proceedings, the West Orange Supplemental Instructors Association is representing thirteen tenured teachers[1] who were employed as supplemental instructors until June 1983. The Association was the collective negotiations representative for supplemental instructors employed by the Board.[2] J-1, in evidence, Article I. The supplemental instructors represented by the Association were compensated at an hourly rate pursuant to the collective negotiations agreements between the Supplemental Instructors Association and the Board that were effective during 1979-81 and 1981-83. J-1, in

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1 Although the Association is the sole Petitioner in this case, eleven individuals were identified in the Petition of Appeal and two more were added pursuant to order of the Administrative Law Judge. Letter from the Administrative Law Judge, November 15, 1983.

2 We note that although the Association has not been formally disbanded, Certification of Paul T. Kolin, April 1, 1987, the Board evidently has not employed any supplemental instructors since June 1984. Board's letter, April 9, 1987. Any individual teachers involved in this case who are currently employed by the Board are assigned as resource room teachers, and are represented in those assignments for collective negotiations purposes by the West Orange Education Association. Id.

evidence. The agreements did not provide for contractual benefits such as medical insurance. Nor did they provide for sick leave, although the Board did agree to provide "those protections prescribed in the Educational Law", id. at Article IX(B), and for the 1982-83 school year, the Board provided each of the supplemental teachers involved here with ten sick days. Petition of Appeal, at 2.

In April 1983, some number of the Association's members were notified that because of "decreased enrollment," they would not be offered employment for the 1983-84 school year. Although the petition did not establish the number or identity of the supplemental teachers who received such notices,[3] the record shows ten of the teachers involved in this case were reemployed by the Board for the 1983-84 school year. West Orange Supplemental Instructors Association v. Board of Education of the Town of West Orange, decided by the Commissioner, August 10, 1984, Initial Decision at 2-5.[4] Three of the supplemental teachers involved in this case, however, were not reemployed by the Board for the 1983-84 school year. Id.

On July 26, 1983, the West Orange Supplemental Instructors Association filed its Petition of Appeal to the Commissioner of Education. In its petition, the Association sought for its members all emoluments and benefits afforded other teaching staff members, "step", i.e., compensation based on the salary guide applicable to classroom teachers, and the reemployment of those of its members who were not offered reemployment for the 1983-84 school year. Thus, this case presents issues relating to tenure and seniority, as well as compensation and benefits.

I

In his Initial Decision, the Administrative Law Judge (ALJ), first considered the question of whether Petitioner's members were entitled to additional salary or to non-statutory benefits, finding that any relief to be granted was limited to the period subsequent to the filing of the Petition of Appeal to the Commissioner. Relying on Spiewak, the ALJ concluded that non-statutory benefits are a matter of negotiated agreement, and that since the relevant agreement did not address non-statutory benefits such as holiday pay or dental and medical benefits, the only substantive term relevant was the hourly wage rate. In light of his understanding that negotiations between the parties for the 1983-84 school year had been held in abeyance pending a resolution of the dispute before him, the ALJ found that, subject to retroactive application of terms arrived at through anticipated negotiation, there was a status quo entitlement to a wage rate of $9.50 per hour for the

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3 In its Petition of Appeal, the Association asserted that a total of nine were not offered reemployment. Petition of Appeal, at 4.

4 See supra note 2.

1983-84 school year. The ALJ therefore directed the Board, if it was not doing so, to compensate its supplemental teachers at that rate until a new agreement was reached. In reaching this conclusion, the ALJ emphasized that unfair labor practice allegations resulting from a failure to negotiate in good faith did not lie within the jurisdiction of the Commissioner.

In considering the statutory benefits to which the Association's members were entitled, the ALJ concluded that pursuant to N.J.S.A. 18A:30-1 et seq. and the terms of the negotiated agreement effective during the 1979-80 school year, the teachers represented by Petitioner were entitled to sick days from that year if the Board had not provided them. He also directed the Board to fulfill its responsibilities under N.J.S.A. 18A:66-32 to the supplemental teachers involved here who apply for membership in the Teachers Pension and Annuity Fund.

The ALJ then turned to the issues presented by Petitioner's claim concerning its members who were not offered employment for 1983-84. Observing that no definitive employment records were in evidence in the matter, that the record included no resolution concerning the Board's action in abolishing the nine supplemental positions that Petitioner asserted represented the total number of those of its members not offered employment for 1983-84, and that the record revealed the identify of only four individuals not reemployed, the ALJ found that a genuine issue of seniority was nevertheless presented. Based on the seniority regulations now in effect, the ALJ found that the supplemental teachers involved in the matter accrued seniority under the endorsements on the Instructional Certificate held by each staff member in the categories established by either N.J.A.C. 6:3-1.10(1)(15) or N.J.A.C. 6:3-1.10(1)(16). In reaching his conclusion, the ALJ rejected the argument that the seniority acquired by the supplemental teachers was limited to service as supplemental teachers, and relying on Lichtman v. Board of Education of the Village of Ridgewood, 93 N.J. 362 (1983), emphasized that the supplemental teachers involved would have a valid claim to full-time positions if their seniority was greater than that of currently employed members. The ALJ specifically directed the Board to determine the seniority of all members in its employ serving in the applicable categories, to reinstate any supplemental teacher to any position in which his seniority was greater than members currently employed, with back pay minus mitigation, and to place any less senior supplemental teachers on a preferred eligibility list pursuant to N.J.S.A. 18A:28-12.

Although not specifically addressing the ALJ's resolution of the seniority issues in the case, the Commissioner rejected his conclusions concerning salary and benefits to which the supplemental teachers were entitled. Relying on his decision in Hyman v. Board of Education of the Township of Teaneck, decided by the Commissioner, August 15, 1983, rev'd by the State Board, March 6, 1985, aff'd, Docket #A-2508-84T7, certif. denied, 104 N.J. 469 (1986), and his interpretation of the Appellate Division's decision in Rutherford Education Association v. Board of Education of the

Borough of Rutherford, Docket #A-2014-82T3 (App. Div. Jan. 11, 1984), rev'd on other grounds, 99 N.J. 8 (1985), the Commissioner found that the relief to which the supplemental teachers were entitled was not controlled by the collective negotiations agreement in this case, and remanded the matter for a determination of the salary benefits and emoluments to which each individual was entitled.

On remand, the ALJ determined the salary entitlement of each individual involved in this case based on a percentage proration of the salary levels established for full-time service by the District's salary guide. In the cases of ten of the teachers who had been reemployed for the 1983-84 school year, the ALJ denied retroactive relief, but directed compensation minus mitigation for 1983-84. He however found that the three members of the Association who had not been reemployed for 1983-84 had no salary entitlement for that year unless it was determined through calculation of their seniority pursuant to implementation of the directive in the ALJ's first decision in the matter that their seniority rights entitled them to reinstatement.

The ALJ directed, pursuant to his first decision in the matter, that each individual be credited for 30 days accumulated sick leave representing unused sick leave for 1979-80 through 1981-82, plus any unused sick days for 1982-84. Pursuant to stipulation at settlement conference, the ALJ directed that the Board provide the same insurance coverage for the individuals here as provided for "regular" staff members, and that it reimburse them for expenditures from the date on which the Petition of Appeal was filed through August 31, 1984. The Commissioner adopted the ALJ's determination in the matter with the modification that by his conclusion that the negotiated agreement was invalid because it failed to recognize the salary entitlement and seniority status of the supplemental teachers, the Commissioner had recognized in his first decision that they were to be accorded the same seniority rights as other tenured teachers in the Board's employ.

By separate appeals, the Board challenged each of the Commissioner's decisions in this matter. Because of the identity of parties and issues in each case, and with the consent of the parties, we are considering the matter as a consolidated appeal.

II

As stated, this case involves questions of both seniority and compensation and benefits. We first will consider whether the teachers represented in these proceedings by the West Orange Supplemental Instructors Association are entitled to compensation or benefits beyond that to which they were entitled by contract. Initially, we affirm that any relief to which the teachers in this case would be entitled by virtue of our determination of these issues is prospective from July 26, 1983, the date on which the Petition of Appeal to the Commissioner was filed. Spiewak, supra.

As in the other cases we have considered involving the entitlements of Title I and supplemental teachers deriving from their status as teaching staff members within the meaning of N.J.S.A. 18A:1-1, our point of departure is the New Jersey Supreme Court's decision in Spiewak v. Board of Education of Rutherford, 90 N.J. 63 (1982). In Spiewak, the court held that part-time supplemental teachers are "teaching staff members" as defined by N.J.S.A. 18A:1-1, and may acquire tenure, as have all of the teachers involved in this case, if they meet the requirements of N.J.S.A. 18A:28-5. The court, however, did not determine the emoluments of tenure. Rutherford Education Association v. Board of Education of the Borough of Rutherford, 99 N.J. 8, at 14 (1985). Nor did the court grant to supplemental teachers any entitlements beyond those conferred by existing statutes. Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A-2508-84T7 (App. Div. Feb. 26, 1986), certif. denied, 104 N.J. 469 (1986).

As set forth in Hyman, the tenure laws do not entitle tenured teaching staff members such as those involved here to compensation based on a negotiated schedule applicable to other teaching staff members. Rather, entitlement to compensation under the education laws is controlled by N.J.S.A. 18A:29-1 et seq., the compensation statutes. The compensation statutes, however, are only applicable to full-time teaching staff members. N.J.S.A. 18A:29-4.1; N.J.S.A. 18A:29-6 (repealed 1985) (provision now codified at N.J.S.A. 18A:29-5). Although the education laws prohibit a reduction in the compensation of any tenured teaching staff member, N.J.S.A. 18A:28-5; N.J.S.A. 18A:6-10, they do not provide any standards for the compensation of teaching staff members who are not full-time. e.g. Scotch Plains-Fanwood Education Association et al. v. Board of Education of Scotch Plains-Fanwood, decided by the State Board March 4, 1987; see also Hyman, supra.

The record in this case clearly indicates that none of the thirteen teachers involved in this litigation was employed on a full-time basis. West Orange Supplemental Instructors Association v. Board of Education of the Town of West Orange, decided by the Commissioner, August 10, 1984, Initial Decision, at 2-5; Supplemental memorandum on behalf of Petitioner, January 27, 1986; Supplemental memorandum on behalf of the Board, January 30, 1987. Again, the education laws do not provide standards governing the manner or rate of compensation for teaching staff members who are not full-time. Accordingly, we conclude that the hourly compensation agreed to by the Supplemental Instructors Association and the Board did not contravene any requirement of the education laws, and whether or not the teachers involved here had a status quo entitlement to continuation of that rate of compensation for the 1983-84 school year under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., the Supplemental Instructors Association has not established in this litigation any entitlement under the education laws to additional compensation for the teachers involved here for the 1983-84 school year. In so concluding, we, like the ALJ, emphasize that allegations of unfair labor practices

based on failures to negotiate in good faith do not lie within our jurisdiction, but rather within the jurisdiction of the Public Employment Relations Commission (PERC). See, e.g., Hyman, supra.

Likewise, neither Spiewak nor any provision of the education laws entitles the teachers involved here to any non-statutory benefits beyond those conferred by the applicable collective negotiations agreement. Scotch Plains-Fanwood, supra. Again, the terms of the agreements in effect during 1981-83 did not entitle the supplemental teachers represented by Petitioner to medical or dental benefits, and there is no indication in the record that any teacher involved in this litigation was deprived of any benefit to which she was entitled by virtue of the collective negotiations agreements applicable to supplemental teachers. Again, the fact that a new agreement was not negotiated upon expiration of the collective agreement in effect during 1981-83 does not entitle the Association's members under the education laws to any additional benefits. We therefore conclude that none of the teachers involved in this case are entitled under the education laws to medical or dental benefits or to reimbursement for medical or dental expenses during 1983-84.

We however affirm that the individual teachers involved in this litigation were entitled to statutory sick leave pursuant to N.J.S.A. 18A:30-2, and therefore to credit for accumulated sick leave pursuant to N.J.S.A. 18A:30-3. Such credit for sick leave to be used prospectively does not constitute retroactive relief, and we direct the Board to credit each teacher with 30 accumulated unused sick days for the period prior to 1982-83 school year when it began to provide the supplemental teachers with sick leave.

III

We turn now to the question of whether the Board's failure to employ any teacher involved in this litigation for the 1983-84 school year violated the tenure or seniority rights of such teachers. We emphasize that Petitioner in this case has not challenged the validity of the Board's determination to abolish pursuant to N.J.S.A. 18A:28-9, any position in which any of its members served during 1982-83. Rather, it has asserted in these proceedings that its members were entitled to reemployment in the District for 1983-84 based on their tenure status and consequent seniority entitlements. We further emphasize that, as set forth in the Initial Decision on remand, all but three of the Association's members involved in this litigation were employed by the District for the 1983-84 school year. However, in the event that a reduction in force becomes necessary in the District, and as set forth in our decision in West Orange Education Association et al. v. Board of Education of the Town of West Orange, decided by the State Board, May 6, 1987, we affirm that the service of the teachers involved as supplemental teachers is to be credited under the current seniority regulations according to the endorsement under which each served regardless of how the Board characterized the assignments and regardless of whether or not employment was full-time.

We turn now to the question of whether the Board's failure to reemploy the three individuals who were not reemployed for 1983-84 violated their seniority rights.[5] We first emphasize that as tenured teachers, each was entitled to retention in the District over those teachers in the Board's employ with less seniority when the Board made its determination as to which teachers would be reemployed for 1983-84. N.J.S.A. 18A:28-10. Again, the seniority rights arising from their status as tenured teachers was not limited to their assignments as supplemental teachers. West Orange Education Association et al., supra.

We further emphasize that when a reduction in staff is necessary, seniority determinations are controlled by the regulations in effect at the time the reduction occurs, regardless of when the Board's determination is effectuated. Elsa Hill v. Board of Education of the Town of West Orange, Docket #A-4355-84T1 (App. Div. Feb. 19, 1987); Edison Township Education Ass'n v. Bd. of Ed. of the Township of Edison, decided by the Commissioner, June 18, 1984, aff'd by the State Board, Dec. 7,1984, aff'd, Docket #A-515-84T7 (Feb. 26, 1986). In contrast to the regulations that became operative on September 1, 1983, under the prior regulations, which were in effect in April 1983, when the teachers here were notified that they would not be reemployed, prior service was credited in all categories of certification regardless of whether a member had actually served in that category. Mulhearn v. Board of Education of the Sterling Regional High School District, Docket #A-5123-81T1 (App. Div. Oct. 31, 1983). Accordingly, proper determination of the seniority of the three individuals not reemployed by the Board for 1983-84 required that the Board credit their seniority in all areas of endorsement.

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5 In its exceptions to our Legal Committee's Report, Petitioner asserted that the Report was in error because it did not consider seniority questions concerning ten teachers whose positions were eliminated for the 1984-85 school year. We emphasize that the case before us concerns only the question of whether the individual teachers involved in this case are entitled to any relief for the 1983-84 school year, and that any disputes involving subsequent years are not before us. Furthermore, on January 2, 1985, we rendered our decision denying Petitioner's motion to consolidate this case with the matter it cites in its exceptions, which was then pending before the Office of Administrative Law. Pursuant to the Commissioner's decision in that matter, which involved questions arising from the Board's elimination of positions of supplemental instructors for the 1984-85 school year, resolution of any issues unresolved by our decision in the instant case may be achieved by exercising the right to reopen that matter within thirty days of the final decision in the case now before us. West Orange Supplemental Instructors Association v. Board of Education of the Town of West Orange, decided by the Commissioner, January 2, 1985.

However, the right of any of the three teachers who were not reemployed to reinstatement turns on whether at the time of her termination, the Board retained in its employ any teacher with less seniority. As set forth above, Petitioner in this litigation did not allege that while terminating its members, the Board retained any teacher serving in any category in which any of its members had superior seniority. Nor does the record in this case provide a basis for finding that any of the three teachers who were not remployed for 1983-84 had superior seniority over any teacher retained by the Board that year. We however direct that the Board determine the seniority of each of the three individuals that it did not reemploy for 1983-84 as set forth above, and in the event that any of these individuals had superior seniority over any teacher retained for that year, we direct that the Board reinstate that teacher with back pay minus mitigation. If any of these three teachers are not entitled to reinstatement, we direct her placement on the preferred eligibility list in accord with our decision in this matter.

IV

In sum, we conclude that any relief to which the teachers represented in this litigation by the West Orange Supplemental Instructors Association, which filed its Petition of Appeal to the Commissioner after the New Jersey Supreme Court rendered its decision in Spiewak, are entitled is limited to the period subsequent to the date on which the petition was filed. We find that the teachers involved here, all of whom were employed on a less than a full-time basis, have no entitlement under the education laws to additional compensation or non-statutory benefits for the 1983-84 school year, but direct that they be credited with accumulated sick leave pursuant to N.J.S.A. 18A:30-3. We further conclude that, in the event a reduction in staff occurs, the service as supplemental teachers of those teachers who continued to be employed by the Board is to be credited under the seniority regulations in effect at the time of the Board's action and emphasize that under the current regulations such service is to be credited according to the endorsement under which each served. Although we are not able to determine whether any of the three teachers not reemployed for 1983-84 is entitled to reinstatement, we find that each was entitled to determination of her seniority prior to her termination under the regulations then in effect and to retention over any less senior teacher. Accordingly, we direct the Board to determine the seniority of each, and in the event that any had superior seniority over teachers retained for 1983-84, further direct reinstatement with back pay minus mitigation. In the case of any teacher not entitled to reinstatement based on seniority, we direct her placement on the preferred eligibility list. Finally, although we reiterate that we do not have the authority to determine eligibility for enrollment in the Teachers Pension and Annuity Fund, we direct the Board to provide TPAF with any pertinent information that it has not yet provided concerning the teachers involved in this case.

JULY 1, 1987